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A TABLE OF STATUTES CONSTRUED IS GIVEN
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CASES REPORTED.

	Page		Page
A. Booth & Co., Bethel v. (Ky.).....	803	Bank of Odessa v. Barnett (Mo. App.)....	727
Ackerson v. Fly (Mo. App.).....	706	Bank of Tipton v. Adair (Mo. Sup.).....	510
Adair v. Hays (Tex. Civ. App.).....	256	Barber v. State (Tex. Cr. App.).....	1133
Adair, Bank of Tipton v. (Mo. Sup.).....	510	Barber, Preston v. (Tex. Civ. App.).....	225
Adams v. State (Tex. Cr. App.).....	588	Barber Asphalt Pav. Co., Hilgert v. (Mo. Sup.)	1070
Adams, First Nat. Bank v. (Tex. Civ. App.)	403	Bardstown & L. Turnpike Co., Nelson County v. (Ky.).....	1104
Adams, Somerset Nat. Banking Co.'s Receiver v. (Ky.).....	1125	Barnes v. Barnes (Ky.).....	282
Adams, State ex rel. Linn County v. (Mo. Sup.)	655	Barnes v. State (Tex. Cr. App.).....	168
Adams, Texas & P. R. Co. v. (Tex. Civ. App.)	81	Barnes v. State (Tex. Cr. App.).....	177
Adams Express Co. v. Smith (Ky.).....	752	Barnes, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.).....	1041
Aetna Ins. Co. v. Eastman (Tex. Civ. App.)	431	Barnett, Bank of Odessa v. (Mo. App.)....	727
Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Sup.)	168	Barrett, St. Louis S. W. R. Co. of Texas v. (Tex. Civ. App.).....	884
Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Sup.)	580	Barron v. Missouri Lead & Zinc Co. (Mo. Sup.)	534
Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Civ. App.).....	621	Bartley v. Bartley (Mo. Sup.).....	521
Aetna Life Ins. Co., Kennedy v. (Tex. Civ. App.)	602	Bates v. Bratton (Tex. Sup.).....	157
Ahl, Huffman v. (Ky.).....	343	Baumgarten, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	78
Ahman, Knoepker v. (Mo. App.).....	483	B. Baer & Co., Ratcliff v. (Ark.).....	896
Ahrens, Peycke v. (Mo. App.).....	151	Beal v. State (Tex. Cr. App.).....	1133
Aitkins, Wallingford v. (Ky.).....	794	Beardsley v. Hill (Ark.).....	372
Albany Mill Co. v. Huff Bros. (Ky.).....	820	Beardsley v. Thomas (Tex. Civ. App.)....	411
Albert v. State (Tex. Cr. App.).....	846	Beckham, Young v. (Ky.).....	1092
Aldredge v. State (Tex. Cr. App.).....	843	Beckman v. Anheuser-Busch Brewing Ass'n (Mo. App.)	710
Alexander v. Parks (Ky.).....	1105	Bekkeland v. Lyons (Tex. Sup.).....	56
Alford v. Carver (Tex. Civ. App.).....	869	Bell v. Smith (Ky.).....	1107
American Nat. Bank, First Nat. Bank v. (Mo. Sup.)	1059	Bell Hardware Co. v. Riddle (Tex. Civ. App.)	613
Ancient Order of Pyramids, Cauveren v. (Mo. App.)	141	Bellonby, Town of Central Covington v. (Ky.).....	1107
Ancient Order of United Workmen, Grand Lodge of Kentucky, Mooney v. (Ky.)...	288	Benchoff v. Stephenson (Tex. Civ. App.)..	106
Anderson v. State (Tex. Cr. App.).....	593	Berry v. State (Tex. Cr. App.).....	170
Anheuser-Busch Brewing Ass'n, Beckman v. (Mo. App.).....	710	Berry, City of Uniontown v. (Ky.).....	295
Ankerson, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	219	Berry, Gulf & B. V. R. Co. v. (Tex. Civ. App.)	1049
Arbuthnot v. Brookfield Loan & Building Ass'n (Mo. App.).....	132	Berry, Texas & P. R. Co. v. (Tex. Civ. App.)	423
Arnold v. Commonwealth (Ky.).....	753	Berwald, Washington Life Ins. Co. v. (Tex. Civ. App.)	436
Ashburn v. Evans (Tex. Civ. App.).....	242	Best, Roberts v. (Mo. Sup.).....	657
Asher v. Howard (Ky.).....	1105	Bethel v. A. Booth & Co. (Ky.).....	803
Ashford v. Metropolitan Life Ins. Co. (Mo. App.)	712	Biffle v. Jackson (Ark.).....	566
Atchison v. Chicago & A. R. Co. (Mo. App.)	489	Big Star Zinc Co., Tegarden Bros. v. (Ark.)	989
Atchison v. State (Tex. Cr. App.).....	998	Birdwell v. Burleson (Tex. Civ. App.)....	446
Atchison, State ex rel. Ward v. (Mo. Sup.)	1075	Black v. Commonwealth (Ky.).....	772
Austin v. Welch (Tex. Civ. App.).....	881	Black v. Missouri Pac. R. Co. (Mo. Sup.)	559
Austin, St. Louis S. W. R. Co. of Texas v. (Tex. Civ. App.).....	212	Blackburn, Reno v. (Ky.).....	775
Avritt, Harman v. (Ky.).....	751	Bland, Summers Bros. v. (Ky.).....	798
Ayers v. McRae (Ark.).....	52	Blattner, Metz v. (Mo. App.).....	489
		Blewett v. Sprague (Ky.).....	317
Rachman, Browne v. (Tex. Civ. App.)....	622	Bloom v. Strauss (Ark.).....	563
Back, State v. (Mo. App.).....	466	Blue Grass Ins. Co. v. Cobb (Ky.).....	1099
Baer & Co., Ratcliff v. (Ark.).....	896	Bohannon v. Commonwealth (Ky.).....	322
Baines Grocery Co., W. F. Taylor Co. v. (Tex. Civ. App.).....	260	Bolton v. Missouri Pac. R. Co. (Mo. Sup.)..	530
Baldwin v. Thomas (Ark.).....	53	Bond v. Carter (Tex. Sup.).....	1059
Ball v. State (Tex. Cr. App.).....	384	Booth & Co., Bethel v. (Ky.).....	803
Ballinger, Dyer v. (Ky.).....	738	Boske, Wren v. (Ky.).....	279
Ballinger & Longwell, El Paso Electric St. R. Co. v. (Tex. Civ. App.).....	612	Bourbon County Court, Hartford Fire Ins. Co. v. (Ky.).....	739
Ballou, King v. (Ky.).....	771	Bouyer v. State (Tex. Cr. App.).....	1133
Balz v. Nelson (Mo. Sup.).....	527	Bowles, St. Louis S. W. R. Co. of Texas v. (Tex. Civ. App.).....	451
Bane v. Irwin (Mo. Sup.).....	522	Boyer & Lucas v. St. Louis, S. F. & T. R. Co. (Tex. Civ. App.).....	1038
		Bradenbaugh, Holmes v. (Mo. Sup.).....	550
		Bradley v. State (Tex. Cr. App.).....	1133
		Brannan v. State (Tex. Cr. App.).....	184
		Brannan v. State (Tex. Cr. App.).....	1133
		Bratton, Bates v. (Tex. Sup.).....	157

	Page		Page
Brewer's Adm'r, City of Louisville v. (Ky.)	9	Chestnut & Bro., Louisville & N. R. Co. v. (Ky.)	351
Brineger v. Louisville & N. R. Co. (Ky.)	783	Chicago, St. L. & N. O. R. Co. v. Commonwealth (Ky.)	1119
Brinkley, Somerset Nat. Banking Co.'s Receiver v. (Ky.)	1129	Chicago & A. R. Co., Atchison v. (Mo. App.)	489
Brock v. State (Tex. Cr. App.)	599	Childers v. R. C. Stone Milling Co. (Mo. App.)	1077
Brookfield Loan & Building Ass'n, Arbutnot v. (Mo. App.)	132	Choctaw, O & G. R. Co. v. Donovan (Ark.)	48
Brookfield Loan & Building Co., Thudium v. (Mo. App.)	134	Choctaw & M. R. Co. v. Vosburg (Ark.)	574
Brown v. Timmons (Tenn.)	958	Chouteau Land & Lumber Co. v. Chrisman (Mo. Sup.)	1062
Brown, State ex rel. Hamilton v. (Mo. Sup.)	940	Chowning v. Howser (Ky.)	748
Brown, Webster v. (Ky.)	774	Chrisman, Chouteau Land & Lumber Co. v. (Mo. Sup.)	1062
Browne v. Bachman (Tex. Civ. App.)	622	Christ v. Kuehne (Mo. Sup.)	537
Bruce, Watts v. (Tex. Civ. App.)	258	Citizens' Nat. Bank v. Donnell (Mo. Sup.)	925
Bryant, Houston & T. C. R. Co. v. (Tex. Civ. App.)	885	Citizens' Rapid Transit Co. v. Dozier (Tenn.)	963
Buchanan, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	96	City Electric Light & Waterworks Co., Lane & Rodley Co. v. (Tex. Civ. App.)	425
Bullitt, Marsden Co. v. (Ky.)	32	City of Campbellsburg v. Odewalt (Ky.)	314
Burghard v. Fitch (Ky.)	778	City of Dallas, Lents v. (Tex. Sup.)	59
Burk v. State (Tex. Cr. App.)	585	City of Flemingsburg, Dudley v. (Ky.)	327
Burkamp v. Healey (Ky.)	759	City of Lebanon v. Knott (Ky.)	790
Burleson, Birdwell v. (Tex. Civ. App.)	446	City of Louisville v. Brewer's Adm'r (Ky.)	9
Burns, Merchants' & Planters' Oil Co. v. (Tex. Civ. App.)	926	City of Nashville, Jones v. (Tenn.)	985
Burnside & C. R. R. Co. v. Tupman (Ky.)	786	City of Owensboro, Lancaster v. (Ky.)	731
Burrows v. State (Tex. Cr. App.)	848	City of Paducah, Crow v. (Ky.)	816
Burton, Parker v. (Mo. Sup.)	663	City of Paducah, Gilbert v. (Ky.)	816
Burton's Heirs v. Carroll (Tex. Sup.)	581	City of Poplar Bluff, Dalton v. (Mo. Sup.)	1068
Bush v. Webster (Ky.)	364	City of Sherman v. Connor (Tex. Civ. App.)	238
Butts v. National Exchange Bank (Mo. App.)	1083	City of Springfield ex rel. Updergraff v. Mills (Mo. App.)	462
Bynum v. State (Tex. Cr. App.)	844	City of Uniontown v. Berry (Ky.)	295
Caddell v. State (Tex. Cr. App.)	1015	Clark v. State (Tex. Cr. App.)	591
Cadiz R. Co. v. Roach (Ky.)	280	Clark v. West (Tex. Civ. App.)	100
Callies v. Modern Woodmen of America (Mo. App.)	718	Clark, Collins v. (Tex. Civ. App.)	97
Callison v. Trenton Building & Loan Ass'n (Mo. App.)	477	Clark, International & G. N. R. Co. v. (Tex. Sup.)	584
Calvert, W. & B. V. R. Co., Pochila v. (Tex. Civ. App.)	255	Clark, Jacob v. (Ky.)	1095
Campbell v. State (Tex. Cr. App.)	396	Clarke v. Lexington Stoveworks (Ky.)	286
Campbell, Shelton v. (Tenn.)	112	Clay v. Clay's Guardian (Ky.)	810
Cane Belt R. Co. v. Hughes (Tex. Civ. App.)	1020	Clay v. Kennedy (Ky.)	815
Capshaw, Matthews v. (Tenn.)	964	Clay's Guardian, Clay v. (Ky.)	810
Carroll, Burton's Heirs v. (Tex. Sup.)	581	Cluck, Houston & T. C. R. Co. v. (Tex. Civ. App.)	83
Carter v. Farthing (Ky.)	745	Cobb, Blue Grass Ins. Co. v. (Ky.)	1099
Carter, Bond v. (Tex. Sup.)	1059	Cochran v. Moerer (Tex. Civ. App.)	1031
Carter, Shannon v. (Mo. App.)	495	Coe v. Coe (Mo. App.)	707
Carter County, Hudgins v. (Ky.)	730	Coleman, Percifull v. (Ky.)	29
Carver, Alford v. (Tex. Civ. App.)	869	Collins v. Clark (Tex. Civ. App.)	97
Carwile v. State (Tex. Cr. App.)	376	Collins, Commonwealth v. (Ky.)	819
Case Threshing Mach. Co. v. Lyons (Ky.)	356	Columbia Finance & Trust Co. v. Mitchell's Adm'r (Ky.)	350
Cates v. State (Tex. Cr. App.)	1133	Combs v. Combs (Ky.)	8
Catlett v. Catlett's Adm'r (Ky.)	781	Comer v. Statham (Mo. Sup.)	1074
Catlett's Adm'r, Catlett v. (Ky.)	781	Commonwealth v. Chesapeake & O. R. Co. (Ky.)	359
Catling v. State (Tex. Cr. App.)	853	Commonwealth v. Chesapeake & O. R. Co. (Ky.)	360
Caudle v. Ford (Ky.)	270	Commonwealth v. Chesapeake & O. R. Co., five cases (Ky.)	361
Cauveren v. Ancient Order of Pyramids (Mo. App.)	141	Commonwealth v. Chesapeake & O. R. Co. (Ky.)	758
Cecil v. State (Tex. Cr. App.)	197	Commonwealth v. Collins (Ky.)	819
Chambers v. Chester (Mo. Sup.)	904	Commonwealth v. Hamilton (Ky.)	744
Chandler's Adm'r, Louisville, H. & St. L. R. Co. v. (Ky.)	805	Commonwealth v. Jenkins (Ky.)	363
Check, Glover v. (Ky.)	302	Commonwealth v. Joerger (Ky.)	1132
Chenault, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	868	Commonwealth v. Longnecker (Ky.)	1132
Chesapeake & O. R. Co. v. Riddle's Adm'r (Ky.)	22	Commonwealth v. Lyon (Ky.)	323
Chesapeake & O. R. Co. v. Wilder (Ky.)	353	Commonwealth v. Nute (Ky.)	1090
Chesapeake & O. R. Co., Commonwealth v. (Ky.)	359	Commonwealth v. Riley's Curators (Ky.)	809
Chesapeake & O. R. Co., Commonwealth v. (Ky.)	360	Commonwealth v. Tarvin (Ky.)	13
Chesapeake & O. R. Co., Commonwealth v., five cases (Ky.)	361	Commonwealth v. Williams' Adm'r (Ky.)	1132
Chesapeake & O. R. Co., Commonwealth v. (Ky.)	758	Commonwealth v. Zweigart (Ky.)	1132
Chesapeake & O. R. Co., Dugan's Adm'r v. (Ky.)	291	Commonwealth, Arnold v. (Ky.)	753
Chesapeake & O. R. Co., Jacobs' Adm'r v. (Ky.)	308	Commonwealth, Black v. (Ky.)	772
Chester, Chambers v. (Mo. Sup.)	904	Commonwealth, Bohannon v. (Ky.)	322
		Commonwealth, Chicago, St. L. & N. O. R. Co. v. (Ky.)	1119
		Commonwealth, Cook v. (Ky.)	283
		Commonwealth, Cosby v. (Ky.)	1089
		Commonwealth, Henderson v. (Ky.)	781

	Page		Page
Commonwealth, Morgan v. (Ky.).....	1098	Denson, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	70
Commonwealth, Mosley v. (Ky.).....	344	Deppen v. German American Title Co. (Ky.).....	768
Commonwealth, Reynolds v. (Ky.).....	277	Devine, Hillebrandt v. (Tex. Civ. App.)...	266
Commonwealth, Swincher v. (Ky.).....	306	Dickey, Louisville & N. R. Co. v. (Ky.)...	332
Commonwealth, Violet v. (Ky.).....	1	Dierig v. South Covington & C. St. R. Co. (Ky.).....	355
Commonwealth, Weber v. (Ky.).....	30	Dils, Williamson v. (Ky.).....	292
Commonwealth, Wright v. (Ky.).....	340	Dimmitt, Wall v. (Ky.).....	300
Connor, City of Sherman v. (Tex. Civ. App.).....	238	Dittlinger, Voges v. (Tex. Civ. App.).....	875
Conover, Craig v. (Ky.).....	2	Dodd v. State (Tex. Cr. App.).....	1015
Consolidated Boat Store Co., Montgomery v. (Ky.).....	816	Dodd, Pittsburg, C., C. & St. L. R. Co. v. (Ky.).....	822
Continental Casualty Co., Hayes v. (Mo. App.).....	135	Donahue, Warner v. (Mo. App.).....	492
Contreras, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	1051	Donavan, Choctaw, O. & G. R. Co. v. (Ark.)	48
Cook v. Commonwealth (Ky.).....	283	Donnell, Citizens' Nat. Bank v. (Mo. Sup.)	925
Cook v. Kentucky Growers' Ins. Co. (Ky.)	764	Dooley, Cumberland Telegraph & Telephone Co. v. (Tenn.).....	457
Cook v. Todd (Ky.).....	779	Doran v. State (Tex. Cr. App.).....	585
Cooke, Garrison v. (Tex. Sup.).....	54	Dorsey, Schneider v. (Tex. Civ. App.).....	1029
Cook's Adm'r v. Louisville & N. R. Co. (Ky.).....	729	Douglas v. Robertson (Tex. Civ. App.).....	863
Cooper, Southern Kansas R. Co. v. (Tex. Civ. App.).....	409	Douglass v. Stahl (Ark.).....	568
Cope v. Slayden (Ky.).....	284	Dowd, Lane v. (Mo. Sup.).....	632
Copeland, Lake v. (Tex. Civ. App.).....	99	Dozier, Citizens' Rapid Transit Co. v. (Tenn.).....	963
Corbett, Lincoln v. (Tex. Civ. App.).....	224	Duck, St. Louis S. W. R. Co. v. (Tex. Civ. App.).....	445
Corralitos Co. v. Mackay (Tex. Civ. App.)	624	Dudley v. City of Flemingsburg (Ky.)....	327
Cosby v. Commonwealth (Ky.).....	1089	Dugan's Adm'r v. Chesapeake & O. R. Co. (Ky.).....	291
Cottengim, State ex rel. Hopper v. (Mo. Sup.).....	498	Dunn, Lacotts v. (Ark.).....	370
Cover, Markham v. (Mo. App.).....	474	Dupoyster v. Ft. Jefferson Imp. Co. (Ky.)	268
Covington, F. & A. R. Co., King's Adm'r v. (Ky.).....	757	Dyer v. Ballinger (Ky.).....	738
Coyle v. State (Tex. Cr. App.).....	847	Earl v. State (Tex. Cr. App.).....	175
Crabtree Coal Min. Co. v. Sample's Adm'r (Ky.).....	24	Earl v. State (Tex. Cr. App.).....	376
Craig v. Conover (Ky.).....	2	Early's Adm'r v. Louisville, H. & St. L. R. Co. (Ky.).....	348
Crawford, McCormick Harvesting Mach. Co. v. (Mo. App.).....	491	Eastman, Etna Ins. Co. v. (Tex. Civ. App.).....	431
Crockett v. McLanahan (Tenn.).....	950	Edelen, Deleshaw v. (Tex. Civ. App.)....	413
Crow v. City of Paducah (Ky.).....	816	Edwards v. Kelso (Mo. App.).....	726
Crow v. State (Tex. Cr. App.).....	392	E. H. Taylor, Jr. & Sons v. Louisville Public Warehouse Co. (Ky.).....	20
Crowson v. Crowson (Mo. Sup.).....	1065	Eitel, St. Louis S. W. R. Co. of Texas v. (Tex. Civ. App.).....	205
Cumberland Coal & Coke Co., Green v. (Tenn.).....	459	Elliott, Ex parte (Tex. Cr. App.).....	837
Cumberland Telegraph & Telephone Co. v. Dooley (Tenn.).....	457	Ellison v. State (Tex. Cr. App.).....	188
Cumberland Telephone & Telegraph Co. v. Louisville Home Telephone Co., two cases (Ky.).....	4	El Paso Electric St. R. Co. v. Ballinger & Longwell (Tex. Civ. App.).....	612
Cummings v. State (Tex. Cr. App.).....	395	El Paso & N. W. R. Co. v. McComas (Tex. Civ. App.).....	620
Cummings v. State (Tex. Cr. App.).....	1133	Elting v. Hickman (Mo. Sup.).....	700
Curd, Smith v. (Ky.).....	744	Elvis, Houston Electric St. R. Co. v. (Tex. Civ. App.).....	216
Curry & Bro., New York Life Ins. Co. v. (Ky.).....	736	Embry, Perkin's Adm'r v. (Ky.).....	788
Dalton v. City of Poplar Bluff (Mo. Sup.)...	1068	Emery v. League (Tex. Civ. App.).....	603
Dalton, State v. (Tenn.).....	456	English, New York Life Ins. Co. v. (Tex. Sup.).....	58
Damon Mound Oil Co., Sharp v. (Tex. Civ. App.).....	1043	Erfurth v. Stevenson (Ark.).....	49
Daniel v. Ft. Worth & R. G. R. Co. (Tex. Sup.).....	578	Evans, Ashburn v. (Tex. Civ. App.).....	242
Darlington v. Missouri Pac. R. Co. (Mo. App.).....	122	Eyeremann, State v. (Mo. Sup.).....	539
Darnall v. Jones' Ex'rs (Ky.).....	1108	Ezell v. Outland (Ky.).....	784
Davidson Benedict Co. v. Severson (Tenn.)	967	Fabel, German Ins. Bank v. (Ky.).....	329
Davis, Jordan v. (Mo. Sup.).....	686	Falk Co., Simberg v. (Mo. App.).....	947
Davis, Scottish-American Mortg. Co. v. (Tex. Civ. App.).....	217	Fannin, Riddle v. (Ky.).....	290
Dawson v. Trustees Common School Dist. No. 40 (Ky.).....	806	Farley v. Gilbert (Ky.).....	1098
Day v. Johnson (Tex. Civ. App.).....	426	Farmers' Nat. Bank, Wright v. (Tex. Civ. App.).....	103
Deering Harvester Co. v. White (Tenn.)...	962	Farmers' & Shippers' Tobacco Warehouse Co. v. Gibbons (Ky.).....	12
De Foe v. Wilmas (Mo. App.).....	475	Farthing, Carter v. (Ky.).....	745
Deleshaw v. Edelen (Tex. Civ. App.).....	413	Felton v. Tally (Tex. Civ. App.).....	614
De Loach Mill Mfg. Co. v. Latham (Mo. App.).....	1080	Ferguson v. Slater, McMahon & Co. (Tex. Civ. App.).....	422
Denison & S. R. Co. v. St. Louis S. W. R. Co. (Tex. Civ. App.).....	201	Ferguson, Rigdon v. (Mo. Sup.).....	504
Denison & S. R. Co. v. St. Louis S. W. R. Co. of Texas (Tex. Sup.).....	161	Ferguson, Temple v. (Tenn.).....	455
Denny v. Stokes (Tex. Civ. App.).....	209	F. Groos & Co. v. First Nat. Bank (Tex. Civ. App.).....	402
Denny, State ex rel. School Dist. No. 1 v. (Mo. App.).....	467	Fielder Salt Works, Roberts v. (Tex. Civ. App.).....	618
		First Nat. Bank v. Adams (Tex. Civ. App.)	403
		First Nat. Bank v. American Nat. Bank (Mo. Sup.).....	1059

	Page		Page
First Nat. Bank v. San Antonio & A. P. R. Co. (Tex. Civ. App.)	1033	Goodin v. Goodin (Mo. Sup.)	502
First Nat. Bank, F. Groos & Co. v. (Tex. Civ. App.)	402	Gordan, Louisville & N. R. Co. v. (Ky.)	311
First Nat. Bank, Lasater v. (Tex. Civ. App.)	1054	Gordon Coffee & Spice Co., Parry v. (Mo. App.)	130
First Nat. Bank, Lasater v. (Tex. Sup.)	1057	Gorman's Adm'r v. Louisville R. Co. (Ky.)	760
First Nat. Bank, Storey v. (Ky.)	318	Goss, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	94
Fisher v. Musick's Ex'r (Ky.)	787	Graff, Pyron v. (Tex. Civ. App.)	101
Fisher, Webb v. (Tenn.)	110	Graham v. Stafford (Mo. Sup.)	507
Fisher, Wilson v. (Mo. Sup.)	665	Gray v. State (Tex. Cr. App.)	169
Fitch, Burghard v. (Ky.)	778	Gray v. State (Tex. Cr. App.)	858
Fleming, Tice v. (Mo. Sup.)	689	Gray, Riggs v. (Tex. Civ. App.)	101
Fly, Ackerson v. (Mo. App.)	706	Gray, State v. (Mo. Sup.)	688
Folkens v. Northwestern Nat. Life Ins. Co. (Mo. App.)	720	Gray, State ex rel. Latimer v. (Mo. App.)	1081
Followill, Wynn v. (Mo. App.)	140	Green v. Cumberland Coal & Coke Co. (Tenn.)	459
Ford, Caudle v. (Ky.)	270	Green v. Meyers (Mo. App.)	128
Ford, Greer v. (Tex. Civ. App.)	73	Greenwood v. Parlin & Orendorff Co. (Mo. App.)	138
Fortenberry v. State (Tex. Cr. App.)	586	Greer v. Ford (Tex. Civ. App.)	73
Fortenberry v. State (Tex. Cr. App.)	588	Greer v. Morrison (Tex. Civ. App.)	73
Fortenberry v. State (Tex. Cr. App.)	593	Greer County v. State (Tex. Civ. App.)	104
Fort Grain Co., Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	419	Griffin v. Sansom (Tex. Civ. App.)	804
Ft. Jefferson Imp. Co., Dupoyster v. (Ky.)	268	Grimes v. State (Tex. Cr. App.)	589
Ft. Worth & R. G. R. Co. v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.)	1135	Grimes v. State (Tex. Cr. App.)	862
Ft. Worth & R. G. R. Co., Daniel v. (Tex. Sup.)	578	Groos & Co. v. First Nat. Bank (Tex. Civ. App.)	402
Ft. Worth & R. G. R. Co., Neely v. (Tex. Sup.)	159	Guiles v. State (Tex. Cr. App.)	187
Foster v. Franklin Life Ins. Co. (Tex. Civ. App.)	91	Gulf, C. & S. F. R. Co. v. Chenault (Tex. Civ. App.)	868
Foust v. Warren (Tex. Civ. App.)	404	Gulf, C. & S. F. R. Co. v. Denson (Tex. Civ. App.)	70
Fox v. Willis (Ky.)	330	Gulf, C. & S. F. R. Co. v. Fort Grain Co. (Tex. Civ. App.)	419
Franch v. Franck (Ky.)	275	Gulf, C. & S. F. R. Co. v. Garren (Tex. Civ. App.)	1028
Frankfort & C. R. Co., Smith v. (Ky.)	1088	Gulf, C. & S. F. R. Co. v. Harris (Tex. Civ. App.)	71
Franklin Life Ins. Co., Foster v. (Tex. Civ. App.)	91	Gulf, C. & S. F. R. Co. v. Robinson (Tex. Civ. App.)	70
Fraternal Home, Hiatt v. (Mo. App.)	463	Gulf, C. & S. F. R. Co. v. Ryon (Tex. Civ. App.)	72
Fred v. Traylor (Ky.)	768	Gulf, C. & S. F. R. Co. v. Shelton (Tex. Sup.)	165
Freeman v. Lavenue (Mo. App.)	1085	Gulf & B. V. R. Co. v. Berry (Tex. Civ. App.)	1049
Freeman v. State (Tex. Cr. App.)	185		
Freeman v. State (Tex. Cr. App.)	1001		
Frye v. Keller (Tex. Civ. App.)	228		
Fuller v. State (Tex. Cr. App.)	184		
Furnish v. Satterwhite (Ky.)	309		
Gables v. State (Tex. Cr. App.)	377	Haist, St. Louis, I. M. & S. R. Co. v. (Ark.)	893
Gabsky, Kansas & Texas Coal Co. v. (Ark.)	572	Hall v. Levy (Tex. Civ. App.)	263
Galveston, H. & S. A. R. Co. v. Baumgarten (Tex. Civ. App.)	78	Hall v. Metcalfe (Ky.)	18
Galveston, H. & S. A. R. Co. v. Contreras (Tex. Civ. App.)	1051	Hall v. State (Tex. Cr. App.)	1133
Galveston, H. & S. A. R. Co. v. Ginther (Tex. Sup.)	166	Hall, Texas & P. R. Co. v. (Tex. Civ. App.)	1052
Galveston, H. & S. A. R. Co. v. Schafmeyer (Tex. Civ. App.)	1037	Hamilton, Commonwealth v. (Ky.)	744
Galveston, H. & S. A. R. Co., Hicks v. (Tex. Sup.)	835	Hankins v. State (Tex. Cr. App.)	191
Garren, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	1028	Hanks' Ex'rs, McBrayer v. (Ky.)	2
Garrison v. Cooke (Tex. Sup.)	54	Harman v. Avritt (Ky.)	751
Garth's Guardian v. Taylor (Ky.)	777	Harmon, Stuart v. (Ky.)	365
Garth's Guardian v. Thompson (Ky.)	782	Harrington & Goodman v. Herman (Mo. Sup.)	546
Gause, Marks & Stix v. (Ky.)	732	Harris v. State (Tex. Cr. App.)	1134
German American Title Co., Deppen v. (Ky.)	768	Harris v. Tuttle (Ky.)	16
German Ins. Bank v. Fabel (Ky.)	329	Harris, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	71
Gibbons, Farmers' & Shippers' Tobacco Warehouse Co. v. (Ky.)	12	Harris, Renfro v. (Tex. Civ. App.)	237
Gilbert v. City of Paducah (Ky.)	816	Harrison, State ex rel. Livesay v. (Mo. App.)	469
Gilbert, Farley v. (Ky.)	1098	Harrison, State ex rel. Williams v. (Mo. Sup.)	1072
Gillespie, Murray v. (Tex. Sup.)	160	Hartford Fire Ins. Co. v. Bourbon County Court (Ky.)	739
Gilliland, Louisville & E. Mail Co. v. (Ky.)	1101	Hartford Life Ins. Co. v. Stalling (Tenn.)	960
Ginther, Galveston, H. & S. A. R. Co. v. (Tex. Sup.)	166	Haviland v. Kansas City, P. & G. R. Co. (Mo. Sup.)	515
Givens v. Louisville & N. R. Co. (Ky.)	320	Hawk v. State (Tex. Cr. App.)	842
Gladney v. Synnor (Mo. Sup.)	554	Hayden v. Kirby (Tex. Civ. App.)	198
Glasscock, Illinois Cent. R. Co. v. (Ky.)	769	Hayes v. Continental Casualty Co. (Mo. App.)	135
Gleason, State v. (Mo. Sup.)	676	Hayes v. Goldman (Ark.)	563
Glover v. Check (Ky.)	302	Hayner & Co. v. McKee (Ky.)	347
Goldman, Hayes v. (Ark.)	563	Hays v. Ison (Ky.)	733
Gonzales, San Antonio & A. P. R. Co. v. (Tex. Civ. App.)	213	Hays v. McLin (Ky.)	339
		Hays v. State (Tex. Cr. App.)	598
		Hays, Adair v. (Tex. Civ. App.)	256
		Head v. State (Tex. Cr. App.)	394

	Page		Page
Healey, Burkamp v. (Ky.).....	769	International & G. N. R. Co. v. Clark (Tex. Sup.)	584
Heath v. Jordt (Tex. Civ. App.).....	1022	International & G. N. R. Co. v. Lehman (Tex. Civ. App.)	619
Heffernan v. Weir (Mo. App.).....	1085	International & G. N. R. Co. v. Lister (Tex. Civ. App.).....	107
Helm v. Missouri Pac. R. Co. (Mo. App.)..	148	International & G. N. R. Co. v. Young (Tex. Civ. App.).....	68
Henderson v. Commonwealth (Ky.).....	781	International & G. N. R. Co., Reichert v. (Tex. Civ. App.).....	1031
Henderson v. Mahoney (Tex. Civ. App.)..	1019	Irwin, Bane v. (Mo. Sup.).....	522
Henderson Building & Loan Ass'n's Assignee, Manheimer v. (Ky.).....	313	Ison, Hays v. (Ky.).....	733
Henningberg v. State (Tex. Cr. App.).....	175	Jackson, Biffle v. (Ark.).....	566
Henningberg v. State (Tex. Cr. App.).....	176	Jacob v. Clark (Ky.).....	1095
Henson v. State (Tenn.).....	960	Jacobs, Louisville & N. Terminal Co. v. (Tenn.).....	954
Herbert v. State (Tex. Cr. App.).....	587	Jacobs, State v. (Mo. App.).....	482
Herman, Harrington & Goodman v. (Mo. Sup.).....	546	Jacobs' Adm'r v. Chesapeake & O. R. Co. (Ky.).....	308
Hernandez v. State (Tex. Cr. App.).....	840	James, Nease v. (Tex. Civ. App.).....	87
Herring v. Johnston (Ky.).....	793	J. B. Parker & Co., Aetna Life Ins. Co. v. (Tex. Sup.).....	168
Hiatt v. Fraternal Home (Mo. App.).....	463	J. B. Parker & Co., Aetna Life Ins. Co. v. (Tex. Sup.).....	580
Hickman v. State (Tex. Cr. App.).....	587	J. B. Parker & Co., Aetna Life Ins. Co. v. (Tex. Civ. App.).....	621
Hickman, Elting v. (Mo. Sup.).....	700	J. E. Hayner & Co. v. McKee (Ky.).....	347
Hicks v. Galveston, H. & S. A. R. Co. (Tex. Sup.)	835	Jenkins, Commonwealth v. (Ky.).....	363
Hilgert v. Barber Asphalt Pav. Co. (Mo. Sup.).....	1070	J. I. Case Threshing Mach. Co. v. Lyons (Ky.)	356
Hill, Beardsley v. (Ark.).....	372	Joerger, Commonwealth v. (Ky.).....	1132
Hill, Spalding v. (Ky.).....	307	John, State v. (Mo. Sup.).....	525
Hillebrandt v. Devine (Tex. Civ. App.).....	266	Johnson v. Houston & T. O. R. Co. (Tex. Civ. App.).....	1021
Hinton v. Sun Life Ins. Co. (Tenn.).....	118	Johnson, Day v. (Tex. Civ. App.).....	426
Hobart, Shields v. (Mo. Sup.).....	669	Johnson, Provident Sav. Life Assur. Soc. v. (Ky.).....	754
Hobart, Shields v. (Mo. Sup.).....	675	Johnson, Tradewater Coal Co. v. (Ky.).....	274
Hodges v. State (Tex. Cr. App.).....	179	Johnson's Adm'r, New York Life Ins. Co. v. (Ky.).....	762
Hoffman, Zepeda v. (Tex. Civ. App.).....	443	Johnston, Herring v. (Ky.).....	793
Holloway, Standard Life & Accident Ins. Co. v. (Ky.).....	796	Johnston, Miller v. (Ark.).....	871
Holmes v. Bradenbaugh (Mo. Sup.).....	550	Jolley, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	871
Home Ins. Co. v. Wood (Ky.).....	15	Jones v. City of Nashville (Tenn.).....	985
Home Ins. Co., Ritchey v. (Mo. App.).....	44	Jones v. National Cotton Oil Co. (Tex. Civ. App.).....	248
Home Mut. Ins. Co. v. Nichols (Tex. Civ. App.)	440	Jones v. State (Tex. Cr. App.).....	845
Hood v. State (Tex. Cr. App.).....	592	Jones, McLavy v. (Tex. Civ. App.).....	407
Hopkins County, Watkins v. (Tex. Civ. App.).....	872	Jones' Ex'rs, Darnall v. (Ky.).....	1108
Hornbeck, Maugh v. (Mo. App.).....	153	Jordan v. Davis (Mo. Sup.).....	686
Houston Cotton Oil Co. v. Trammell (Tex. Civ. App.).....	244	Jordt, Heath v. (Tex. Civ. App.).....	1022
Houston Electric St. R. Co. v. Elvis (Tex. Civ. App.).....	216	Kansas City, P. & G. R. Co., Haviland v. (Mo. Sup.).....	515
Houston & T. O. R. Co. v. Bryant (Tex. Civ. App.).....	885	Kansas City, South Highland Land & Improvement Co. v. (Mo. Sup.).....	944
Houston & T. C. R. Co. v. Cluck (Tex. Civ. App.)	83	Kansas City & I. Air Line, McElroy v. (Mo. Sup.).....	913
Houston & T. C. R. Co., Johnson v. (Tex. Civ. App.).....	1021	Kansas & Texas Coal Co. v. Gabsky (Ark.).....	572
Howard v. London Mfg. Co. (Ky.).....	771	Karn, Mayes v. (Ky.).....	1111
Howard v. Scott (Mo. App.).....	709	Keel, Phillips v. (Ky.).....	272
Howard, Asher v. (Ky.).....	1105	Keeney, Leicher v. (Mo. App.).....	145
Howerton, Louisville & N. R. Co. v. (Ky.)	760	Kees v. State (Tex. Cr. App.).....	853
Howe & Johnson v. Skidmore (Ky.).....	792	Keller, Frye v. (Tex. Civ. App.).....	228
Howser, Chowning v. (Ky.).....	748	Kelso, Edwards v. (Mo. App.).....	726
Hubbard v. St. Louis & M. R. R. Co. (Mo. Sup.).....	1073	Kempner v. State (Tex. Civ. App.).....	888
Huber Mfg. Co. v. Hunter (Mo. App.).....	484	Kennedy v. Aetna Life Ins. Co. (Tex. Civ. App.).....	602
Hudgeons, Maddox v. (Tex. Civ. App.).....	414	Kennedy, Clay v. (Ky.).....	815
Hudgins v. Carter County (Ky.).....	730	Kentucky Citizens' Building & Loan Ass'n's Assignee, Olliges v. (Ky.).....	747
Hudgins, Maryland Casualty Co. v. (Tex. Civ. App.).....	1047	Kentucky Growers' Ins. Co., Cook v. (Ky.)	764
Huff Bros., Albany Mill Co. v. (Ky.).....	820	King v. Ballou (Ky.).....	771
Huffman v. Ahl (Ky.).....	343	King, Sherman v. (Ark.).....	571
Hughes v. Roberts, Johnson & Rand Shoe Co. (Ky.).....	799	King, Sullivan v. (Tex. Civ. App.).....	207
Hughes, Cane Belt R. Co. v. (Tex. Civ. App.).....	1020	King, Taylor v. (Ky.).....	309
Hume v. S. Netter, A. Geismar & Co. (Tex. Civ. App.).....	865	King's Adm'r v. Covington, F. & A. R. Co. (Ky.)	757
Hunter v. Magee (Tex. Civ. App.).....	230	Kirby, Hayden v. (Tex. Civ. App.).....	198
Hunter, Huber Mfg. Co. v. (Mo. App.).....	484	Klockenbrink v. St. Louis & M. R. R. Co. (Mo. Sup.).....	900
Hynes, Pepperdine v. (Mo. App.).....	1078	Knoedler v. Teegarden (Ky.).....	268
Illinois Cent. R. Co. v. Glasscock (Ky.).....	769	Knoepker v. Ahman (Mo. App.).....	483
Illinois Cent. R. Co. v. Matthews (Ky.)...	302		
Illinois Cent. R. Co. v. Scheible (Ky.).....	325		
Illinois Cent. R. Co. v. Waldrop (Ky.).....	1116		
Industrial Lumber Co. v. Texas Pine Land Ass'n (Tex. Civ. App.).....	875		
Insurance Co. of America, Roberts v. (Mo. App.)	144		

	Page		Page
Knollenberg v. Nixon (Mo. Sup.).....	41	Louisville & N. R. Co. v. Voss (Tenn.)...	983
Knott, City of Lebanon v. (Ky.).....	790	Louisville & N. R. Co., Brinegar v. (Ky.)	783
Knowles v. State (Tex. Cr. App.).....	398	Louisville & N. R. Co., Cook's Adm'r v.	
Kobush v. Schmidt (Mo. App.).....	1087	(Ky.).....	729
Kohler, Opp v. (Mo. App.).....	128	Louisville & N. R. Co., Givens v. (Ky.)...	320
Kraus v. Kraus (Mo. App.).....	130	Louisville & N. R. Co., Payton v. (Ky.)...	346
Krepp v. St. Louis & S. F. R. Co. (Mo.		Louisville & N. Terminal Co. v. Jacobs	
App.).....	479	(Tenn.).....	954
Kruegel v. Nash (Tex. Civ. App.).....	601	Low v. Moore (Tex. Civ. App.).....	421
Kuehne, Christ v. (Mo. Sup.).....	537	Luna v. State (Tex. Cr. App.).....	378
Kuhn, Loeb & Co., Owen v. (Tex. Civ.		Lyon v. Lyon (Ky.).....	1102
App.).....	432	Lyon, Commonwealth v. (Ky.).....	323
Laclede Farmers' Mut. Fire & Lightning		Lyons, Bekkeland v. (Tex. Sup.).....	56
Ins. Co., Ormsby v. (Mo. App.).....	139	Lyons, J. I. Case Threshing Mach. Co. v.	
Lacotta v. Dunn (Ark.).....	370	(Ky.).....	356
Ladd v. Williams (Mo. App.).....	475	McAnally v. State (Tex. Cr. App.).....	842
Lake v. Copeland (Tex. Civ. App.).....	99	McArthur, St. Louis S. W. R. Co. of Tex-	
Lancaster v. City of Owensboro (Ky.)...	731	as v. (Tex. Civ. App.).....	76
Landers, Supreme Council American Le-		McBrayer v. Hanks' Ex'rs (Ky.).....	2
gion of Honor v. (Tex. Civ. App.).....	880	McCollum & Frazier, McLain v. (Tex.	
Lane v. Dowd (Mo. Sup.).....	632	Civ. App.).....	1027
Lane, Sites v. (Tex. Civ. App.).....	873	McComas v. State (Tex. Cr. App.).....	189
Lane & Bodley Co. v. City Electric Light		McComas, El Paso & N. W. R. Co. v.	
& Waterworks Co. (Tex. Civ. App.).....	425	(Tex. Civ. App.).....	629
Langdon-Creasy Co. v. Rouse (Ky.).....	1113	McCormick Harvesting Mach. Co. v.	
Lankster v. State (Tex. Cr. App.).....	388	Crawford (Mo. App.).....	491
Lasater v. First Nat. Bank (Tex. Civ.		McCune, Louisville, H. & St. L. R. Co. v.	
App.).....	1054	(Ky.).....	756
Lasater v. First Nat. Bank (Tex. Sup.)...	1057	McCune, Louisville, H. & St. L. R. Co. v.	
Latham v. State (Tex. Cr. App.).....	182	(Ky.).....	1094
Latham, De Loach Mill Mfg. Co. v. (Mo.		McDonald v. State (Tex. Cr. App.).....	383
App.).....	1080	McDonnell, Lee v. (Tex. Civ. App.).....	612
Latshaw, Tufts v. (Mo. Sup.).....	679	McElroy v. Kansas City & I. Air Line (Mo.	
Lavenue, Freeman v. (Mo. App.).....	1085	Sup.).....	913
Leach v. State (Tex. Cr. App.).....	600	McFadin v. State (Tex. Cr. App.).....	172
League, Emery v. (Tex. Civ. App.).....	603	McInerney v. Tarvin (Ky.).....	1107
Lee v. McDonnell (Tex. Civ. App.).....	612	Mackay, Corralitos Co. v. (Tex. Civ. App.)	
Lee v. State (Tex. Cr. App.).....	186	McKee, J. E. Hayner & Co. v. (Ky.).....	347
Lee v. State (Tex. Cr. App.).....	195	McLain v. McCollum & Frazier (Tex. Civ.	
Lee v. State (Tex. Cr. App.).....	1005	App.).....	1027
Leeper, Paul v. (Mo. App.).....	715	McLanahan, Crockett v. (Tenn.).....	950
Lehman, International & G. N. R. Co. v.		McLavy v. Jones (Tex. Civ. App.).....	407
(Tex. Civ. App.).....	619	McLain, Hays v. (Ky.).....	339
Leicher v. Keeney (Mo. App.).....	145	McRae, Ayers v. (Ark.).....	52
Lenoir, Stewart v. (Tex. Civ. App.).....	619	McReynolds, Seaton v. (Tex. Civ. App.)...	874
Lentz v. City of Dallas (Tex. Sup.).....	59	McVitie, Shute & Limont v. (Tex. Civ.	
Lenz v. South Covington & C. St. R. Co.		App.).....	433
(Ky.).....	1132	Maddox v. Hudgeons (Tex. Civ. App.)...	414
Levy, Hall v. (Tex. Civ. App.).....	263	Magee, Hunter v. (Tex. Civ. App.).....	230
Lewandowski v. State (Tex. Cr. App.)...	594	Mahoney, Henderson v. (Tex. Civ. App.)...	1019
Lewis v. Rutherford (Ark.).....	373	Maloney v. Terry (Ark.).....	570
Lexington Stoveworks, Clarke v. (Ky.)...	286	Manheimer v. Henderson Building & Loan	
Lichtenfeldt, Newport & Dayton Lumber		Ass'n's Assignee (Ky.).....	313
Co. v. (Ky.).....	778	Markham v. Cover (Mo. App.).....	474
Lincoln v. Corbett (Tex. Civ. App.).....	224	Marks & Stix v. Gause (Ky.).....	732
Lister, International & G. N. R. Co. v.		Marsden Co. v. Bullitt (Ky.).....	32
(Tex. Civ. App.).....	107	Marshall v. State (Tex. Cr. App.).....	1134
Lively v. State (Tex. Cr. App.).....	393	Martin v. State (Tex. Cr. App.).....	389
Locklin, Ex parte (Tex. Cr. App.).....	585	Martin v. State (Tex. Cr. App.).....	386
Logan, Logan's Heirs v. (Tex. Civ. App.)		Marx v. State (Tex. Cr. App.).....	590
Logan's Heirs v. Logan (Tex. Civ. App.)...	416	Maryland Casualty Co. v. Hudgins (Tex.	
London Mfg. Co., Howard v. (Ky.).....	771	Civ. App.).....	1047
Longnecker, Commonwealth v. (Ky.).....	1132	Mason, Louisville & N. R. Co. v. (Ky.)...	27
Louisville Home Telephone Co., Cumberland		Mason, Stapp v. (Ky.).....	11
Telephone & Telegraph Co. v., two cases		Mastin v. Zweigart (Ky.).....	750
(Ky.).....	4	Matthews v. Capshaw (Tenn.).....	964
Louisville, H. & St. L. R. Co. v. Chandler's		Matthews, Illinois Cent. R. Co. v. (Ky.)...	302
Adm'r (Ky.).....	805	Mattingly, Mattingly's Trustee v. (Ky.)...	802
Louisville, H. & St. L. R. Co. v. McCune		Mattingly's Trustee v. Mattingly (Ky.)...	802
(Ky.).....	756	Maugh v. Hornbeck (Mo. App.).....	153
Louisville, H. & St. L. R. Co. v. McCune		May v. Moore (Mo. App.).....	476
(Ky.).....	1094	May, State (Mo. Sup.).....	918
Louisville, H. & St. L. R. Co., Early's		May, Whitmire v. (Tex. Sup.).....	375
Adm'r v. (Ky.).....	348	Mayes v. Karn (Ky.).....	1111
Louisville Public Warehouse Co., E. H.		Meacham v. Young (Ky.).....	1094
Taylor, Jr. & Sons v. (Ky.).....	20	Meador v. State (Tex. Cr. App.).....	186
Louisville R. Co. v. Poe (Ky.).....	6	Meaks, Pinnell v. (Mo. App.).....	461
Louisville R. Co. Gorman's Adm'r v. (Ky.)		Merchants' & Planters' Oil Co. v. Burns	
Louisville & E. Mail Co. v. Gilliland (Ky.)...	1101	(Tex. Civ. App.).....	626
Louisville & N. R. Co. v. Dickey (Ky.)...	332	Mersman v. Worthington's Ex'rs (Ky.)...	1094
Louisville & N. R. Co. v. Gordan (Ky.)...	311	Mesker, Richardson v. (Mo. Sup.).....	506
Louisville & N. R. Co. v. Howerton (Ky.)		Metcalfe, Hall v. (Ky.).....	18
Louisville & N. R. Co. v. Mason (Ky.)...	27	Metropolitan Life Ins. Co., Ashford v.	
Louisville & N. R. Co. v. S. D. Chestnut		(Mo. App.).....	712
& Bro. (Ky.).....	351	Metz v. Blattner (Mo. App.).....	489

	Page
Metz, Moore v. (Ky.).....	294
Meyere v. Nashville, C. & St. L. Ry. (Tenn.).....	114
Meyers, Green v. (Mo. App.).....	128
Middlesborough R. Co. v. Stallard's Adm'r (Ky.).....	17
Miller, Ex parte (Tex. Cr. App.).....	183
Miller v. Johnston (Ark.).....	371
Miller v. State (Tex. Cr. App.).....	856
Miller v. State (Tex. Cr. App.).....	996
Mills, City of Springfield ex rel. Updergraff v. (Mo. App.).....	462
Mills, Van Buren County Sav. Bank v. (Mo. App.).....	497
Mishawaka Woolen Mfg. Co. v. Powell (Mo. App.).....	723
Missouri, K. & T. R. Co. of Texas v. Buchanan (Tex. Civ. App.).....	96
Missouri, K. & T. R. Co. of Texas v. Goss (Tex. Civ. App.).....	94
Missouri, K. & T. R. Co. of Texas v. Jolley (Tex. Civ. App.).....	871
Missouri, K. & T. R. Co. of Texas v. Seley (Tex. Civ. App.).....	89
Missouri, K. & T. R. Co. of Texas v. Sherrill (Tex. Civ. App.).....	429
Missouri, K. & T. R. Co. of Texas v. Smith (Tex. Civ. App.).....	418
Missouri Lead & Zinc Co., Barron v. (Mo. Sup.).....	534
Missouri Pac. R. Co., Black v. (Mo. Sup.).....	559
Missouri Pac. R. Co., Bolton v. (Mo. Sup.).....	530
Missouri Pac. R. Co., Darlington v. (Mo. App.).....	122
Missouri Pac. R. Co., Helm v. (Mo. App.).....	148
Missouri Pac. R. Co., Ready v. (Mo. App.).....	142
Missouri Pac. R. Co., Saxton v. (Mo. App.).....	717
Missouri Pac. R. Co., Shaefer v. (Mo. App.).....	154
Missouri Pac. R. Co., White v. (Mo. App.).....	716
Mitchell v. State (Tex. Cr. App.).....	594
Mitchell's Adm'r, Columbia Finance & Trust Co. v. (Ky.).....	350
Moayon v. Moayon (Ky.).....	33
Modern Woodmen of America, Callies v. (Mo. App.).....	713
Moerer, Cochran v. (Tex. Civ. App.).....	1031
Montgomery v. Consolidated Boat Store Co. (Ky.).....	816
Montgomery, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	616
Moody v. Ogden (Tex. Civ. App.).....	253
Mooney v. Ancient Order of United Workmen, Grand Lodge of Kentucky (Ky.).....	288
Moore v. Metz (Ky.).....	294
Moore v. State (Tex. Cr. App.).....	595
Moore v. Williams (Tex. Civ. App.).....	222
Moore, Low v. (Tex. Civ. App.).....	421
Moore, May v. (Mo. App.).....	476
Moore, Nolan v. (Tex. Sup.).....	583
Moore, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	226
Morgan v. Commonwealth (Ky.).....	1098
Morgan v. Wickliffe (Ky.).....	1122
Morrison, Greer v. (Tex. Civ. App.).....	73
Mosley v. Commonwealth (Ky.).....	344
Murff, Sun Life Ins. Co. of America v. (Tex. Civ. App.).....	1040
Murray v. Gillespie (Tex. Sup.).....	160
Murray v. Roach (Ky.).....	807
Musick's Ex'r, Fisher v. (Ky.).....	787
Musselman, Wilhoit v. (Ky.).....	1112
Mutual Ben. Life Ins. Co., Smith v. (Mo. Sup.).....	935
Mutual Life Ins. Co. v. Richards (Mo. App.).....	487
Myers v. Pedigo (Ky.).....	734
Myers v. Rolfe (Ark.).....	52
Nash, Kruegel v. (Tex. Civ. App.).....	601
Nashville, C. & St. L. Ry., Meyere v. (Tenn.).....	114
Nashville, C. & St. L. Ry., Tompkins v. (Tenn.).....	116
Nashville Trust Co., Overton v. (Tenn.).....	108
National Cotton Oil Co. v. State (Tex. Civ. App.).....	615

	Page
National Cotton Oil Co., Jones v. (Tex. Civ. App.).....	248
National Exchange Bank, Butts v. (Mo. App.).....	1083
Nease v. James (Tex. Civ. App.).....	87
Neely v. Ft. Worth & R. G. R. Co. (Tex. Sup.).....	159
Nelson, Balz v. (Mo. Sup.).....	527
Nelson County v. Bardstown & L. Turnpike Co. (Ky.).....	1104
Netherlands Fire Ins. Co., Spears & Kattman v. (Tex. Civ. App.).....	1018
Netter, A. Geismar & Co., Hume v. (Tex. Civ. App.).....	865
Newport & Dayton Lumber Co. v. Lichtenfeldt (Ky.).....	778
New York Life Ins. Co. v. English (Tex. Sup.).....	58
New York Life Ins. Co. v. Johnson's Adm'r (Ky.).....	762
New York Life Ins. Co. v. N. L. Curry & Bro. (Ky.).....	736
Nichols, Home Mut. Ins. Co. v. (Tex. Civ. App.).....	440
Nixon, Knollenberg v. (Mo. Sup.).....	41
N. L. Curry & Bro., New York Life Ins. Co. v. (Ky.).....	736
Nolan v. Moore (Tex. Sup.).....	583
Norman v. Thompson (Tex. Civ. App.).....	64
Norman v. Thompson (Tex. Sup.).....	62
Northwestern Nat. Life Ins. Co., Folkens v. (Mo. App.).....	720
Norton v. Wochler (Tex. Civ. App.).....	1025
Nute, Commonwealth v. (Ky.).....	1090
Odewalt, City of Campbellsburg v. (Ky.).....	314
Ogden, Moody v. (Tex. Civ. App.).....	253
O'Laughlin, Texas Cent. R. Co. v. (Tex. Civ. App.).....	610
Olliges v. Kentucky Citizens' Building & Loan Ass'n's Assignee (Ky.).....	747
Opp v. Kohler (Mo. App.).....	128
Ordelheide, Wabash R. Co. v. (Mo. Sup.).....	684
Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co. (Mo. App.).....	139
Osborn v. State (Tex. Cr. App.).....	592
Outland, Ezell v. (Ky.).....	784
Overall, Turner v. (Mo. Sup.).....	644
Overton v. Nashville Trust Co. (Tenn.).....	108
Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.).....	432
Padgett, Shepherd v. (Mo. App.).....	490
Page v. State (Tex. Cr. App.).....	1134
Park v. Park (Ark.).....	993
Parker v. Burton (Mo. Sup.).....	663
Parker v. Thomas (Tex. Civ. App.).....	229
Parker, State v. (Mo. Sup.).....	650
Parker & Co., Aetna Life Ins. Co. v. (Tex. Sup.).....	168
Parker & Co., Aetna Life Ins. Co. v. (Tex. Sup.).....	580
Parker & Co., Aetna Life Ins. Co. v. (Tex. Civ. App.).....	621
Parks, Alexander v. (Ky.).....	1105
Parks, San Antonio Brewing Ass'n v. (Tex. Civ. App.).....	1135
Parlin & Orendorff Co., Greenwood v. (Mo. App.).....	138
Parry v. Gordon Coffee & Spice Co. (Mo. App.).....	130
Parsons v. Weller (Ky.).....	273
Parsons, Western Union Telegraph Co. v. (Ky.).....	800
Paul v. Leeper (Mo. App.).....	715
Payton v. Louisville & N. R. Co. (Ky.).....	346
Pedigo, Myers v. (Ky.).....	734
Pepperdine v. Hymes (Mo. App.).....	1078
Percifull v. Coleman (Ky.).....	29
Parkin's Adm'r v. Embry (Ky.).....	788
Pettus, Ex parte (Tex. Cr. App.).....	1134
Peycke v. Ahrens (Mo. App.).....	151
Phillips v. Keel (Ky.).....	272
Phillips v. Presson (Mo. Sup.).....	501
Pinnell v. Meaks (Mo. App.).....	461

	Page		Page
Pittsburg, C. O. & St. L. R. Co. v. Dodd (Ky.)	822	St. Louis S. W. R. Co. of Texas v. Barnes (Tex. Civ. App.)	1041
Plemons v. State (Tex. Cr. App.)	854	St. Louis S. W. R. Co. of Texas v. Barrett (Tex. Civ. App.)	884
Pochila v. Calvert, W. & B. V. R. Co. (Tex. Civ. App.)	255	St. Louis S. W. R. Co. of Texas v. Bowles (Tex. Civ. App.)	451
Poe, Louisville R. Co. v. (Ky.)	6	St. Louis S. W. R. Co. of Texas v. Eitel (Tex. Civ. App.)	205
Powell, Mishawaka Woolen Mfg. Co. v. (Mo. App.)	723	St. Louis S. W. R. Co. of Texas v. McArthur (Tex. Civ. App.)	76
Presson, Phillips v. (Mo. Sup.)	501	St. Louis S. W. R. Co. of Texas, Denison & S. R. Co. v. (Tex. Sup.)	161
Preston v. Barber (Tex. Civ. App.)	225	St. Louis & M. R. R. Co., Hubbard v. (Mo. Sup.)	1073
Priest, Southwestern Telegraph & Telephone Co. v. (Tex. Civ. App.)	241	St. Louis & M. R. R. Co., Klockenbrink v. (Mo. Sup.)	900
Provident Sav. Life Assur. Soc. v. Johnson (Ky.)	754	St. Louis & S. F. R. Co. v. Terrell (Tex. Civ. App.)	430
Pyron v. Graff (Tex. Civ. App.)	101	St. Louis & S. F. R. Co., Krepp v. (Mo. App.)	479
Ratcliff v. B. Baer & Co. (Ark.)	896	Sample's Adm'r, Crabtree Coal Min. Co. v. (Ky.)	24
Raymond v. Yarrington (Tex. Sup.)	580	San Antonio Brewing Ass'n v. Parks (Tex. Civ. App.)	1135
R. C. Stone Milling Co., Childers v. (Mo. App.)	1077	San Antonio & A. P. R. Co. v. Ankerson (Tex. Civ. App.)	219
Ready v. Missouri Pac. R. Co. (Mo. App.)	142	San Antonio & A. P. R. Co. v. Gonzales (Tex. Civ. App.)	213
R. B. Bell Hardware Co. v. Riddle (Tex. Civ. App.)	613	San Antonio & A. P. R. Co. v. Montgomery (Tex. Civ. App.)	616
Reed v. Schmidt (Ky.)	367	San Antonio & A. P. R. Co. v. Moore (Tex. Civ. App.)	226
Reichert v. International & G. N. R. Co. (Tex. Civ. App.)	1031	San Antonio & A. P. R. Co., First Nat. Bank v. (Tex. Civ. App.)	1033
Renfro v. Harris (Tex. Civ. App.)	237	Sandy River Cannel Coal Co. v. White House Cannel Coal Co. (Ky.)	298
Reno v. Blackburn (Ky.)	775	Sansom, Griffin v. (Tex. Civ. App.)	864
Reynolds v. Commonwealth (Ky.)	277	Satterwhite, Furnish v. (Ky.)	309
Reynolds, State v. (Mo. Sup.)	39	Saxon v. Missouri Pac. R. Co. (Mo. App.)	717
Rice v. Strange (Ky.)	756	Schaeffer, State v. (Mo. Sup.)	518
Richards, Ex parte (Tex. Cr. App.)	838	Schafermeyer, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.)	1037
Richards, Mutual Life Ins. Co. v. (Mo. App.)	487	Scheible, Illinois Cent. R. Co. v. (Ky.)	325
Richardson v. Meaker (Mo. Sup.)	506	Schmidt, Kobush v. (Mo. App.)	1087
Ricks, Ex parte (Tex. Cr. App.)	1134	Schmidt, Reed v. (Ky.)	367
Riddle v. Fannin (Ky.)	290	Schneider v. Dorsey (Tex. Civ. App.)	1029
Riddle, R. B. Bell Hardware Co. v. (Tex. Civ. App.)	613	Scott, Howard v. (Mo. App.)	709
Riddle's Adm'r, Chesapeake & O. R. Co. v. (Ky.)	22	Scott, State v. (Mo. Sup.)	897
Rigdon v. Ferguson (Mo. Sup.)	504	Scott, Thomas v. (Ky.)	1129
Riggs v. Gray (Tex. Civ. App.)	101	Scottish-American Mortg. Co. v. Davis (Tex. Civ. App.)	217
Riley's Curators, Commonwealth v. (Ky.)	809	S. D. Chestnut & Bro., Louisville & N. R. Co. v. (Ky.)	351
Rios, Singer Mfg. Co. v. (Tex. Civ. App.)	1135	Seaton v. McReynolds (Tex. Civ. App.)	874
Ritchey v. Home Ins. Co. (Mo. App.)	44	Sebastian v. State (Tex. Cr. App.)	849
Riviere v. Wilkens (Tex. Civ. App.)	608	Seley, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	89
Roach, Cadiz R. Co. v. (Ky.)	280	Severson, Davidson Benedict Co. v. (Tenn.)	967
Roach, Murray v. (Ky.)	807	Shaefer v. Missouri Pac. R. Co. (Mo. App.)	154
Roberts v. Best (Mo. Sup.)	657	Shannon v. Carter (Mo. App.)	495
Roberts v. Fielder Salt Works (Tex. Civ. App.)	618	Sharp v. Damon Mound Oil Co. (Tex. Civ. App.)	1043
Roberts v Insurance Co. of America (Mo. App.)	144	Shea v. Shea's Adm'r (Ky.)	7
Roberts, Johnson & Rand Shoe Co., Hughes v. (Ky.)	799	Shea's Adm'r, Shea v. (Ky.)	7
Robertson, Ex parte (Tex. Cr. App.)	859	Shelton v. Campbell (Tenn.)	112
Robertson v. Robertson (Ky.)	813	Shelton, Gulf, C. & S. F. R. Co. v. (Tex. Sup.)	165
Robertson, Douglas v. (Tex. Civ. App.)	868	Shepherd v. Padgett (Mo. App.)	490
Robinson v. United Trust (Ark.)	992	Sherman v. King (Ark.)	571
Robinson, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	70	Sherrill, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	429
Rock Island Implement Co. v. Sloan (Mo. App.)	728	Shields v. Hobart (Mo. Sup.)	669
Rolfe, Myers v. (Ark.)	52	Shields v. Hobart (Mo. Sup.)	675
Rose, Stewart v. (Ky.)	271	Shipp, Wright v. (Ky.)	1132
Rountree v. Thompson (Tex. Civ. App.)	69	Shouse v. Taylor (Ky.)	324
Rouse, Langdon-Creasy Co. v. (Ky.)	1113	Shute & Limont v. McVitie (Tex. Civ. App.)	433
Rowland v. Wadly (Ark.)	994	Simmons v. State (Tex. Cr. App.)	586
Russell v. State (Tex. Cr. App.)	190	Sinberg v. Falk Co. (Mo. App.)	947
Rutherford, Lewis v. (Ark.)	373	Singer Mfg. Co. v. Rios (Tex. Civ. App.)	1135
Ryon, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	72	Sirmons v. State (Tex. Cr. App.)	395
St. Louis, I. M. & S. R. Co. v. Haist (Ark.)	893	Sites v. Lane (Tex. Civ. App.)	873
St. Louis, I. M. & S. R. Co. v. Vaughan (Ark.)	575	Skidmore, Howe & Johnson v. (Ky.)	792
St. Louis, S. F. & T. R. Co., Boyer & Lucas v. (Tex. Civ. App.)	1038	Slater, McMahon & Co., Ferguson v. (Tex. Civ. App.)	422
St. Louis S. W. R. Co. v. Duck (Tex. Civ. App.)	445		
St. Louis S. W. R. Co., Denison & S. R. Co. v. (Tex. Civ. App.)	201		
St. Louis S. W. R. Co. of Texas v. Austin (Tex. Civ. App.)	212		

	Page		Page
Slayden, Cope v. (Ky.).....	284	State, Bynum v. (Tex. Cr. App.).....	844
Sloan, Rock Island Implement Co. v. (Mo. App.).....	728	State, Caddell v. (Tex. Cr. App.).....	1015
Smith v. Curd (Ky.).....	744	State, Campbell v. (Tex. Cr. App.).....	398
Smith v. Frankfort & O. R. Co. (Ky.).....	1038	State, Carwile v. (Tex. Cr. App.).....	376
Smith v. Mutual Ben. Life Ins. Co. (Mo. Sup.).....	935	State, Cates v. (Tex. Cr. App.).....	1133
Smith v. Smith (Ky.).....	766	State, Catling v. (Tex. Cr. App.).....	853
Smith, Adams Express Co. v. (Ky.).....	752	State, Cecil v. (Tex. Cr. App.).....	197
Smith, Bell v. (Ky.).....	1107	State, Clark v. (Tex. Cr. App.).....	591
Smith, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	418	State, Coyle v. (Tex. Cr. App.).....	847
Smith, State ex rel. Chicago, R. I. & P. R. Co. v. (Mo. Sup.).....	692	State, Crow v. (Tex. Cr. App.).....	392
S. Netter, A. Geismar & Co., Hume v. (Tex. Civ. App.).....	865	State, Cummings v. (Tex. Cr. App.).....	395
Snow, Western Union Tel. Co. v. (Tex. Civ. App.).....	250	State, Cummings v. (Tex. Cr. App.).....	1133
Soderer, Union Trust Co. v. (Mo. Sup.).....	499	State, Dodd v. (Tex. Cr. App.).....	1015
Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.).....	1125	State, Doran v. (Tex. Cr. App.).....	585
Somerset Nat. Banking Co.'s Receiver v. Brinkley (Ky.).....	1129	State, Earl v. (Tex. Cr. App.).....	175
South Covington & C. St. R. Co., Dierig v. (Ky.).....	355	State, Earl v. (Tex. Cr. App.).....	376
South Covington & C. St. R. Co., Lenz v. (Ky.).....	1132	State, Ellison v. (Tex. Cr. App.).....	188
Southern Cotton Oil Co. v. State (Tex. Civ. App.).....	1135	State, Fortenberry v. (Tex. Cr. App.).....	586
Southern Kansas R. Co. v. Cooper (Tex. Civ. App.).....	409	State, Fortenberry v. (Tex. Cr. App.).....	588
South Highland Land & Improvement Co. v. Kansas City (Mo. Sup.).....	944	State, Fortenberry v. (Tex. Cr. App.).....	593
Southwestern Telegraph & Telephone Co. v. Priest (Tex. Civ. App.).....	241	State, Freeman v. (Tex. Cr. App.).....	185
Southwestern Telegraph & Telephone Co., Ft. Worth & R. G. R. Co. v. (Tex. Civ. App.).....	1135	State, Freeman v. (Tex. Cr. App.).....	1001
Southwick v. Southwick (Mo. App.).....	477	State, Fuller v. (Tex. Cr. App.).....	184
Spaeth, State v. (Mo. Sup.).....	1133	State, Gables v. (Tex. Cr. App.).....	377
Spalding v. Hill (Ky.).....	307	State, Gray v. (Tex. Cr. App.).....	169
Spears & Kattman v. Netherlands Fire Ins. Co. (Tex. Civ. App.).....	1018	State, Gray v. (Tex. Cr. App.).....	858
Sperry v. Sperry (Mo. App.).....	1077	State, Greer County v. (Tex. Civ. App.).....	104
Sprague, Blewett v. (Ky.).....	317	State, Grimes v. (Tex. Cr. App.).....	589
Stafford, Graham v. (Mo. Sup.).....	507	State, Grimes v. (Tex. Cr. App.).....	862
Stahl, Douglass v. (Ark.).....	568	State, Guiles v. (Tex. Cr. App.).....	187
Stallard's Adm'r, Middlesborough R. Co. v. (Ky.).....	17	State, Hall v. (Tex. Cr. App.).....	1133
Stalling, Hartford Life Ins. Co. v. (Tenn.)	960	State, Hankins v. (Tex. Cr. App.).....	191
Standard Life & Accident Ins. Co. v. Hol-loway (Ky.).....	796	State, Harris v. (Tex. Cr. App.).....	1134
Stapp v. Mason (Ky.).....	11	State, Hawk v. (Tex. Cr. App.).....	842
State v. Back (Mo. App.).....	466	State, Hays v. (Tex. Cr. App.).....	598
State v. Dalton (Tenn.).....	456	State, Head v. (Tex. Cr. App.).....	394
State v. Eyermann (Mo. Sup.).....	539	State, Henningberg v. (Tex. Cr. App.).....	175
State v. Gleason (Mo. Sup.).....	676	State, Henningberg v. (Tex. Cr. App.).....	176
State v. Gray (Mo. Sup.).....	698	State, Henson v. (Tenn.).....	960
State v. Jacobs (Mo. App.).....	482	State, Herbert v. (Tex. Cr. App.).....	587
State v. John (Mo. Sup.).....	525	State, Hernandez v. (Tex. Cr. App.).....	840
State v. May (Mo. Sup.).....	918	State, Hickman v. (Tex. Cr. App.).....	587
State v. Parker (Mo. Sup.).....	650	State, Hodges v. (Tex. Cr. App.).....	179
State v. Reynolds (Mo. Sup.).....	39	State, Hood v. (Tex. Cr. App.).....	592
State v. Schaeffer (Mo. Sup.).....	518	State, Jones v. (Tex. Cr. App.).....	845
State v. Scott (Mo. Sup.).....	897	State, Kees v. (Tex. Cr. App.).....	855
State v. Spaeth (Mo. Sup.).....	1133	State, Kempner v. (Tex. Civ. App.).....	888
State v. Terry (Mo. Sup.).....	513	State, Knowles v. (Tex. Cr. App.).....	398
State v. Wilson (Mo. Sup.).....	696	State, Lankster v. (Tex. Cr. App.).....	388
State, Adams v. (Tex. Cr. App.).....	588	State, Latham v. (Tex. Cr. App.).....	182
State, Albert v. (Tex. Cr. App.).....	846	State, Leach v. (Tex. Cr. App.).....	600
State, Aldredge v. (Tex. Cr. App.).....	843	State, Lee v. (Tex. Cr. App.).....	186
State, Anderson v. (Tex. Cr. App.).....	593	State, Lee v. (Tex. Cr. App.).....	195
State, Atchison v. (Tex. Cr. App.).....	998	State, Lee v. (Tex. Cr. App.).....	1005
State, Ball v. (Tex. Cr. App.).....	384	State, Lewandowski v. (Tex. Cr. App.).....	594
State, Barber v. (Tex. Cr. App.).....	1133	State, Lively v. (Tex. Cr. App.).....	393
State, Barnes v. (Tex. Cr. App.).....	108	State, Luna v. (Tex. Cr. App.).....	378
State, Barnes v. (Tex. Cr. App.).....	177	State, McAnally v. (Tex. Cr. App.).....	842
State, Beal v. (Tex. Cr. App.).....	1133	State, McComas v. (Tex. Cr. App.).....	189
State, Berry v. (Tex. Cr. App.).....	170	State, McDonald v. (Tex. Cr. App.).....	383
State, Bouyer v. (Tex. Cr. App.).....	1133	State, McFadin v. (Tex. Cr. App.).....	172
State, Bradley v. (Tex. Cr. App.).....	1133	State, Marshall v. (Tex. Cr. App.).....	1134
State, Brannan v. (Tex. Cr. App.).....	184	State, Martin v. (Tex. Cr. App.).....	380
State, Brannan v. (Tex. Cr. App.).....	1133	State, Martin v. (Tex. Cr. App.).....	386
State, Brock v. (Tex. Cr. App.).....	599	State, Marx v. (Tex. Cr. App.).....	590
State, Burk v. (Tex. Cr. App.).....	585	State, Meador v. (Tex. Cr. App.).....	186
State, Burrows v. (Tex. Cr. App.).....	848	State, Miller v. (Tex. Cr. App.).....	856
		State, Miller v. (Tex. Cr. App.).....	996
		State, Mitchell v. (Tex. Cr. App.).....	594
		State, Moore v. (Tex. Cr. App.).....	595
		State, National Cotton Oil Co. v. (Tex. Civ. App.).....	615
		State, Osborn v. (Tex. Cr. App.).....	592
		State, Page v. (Tex. Cr. App.).....	1134
		State, Plamous v. (Tex. Cr. App.).....	854
		State, Russell v. (Tex. Cr. App.).....	190
		State, Sebastian v. (Tex. Cr. App.).....	840
		State, Simmons v. (Tex. Cr. App.).....	580
		State, Sirmons v. (Tex. Cr. App.).....	395
		State, Southern Cotton Oil Co. v. (Tex. Civ. App.).....	1135
		State, Tackaberry v. (Tex. Cr. App.).....	384
		State, Taylor v. (Tex. Cr. App.).....	181
		State, Taylor v. (Tex. Cr. App.).....	396
		State, Terry v. (Tex. Cr. App.).....	382
		State, Thomas v. (Tex. Cr. App.).....	178

	Page		Page
State, Turner v. (Tex. Cr. App.).....	187	Texas & P. R. Co. v. Adams (Tex. Civ. App.).....	81
State, Walker v. (Tex. Cr. App.).....	401	Texas & P. R. Co. v. Berry (Tex. Civ. App.).....	423
State, Walker v. (Tex. Cr. App.).....	861	Texas & P. R. Co. v. Hall (Tex. Civ. App.).....	1052
State, Walker v. (Tex. Cr. App.).....	997	Texas & P. R. Co. v. Webb (Tex. Civ. App.).....	1044
State, Watts v. (Tex. Cr. App.).....	1134	Thomas v. Scott (Ky.).....	1129
State, White v. (Tex. Cr. App.).....	173	Thomas v. State (Tex. Cr. App.).....	178
State, White v. (Tex. Cr. App.).....	185	Thomas, Baldwin v. (Ark.).....	53
State, Wilkerson v. (Tex. Cr. App.).....	850	Thomas, Beardsley v. (Tex. Civ. App.).....	411
State, Williams v. (Tex. Cr. App.).....	192	Thomas, Parker v. (Tex. Civ. App.).....	229
State, Williams v. (Tex. Cr. App.).....	380	Thompson, Garth's Guardian v. (Ky.).....	782
State, Williamson v. (Tex. Cr. App.).....	600	Thompson, Norman v. (Tex. Sup.).....	62
State, Wilson v. (Tex. Cr. App.).....	862	Thompson, Norman v. (Tex. Civ. App.).....	64
State, Windom v. (Tex. Cr. App.).....	193	Thompson, Rountree v. (Tex. Civ. App.).....	69
State, Winfield v. (Tex. Cr. App.).....	182	Thudium v. Brookfield Loan & Building Co. (Mo. App.).....	134
State, Wright v. (Tex. Cr. App.).....	847	Tice v. Fleming (Mo. Sup.).....	689
State ex rel. Chicago, R. I. & P. R. Co. v. Smith (Mo. Sup.).....	692	Timmons, Brown v. (Tenn.).....	958
State ex rel. Hamilton v. Brown (Mo. Sup.).....	640	Todd, Cook v. (Ky.).....	779
State ex rel. Hopper v. Cottengim (Mo. Sup.).....	498	Tompkins v. Nashville, C. & St. L. Ry. (Tenn.).....	116
State ex rel. Jackson v. Town of Mansfield (Mo. App.).....	471	Town of Central Covington v. Bellouby (Ky.).....	1107
State ex rel. Latimer v. Gray (Mo. App.).....	1081	Town of McMinnville v. Stroud (Tenn.).....	949
State ex rel. Linn County v. Adams (Mo. Sup.).....	655	Town of Mansfield, State ex rel. Jackson v. (Mo. App.).....	471
State ex rel. Livesay v. Harrison (Mo. App.).....	469	Tradewater Coal Co. v. Johnson (Ky.).....	274
State ex rel. School Dist. No. 1. v. Denny (Mo. App.).....	467	Trammell, Houston Cotton Oil Co. v. (Tex. Civ. App.).....	244
State ex rel. Ward v. Atchison (Mo. Sup.).....	1075	Travelers' Ins. Co., Wilkinson v. (Tex. Civ. App.).....	1016
State ex rel. Williams v. Harrison (Mo. Sup.).....	1072	Traylor, Fred v. (Ky.).....	768
Statham, Comer v. (Mo. Sup.).....	1074	Trenton Building & Loan Ass'n, Callison v. (Mo. App.).....	477
Steele, United Laundry Co. v. (Ky.).....	305	Trustees Common School Dist. No. 40, Dawson v. (Ky.).....	806
Stephens v. Wilson (Ky.).....	336	Tufts v. Lathshaw (Mo. Sup.).....	679
Stephenson v. Stephenson (Ky.).....	742	Tupman, Buruside & C. R. R. Co. v. (Ky.).....	786
Stephenson, Benchoff v. (Tex. Civ. App.).....	106	Turner v. Overall (Mo. Sup.).....	644
Stevens v. Stevens (Mo. Sup.).....	542	Turner v. State (Tex. Cr. App.).....	187
Stevenson, Erfurth v. (Ark.).....	49	Tuttle, Harris v. (Ky.).....	16
Stewart v. Lenoir (Tex. Civ. App.).....	619	Union Trust Co. v. Soderer (Mo. Sup.).....	499
Stewart v. Rose (Ky.).....	271	United Laundry Co. v. Steele (Ky.).....	305
Stokes, Denny v. (Tex. Civ. App.).....	209	United States Casualty Co. Wertheimer-Swarts Shoe Co. v. (Mo. Sup.).....	635
Stone, Ex parte (Tex. Cr. App.).....	1000	United Trust, Robinson v. (Ark.).....	992
Stone Milling Co., Childers v. (Mo. App.).....	1077	Uvalde Nat. Bank, Western Union Tel. Co. v. (Tex. Civ. App.).....	232
Storey v. First Nat. Bank (Ky.).....	318	Van Buren County Sav. Bank v. Mills (Mo. App.).....	497
Strange, Rice v. (Ky.).....	756	Vaughan, St. Louis I. M. & S. R. Co. v. (Ark.).....	575
Strauss, Bloom v. (Ark.).....	563	Violet v. Commonwealth (Ky.).....	1
Stroud, Town of McMinnville v. (Tenn.).....	949	Voges v. Dittlinger (Tex. Civ. App.).....	875
Stuart v. Harmon (Ky.).....	365	Vosburg, Choctaw & M. R. Co. v. (Ark.).....	574
Sullivan v. King (Tex. Civ. App.).....	207	Voss, Louisville & N. R. Co. v. (Tenn.).....	983
Summers Bros. v. Bland (Ky.).....	798	Wabash R. Co. v. Ordelheide (Mo. Sup.).....	684
Sun Life Ins. Co., Hinton v. (Tenn.).....	118	Wadly, Rowland v. (Ark.).....	994
Sun Life Ins. Co. of America v. Murff (Tex. Civ. App.).....	1040	Waldrop, Illinois Cent. R. Co. v. (Ky.).....	1116
Supreme Council American Legion of Honor v. Landers (Tex. Civ. App.).....	880	Walker v. State (Tex. Cr. App.).....	401
Swincher v. Commonwealth (Ky.).....	306	Walker v. State (Tex. Cr. App.).....	861
Sydnor, Gladney v. (Mo. Sup.).....	554	Walker v. State (Tex. Cr. App.).....	997
Tackaberry v. State (Tex. Cr. App.).....	384	Wall v. Dimmitt (Ky.).....	300
Tally, Felton v. (Tex. Civ. App.).....	614	Waller, Western Union Tel. Co. v. (Tex. Civ. App.).....	264
Tarvin, Commonwealth v. (Ky.).....	13	Wallingford v. Aitkins (Ky.).....	794
Tarvin, McInerney v. (Ky.).....	1107	Warner v. Donahue (Mo. App.).....	492
Taylor v. King (Ky.).....	309	Warren, Foust v. (Tex. Civ. App.).....	404
Taylor v. State (Tex. Cr. App.).....	181	Washington Life Ins. Co. v. Berwald (Tex. Civ. App.).....	436
Taylor v. State (Tex. Cr. App.).....	396	Watkins v. Hopkins County (Tex. Civ. App.).....	872
Taylor, Garth's Guardian v. (Ky.).....	777	Watts v. Bruce (Tex. Civ. App.).....	258
Taylor, Jr. & Sons v. Louisville Public Warehouse Co. (Ky.).....	20	Watts v. State (Tex. Cr. App.).....	1134
Taylor, Shouse v. (Ky.).....	324	Webb v. Fisher (Tenn.).....	110
Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.).....	260	Webb, Texas & P. R. Co. v. (Tex. Civ. App.).....	1044
Teegarden, Knoedler v. (Ky.).....	268	Weber v. Commonwealth (Ky.).....	30
Teegarden Bros. v. Big Star Zinc Co. (Ark.).....	989	Webster v. Brown (Ky.).....	774
Temple v. Ferguson (Tenn.).....	455		
Terrell, St. Louis & S. F. R. Co. v. (Tex. Civ. App.).....	430		
Terry v. State (Tex. Cr. App.).....	382		
Terry, Maloney v. (Ark.).....	570		
Terry, State v. (Mo. Sup.).....	513		
Texas Cent. R. Co. v. O'Laughlin (Tex. Civ. App.).....	610		
Texas Pine Land Ass'n, Industrial Lumber Co. v. (Tex. Civ. App.).....	875		

	Page		Page
Webster, Bush v. (Ky.).....	364	Williams, Ladd v. (Mo. App.).....	475
Weir, Heffernan v. (Mo. App.).....	1085	Williams, Moore v. (Tex. Civ. App.).....	222
Welch, Austin v. (Tex. Civ. App.).....	881	Williams, Adm'r, Commonwealth v. (Ky.)..	1132
Weller, Parsons v. (Ky.).....	273	Williamson v. Dils (Ky.).....	292
Wertheimer-Swarts Shoe Co. v. United States Casualty Co. (Mo. Sup.).....	635	Williamson v. State (Tex. Cr. App.).....	600
West, Clark v. (Tex. Civ. App.).....	100	Willis, Fox v. (Ky.).....	330
Western Union Tel. Co. v. Parsons (Ky.)..	800	Wilmas, De Foe v. (Mo. App.).....	475
Western Union Tel. Co. v. Snow (Tex. Civ. App.)	250	Wilson v. Fisher (Mo. Sup.).....	665
Western Union Tel. Co. v. Uvalde Nat. Bank (Tex. Civ. App.).....	232	Wilson v. State (Tex. Cr. App.).....	862
Western Union Tel. Co. v. Waller (Tex. Civ. App.)	264	Wilson, State v. (Mo. Sup.).....	696
Western Union Tel. Co. v. Wofford (Tex. Civ. App.)	620	Wilson, Stephens v. (Ky.).....	336
W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.).....	260	Windom v. State (Tex. Cr. App.).....	193
White v. Missouri Pac. R. Co. (Mo. App.)	716	Winfield v. State (Tex. Cr. App.).....	182
White v. State (Tex. Cr. App.).....	173	Wochler, Norton v. (Tex. Civ. App.)....	1025
White v. State (Tex. Cr. App.).....	185	Wofford, Western Union Tel. Co. v. (Tex. Civ. App.)	620
White, Deering Harvester Co. v. (Tenn.)..	962	Wood, Home Ins. Co. v. (Ky.).....	15
White House Cannel Co., Sandy River Cannel Co. v. (Ky.).....	298	Worthington's Ex'rs, Mersman v. (Ky.)..	1094
Whitmire v. May (Tex. Sup.).....	375	Wren v. Boske (Ky.).....	279
Wickliffe, Morgan v. (Ky.).....	1122	Wright v. Commonwealth (Ky.).....	340
Wilder, Chesapeake & O. R. Co. v. (Ky.)	353	Wright v. Farmers' Nat. Bank (Tex. Civ. App.)	103
Wilboit v. Musselman (Ky.).....	1112	Wright v. Shipp (Ky.).....	1132
Wilkens, Riviere v. (Tex. Civ. App.).....	608	Wright v. State (Tex. Cr. App.).....	847
Wilkerson v. State (Tex. Cr. App.).....	850	Wynn v. Followill (Mo. App.).....	140
Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.)	1016	Yarrington, Raymond v. (Tex. Sup.).....	580
Williams v. State (Tex. Cr. App.).....	192	Young v. Beckham (Ky.).....	1092
Williams v. State (Tex. Cr. App.).....	380	Young, International & G. N. R. Co. v. (Tex. Civ. App.).....	68
Williams v. Williams (Ky.).....	271	Young, Meacham v. (Ky.).....	1094
		Zepeda v. Hoffman (Tex. Civ. App.).....	443
		Zweigart, Commonwealth v. (Ky.).....	1132
		Zweigart, Mastin v. (Ky.).....	750

See End of Index for Tables of Southwestern Cases in State Reports.

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VIOLETT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 20, 1908.)

SHOOTING AT ANOTHER—OFFENSE—INSTRUCTIONS.

1. In a prosecution for shooting at a third person without wounding him, under Ky. St. § 1242, punishing any person who shall in a "sudden affray or in a sudden heat and passion," without previous malice, and not in self-defense, shoot at another without wounding him, etc., it appeared that, while defendant and another were talking, the third person approached, and without cause grossly insulted defendant, and followed this up with a threatening attitude. Defendant, thinking the third person was about to draw a weapon, drew his pistol and fired, and when the third person said he was unarmed defendant replied that he would not hurt him. *Held*, that an instruction that defendant was guilty if the shooting was done in a sudden heat and passion without previous malice was prejudicial to defendant for failing to refer to shooting in a sudden affray, inasmuch as under the statute the jury were allowed to graduate the sentence according as, in their judgment, the defendant was in the wrong.

2. Since Ky. St. § 1242, creating the offense of shooting at another, provides as an element thereof that the shooting must not be in self-defense, the instructions should follow the statute in this particular in defining the offense.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

James A. Violett was convicted of shooting at a person without wounding him, and appeals. Reversed.

Jno. W. Rodman, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

HOBSON, J. Appellant was convicted of the offense of shooting at Wingate Thompson without wounding him, under section 1242, Ky. St., and his punishment was fixed at a fine of \$500 and six months' imprisonment in the county jail. The court, in substance, instructed the jury that the defendant was guilty under the statute if the shooting was done in sudden heat and passion, and without previous malice, and that, if they found him guilty, they ought to fix his punishment at a fine of not less than \$50 nor more than \$500, or confinement in the county jail for

not less than 6 months nor more than 12 months, or both so fine and imprison, in their discretion. By another instruction the court told the jury that, if the shooting was done in self-defense, they should acquit the defendant. The statute under which the conviction was had is in these words: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot at without wounding, or shoot and wound another person, or wound a person other than the person shot at, with a gun or other instrument, loaded with ball or other hard substance, without killing such person; or shall, in like manner, cut, thrust or stab any other person with a knife, dirk, sword or other deadly weapon, without killing such person, he shall be fined not less than fifty nor more than five hundred dollars, or confined in the jail not less than six months nor more than one year, or both, in the discretion of the jury." Ky. St. § 1242. It will be observed that the instruction of the court defining the offense does not follow the language of the statute. By the instruction of the court the offense consists in shooting in sudden heat and passion without previous malice. By the statute it consists in shooting "in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense." The words "in sudden affray" are not synonymous with the words "in sudden heat and passion." The statutory offense is, therefore, different from that defined in the instruction, and under the evidence in the case the jury might well have concluded that the shooting was done in a sudden affray, and, inasmuch as they were allowed by the statute to graduate the punishment according as, in their judgment, the defendant was in the wrong, the failure of the court to define the offense properly to the jury was prejudicial to the defendant, and, in view of the severity of the verdict under the evidence, we are of opinion a new trial should be had. The testimony tended strongly to show that while appellant was talking to another, Thompson approached them, and without proper cause insulted appellant twice very grossly, following this up with a threatening

attitude; and that appellant, thinking he was about to draw a weapon, drew his pistol, and fired the shot in question, and when Thompson said he was unarmed appellant replied that then he would not hurt him. If the court had instructed the jury that if the defendant did the shooting in a sudden affray they should fix his punishment at a fine of not less than \$50 nor more than \$500, or imprisonment not less than six months nor more than one year, or both, they might have rendered a different verdict. As the statute creating the offense provides as an element of the offense that the shooting must be not in self-defense, it is better that the instruction should follow the statute in this particular in defining the offense.

Judgment reversed, and cause remanded for a new trial.

McBRAYER v. HANKS' EX'RS.

(Court of Appeals of Kentucky. Feb. 19, 1903.)

VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT—JUDGMENT—PARTNERSHIP—ACCOUNTING—REFERENCE.

1. Where an action was referred to commissioners to take an account between the parties, the commissioners properly allowed such claims as were undisputed, and rejected such claims as were disputed, with regard to which the pleader had the burden, and which were unsupported by proof.

2. Where an accounting of a partnership engaged in the distilling of whisky was referred to a commissioner, the latter was entitled to accept an agreement of counsel that the cost of manufacturing whisky by the partnership was a certain price per gallon.

3. Where plaintiff sued to enforce a lien on real estate for the purchase price, against a subsequent purchaser who assumed the debt, a judgment directing a sale of the land to pay the debt and costs was proper.

Appeal from circuit court, Anderson county.

"Not to be officially reported."

Action by Thomas Hanks, revived in the name of his executors on his death pendente lite, against John H. McBrayer. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

T. L. Edelen and M. P. Marsh, for appellant. F. R. Feland, for appellees.

SETTLE, J. This equitable action was instituted in the Anderson circuit court by Thomas Hanks to recover of appellant a debt of \$2,712, alleged to be due on land which Hanks sold and conveyed to J. W. Stephens, who thereafter sold and conveyed it to appellant; it being recited in the deed from Stephens to appellant that the latter assumed payment of the sum due Hanks from Stephens on the land, and which was secured by a lien thereon. Hanks died pending the litigation, and the action was thereupon revived in the name of his executors, who prosecuted it to judgment. By way of set-off against the amount due on the land debt, appellant's answer sets up numerous

alleged items of indebtedness claimed to be due him by Thomas Hanks, growing out of a partnership between them in the manufacture of whisky, and otherwise, all of which was denied by the reply. After the issues were formed, by consent of the parties the case was referred to the master commissioner to make and report a settlement of all matters in dispute between them. The commissioner, under the order of reference, was authorized to consider the proof already in, and such as might thereafter be taken. The commissioner very properly allowed the claims of each party that were undisputed, and rejected all disputed claims where the pleader had the burden, and the claims were unsupported by the proof. He also properly accepted the agreement of counsel that the cost of the manufacture of whisky made by the partnership was 25 cents a gallon. The first report filed by the commissioner showed appellant indebted to the Hanks estate in the sum of \$1,443.86. The supplemental report increases that indebtedness \$310. Numerous exceptions were filed to the commissioner's reports, and all overruled by the court.

We think the account between the parties is stated by the commissioner with great clearness, fairness, and brevity; and the lower court is to be commended for basing its judgment upon the findings of the commissioner, although it is more favorable to appellant, by \$300, than the last report of the commissioner would seem to justify. The judgment, as rendered by the court, allows appellees the amount of the lien debt assumed by appellant in the deed from Stephens to him, viz, \$2,712, with 6 per cent. interest from October 11, 1881, until paid, and his costs, subject to credits of \$810 as of September 21, 1883, \$1,000 as of December 3, 1883, and \$791 as of February 20, 1887. The judgment likewise enforces appellees' lien upon the land described in the petition, and directs its sale to pay their debt and costs. An examination of the pleadings and commissioner's report will show that the credits of \$810 and \$1,000 allowed by the judgment were undisputed, but that of \$791 was allowed appellant as due him from the settlement of the affairs of the partnership, and is credited on his indebtedness to appellees as of the date the partnership should have been settled.

Finding no error in the judgment of the lower court, it is hereby affirmed.

CRAIG et al. v. CONOVER.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

HUSBAND AND WIFE—PURCHASE WITH WIFE'S MONEY—CONVEYANCE TO WIFE—CONSIDERATION—STALE CLAIM.

1. Where a husband, at a time when chases in action of the wife at her marriage vested in the husband on his reducing them to possession or disposing of them during coverture,

bought land with the money of his wife, deposited in bank in his name as her trustee, under an agreement between them that it was to be conveyed to her, his conveyance to her pursuant thereto was for a valuable consideration, and not in fraud of creditors, he being solvent, so that it could not be sold on execution against him.

2. Where one takes possession of real estate, and holds it for a number of years, but not long enough for the bar of the statute, the owner will not be prevented, on the ground of stale claim, from recovering it.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Annie E. Conover against Lizzie L. Craig and others. Judgment for plaintiff. Defendants appeal. Reversed.

R. H. Cunningham, for appellants. Yeaman & Yeaman, for appellee.

PAYNTER, J. In June, 1878, the two lots in controversy were purchased by F. W. Craig, husband of the appellant Lizzie L. Craig, at a sale in bankruptcy, with an agreement between husband and wife that they were to be conveyed to the wife. On July 22, 1879, pursuant to that agreement, the lots were conveyed to her through the medium of a trustee. The uncontradicted testimony, of the most convincing character, is that the money of the wife was used in payment of the lots. It is unnecessary to go into the details which force this conclusion upon us. At the time this conveyance was made to the wife, the husband was worth five or six thousand dollars, and owed about six hundred dollars, so there was no reason why he should have conveyed his property to his wife to avoid the payment of his debts. The wife acquired some money by inheritance and otherwise, and it was deposited in the bank in the name of her husband, F. W. Craig, as her trustee. It was never deposited in his name, and no intention was manifested to appropriate the money to his own use, or to reduce it to his possession. At the time of this transaction, choses in action of the wife at her marriage were vested in the husband on condition that he reduce them to his possession or dispose of them during coverture. *McKay v. Mayes* (Ky.) 29 S. W. 327. In this case the money was never reduced to the possession of the husband, because he treated it as her property, and held it in bank as her trustee. The conveyance was made to her in the discharge of an obligation to and agreement with her. In the case of *Sanders v. Miller*, 79 Ky. 519, 42 Am. Rep. 237, the court said: "While contracts made between husband and wife, as a general rule, are void, still, if a husband voluntarily enter into a contract to make, or he does make, a settlement upon the wife in satisfaction of an obligation arising out of the reception of her property under an agreement made before its receipt or reduction to possession, such as a chancellor

would, upon her application, make upon her, neither the contract nor settlement would be regarded as fraudulent against creditors." The case of *Miller v. Edwards*, 7 Bush, 394, is to the same effect. Had a creditor of the grantor made a question about this conveyance at the time it was made, we have no doubt that the chancellor would have upheld the transaction, and decreed that she was vested with title to the property. These conclusions are supported by the recent case of *Sparks v. Colston*, 60 S. W. 540.

In the fall following this conveyance to the wife, the husband and wife moved to Kansas City, where they have remained until the present time. The same fall one of the creditors of the husband obtained personal judgment against him, and in 1884 had an execution issued and levied upon the lots in question, and had them sold, and at the sale they brought thirty-six dollars, although it appears that they were worth four or five hundred dollars. The purchaser took possession of them, sold off parts of them, and houses have been erected thereon. The uncontradicted testimony shows that appellants did not know that the lots had been sold under the execution until some time in the year 1900. There is no question here as to the improvements, as that question has been reserved. The question is, what effect had the sale upon the rights of the wife?

It is insisted upon behalf of the appellee that it was a voluntary conveyance, and fraudulent as to the creditors of the grantor, and therefore the sale under execution, disregarding the conveyance, was valid. If we reached the conclusion that it was a voluntary conveyance, the question suggested would arise, but as we are of the opinion that the conveyance to the wife was for a valuable consideration, and that she acquired such right in the property as the deed purports to give her, she could not be divested of it by a sale under an execution against her husband.

It is also contended that the recording of a voluntary deed is not constructive notice of the change of title, and that a bona fide purchaser is affected only by actual notice of a voluntary conveyance. It may be conceded that the authorities quoted support the contention of counsel, but they have no application here, for the reason that the conveyance was for a valuable consideration. If the wife acquired title to the property by the conveyance, then she was just as much entitled to it as if she had inherited it, or she would have been had the conveyance been made to her by some one else. She could only part with the title in some way recognized by law. She could have sold it by her husband joining in the conveyance. Under some opinions of this court, she might have been guilty of some act which would have estopped her claim to it, but she has done nothing to work such an estoppel on her rights. She was laboring under the dis-

ability of coverture, and the statute, at least, did not begin to run against her until the passage of what is commonly known as the "Married Woman's Act," but we are not deciding whether it commenced to run upon the passage of that act, as the question is not here, for, if it did begin to run at that date, sufficient time has not elapsed to bar her right of recovery.

It has been suggested that her claim is stale, and for that reason she ought not to be allowed to recover. She was not aware until 1900 that her property had been sold, and that the houses had been built upon it. The parties who purchased this property were charged with notice that she was the owner of it, and they are presumed to have bought with that knowledge. She has done nothing to mislead them to their prejudice. It will not do to say that, because some one, under some kind of a claim, takes possession of real estate and holds it for a number of years, but not for a sufficient length of time to enable them to interpose the plea of the statute of limitation against the recovery of it, the owner's claim is stale, and he should not, for that reason, be permitted to recover it. This is no case for the application of the doctrine of stale claim.

Judgment is reversed for proceedings consistent with this opinion.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. LOUISVILLE HOME TELEPHONE CO. (two cases).

(Court of Appeals of Kentucky. Feb. 18, 1903.)

FOREIGN CORPORATIONS—RIGHT TO SUE—TELEPHONE POLES—INTERFERENCE WITH ERECTION—INJUNCTION.

1. Where a foreign corporation had spent nearly \$500,000 in the construction of a telephone system in a city in the state under a franchise granted by the city, it had a right to sue in the courts of the state to protect its rights; and the fact that all of its incorporators but one were residents of the state, and that the evident object of forming the corporation elsewhere was to obtain the benefit of less rigorous laws, could not defeat that right; it appearing that the state was not complaining.

2. Where a telephone company had been granted a permit to erect its poles on the same side of a street with the poles of another company, having a prior, but not exclusive, franchise, and the old company, whenever the new one started to put in poles of a certain height, immediately changed its own poles, and made them of such a height as to prevent the new company from proceeding, an injunction was issuable.

Appeal from circuit court, Jefferson county; chancery division.

"To be officially reported."

Two separate actions, for injunction and other relief, brought by the Louisville Home Telephone Company against the Cumberland Telephone & Telegraph Company. Judgments for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Eagles and Humphrey, Burnett & Humphrey, for appellant. Helm, Bruce & Helm, for appellee.

HOBSON, J. On August 17, 1886, by an ordinance of the city of Louisville, pursuant to an act of the legislature approved April 3, 1886, the Ohio Valley Telephone Company was authorized to construct, operate, and maintain a telephone system on the streets of the city; but the ordinance contained this provision: "Nothing in this ordinance shall be so construed as to give the said telephone company, its successors or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors or wires in the streets, avenues, alleys or sidewalks of the city of Louisville." The company accepted the provisions of the ordinance, and constructed its telephone system, which it maintained until the year 1900, when it was consolidated with the appellant, the Cumberland Telephone & Telegraph Company, and since that time the consolidated company has continued to maintain and operate this telephone system. On November 5, 1900, the general council of the city of Louisville passed an ordinance providing for the sale at public auction of the franchise or privilege to construct, maintain, and operate a telephone system in the city; the purchaser to have the right to transfer or assign the franchise, provided the transfer was not made to any competing telephone system. It was also provided in the ordinance that the telephone system should be constructed in the public ways of the city, under the supervision of the board of public works, and that the franchise should not be construed as being in any way exclusive, or as preventing the council from providing for the sale of similar franchises to other persons. E. M. Coleman purchased the franchise, when sold at public auction under the ordinance, for the sum of \$10,000, and assigned his purchase to appellee, the Louisville Home Telephone Company,—a corporation formed on March 20, 1901, under the laws of Delaware. It thereupon complied with the terms of the ordinance, by the execution of bonds to the city as required thereby, and began operations for the construction of its telephone system under permits from the board of public works. One of its lines, through the eastern part of the city, ran along Frankfort avenue; and, as the Cumberland Telephone & Telegraph Company had also a line along Frankfort avenue, notice was given it of the application, and a time fixed when both companies could be heard. They were heard by the board, and the board then, in person, visited the grounds, and, after looking over the actual situation, granted the permit as asked for by the appellee, which allowed it to erect its line on the same side of the street as the line of appellant, but on higher poles, and up above it. Appellee thereupon commenced building its line, and distributed

its poles along the street for a considerable distance. These poles were 50 feet long. It set the poles for several squares, and was going on smoothly until one morning, when the workmen returned, they found that, since the last evening, appellant had set just in front of them, along the street where appellee's poles were lying on the ground, waiting to be erected, its poles, forty-five feet long. As a 5-foot space was not sufficient for the operation of a telephone system, appellee hauled away its 50-foot poles, and set in place of them poles 55 feet high, so that it would have 10 feet of space above the top of appellant's 45-foot poles, and so continued to construct its line. After this, appellant took down its 45-foot poles, and substituted for them 50-foot poles; thus leaving appellee, as before, only 5 feet of space. At another point on the line, where appellant was maintaining 35-foot poles, appellee erected 50-foot poles, so as to leave 15 feet of space above them. After it had done this, appellant erected in the same line poles 50 feet long, notched exactly the same way as appellant's, so as to render it impossible for appellee to operate its line, as two telephone systems cannot be operated on the same horizontal plane. At another point along the avenue appellant's poles were set out along the roadway; the street at this point not having been improved, or sidewalks constructed. Appellee set its poles, 50 feet long, on the line of the sidewalk. Appellant then set new poles, 55 feet long, in the same line. Appellee thereupon instituted these two actions to restrain appellant from interfering with it, and to require it to cut off its poles, or make its line in the plane 10 feet below it. The chancellor adjudged the relief sought, and the defendant appeals.

It is shown in the record that appellee, the Louisville Home Telephone Company, was formed in Delaware by incorporators, one of whom lived in Ohio, and the others in Kentucky. The articles of incorporation do not conform to the Kentucky laws, and it is urged that the incorporators evaded the laws of Kentucky to get privileges not granted here, and to avoid burdens placed by our law, and that, having gone to Delaware for this purpose, the corporation formed by them, should not on principles of comity be recognized by the courts of Kentucky, or allowed to sue here. The corporation may do business in Delaware or in any other state, and, while its incorporators seem to have contemplated that their main business would be done in Louisville, they are not by their articles confined to this state; and in fact they contemplated doing business in other states, as shown by the evidence. The purpose they had in going to Delaware to get their articles of incorporation does not clearly appear, except as it may be inferred from the fact that the laws of Delaware are not so rigorous as the laws of Kentucky. It is conceded that a foreign corporation is recog-

nized in other states only as a matter of comity, but, owing to the intimate association of the people of the several states, corporations formed in one state have been universally recognized in other states, except in cases clearly forbidden by the policy of those states. Thus it has been held that a corporation formed in one state, which is not allowed to do business there, by the terms of its articles of incorporation, will not be recognized elsewhere. *Land Grant Railway v. Board of Commissioners*, 6 Kan. 245. And where the statutes of a state did not allow a corporation to carry on a mercantile business, citizens of that state, who had themselves incorporated in another state, and then did business as a corporation in the state of their domicile, were held liable as partners. *Empire Mills v. Alston Grocery Company* (Tex. App.) 15 S. W. 505, 12 L. R. A. 366. So where the charter of incorporation was not valid in the state in which it was made. *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342. Other cases may be found in which, what are denominated "tramp corporations" having become insolvent, their stockholders have been held liable in the state of their domicile as partners. 6 *Thompson on Corporations*, sec. 7895, 7896, and cases cited; *Cleaton v. Emery*, 49 Mo. App. 345; *Hill v. Beach*, 12 N. J. Eq. 31. On the other hand, the court of appeals of New York refused to follow this rule in a case where citizens of New York had obtained a West Virginia charter of incorporation, which contained no privileges not granted by the laws of New York. *Demarest v. Flack*, 28 N. E. 645, 13 L. R. A. 854. But no question of this sort arises here. This is not an application by the state, questioning appellee's power to act as a corporation. The objection is made by appellant when sued by appellee for an invasion of its rights. Appellee has not only been incorporated in the state of Delaware, but it has been recognized by the authorities of the city of Louisville as a corporation, and has been granted by it an important and valuable franchise. It is at least a de facto corporation, and the rule seems to be that, when an association of persons is exercising corporate franchises under color of legal organization, the existence of the corporation cannot be inquired into collaterally, but only in a direct proceeding by the government. The reason of the rule is that it would produce endless confusion, and destroy the corporation, if the legality of its existence could be drawn in question in every suit to which it was a party, for then no judgment could be rendered which would finally settle the question. Where property has been granted to such a corporation, and it brings a suit to recover its property, the defendant cannot be allowed to inquire into the regularity of the organization in that suit, upon the broad principle of common justice and public policy. *Agricultural Association v. Insurance Com-*

pany, 70 Ala. 130; East Norway Church v. Froislie, 37 Minn. 447, 35 N. W. 260; First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60; Eaton v. Aspinwall, 19 N. Y. 119; Buffalo, etc., Railroad Co. v. Cary, 26 N. Y. 75; Exporting Co. v. Locke, 50 Ala. 332; Gill's Adm'r v. Mining Co., 7 Bush, 639. The stock of corporations is now sold every day in the market, and may in a short time entirely change hands, so that none of the original incorporators have any longer an interest in the corporation; and to allow a trespasser who had destroyed its property to defeat an action against him by the corporation on the ground that it was not originally properly incorporated, when the state has not complained, and the municipality has recognized and contracted with the corporation, would be a perversion of justice. It appears from the record that appellee has spent something like a half million of dollars in the construction of its telephone system under the grant referred to. It has been the policy of the state to invite foreign capital here, to aid in the development of the resources of the state. This corporation has come here under that policy, and, in the absence of some express legislation, we are not at liberty to shut the doors of the court against it when suing for the protection of valuable rights granted to it by the municipality pursuant to the laws of the state. We rest our judgment here, and intimate no opinion on any other question discussed on the argument.

On the merits of the case we have little difficulty. Appellant's franchise was not exclusive. Its prior occupation of a particular space entitled it to the continued enjoyment of that space without substantial impairment by appellee; but this enjoyment is subject to such incidents as result from the exercise of the rights of appellee under its franchise, for it is necessarily implied in the grant to appellee that it is subject to such limitations as will enable another to enjoy a like franchise. Otherwise the right of the first company obtaining a grant would amount to a monopoly. This was not intended. The grant to appellant is like other privileges in the public ways. It must be exercised in such a way as not unduly to interfere with the rights of others. The substance of its rights cannot be appropriated by another, but there is no reason why two telephone companies cannot operate on the same side of the street; and, from the proof in this case, it is not only common, but much better than to have them on different sides, when there are electric light lines on the street, or other wires carrying heavy currents of electricity. The city authorities may rightfully determine in what manner the streets may be used, and to what extent, and when, structures may be erected in them; and, within reasonable limits, to fix the space to be occupied by rival telephone lines. Of course, there must be no substantial impair-

ment of appellant's property rights, but mere inconvenience must be endured by it, just as by all others, in the enjoyment of the public utilities of the city. After a careful reading of the record, we are unable to see that any substantial injustice was done appellant by the chancellor's judgment. On the contrary, it seems to us to have been in accord with the real equity of the case.

Judgment affirmed.

LOUISVILLE RY. CO. v. POE

(Court of Appeals of Kentucky. Feb. 19, 1903.)

STREET RAILROADS—INJURIES TO PEDESTRIANS—CROSSING TRACKS—CARE REQUIRED.

1. In an action for injuries to a pedestrian on a street railway track, an instruction that it was plaintiff's duty, when she started to cross the street, to exercise ordinary care, and that if she failed to exercise such care, and by reason thereof helped to cause the injury, she could not recover, was not objectionable for failure to state that it was plaintiff's duty to look and listen for approaching cars before going on the track.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Mary J. Poe against the Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant. Caruth, Chatterson & Blitz, for appellee.

NUNN, J. The appellant appeals from a judgment of the Jefferson circuit court in favor of appellee for \$1,200. The appellee, in substance, alleges in her petition that while she was in the act of crossing Portland avenue at or near the intersection of Twenty-Fifth street, which streets were in a thickly populated territory in the city of Louisville, Ky., and much used and frequented by citizens and vehicles, she was, by the carelessness and negligence of the appellant's agents and employes in operating its street cars, run into and against by one of its electric cars, knocking her down, breaking the bones of her body, and otherwise bruising her, from which she has suffered and would continue to suffer great mental and physical pain and anguish, and that she was permanently injured and disabled, and that before said collision her perilous position was seen, or by the exercise of ordinary care could have been seen, by the employes and agents of appellant in charge of said car in time to have slackened the speed of or to have stopped the same, and saved her from her said injuries, and that appellant's agents and employes in charge of said car negligently and carelessly operated the same at a high and reckless rate of speed, and gave no signal or warning of its approach to the Twenty-Fifth street crossing by ringing the gong or bell on said car or otherwise. The appellant,

by its answer, traversed all the allegations of appellee's petition, and pleaded the usual or ordinary plea of contributory negligence. The appellee, by her reply, denied the contributory negligence. Upon these issues the evidence was heard. According to appellee's evidence, the appellant's employes in charge of the car were guilty of gross negligence in the management and operation of same. They did not ring the bell or gong, or give any warning of its approach to the Twenty-Fifth street crossing, and it was running at a high rate of speed. According to some of the evidence, those in charge of the car had plenty of time to stop the car after discovering appellee's danger. The appellant's evidence showed that the car was prudently managed and operated, and was running at a slow rate of speed, and under the control of the motorman; that the bell was rung and the gong sounded on its approach to the Twenty-Fifth street crossing. The motorman and a colored man on the platform with him state that they saw appellee in time to have stopped the car, and slowed it up for that purpose, and that the appellee stopped and looked at the car when in about three feet of the track, and, thinking that she would remain there until he got past, he (motorman) moved the car forward, and when in about 10 feet of her she moved upon the track, and was run upon and injured. The motorman also stated that he was then unable to stop the car, after he saw her perilous position. Appellee stated that she did not stop and look at the car. The proof also showed that the appellee was severely injured by having her leg broken between the ankle and knee, collar bone broken, and otherwise bruised and injured.

Appellant's counsel, in their brief, do not complain of the instructions given by the court, except the second instruction, which is as follows: "But it was the duty of the plaintiff, when she started across the street, to exercise ordinary care for her own safety; and if you shall believe from the evidence that at the time she failed to exercise ordinary care for her own safety, and, by reason of her failure in that respect, she helped to cause or bring about the injury of which she complains, and that she would not have been injured but for her failure in that respect, the law is for the defendant, and you should so find, unless you shall further believe from the evidence that those in charge of the car by the exercise of ordinary care could have discovered the plaintiff's peril after she was in peril from the car, and, by the exercise of that degree of care, have avoided the injury of which she complains. If such was the state of facts, then the law would be for the plaintiff, and you should find for her." The appellant contends that the court should have instructed the jury as follows, in lieu of the first part of instruction No. 2: "The court instructs the jury that it was the duty of the plaintiff, as she approached the defendant's

tracks for the purpose of crossing same, to listen and look for approaching cars before going onto its tracks; and if the jury believe from the evidence that, in the exercise of ordinary care, she failed to do so, and such failure on her part caused or helped to bring about the injuries complained of, then the law is for the defendant, and the jury should so find." Instruction No. 2, as given by the court, has been approved by this court in several cases, to wit, in the case of *The Owensboro City Railroad Co. v. Hill*, 56 S. W. 21, and the case of *Pittsburg, etc., Ry. Co. v. Lewis*, 38 S. W. 482, and the case of *Louisville Railway Co. v. French*, 71 S. W. 486.

Perceiving no error in the case, it is therefore affirmed.

SHEA v. SHEA'S ADM'R.

(Court of Appeals of Kentucky. Feb. 19, 1903.)

ADMINISTRATORS—ALLOTMENT OF HOMESTEAD—SALE OF REALTY.

1. The real estate of a husband at the time of his death consisted of 60 acres of land, worth \$600, and the fee-simple title to an adjoining tract, subject to a life estate and a charge of \$400, upon which latter tract he and his family, together with the life tenant, lived. In an action for the settlement of the administrator's accounts and the allotment of the homestead the 60 acres were allotted to the widow as a homestead, and the estate in remainder ordered to be sold to pay debts. Prior to the sale the life estate ceased. No objections, however, were made to the confirmation of the sale, though the proceeds were not distributed. Held that, after the charge of \$400 had been paid, the widow was entitled, for the completion of her \$1,000 homestead, to have \$400 of such proceeds set apart to be invested for the benefit of herself and children during her life and until the youngest child should come of age.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Suit by P. A. Alexander, as administrator of Peter Shea, for a settlement of his accounts, and exceptions by Mary Shea, the widow of Peter Shea, to the allotment of her homestead. From a judgment confirming the allotment, the widow appeals. Reversed.

W. A. Lee, for appellant.

BURNAM, J. This suit was instituted by the appellee, P. A. Alexander, as administrator of the estate of Peter Shea, deceased, for a settlement of his accounts as administrator. He alleges that the decedent left surviving him a widow and seven infant children, whose ages ranged from 1 to 16 years, and who were made defendants: that there came to his hands \$1,425.91 from the personal estate, which he had applied to the debts of his intestate, but there remained still due and unpaid debts which aggregated \$1,085; and that it would be necessary to sell a part or all of the real estate belonging to the decedent to realize a sufficient sum to pay this balance. He further alleged that his intestate was at his death the owner and in possession of a tract of about 70 acres of

land, and that he also held the fee-simple title to another tract of land which adjoined the 70 acres, but which was subject to a life estate of his mother and to a charge of \$400, due to his brother and sisters. Shortly before the institution of this suit by the administrator, the appellant, Mary Shea, brought suit in the circuit court, setting out substantially the same facts, and asking that a homestead should be allotted to her and her infant children from the real estate of her deceased husband. These suits were consolidated, and a judgment entered directing the master commissioner, in conjunction with two other persons, to allot to the widow and children a homestead out of the 70-acre tract; and also adjudging that Nora Shea, Helen Maloney, Ben McFarland, and John McFarland had a claim of \$100 each against the decedent, which were prior liens upon the 100-acre tract of land purchased by Peter Shea from his mother, Maria Shea. The judgment also provided that, after allotting to the widow a homestead, he should sell the 100-acre tract of land subject to the life estate of Maria Shea. Pursuant to this judgment there was allotted to the appellant, Mary Shea, and her children, 66 acres of land, this being all the land owned by decedent outside of his 100-acre tract, and which the commissioners valued \$792. The 100-acre tract was then sold by the master commissioner to the appellee, G. M. Smith, at the price of \$1,000. Appellants filed exceptions to the allotment of homestead, claiming that the land set apart to them was not worth exceeding \$600. Upon the trial of these exceptions it was admitted as a fact of record that the land allotted as a homestead was not worth more than \$600. It further appears that the deceased, Peter Shea, lived previous to his death, with his wife and children, at the old homestead, upon the 100 acres of land, and that his mother, Maria Shea, lived with him, and that the wife and children continued to live with the grandmother up to the entry of the judgment. But before the day of the sale Maria Shea died, thereby vesting the heirs at law of Peter Shea with the complete fee-simple title to this tract of land, subjected to the charge of \$400 in favor of the parties enumerated above. No exceptions, however, seem to have been taken to the confirmation of the sale to Smith, but there seems to have been no order of distribution or collection of the bond for purchase money executed by him. Under this state of fact the four children of Maria Shea were entitled to be paid \$100 each, and they were properly adjudged a first lien upon the proceeds of the 100-acre tract of land. Appellant was then entitled to have allotted to her from the proceeds of the sale of that tract of land \$400, and to have had it invested in real estate, or in some good personal security, and the interest paid over to her for the benefit of herself and children during her life and until the youngest child arrived at the age of 21 years, to make up

the difference between \$600, the admitted value of the homestead allotted to her, and the \$1,000 to which in law she was entitled, before the general creditors of the decedent could be paid anything therefrom.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

COMBS v. COMBS.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

PUBLIC LANDS—PATENTS—VALIDITY—ADVERSE POSSESSION—CUTTING TIMBER—OC-CASIONAL ENTRIES—ACTION TO QUIET TITLE—LOST DEED—EVIDENCE.

1. Where land had been previously patented by the state, a subsequent patent thereto is void.

2. Occasional entries on land and occasional cutting of timber are not sufficient to set the statute of limitation in motion, so as to give the person making such entries a right which may ripen into title by adverse possession.

3. Where a deed from a patentee from the state was not produced in an action to quiet title, but the evidence tended to show that it had been lost, and plaintiff and his grantor had claimed title since 1848, without any objection on the part of the patentee or his heirs, a finding that such lost deed covered the land in controversy was proper.

Appeal from circuit court, Perry county.

"Not to be officially reported."

Action by G. P. Combs against Fielding Combs. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. J. C. Bach and W. H. Miller, for appellant. W. F. Hall, for appellee.

HOBSON, J. Appellee filed this suit to quiet his title to a tract of land in Perry county. The facts of the case are substantially undisputed. The land in controversy is a part of a 500-acre survey patented by the state to Samuel Napier on the 9th of August, 1846, and conveyed by him on March 6, 1848, to Washington Combs, under whom appellee claims. Appellant obtained a patent for the land from the state in the year 1881, and about that time entered on the land, and for a few months had a tenant on it; but since then, until the year 1897, the land was unoccupied, and in that year appellee entered upon the land, finding it vacant, and has since been in possession. The patent issued in 1881 was void, as the land had been previously patented. Appellant lived about 10 or 12 miles from the land for a number of years after the tenant left. He occasionally entered on the land and cut timber, but occasional cutting of timber or other trespasses on land are not sufficient to set the statute in motion, and the court properly held that appellant had acquired no title by possession. While the deed from Washington Combs to appellee is not produced, the proof satisfactorily shows that it was ex-

¶ 2. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 113, 114.

ected, and is lost, and, in view of the lapse of time, the acquiescence of Washington Combs and his heirs at law in appellee's claim of the land, and the other circumstances shown by the proof, we cannot disturb the chancellor's conclusion of fact that this deed covered the land in controversy. Appellant connects himself in no way with Washington Combs' title, and is a mere trespasser.

Judgment affirmed.

CITY OF LOUISVILLE v. BREWER'S ADM'R.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—CITY STREETS—DEFECTS—INJURY TO TRAVELER—NOTICE—CONTRIBUTORY NEGLIGENCE.

1. Where a county road was taken into a city by annexation of the territory which it traversed, it became a city street without formal action on the city's part.

2. A city must be deemed to have had notice of an obstruction in a street, consisting of a post 2½ feet high, where it appears that the post has been standing there for more than three years.

3. Any defect in a petition in an action against a city for injuries due to a defective street, in failing to aver that the city had notice of the defect, was cured by a verdict for plaintiff, where it appeared that the instructions distinctly submitted the question of notice to the jury.

4. One stumbling over a post which he knew was in a highway was not guilty of contributory negligence, as matter of law, in momentarily having forgotten its existence; it appearing that the accident occurred at night, and that the street was not lighted.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by William H. Brewer's administrator against the city of Louisville and another. Judgment for plaintiff, and the city appeals. Affirmed.

H. L. Stone, for appellant. B. H. Young, M. W. Rippey, and Edwin C. Walde, for appellee.

BURNAM, C. J. This action was brought by the appellee, James W. Brewer, as the administrator of Wm. M. Brewer, deceased, against the appellant, the city of Louisville, and Clara Kleinhenz, for damages for the death of his intestate. The particular acts of negligence relied on for recovery, set out in the amended petition, are that the defendant, by its agent or servants, with negligence, and without regard to the rights of the public to the free and unobstructed use of Rawlings street, erected or permitted to be erected or put up in front of the premises owned by Kleinhenz certain wooden posts, so near to the yard fence in front of her premises as to obstruct the pathway, and so as to make a dangerous obstacle to the public

and those passing along and using the street, and that it was negligently maintained and allowed to remain in its position by the appellant, its agents and servants; and that by reason thereof appellee's intestate sustained the injuries which resulted in his death. The defendant, in its answer, denied all the material allegations of the petition, and especially that Rawlings street was at the time set out in plaintiff's petition, or at any time, a street, highway, or thoroughfare of the city, or that it had ever been dedicated for the use of the public as a street, or was under the charge or control of the defendant at the time of the accident complained of, or that it was its duty to have kept it free from obstructions, or that the post which caused the injury was either erected or permitted to remain at the point indicated, to the danger of the public using the said street. And in the second paragraph of the answer it pleads contributory negligence on the part of appellee's intestate, which helped to bring about his injury, and but for which it would not have happened. The reply of plaintiff denied all the material allegations of the answer. The cause was tried out before a jury, and resulted in a verdict in favor of the appellee for \$1,000, on which the court entered a judgment against the city; the petition having been previously dismissed as to the other defendant. And the defendant appeals, and asks a reversal—First, on the ground that appellee's petition, as amended, does not state a cause of action, and is insufficient to support a verdict and judgment; and, second, that the court erred in excluding evidence offered by the defendant to show that Rawlings street had never been accepted as a public street of the city, and misinstructing the jury on this point.

We will first consider the last ground relied on, and, to do so, it is necessary that we should give a brief history of the facts disclosed by the record as to the existence of Rawlings street: In September, 1895, a considerable boundary of territory which theretofore constituted a part of Jefferson county was annexed to the city of Louisville. Previous to this annexation what is known now as "Rawlings Street" was a county road, used by the public as such, and has been so used for a considerable time. A number of houses had been built upon the property adjacent, which fronted the road; and before it was annexed to the city a cinder path had been built along the edge of the road for the use of pedestrians, and three or four posts, one of which caused the accident to decedent, had been erected along the outside edge of the cinder path for the purpose of preventing wagons and other vehicles from being driven on or over it. The path was about 4 or 5 feet wide, and the post which occasioned the injury stood nearly in the middle thereof, about 1½ feet further in than the others. It was about 2½ feet high and about 6 or 8 inches square, and its top had

¶ 1. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1420.

been gnawed or split to a sharp point. After this portion of the county road was taken into the city limits by the annexation of the territory, it was continued in use as a public thoroughfare, and the property fronting thereon assessed for taxation, by the city of Louisville, and appears, with its dimensions, upon all the official maps of the city published subsequent to the annexation, beginning with the year 1896. On the night of October 30, 1897, W. M. Brewer, his son S. B. Brewer, and his grandson Ernest Qure were walking along Rawlings street; and William Brewer (quite an old man) stumbled over the post which stood in the center of the path, striking the top of the post with the left side of his abdomen, near the groin, and in consequence thereof the wall of the abdomen was broken, and the bowels came out. He died the next day, as a result of the injury.

It is insisted for appellant that, to authorize a recovery in this proceeding, it was necessary for appellee to establish the fact that Rawlings street had been formally accepted as a public street of the city of Louisville by its council, or that they had taken control of it and improved it in some way. And the appellant offered to prove by Messrs. Claybrooke and Breed, engineers in the employ of the city, that the council had done neither. An objection was sustained by the trial court to this testimony, and this is relied on as one of the main grounds for a reversal. Elliott on Roads and Streets, sec. 414, says: "Where land is dedicated or appropriated for a suburban road, the implication must be that it shall be used as the convenience and welfare of the public may demand, although that demand may be augmented by an increase in population, or by towns and cities springing up in the territory traversed by the road. Under the ancient maxim, 'Once a highway, always a highway,' the road continues to exist for all lawful purposes to which a highway of its class may be devoted, unless it is abandoned or vacated in due course of law. This subject is, however, generally covered by statute, and recourse must, of course, be had to the statute to determine what right a town or city has over roads laid out as public or suburban ways; but it may be said that, where a town or city grows up within a territory traversed by rural public roads, they pass under the jurisdiction of the municipal corporation, unless some different provision is made by statute." In section 416 the same author says: "Our opinion is that, as soon as a town or city is incorporated, the public ways (that is, ways belonging to the public, and not owned by private corporations) come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must of necessity change character, and the servitude be much

extended. This extension carries with it wider duties and greater liabilities, thus requiring an essentially different control and care." In section 154 the author says: "It may now be considered the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon this subject will, when analyzed, be found to be well bedded in principle." In *Mackin v. Wilson* (Ky.) 45 S. W. 663, it was decided that, where a turnpike road is taken into a city by an extension of the city boundary, it becomes a street of the city, and, although it had already been improved as a public highway at the time it was taken into the city, any subsequent improvement would be original construction. And in the recent case of *The South Covington & Cincinnati Street R. R. Co. v. N. L. & A. Turnpike Co.* (Ky.) 62 S. W. 687, the court said: "Where an amended charter is accepted which adds municipal territory previously laid out and platted, there is an implied acceptance of the streets and alleys designated on the plat. The extension of the city limits in 1872, and the original construction of Preston street in 1890, are sufficient evidence of the dedication of this street by the city." And numerous authorities are cited in support of this contention. Dillon on Municipal Corporations, sec. 1009, says: "Where a corporation has treated a piece of land within the limits of the municipality as a public street, taking charge of it as such, it is chargeable with the same duties as though it was legally laid out, and it is liable for damages by reason of neglect to keep the same in safe condition for travel. It is, under such circumstances, estopped to claim that it is not a legal highway, and it is affected with the consequence of the knowledge and acts of its officers and agents." It seems to us that there can be no doubt that, when the city of Louisville procured the annexation of the territory traversed by the county road known as "Rawlings Lane," it became a street of the city, and they became chargeable with all the duties with reference thereto that they owe to any of the public streets and alleys of the municipality; that a formal recognition of this fact by a resolution of its board of council was wholly unnecessary. We therefore conclude that the trial court did not err in the exclusion of the testimony on this point.

Appellant insisted that the petition as amended is not good, because it fails to allege that appellant knew of the erection of the posts in the pavement, or by the exercise of ordinary care or diligence could have known thereof, and also because there is no averment that appellee's intestate did not know of the obstruction complained of prior to the injury. This court has frequently declared that a municipal corporation cannot be charged with negligence by the act of a third person unless sufficient time has elapsed

ed after the authorities had notice of the defect to repair it, or they ought by reasonable diligence to have acquired notice of such defects. See *City of Covington v. Asman*, 68 S. W. 646; *City of Covington v. Manwaring*, 68 S. W. 625; *City of Wickliffe v. Morning, by, etc.*, 68 S. W. 641. "But it is not necessary, however, that it should have actual notice. Constructive notice is sufficient. Wherever the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of the defect, notice hereof will be presumed. And it is generally for the jury to determine, as a question of fact, whether the city had notice or not, although it may become a question for the court where the facts are undisputed, and but one reasonable inference can be drawn from them. In a recent case it was held that the existence of an obstruction, consisting of a plank crossing a sidewalk, for an hour and forty-five minutes, was not sufficient to charge the city with notice, and the judgment upon the verdict against the city was reversed because the evidence failed to sustain the verdict upon that point. But where a dangerous obstruction had existed for three weeks, it was held sufficient time to charge the city with notice. And in a number of cases notice has been presumed where the obstruction existed for several months. The length of time during which a defect or obstruction is required to exist, in order to charge the city with notice, must, however, depend largely on the nature of the defect, and the circumstances of the particular case." See *Elliott on Streets and Roads*, sec. 626, and authorities there cited.

It is conclusively shown in this case that the post over which the intestate stumbled had been standing in the middle of the cinder path more than three years previous to the injury, after the annexation of the property through which the road ran. This fact alone, we think, is sufficient to charge the appellant with notice of the obstruction. Having means of knowledge and negligently remaining ignorant is equivalent to knowledge. In *City of Covington v. Diel* (Ky.) 59 S. W. 492, it was contended for the appellant, as in this case, that the petition should have affirmatively alleged that the defect in the sidewalk was known to exist by the appellant a sufficient length of time to have enabled it to have repaired it before the injury was received. In response to this contention, the court said this was a matter of defense, but, if the petition was defective, it was good after trial and judgment. Besides, in this case no such objection to the petition was raised in the lower court in any way, and the instructions distinctly submitted this question to the jury, and the defect, if any, was cured by the verdict.

In *The City of Maysville v. Gullfoyle* (Ky.) 62 S. W. 493, the proof showed that the appel-

lant knew of the defect in the street, but momentarily forgot its existence, and the contention was there made that this was such contributory negligence as to preclude recovery. The court said: "It cannot be fairly stated, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect. So far as we are informed, it has never been so held in this state." And it was held in that case that the question of contributory negligence should go to the jury. And the facts in this case bring it within the rule announced in that case. The accident occurred at night. The streets were not lighted. The deceased, while walking along the cinder path, stumbled over an obstruction which was so dangerous as to cause his death.

These questions were fully submitted in apt instructions to the jury, and, upon the whole case, we see no error prejudicial to the substantial rights of the defendant, and the judgment must therefore be affirmed.

STAPP v. MASON et al.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

GAMING—STATUTES—CONSTRUCTION—RECOVERY OF MONEY LOST—RIGHTS OF CREDITORS.

1. Ky. St. § 1909, provides that whoever shall invite, persuade, or otherwise induce another to visit a place where any gambling, etc., is carried on, shall be responsible to such other and his creditors for whatever he may lose in gaming at such place. *Held*, that such statute did not include a person who entered into a partnership for the purpose of conducting a gambling house, and lost money in the games played there, and hence a creditor of such person was not entitled to recover from the other partners the amount so lost.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by Nannie W. Stapp against T. P. Mason and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Thos. E. Ward, for appellant. A. O. Stanley, for appellees.

HOBSON, J. As shown by the evidence in the case, and, in substance, found by the verdict of the jury, C. A. Stapp, the husband of appellant, Nannie W. Stapp, in connection with T. P. Mason and C. F. Cody, opened a gambling house in the city of Henderson, which they ran for some time; getting a take-out on all the games played there. C. A. Stapp played in these games, and lost a considerable amount of money, which was the property of his wife, Nannie Stapp, and which he held as her agent. She thereupon filed this suit to recover of her husband's partners the money thus lost by him at the gaming place set up by him and his partners, on the ground that they had enticed him into

playing there by setting up the gaming place. The suit seems to have been brought under section 1960, Ky. St., which is as follows: "Whoever shall invite, persuade or otherwise induce another to visit any place where any gaming mentioned or included in section one thousand nine hundred and sixty of this chapter is carried on, shall be fined from fifty to five hundred dollars, and, moreover, be responsible to such other and his creditors for whatever he may lose in gaming at such place." It is charged in the petition that the husband, by betting and losing the money of his wife, became indebted to her in that amount, and that she thereby became entitled to sue for and recover it. It is earnestly maintained that, although the husband himself could not maintain the action against his partner, the wife, who was innocent of any wrong, and is his creditor, may maintain it. But back of this is the question whether the husband is one of the persons provided for by the section, for, if he is not covered by the section, then his creditors stand in no better light than he, for they are the creditors of a person not provided for by the section, and only the creditors of such persons as are given a right of action by the section can maintain an action under it. This is not an action under section 1956, providing for a recovery of the money lost from the winner, for the facts required by that section are not alleged. The question, then, simply is, is a man who, jointly with others, sets up a gaming place, and plays there himself, within the protection of the statute, as against his partners in the enterprise, on the ground that they thereby invited, persuaded, or otherwise induced him to visit the place? The question is not new. In *Brown v. Thompson*, 77 Ky. 538, 29 Am. Rep. 416, the question was presented whether one who was interested in setting up a faro bank, and who lost money to those who bet against the bank, could recover it. It was held he could not recover. The court said: "It is a familiar rule that a case within the letter, but not within the spirit, of a remedial statute, is not embraced by it. The courts will look beyond the letter, to the legislative purpose and intent, and will not, by a blind adherence to the letter, permit a law to become the shelter of those it was intended to punish, nor to be used to encourage practices it was made to suppress." It was accordingly held that as the statute was enacted for the protection of the community against gamblers, and not for their protection, one who had set up the faro bank was not within the protection of the statute. This case was followed and approved in *Elias v. Gill*, 92 Ky. 509, 18 S. W. 454, where the question was whether one who engaged in the business of selling pools on horse races was within the protection of the statute. The court, after referring to the previous case, said: "And looking to the evil of gaming, suppression of which was the object of the statute, it is ob-

vious that persons who engage in gaming by means of selling pools on horse races are no more within the protection of that statute than those who set up or keep faro banks, for in each case gaming is carried on and made a business." These cases seem to us conclusive of the question before us. It was, no doubt, contemplated by all of the partners that each of them would contribute what he could to the success of the common enterprise. The more gaming was done, the more the take-out, and C. A. Stapp was as much interested in this take-out as anybody else. In playing there he therefore was furthering his own business, which was a felony. Ky. St. § 1960. It was never intended by the legislature to give him a right of action against his partners, or them against him, for losses in the business, or to require the court to settle up for them their felonious enterprise. And if he is not given a right of action, then his creditor cannot sue, for only the creditor of a person who can sue is given the right of action.

Judgment affirmed.

FARMERS' & SHIPPERS' TOBACCO WAREHOUSE CO. v. GIBBONS.

(Court of Appeals of Kentucky. Feb. 18. 1903.)

APPEAL—LAW OF THE CASE—WRONGFUL ATTACHMENT—SCOPE OF CAUSE OF ACTION.

1. On the trial of a wrongful attachment suit, the court instructed that plaintiff was entitled to such damages as he sustained by reason of the seizure of his tobacco under the attachment or purported copies thereof, thus charging defendant not only for the tobacco actually taken possession of by the officer, but also that restrained from plaintiff by persons served with copies of the writ. On appeal the court did not disapprove this instruction, but said: "But the injury for which appellee [plaintiff] has a cause of action is that the attachment * * * was by direction of appellant levied upon his property, and the averments of the petition are sufficient to support a cause of action for such wrongful levy and seizure, and for damages to the property levied upon," etc. *Held*, that plaintiff's right to recover damages for all the tobacco restrained was settled by the decision on appeal, and a similar instruction given on a retrial could not be reviewed.

Appeal from circuit court, Bracken county.

"Not to be officially reported."

Action by W. M. Gibbons against the Farmers' & Shippers' Tobacco Warehouse Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Wadsworth and J. R. Minor, for appellant. M. L. Harbison, for appellee.

PAYNTER, J. This is the second appeal. On the former one the court delivered an opinion which is in 55 S. W. 2. The court eliminated one of the causes of action, and stated the remaining one in language as follows, to wit: "But the injury for which appellee has cause of action is that the attachment against W. A. Gibbons was by the di-

rection of the appellant levied upon his property, and the averments of the petition are sufficient to support a cause of action for such wrongful levy and seizure, and for damages to the property levied upon that directly flowed therefrom." It is insisted that, although the plaintiff may have directed the property to be levied upon, the attachment was not executed in the manner provided by law, and therefore no injury could result to the appellee for which the appellant is liable. On the trial the court allowed the appellee to recover damages for depreciation of not only the tobacco taken into actual possession by the sheriff, but for the depreciation of all of the tobacco restrained or withheld from him by persons who did so by reason of the service upon them of the purported copies of the writ. On the former trial the court did likewise, and in submitting that question to the jury gave instruction No. 1, which reads as follows: "The jury are instructed that they shall find for the plaintiff such damages as he sustained by reason of the seizure or detention of the tobacco and money mentioned in proof under the attachment or purported copies thereof issued in the former cause. The measure of damages for the detention or seizure of the money mentioned in the proof is interest on the sum garnished at the rate of 6 per cent. per annum from the date of the seizure and service of the writ of attachment and garnishment, or purported copy thereof, to the date of its discharge. The measure of damages for the seizure or detention of the tobacco mentioned in proof is the difference in value, if there was any depreciation in value of the tobacco, of which the plaintiff was the sole owner, and one-half of the difference in value of the tobacco of which plaintiff was the owner of a one-half interest on the date of the seizure and service of the purported copies of the writ of attachment and garnishment, the date of the discharge or release of the tobacco; also all expenses incurred by plaintiff for storage, insurance on tobacco during the period it was so restrained; and also the necessary rehandling of said tobacco, if such was necessary, and such expense." It will be observed that this instruction submitted to the jury on the first trial the very questions which the appellant contends should not have been submitted to the jury on the last trial, for on it the court gave substantially the same instruction as No. 1, quoted above. The court decided that the only cause of action remaining was the one submitted to the jury by that instruction. It did not condemn this instruction on the former appeal, and we must treat it as having approved it as properly submitting the issue to the jury. The doctrine of *res judicata* prohibits us from reviewing the action of the court on the question on the former appeal of this case. *Davis v. McCorkle*, 14 Bush, 746. The facts authorized the submission of the case to the jury, and the verdict is not, if at all, so palpably against the weight of

evidence as to warrant us in reversing on that ground.

Judgment is affirmed.

COMMONWEALTH v. TARVIN, Judge.

(Court of Appeals of Kentucky. Feb. 17, 1903.)

APPEAL—TIME FOR PRAYING—JUDGMENT—WHEN FINAL.

1. A motion for new trial suspends the judgment until the motion is overruled, and until such time there is no judgment, within the meaning of Cr. Code, § 348, which provides that the appeal must be prayed during the term at which the judgment is rendered, and shall be granted if the record is lodged in the clerk's office of the court of appeals within 60 days after the judgment.

"To be officially reported."

Application for a writ of mandamus by the commonwealth of Kentucky against James P. Tarvin, judge. Granted.

O. J. Pratt and D. A. Glenn, for the Commonwealth. George Washington and Joe L. Ellison, for appellee.

BURNAM, O. J. The Bavarian and other brewing companies were indicted by the grand jury of Kenton county for a violation of section 3915 of the Kentucky Statutes, which is a section of the act of May 20, 1890, prohibiting combinations by corporations, partnerships, individuals, or persons, or associations of persons, for the purpose of regulating, controlling, or fixing the price of any merchandise, manufactured article, or property of any kind. Section 3917 prescribed a fine of not less than \$500 nor more than \$5,000 for the violation of the preceding section. A trial of the defendants under the indictment on the 8th of October, 1902, resulted in a verdict for the defendants, which was rendered under a peremptory instruction from the court. On the following day the commonwealth's attorney for that district filed grounds and entered a motion for new trial. At the sitting of the court on October 20, 1902, the motion was continued by consent. On October 20, 1902, the motion was again continued for two weeks, but the record does not show at whose instance. On November 4th the motion was again continued for two weeks. On November 24, 1902, the motion for a new trial was set for oral argument on December 8, 1902. On December 8, 1902, the defendants moved the court to strike the motion and grounds for a new trial from the file, and the argument on the motion for a new trial was continued until December 15th. On December 22d both motions were submitted, and on December 26th the trial court overruled the motion of the commonwealth for a new trial, to which the plaintiff excepted, and asked the court to grant it an appeal to the court of appeals. Defendants objected to this, and the court took time. On December 30th the common-

wealth's attorney moved the court to dispose of his motion for an appeal, which was first made on December 8, 1902, and this motion was finally submitted on January 12, 1903. At a sitting of the court on January 21, 1903, the motion of the commonwealth for an appeal to the court of appeals was overruled, and the appeal refused, to which the commonwealth excepted. On the 28th of January, 1903, the commonwealth of Kentucky, by C. J. Pratt, attorney general, appeared in this court, and filed a certified transcript of the orders of the court below, and asked that a writ of mandamus should issue against the Honorable James P. Tarvin, judge of the Kenton circuit court, requiring him to grant an appeal from the judgment of the Kenton circuit court overruling the motion, to which the Honorable James P. Tarvin, as judge of the Kenton circuit court, filed a response, in which he says, in substance, that he had reached the conclusion that the commonwealth was not entitled to file a motion for a new trial in the case, and that he, as judge of the Kenton circuit court, had no jurisdiction to pass on same, and that more than 60 days having elapsed since the rendition of the judgment on October 8, 1902, before the commonwealth moved for an appeal, its motion came too late, and was consequently overruled.

By section 347 of the Criminal Code, the court of appeals is given appellate jurisdiction of penal actions and prosecutions for misdemeanors, if the judgment be for the defendant, in cases in which a fine exceeding \$50 might have been inflicted. Section 348 provides: "The appeal must be prayed during the term at which the judgment is rendered, and shall be granted upon the condition that the record be lodged in the clerk's office of the court of appeals within sixty days after the judgment." Section 350: "When the commonwealth attorney prays an appeal, the clerk shall forthwith make and certify a complete transcript of the record and transmit the same to the attorney general, or deliver it to the commonwealth's attorney for that purpose. And if the attorney general on inspecting the same believe it proper to take the appeal, he shall do so by filing the transcript in the clerk's office of the court of appeals in sixty days after judgment." There has been no change in these provisions of the Code since it took effect, on the 1st of July, 1854. In *Commonwealth v. Adams*, 55 Ky. 338, which was decided in 1855, this court construed these sections of the Code, and held, first, that appeals from judgment of circuit courts in misdemeanor cases must be taken at the term at which the judgment was rendered, and the record filed in the clerk's office of the court of appeals within 60 days after judgment. In *Commonwealth v. McCready*, 59 Ky. 377, the ruling in the *Adams Case* was adhered to. But it appears that in that case, after judgment was rendered and the motion for a new trial

had been overruled, time was given, by consent of parties, until the first day of the next term to file a bill of exceptions. And it was held to be still incumbent upon the appellee to file the record within 60 days after the judgment. In the case of *The Louisville Chemical Works v. Commonwealth*, 71 Ky. 179, it was held that a motion for a new trial suspended the judgment, and that no appeal could be prosecuted until after the motion for a new trial had been disposed of. The court, through Judge Pryor, said: "No appeal can be taken by either party (plaintiff or defendant) to this court from the judgment of an inferior court, in a case like this, without first making a motion for a new trial in the court where the error complained of occurred. Upon the hearing of the motion, if overruled, the party complaining files his bill of evidence, and is then in a condition to bring his case to this court, and not before. If either party should bring the case here upon the judgment alone, with the motion for a new trial pending in the lower court, or without having made such motion, the dismissal of the appeal would be the inevitable result. If appellants had appealed from the judgment in this case at the time it was entered, viz., at the November term, and filed their record in this court, with the motion for a new trial pending in the lower court, and continued over until December term, we are at a loss to perceive how this court could take jurisdiction and try the appeal. There is no judgment, in fact, upon the verdict of a jury, until the motion for a new trial, if made in proper time, is disposed of. This motion suspends the judgment, and it has no more effect than the verdict of the jury until the application for a new trial is overruled. Any other construction of the law would deprive the parties of the right to an appeal in all cases where the court, for prudential reasons, or otherwise, saw proper to continue the motion from one term to another,—a right that the court can exercise, and over which neither the counsel nor his client has any control." It seems to follow from these provisions of the Code, and from the construction given them in the case quoted, that a motion for new trial was necessary, to enable this court to correct errors growing out of the evidence or instructions given to the jury in the court below. This court has uniformly held that a motion for a new trial suspends the judgment in a civil case, and may be continued and passed on at a subsequent term. See *Louisville Rock Lime Co. v. Kerr*, 78 Ky. 12; *Harper v. Harper*, 10 Bush, 447; *Turner v. Johnson* (Ky.) 35 S. W. 923; and *Trapp, etc., v. Aldrich* (Ky.) 67 S. W. 834.

We are therefore of the opinion that the motion for a new trial had the effect to suspend the judgment until it was finally overruled, or, in other words, that the judgment only became final when the motion for a new trial was finally overruled, and that, under section 348 of the Criminal Code, it was the

duty of the defendant to have granted the appeal prayed; and he is directed to conform his rulings in this matter to the views herein expressed, and order will go as prayed.

HOME INS. CO. v. WOOD.

(Court of Appeals of Kentucky. Feb. 13, 1908.)

INSURANCE—PREMIUMS—WAIVER OF PAYMENT—SICKNESS AS EXCUSE.

1. A fire policy provided that there should be no liability while a payment on the premium note was past due and unpaid. The note provided for payment at the company's office. *Held*, that any waiver contained in the agent's subsequent voluntary agreement to bring the note to insured could be, and was, revoked by notice from the company to pay at its office.

2. It being provided by a fire policy that it shall not be in force while a payment on the premium note is past due and unpaid, it is no excuse for nonpayment that insured was sick.

Appeal from circuit court, Warren county. "Not to be officially reported."

Action by John T. Wood against the Home Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Sims & Grider and Guy H. Herdman, for appellant. McQuown & Bradburn, for appellee.

BURNAM, C. J. The appellant issued to appellee a policy insuring his barn and contents for five years from the 7th of December, 1895, which contained the following stipulation: "It is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any installment of the installment note given for premium upon this policy remains past due and unpaid, or while any single payment of the premium remains past due and unpaid." In consideration of the policy, the appellee paid to the agent of the appellant \$7 in cash, and executed the following obligation: "For value received, in policy dated the 9th day of December, 1895, issued by the Home Ins. Co. of New York, I promise to pay said company or order, by mail, if requested, at the office of its Western Farm Department, in Chicago, Ill., \$28.00, in installments as follows: \$7.00 upon the 1st of Dec., 1896; \$7.00 on the 1st of Dec., 1897; \$7.00 on the 1st of Dec., 1898; \$7.00 on the 1st of Dec., 1899,—without interest. It is hereby agreed that, in case any one of the installments herein named shall not be paid at maturity, * * * this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company at the Western Farm Department, at Chicago." The installment due on the 1st day of December, 1899, was not paid at maturity, and the insured barn, with its contents, was burned up on the 22d day of December, 1899, whilst the installment premium remained unpaid. The company having declined to pay, appellee brought this suit to

coerce payment. Appellant pleaded and relied on the foregoing provisions of the policy and note to avoid liability. Appellee, in his reply, seeks to escape the forfeiture provided for in the policy and note for default in the payment, upon two grounds: First. Because this provision, he alleges, was waived by the defendant, through its agent, Dearing, before the last installment of the premium became due. Second. He alleges that about the last of November, 1899, he was taken violently ill, and was unable to attend to any of his business matters, and that whilst in this condition his barn and other property insured by the defendant was burned up.

The defendant, in its rejoinder, denies the alleged promise or agreement made with Dearing, and alleges that on the 15th day of November, it mailed to appellee the following notice:

"Chicago, Nov. 15, 1899. John T. Wood: Your fifth installment of premium for insurance in the Home Ins. Co. of New York, seven dollars, falls due on the first day of next month. Please remit immediately the above-named sums by draft on Chicago or New York, or by post office order or express money office order, payable to the Home Ins. Co. of New York. * * * We inclose herewith an addressed envelope, in which please return this sheet, with the amount designated. Respectfully yours, H. H. Walker, Secretary.

"P. S. Do not fail to fill and sign the following blank attached below, and return this whole sheet, with remittance, in the return envelope. Write your name plainly, also the name of the post office at which you now receive your mail, so that we may change our records if your name or address is not recorded correctly."

Plaintiff testified upon the trial that, three or four months before the installment became due, he had an interview with John Dearing, the agent of the company, who called upon him to pay an overdue premium upon a policy of insurance upon his dwelling house, which he paid, and that at this time he asked Dearing if he had the note for the last premium on his barn, which fell due on the 1st day of the following December; that Dearing answered, "No;" that he then said to Dearing: "If you will get that note, and send it to the bank, I will pay. I had rather pay it now;" that, in response, Dearing said that it was all right,—that he would bring it down some time when he came on other business. Plaintiff admitted upon cross-examination that Dearing told him at that time that it was not the rule of the company to send the note, and the way for him to do was to send the money, and the company would forward the note; that, in response to this, he said it was not his rule, and was not customary throughout the county; that when his note was paid he wanted it, and would require it, but that he never sent

it to the bank. Dearing denied the whole of this conversation. This conversation is not as definite and specific as it might be, but, even if we concede that it amounted to a waiver of the express stipulation of the note that the installment was to be paid direct to the company at its home office, in Chicago, it was based upon a mere voluntary agreement, without consideration, which the company had the power to withdraw upon notice; and we are of the opinion that the notice of November 15, 1899, which appellee admits he received, amounted to a revocation of the alleged waiver made by Dearing.

Nor can appellee avail himself of the defense of sickness, relied on in the second paragraph of his reply. It is a well-settled rule of law that, where the law itself creates a duty, the nonperformance of it will be excused by an unavoidable accident previous to its performance. But this principle has no application to a case where a person has created a charge or obligation upon himself by an express contract. In the latter case he will not be permitted to excuse himself therefrom by pleading an act of God rendering performance impossible. See *A. & E. En. of Law* (2d Ed.) v. 1, page 588, and authorities there cited. This doctrine has also been repeatedly announced by this court. See *Beaty & Skinner v. Scrivener*, 19 Ky. 139; *Bohannons v. Lewis*, 19 Ky. 380; *Singleton v. Carrol*, 29 Ky. 527, 22 Am. Dec. 95; *Helburn v. Mofford*, 70 Ky. 174. We are therefore of the opinion that the court erred in failing to direct the jury to return a verdict for the defendant upon their motion at the close of plaintiff's testimony.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

HARRIS v. TUTTLE.

(Court of Appeals of Kentucky. Feb. 17, 1903.)

PARTNERSHIP—MORTGAGE—FIRM DEBTS—PRIORITY.

1. Each of two partners gave a mortgage on an undivided one-half of the partnership property to secure a personal debt, but before they were recorded the partners gave a mortgage on the firm property to secure a prior debt. One of the partners testified that the other partner understood when the first mortgages were given that they only gave a lien on their interest in the property after the partnership debts were paid, each partner reserving his equitable lien for the payment of partnership debts. The other partner contradicted such testimony, but the mortgagee in the firm mortgage testified that the latter partner stated that there was no prior mortgage lien. *Held*, that a judgment that the firm debt was a superior lien would be affirmed.

Appeal from circuit court, Barren county. "To be officially reported."

Action by E. A. Tuttle against H. S. Harris and others. From a judgment for plaintiff, defendant Harris appeals. Affirmed.

Jno. W. Ray and Sturgeon & James, for appellant. W. L. Porter and V. H. Baird, for appellee.

NUNN, J. The substance of the facts of this case appear to be that J. T. Harris, who is a son of appellant, H. S. Harris, and S. L. Bowen, who is a son-in-law of appellee, E. A. Tuttle, formed a copartnership under the style of the Glasgow Electric Light & Power Company. They were equal partners. Each borrowed the capital with which he began,—Harris, from his mother, appellant; and Bowen, from his father-in-law, Tuttle, appellee. The sum loaned in each instance was \$7,500. It was agreed all along that each was to give a mortgage on the undivided one-half of the property to secure the loan made. On the 27th of May, 1898, the final amount to make the \$7,500 was loaned to Harris by his mother, and on that day he executed to her his note for the full sum, and also executed a mortgage to her on his one-half of the property to secure the note, as he had agreed to do. On the same day, Bowen executed a note and mortgage to appellee, Tuttle, for the like sum of \$7,500 to secure the loan from him, as he had agreed to do. These mortgages were not acknowledged and lodged for record until June 17, 1898. On May 31, 1898, just four days after the execution of the notes and mortgages, but before they were acknowledged and lodged for record, Harris and Bowen executed a note and mortgage to Trigg & Co., to secure a prior indebtedness, in the sum of \$4,000. This mortgage to Trigg & Co. was filed and recorded November 8, 1898. This note and mortgage for \$4,000 was sold and transferred by Trigg & Co. to appellee, E. A. Tuttle, and he brought suit upon it on the 21st day of January, 1899, against Harris & Bowen, as partners, and Annie M. Bowen and H. S. Harris, etc. Appellee alleged in his petition that his lien for the \$4,000 mortgage debt was a prior lien over the mortgage debt of himself and that of appellant, H. S. Harris, for \$7,500 each. The appellant filed an answer denying this allegation, and alleging that her mortgage was a superior lien to that of appellee, for the \$4,000 debt, or any one else, except the mechanic's lien of E. B. Davis. The special commissioner in the case reported, and the lower court adjudged, that all of the firm's debts were superior liens, and should be paid before the individual debts of the two partners; and on this judgment Tuttle received on his \$4,000 debt and its interest the sum of \$3,529.50, and the appellant, H. S. Harris, excepted to this judgment, and is now here on appeal.

Appellant claims that by the mortgage of her son to herself, and H. L. Bowen to his father-in-law, Tuttle, of their undivided half, each, of the partnership property, they by that act waived all their rights to partnership liens, and that the general creditors of the partnership have no lien upon the part-

nership property; that their lien is derivative only; and that they can only assert such lien when the partners themselves can do so. Admitting this to be true, the mortgages were each executed individually.—Bowen to Tuttle, and Harris to his mother,—conveying each of their undivided half interests in said partnership property. And construing these mortgages, they only put in lien to the mortgagees their interests in the property after the partnership debts were paid; each partner reserving his equitable lien upon all the property for the payment of partnership debts. Bowen swears that this was the understanding with Harris at the time these individual mortgages were executed. Harris contradicts him in his testimony. Trigg and Dickinson, of the firm of Trigg & Co., corroborate Bowen. They say that they made the loan of \$4,000 to Bowen & Harris directly with Harris, and that they would not have loaned the money to them except upon the statement of Harris that there was no mortgage lien of any kind upon the property.

For these reasons, the judgment of the lower court is affirmed.

MIDDLESBOROUGH R. CO. v. STALLARD'S ADM'R.

(Court of Appeals of Kentucky. Feb. 17, 1903.)

MASTER AND SERVANT—RAILROAD BRIDGE BUILDER—COLLISION OF HAND CARS—RAILROAD COMPANY'S LIABILITY FOR DEATH—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. On returning from work, plaintiff's intestate, a railroad bridge builder, was placed on a hand car with others, the balance of the crew being placed on a second hand car. The cars were allowed to coast down a grade, being about 300 feet apart, and running some 10 miles an hour. The first car struck a mule, and plaintiff's intestate, to avoid injury, jumped from the rear of the car, and was struck by the second car. No attempt was made to stop the second car until too late to avoid the accident. *Held*, that the railroad company was chargeable with negligence, either in failing to stop the car in time, if that were possible, or, if it were not, in operating the two cars on so steep a grade so close together, and without retaining control of the brakes on the second car.

2. Plaintiff's intestate was not guilty of contributory negligence.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by J. L. Reader, as administrator of W. E. Stallard, deceased, against the Middlesborough Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Alcorn, B. D. Warfield, and C. W. Metcalf, for appellant. Beckner & Jouett, for appellee.

BURNAM, C. J. The appellee, J. L. Reader, administrator of W. E. Stallard, recovered a judgment against the appellant, the Middlesborough Railroad Company, for \$2,000, for the death of his intestate, which it is alleged was caused by the negligence of the

defendant in permitting a hand car to be run against him while in the service of the appellant. Appellant asks a reversal on the grounds: First, that no negligence was proven against the defendant, and that the verdict was the result of passion and prejudice; second, that, but for the decedent's contributory negligence, the accident would not have happened; third, that the court erred in the instruction given to the jury. The testimony shows that the decedent, W. E. Stallard, was working for the appellant as one of a gang of bridge builders on its road at a point not far from the city of Middlesborough; that at the close of the day's work the whole gang were loaded upon two hand cars; that plaintiff's intestate, with 5 other persons, was on the front car, and that about 15 others were loaded on the second car; that there was a steep grade from the point where they had been at work, and from which the hand car started to Middlesborough, which made it unnecessary for the occupants of the car to work the handles, and they were turned loose, and the car permitted to "coast," as one of the witnesses expresses it. The distance between the cars varied, according to the testimony of the witnesses, from 200 to 300 feet. A mule, which suddenly ran on to the track in front of the first car, was struck and knocked down, and the car ran up on its body. The men on this car jumped off; some of them from the sides of the car, but the decedent, Stallard, and one Prior Wilson, jumped from the rear end of the car, and Stallard was struck by the second car, which Wilson testifies was not more than 200 feet behind the first car at the time the mule was struck, and was running down grade at the rate of about 10 miles an hour; that he heard some one call "Look out!" and he stepped off the track just in time to avoid being struck by the second car. But Stallard failed to do so, and was knocked down and killed. The testimony of the other witnesses as to how the accident occurred does not materially differ from the version of Wilson. W. S. Bean, the foreman in charge of the front car, says that the rear car was running about 250 feet behind his car when the mule was struck, and could have been stopped, if the brakes had been promptly applied, in a distance of about 150 feet. W. T. Mills, who was section foreman, and who had charge of the rear car, testified that he was between 200 and 300 feet behind the first car when he saw the men jump off the front car; that he was running down grade with loose brakes; that he did not see the mule before it was struck by the front car, and supposed the men were getting off at their homes; that no one had hold of the handles, and he gave no order to apply the brakes until too late to avoid the collision. The witness Logsdon, the general manager of the appellant company, testifies that the grade of the track where the accident occurred is about 60 feet to the mile, and that a coasting car would

run 15 or 20 miles an hour at that point. Three hundred feet is the farthest distance at which any of the witnesses place the rear car at the time the first one struck the mule, and, if it was running at the rate of 10 miles an hour, it would have only taken 20 seconds for it to have overtaken the first one. All the witnesses testified that the front car was in plain view of the rear car when the accident occurred, and it is evident that, if the rear car could have been stopped in time to have avoided striking decedent, it was gross negligence not to have done so. If, on the other hand, it could not have been stopped after the collision of the first car with the mule, it was gross negligence to have operated them on so steep a grade so close together, and especially not to have retained control of the brakes. Taking either horn of the dilemma, it seems to us that defendant cannot escape the charge of negligence.

There is nothing in the testimony which justifies the claim of appellant that Stallard was guilty of such contributory negligence as, but for which, he would not have been struck by the rear car. The right of a person to damages for a personal injury is not affected by his having contributed to it, unless he was in fault in so doing. "The rule is well settled that, where an employé is suddenly and unexpectedly placed in a position of imminent danger, caused by the failure of duty on the part of others, that he will not be held guilty of contributory negligence because he did not adopt the best means of escape, or made an error in judgment as to the best course to pursue." See *Gayley's Personal Injuries*, sec. 1151; *South Covington & Cincinnati Ry. Co. v. Ware*, 84 Ky. 269, 1 S. W. 493; *Thompson on Negligence*, vol. 2, 1092; *Stokes v. Saltonstall*, 13 Pet. 191, 10 L. Ed. 115; *Price on American Railroad Law*, p. 495.

Serious complaint is made of the instructions. We think it may be conceded that they are not drawn with technical accuracy, but, taking them as a whole, they are more favorable to appellant than the facts seem to warrant, and certainly, taking the verdict as a criterion, were not prejudicial.

Judgment affirmed.

HALL et al. v. METCALFE.

(Court of Appeals of Kentucky. Feb. 17, 1903.)

FORECLOSURE—DECEDENT'S ESTATE—ALLOWANCE OF ATTORNEY'S FEES—PAYMENT—SUFFICIENCY OF EVIDENCE—TAXATION OF COSTS—APPEAL—OBJECTION TO DEPOSITIONS—TIME OF TAKING.

1. It is too late, on appeal, to object to depositions as taken without notice.

2. Decedent left no personal estate. A mortgagee instituted foreclosure, making the widow, son, and administrator defendants, and also another creditor. The widow then sold the land and paid all the debts. At the settlement the

mortgagee's attorney demanded a fee of \$75; the administrator's attorney, one of \$50; and a cost bill of \$19.35 was presented. The mortgagee stated, without contradiction from his attorney, that the latter's fee was to have been \$20; and the administrator denied employing his attorney, though he later, in an affidavit, demanded the allowance of a fee for him. The note secured by the mortgage was proved by affidavit prepared by the holder. An amended petition, containing averments authorizing a reference to a commissioner to settle the estate, was not filed till after the payment of the debts. *Held*, that neither attorney was entitled to a fee.

3. The mortgagee's debt not having been paid till after foreclosure was instituted, he was entitled to costs accruing to the time of payment including \$5 as an attorney's fee, as is usual in equitable actions.

4. In foreclosure of a mortgage on a decedent's estate, it appeared that after suit was instituted a third person placed \$600 in the mortgagee's hands, with which to effect a purchase at commissioner's sale. The third person then bought from the widow and son for \$850, paying them the balance above the \$600. The mortgagee then settled with the third person by returning \$42; having retained enough to pay his mortgage debt and interest, and \$15 in satisfaction of another claim. *Held*, that it was error to decree a sale of the property, as the mortgagee's debt had been paid.

Appeal from circuit court, Kenton county.
"To be officially reported."

Suit to foreclose a mortgage by T. T. Metcalfe against Julia A. Hall and others. From a judgment for plaintiff, defendants appeal. Reversed.

Walker C. Hall, for appellants. L. L. Manson and B. F. Graziani, for appellee.

SETTLE, J. Charles L. Hall died in Kenton county, Ky., intestate. The appellant Julia A. Hall is his widow, and the appellant Edward Hall his son and only heir at law. On November 21, 1900, one R. J. Perry was appointed and qualified as the administrator of his estate. On November 24, 1900, this action was instituted by appellee in the Kenton circuit court to enforce a mortgage lien that had been given him on a small tract of land by the decedent and his wife to secure a note of \$500, in which action R. J. Perry, as administrator of the estate of the decedent, the latter's widow and son, and Samuel Stephens were made defendants. The petition alleges that appellee, T. T. Metcalfe, and Samuel Stephens were the only creditors of the estate, but fails to allege that the decedent left no personal estate, or not enough thereof to pay his debts; nor does it state the amount or nature of the claim held by Samuel Stephens against the estate. The prayer of the petition asks a sale of the mortgaged real estate to pay appellee's debt, and a reference of the cause to the master commissioner for settlement of the estate, and that appellee be allowed his costs, including attorney's fees. The administrator filed answer, in which he states his appointment and qualification as administrator; that, so far as he knows, Metcalfe and Stephens were the only creditors of C. L. Hall's estate, and,

¶ 1. See Depositions, vol. 16, Cent. Dig. § 339.

further, that the mortgage note of appellee contained usury, as it calls for 8 per cent. interest, when only entitled in law to bear 6, and asks that the note be purged of usury, which would leave \$468.16 due appellee, instead of the larger sum claimed. The answer, like the petition, is silent as to the nature and amount of the Stephens debt; and it also fails to state what personal estate, if any, was left by the decedent, but concurs in the prayer of the petition for a reference and settlement, and asks an allowance to himself and attorney. It appears from the record that the appellant Julia A. Hall had ascertained that her deceased husband owed about \$250 in addition to appellee's debt, and a part of this sum she paid; but, being desirous of paying all his debts, she effected a sale of the little farm covered by appellee's mortgage, which was all the estate left by her husband at \$850, which sum was sufficient to pay the debts in full, and leave her and her son \$50 or \$75. The answer of appellants averred that all the debts of the decedent, including that of appellee, had been fully paid by them; and they exhibited with their answer a schedule containing the names of the creditors, and the sums paid them, respectively, which showed the aggregate indebtedness to be \$832.52, paid out of the proceeds realized from the sale of the farm, leaving to appellants \$32.48. Appellee filed a reply traversing the averments of appellants' answer, and appellants thereupon took the depositions of several witnesses, which were duly filed with the clerk of the Kenton circuit court before the submission of the case, as appears from an order of court. It is contended by counsel for appellee that the depositions were taken without notice, or upon insufficient notice, and therefore they should not be considered by this court. If they were taken without notice, exceptions should have been filed to them in the lower court, and before the submission of the case; but, as the record fails to show that they were excepted to in that court, it is too late to object to them now, and in this court. The depositions furnish indisputable evidence to the effect that as far back as December 21, 1900, which was less than a month after the institution of appellee's action, one J. C. Cotton, who afterwards became the purchaser of the farm from appellants, learning of the mortgage debt of appellee, went to see him, and advised him of his purpose to purchase the farm; and appellee told him that he did not wish to buy the farm, but would buy it for him (Cotton); and the latter then placed in his hands \$600 as a guaranty that he would take the farm if appellee would buy it for him at commissioner's sale, and, for the \$600 then left with him, appellee executed to Cotton his duebill. It is further shown by the proof that Cotton then learned that appellants were endeavoring to sell the farm through Foster, a real estate agent; and

he bargained for the place through Foster at the price of \$850, and paid to appellant Julia A. Hall, and certain of the creditors, all of the purchase price over and above the \$600 in appellee's hands; and, upon receiving of appellants a deed conveying him the farm, Cotton again saw appellee, who settled with him by paying back to him \$42 out of the \$600 which had been left with him by Cotton, and, after paying the \$42 to Cotton, he claimed that the sum retained by him only equaled the principal and interest of his mortgage debt, and a medical bill of \$15 which appellant Julia A. Hall owed him. Thus we find that appellee not only received the amount of his mortgage debt, but, in addition, that he appropriated to the liquidation of a medical bill which he had against the widow the pittance going to her out of the money left in his hands after satisfying his mortgage debt. Notwithstanding the payment of his debt, appellee refused to release the mortgage lien which he held upon the farm purchased by Cotton of appellants. It appears that appellee's attorney, upon being informed of the sale of the land to Cotton, presented himself while the parties were making out a list of the debts to be paid out of the proceeds of the sale, and demanded the payment of a fee of \$75 for services rendered by him in this action in the lower court, a fee of \$50 for the attorney of the administrator, and a bill of \$19.35 costs, the payment of which fees and costs appellants refused. Appellee was also present when these fees were demanded, and he then stated in the presence of his attorney, and without contradiction from him, that the latter had agreed with him on a fee of \$20 for his services in the case. The administrator, upon being asked by the attorney of Cotton about the fee demanded by his attorney, denied that he had employed him, yet, in an affidavit afterwards filed by him in the case, he demanded the allowance of a fee to that attorney. The lower court, in the judgment rendered upon the submission of the case, allowed appellee's attorney a fee of \$40, a fee of \$15 to the attorney for the administrator, and ordered a sale of the land described in the mortgage of appellee to pay the debt sued on, and the costs of the action. This court is now asked to reverse that judgment.

We do not hesitate to say that the judgment in question is altogether erroneous. There was no necessity for the appointment of an administrator of the estate of the decedent, C. L. Hall, as there was no personal estate left by him. No proof of the appellee's debt was necessary, other than the statutory affidavit thereto attached, which seems to have been properly made by the holder of the note; and no demand for its payment before suit would have been necessary, had there been no administrator. The action to enforce the mortgage lien of appellee could have been maintained by simply making the widow and heir at law parties. Other cred-

itors, if known, should also have been made parties. A reference to the commission in such a case would have presented their claims fully to the court, and given such relief as they were entitled to. The manner in which this action has been instituted and conducted is well calculated to excite suspicion that the recovery of attorney's fees, and their payment out of the estate of the decedent, is the end mainly sought to be attained. It is not the policy of the law, nor the aim of this court, to permit estates, small or great, to be consumed by unnecessary costs. The action was not one to settle an estate. The original petition contained no statement of fact that would have authorized a reference of the case to a commissioner for the purpose of ascertaining the estate's indebtedness, or to make a settlement thereof. In fact, the amended petition, which contained the only averment in the pleadings to the effect that the decedent left no personal estate, was not filed until after appellee and all other creditors had been paid what was due them from the estate.

We are of opinion that no attorney's fees should have been allowed by the lower court, either to appellee's attorney, or the attorney of the administrator.

We are also of the opinion that the lower court erred in decreeing the enforcement of appellee's mortgage lien, and a sale of the land in satisfaction of the mortgage debt, for, according to the evidence, his debt was paid some months before the rendition of the judgment. But inasmuch as the debt was not paid until after suit was instituted, appellee is entitled to his costs incurred in the proceeding to enforce his lien down to the time of the payment of his debt,—say, February 1, 1901. The costs to which he will be entitled should include a taxed attorney's fee of \$5, as is usual in actions in equity. In all other respects the appellants should be allowed their costs.

For the reasons indicated, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with the opinion herein.

E. H. TAYLOR, JR., & SONS v. LOUISVILLE PUBLIC WAREHOUSE CO.

(Court of Appeals of Kentucky. Feb. 17, 1903.)

CONTRACTS — BREACH — TERMINATION — REASONABLE TIME — QUESTION FOR JURY — INSTRUCTIONS — CONDUCT OF TRIAL — EXHIBITS GIVEN TO JURY — APPEAL — DIRECTING JUDGMENT.

1. Plaintiff deposited certain whisky in defendant's warehouse under a contract whereby defendant agreed to hold the same for a specified charge per barrel per month, and to loan or secure to be loaned, and renew the loans thereon, at \$10 per barrel, so long as it remained in the warehouse. Defendant failed to renew the loan, thereby forcing the sale of the whisky at a loss. *Held*, in an action for the breach of such contract, that, though defendant had the right to terminate the contract af-

ter the expiration of a reasonable time, the question whether a reasonable time had elapsed between the making of the contract and the forced sale was for the jury.

2. An instruction that, if defendant gave plaintiff a reasonable notice that the loan would not be renewed, then the jury should find only the amount plaintiff would have been compelled to pay to carry the loan without defendant's assistance, was inapplicable to the facts.

3. Though the court, on appeal from a judgment rendered for defendant on the second trial of the case on the trial court setting aside the judgment rendered for plaintiff on the first trial, has the power to direct the entry of the first judgment when it was erroneously set aside, it will not do so where the defense is supported by strong evidence, and, in the opinion of the trial court presented a good defense, and especially where errors were committed on the first trial.

4. In an action for the breach of a contract for failure to renew loans, permitting the advertisement for the sale of plaintiff's property, caused thereby, to be sent to the jury after the case had been submitted to them, was erroneous.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by E. H. Taylor, Jr., & Sons against the Louisville Public Warehouse Comp.ny. There was a verdict and judgment for plaintiff, which the court set aside, and granted a new trial, which resulted in a judgment in favor of defendant. Plaintiff appeals from the judgment rendered on the second trial, and asks that judgment be entered on the verdict given on the first trial. Judgment reversed, and new trial ordered.

Hargis & Duncan, for appellant. Helm, Bruce & Helm, for appellee.

NUNN, J. This was an action brought in the Jefferson circuit court by appellant against appellee for damages on an alleged breach of contract, whereby it claims to have suffered to the extent of more than \$8,000. The appellant alleges, in substance, in its petition: That in the spring of the year 1895 it had in its bonded warehouse in Woodford county, Ky., 736 barrels of whisky, containing 50 gallons to the barrel, of the "Old Taylor" brand, which was worth 50 cents per gallon. That on the 27th day of May, 1895, J. S. Taylor, vice president of appellant, it being a corporation, made and entered into a contract with one Coldewey, who was then the president of appellee, a corporation, that appellant would ship to Louisville, Ky., and deposit in appellee's warehouse said 736 barrels of Old Taylor whisky on a storage charge of 5 cents per barrel per month, and that appellee, in consideration therefor, agreed with appellant to loan or cause to be loaned to it \$10 per barrel on said whisky, and would renew or cause to be renewed the loan from time to time as long as the whisky remained in the appellee's warehouse, the appellant to pay the regular bank rates of interest and discounts and 5 cents per barrel per month storage to appellee. That under this contract appellant shipped said whisky to appellee's

warehouse in Louisville, Ky., and obtained the loan of \$10 per barrel, and appellee issued its warehouse receipts for the whisky, and attached said receipts, as collateral, to the notes given by appellant for said loan. That after getting possession of the whisky appellee claimed that, in order to keep its contract and renew and carry this loan, it was necessary for appellant to execute its note for \$9 per barrel to the Citizens' National Bank of Louisville, and a note for \$1 per barrel to appellee; these notes due in four months. Before these notes became due, appellant sold a portion of said whisky, and the proceeds were credited on said notes. There was left of said whisky, at the expiration of said four months, 448 barrels, on the same terms and conditions as the first loan. That on the 30th day of January, 1896, when the renewed loans matured, the appellee violated and broke its contract by refusing to renew and carry said loan, notwithstanding it had contracted to carry the loan. That appellant was unable to carry the same, and that appellee knew that appellant was unable to carry and renew the loan, and that appellant notified appellee of the contemplated sale of the whisky by the Citizens' National Bank, and requested appellee to protect appellant's whisky from sale and sacrifice by performing its contract to renew the loan, and that appellee failed to perform its contract, and allowed the whisky to be sold at a sacrifice. That 200 barrels of the whisky sold at forced sale at the price of 18 cents per gallon, and 248 barrels at the price of 19 cents per gallon, the whisky at the time being reasonably worth 50 cents per gallon, to the appellant's loss of \$8,412. The appellee's answer put in issue every allegation of the petition, except those stating that appellant was unable to carry said loan, and that appellee knew of appellant's inability to do so, and that it did not contract to bind itself to loan or cause to be loaned to appellant, nor contract that the loan would be renewed or continued for a longer period of time than that named in the notes, viz., four months; that its efforts in securing and continuing the loan made by the Citizens' National Bank were simply for the accommodation of its customers. And by counterclaim set up two notes which it held against appellant, amounting to the sum of \$584, which counterclaim the appellant by reply admitted, but controverted the affirmative allegations of appellee's answer. Upon these issues a trial was had, which resulted in a verdict for appellant for the sum of \$3,100. Upon motion of appellee, with reasons filed, the court set aside that verdict and judgment, and granted appellee a new trial, and afterwards another trial was had, which resulted in a verdict and judgment in favor of appellee for the full amount of its counterclaim. Appellant filed grounds and asked that this verdict and judgment be set aside, which motion the court overruled. Appellant is here in appeal asking that the last judgment be reversed,

and that the lower court be ordered to enter judgment on the first verdict.

The instructions given by the court to the jury on the second trial were erroneous, and prejudicial to the appellant. The court, under the facts and circumstances in issue in this case, should not have told the jury that the appellee had the right to terminate the contract after the expiration of a reasonable time, and that a reasonable time had elapsed, in contemplation of law, between the making of said contract, as alleged in the petition, and the forced sale of the whisky. Under the evidence in this case, as appears from the record, this question should have been left to the jury. Counsel for appellee on this point refer this court to the case of *Blackwell, etc., v. Fosters, etc.*, 1 Metc. 88, as sustaining said instruction of the court. We do not so understand the decision. In that case the appellant in October, 1851, sold to appellee 500 hogs, to be delivered between the 10th of October and 1st of November, 1852, more than a year after the making of said contract. And in the contract this language was used: "And the said parties bind themselves to give security for their respective performance of this contract, if at any time required." The parties lived about seven miles from each other, the testimony in the case showed, and it was admitted by the appellees, that before January 1, 1852, the appellants had given notice that they required security for the performance of said contract. The appellees failed to give the security, and on the 6th day of March, 1852, the appellants gave to appellees written notice that their said contract was annulled in consequence of their failure to give the security as required; and this court said, the facts being admitted, that four months' time to comply with the stipulation of their written contract was, as a matter of law, reasonable time. And in the same case the court said: "It is a well-settled rule of law that, wherever one party is required to do an act upon the demand of another, performance or an offer to perform must be within a reasonable time after demand; that is, so much time as is necessary to do conveniently what the contract requires to be done." That case is unlike this case for the reason that, according to appellant's contention, it transferred this whisky, at considerable expense, from its warehouse in Woodford county, Ky., to appellee's public warehouse in the city of Louisville, and there deposited it, under a contract with appellee to hold it for the consideration of 5 cents per barrel per month, and to loan or secure to be loaned and renew the loans thereon at \$10 per barrel, so long as the whisky remained in appellee's warehouse. Appellee violating its said contract, and failing and refusing to renew the loan, thereby forcing the sale of the said whisky at a sacrifice, and knowing at the time appellant was unable to protect itself and save itself from loss. Under these alleged facts the question of rea-

sonable time, under all the circumstances, should have been submitted to the jury.

There are other errors in the instructions given on the second trial, but we do not think it necessary to refer to them, as the instructions given on the first trial were correct, except instruction No. 3.

If the appellee had contracted to loan and renew the loan so long as the whisky remained in its warehouse, and knew that appellant was unable otherwise to obtain or renew the loan, we cannot understand the application of the first part of instruction No. 3: "That, if the appellee gave the appellant a reasonable notice that the loan would not be renewed or continued, then they should find only in such sum as they may believe from the evidence represents the amount the plaintiff would have been compelled to pay to carry the said loan without the defendant's assistance under the said contract." We are not inclined to disturb the action of the court in the setting aside the verdict of the jury on the first trial. That court presided, and witnessed the conduct of the trial from its inception to the end, and could better determine whether or not the parties had a fair and impartial trial. And while, in some cases, this court has directed the entry of the first judgment, when it was erroneously set aside, yet, in a case where the defense is supported by strong evidence, and in the opinion of the trial judge presents a good defense, we are not inclined to apply the rule contended for. And, besides, it was error for the court to permit the advertisement for the sale of appellant's whisky to be sent to the jury after the cause had been submitted to them. And the court may have observed other small errors in the progress of the trial which caused him to exercise his discretion in the setting aside the verdict.

For these reasons the case is reversed, and the cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

CHESAPEAKE & O. RY. CO. v. RIDDLE'S ADM'X.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

RAILROADS—INJURIES AT CROSSINGS—CARE REQUIRED—ACTION IN FEDERAL COURTS—DISMISSAL—EFFECT—PLEADINGS—DEMURRER—EVIDENCE—REPUTATION—SUBSEQUENT NEGLIGENCE—INSTRUCTIONS.

1. Where defendant demurred to plaintiff's reply, it was proper to carry the demurrer back to the first paragraph of defendant's answer, and sustain the same as to it, if insufficient.

2. That plaintiff brought her action originally in the United States court, and thereafter dismissed the same without prejudice, was no bar to an action subsequently brought by her for the same cause in the state court.

3. Where a petition of an administratrix to recover for the death of her intestate alleged that he was a resident of the county in which the suit was brought at the time of his death, an application at the trial to file an amended

answer denying intestate's residence, after the introduction of certain evidence raising a doubt as to intestate's residence in that county, was properly refused for lack of diligence.

4. In an action against a railroad company for killing plaintiff's intestate at a crossing, evidence of intestate's general reputation for sobriety was inadmissible.

5. Where a railroad track, at the point where plaintiff's intestate was killed, was used by two different companies, the admission of evidence that after the accident witness crossed the track at that place, and listened for a whistle or bell, and heard none, and did not perceive or hear the train until he was within 20 feet of the crossing, was prejudicial error.

6. In an action for the killing of plaintiff's intestate at a railroad crossing, an instruction that the duty of both parties as to care was reciprocal,—it being defendant's duty to exercise such care as to signals, speed, and lookout as might be expected of ordinarily prudent persons operating a railroad under like circumstances, and the duty of plaintiff's intestate to use such care as might be expected of an ordinarily prudent person, situated as he was, to learn of the approach of a train,—and, if the crossing was especially dangerous, it was incumbent on both parties to exercise increased care, commensurate with the danger, was proper.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Action by Mary Riddle, administratrix of Clabe Riddle, against the Chesapeake & Ohio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wallace & Harris and Jno. T. Shelby, for appellant. Burton Vance and S. E. Blackburn, for appellee.

BARKER, J. On the 24th day of February, 1899, Clabe Riddle, in company with Erasmus Breedon, while driving along the Frankfort & Lexington Turnpike Road in a buggy, at a point where the highway intersects with the track of the Louisville & Nashville Railroad Company, near Ducker's Station, in Woodford county, Ky., was run into, and instantly killed, by appellant's train of cars, which was being operated over the Louisville & Nashville Railroad Company's track, at said point under a contract with the said Louisville & Nashville Railroad Company. Whereupon his mother, Mary Riddle, was appointed, by order of the Scott county court, administratrix of his estate, and, as such administratrix, instituted an action against appellant in the United States district court for the district of Kentucky for said injury, claiming damage in the sum of \$10,000. Afterwards, by leave of said United States district court, she dismissed said action without prejudice, and then instituted this action in the Woodford circuit court, to recover for said injury the sum of \$2,000. Her petition sets out the facts of the killing of Clabe Riddle, and charges that his death was caused by the negligence of appellant's servants operating said train. Appellant's answer sets up as a defense, first, the institution by appellee of her action in the

United States district court, as a bar to her right to prosecute this action in the state court; claiming, in substance, that, by reason of the institution of the action in the United States district court, it had obtained jurisdiction of the case, and the same could not be tried in the state court, for want of jurisdiction. Said answer also denies negligence upon the part of its agents and employes, and pleads that the death of appellee's intestate was the result of his contributory negligence. This was put in issue by the reply. Appellant filed a demurrer to appellee's reply. The demurrer was carried by the court back to the first paragraph of appellant's answer, which sets up the want of jurisdiction in the Woodford circuit court, by reason of the fact that the action had first been instituted in the United States district court for the district of Kentucky, as aforesaid, and said first paragraph was dismissed; and thus the issues were finally made up. Upon the trial of the case a verdict was rendered by the jury in favor of appellee in the sum of \$2,000. Appellant's motion for a new trial having been overruled, the case is here on appeal for a review.

We think that the lower court did not err in carrying the demurrer back to the first paragraph of appellant's answer, and dismissing said paragraph. The case of *Cox v. The East Tennessee, V. & G. Railroad Co.*, 68 Ga. 446, and *Baltimore & Ohio Railroad Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 285, 44 L. R. A. 520, established the doctrine that where an action is instituted in the state court, and is removed by the defendant to the United States court under the act of congress regulating such procedure, thereafter the plaintiff cannot deprive the defendant of his right to a trial in the United States court, either by dismissing without prejudice, or by so acting as to force the court to nonsuit him; but there is a wide distinction between that proposition and the one at bar. When the defendant exercises his right, under the act of congress, to remove the action against him to the United States court, he thereby, as said before, acquires a right to have the case tried by that court, and of this right it is not in the power of the plaintiff to deprive him. The defendant, having set in motion the law of removal, acquires vested rights, and confers upon the United States court a jurisdiction which cannot be divested by any act of the defendant. But no such reason exists where the plaintiff goes herself into the United States court with her cause of action. When she so goes, her standing there is precisely the same as it would have been in the state court, had she first instituted her action therein; and there is no principle of law or procedure which requires that her standing, under these circumstances, should be different in the two courts. We think she clearly had the right to dismiss her action in the United States court without prejudice,

by permission of the court; and, having done so, she was free to bring it in any other court she chose, which had jurisdiction.

Pending the trial in the Woodford circuit court, appellant offered to file an amended answer denying the residence of Clabe Riddle in Scott county, and denying the jurisdiction of the Scott county court to appoint appellee administratrix of the estate of her son. This motion was based upon certain answers which were made by appellee on the witness stand, conveying to appellant, for the first time, a doubt as to the residence of Clabe Riddle in Scott county. The motion to file this amended answer was overruled by the court, and we think properly. The trial of the case had begun, and the court very naturally concluded that the question of Clabe Riddle's residence was as open to investigation at the hands of appellant before the trial as any other fact set up in the petition as a basis of appellee's cause of action; and there was no more reason why it should accept as true the allegation that Clabe Riddle lived in Scott county than for it to accept as true any other allegation in the petition; and, if it was true that Clabe Riddle had not lived in Scott county, a little diligence on the part of appellant could have discovered it before the trial. That fact may have been more obscure than some other facts in the case, but it was open to investigation, none the less.

During the trial of the case, appellee was permitted to introduce evidence, over the objection of appellant, as to the general habits of her intestate for sobriety. On this point, Capt. James Blackburn was allowed to testify that he was a perfectly sober man, and that he had never seen him take a drink in his life. This evidence was introduced in anticipation of evidence subsequently introduced by appellant that, at the time he was killed, decedent had about him a strong odor of whisky, and that on the day before he was killed he had, in company with Erasmus Breeden, purchased three pints of whisky. We do not think it was competent for appellee to introduce any evidence tending to show the general reputation of her decedent for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober, and yet at some particular time in his life be drunk or under the influence of whisky.

Mr. Robert B. Franklin was allowed to testify for appellee that, long after the accident in question, he had crossed the railroad track at the place where Clabe Riddle was killed; that he had listened for a railroad whistle or bell, and heard none, and that he did not perceive or hear the train until he was within 20 feet of the crossing; that he could have heard the bell or whistle if one had been sounded or rung, but that he heard none. This evidence was clearly incompetent and

prejudicial to appellant. In the first place, it would have been incompetent to have shown that the employes on one of appellant's trains had failed to do their duty in regard to giving warning of the approach of the train to the crossing in question at a subsequent time; but it was especially erroneous because of the fact that there are two different lines of railroad trains operated over the same right of way,—one belonging to appellant, and the other to the Louisville & Nashville Railroad Company; and there was no evidence that the train which Mr. Franklin saw pass was not that of the Louisville & Nashville Railroad Company, instead of appellant's. In the case of *Hutcherson v. Louisville & Nashville Railroad Co.*, 52 S. W. 955, this court said: "The fact that those in charge of other trains approaching the crossing had failed to give signals would not be admissible as evidence conducing to show that those in charge of the train that is alleged to have caused plaintiff's injury failed to give the necessary signals of its approach." In the case of *Eskridge's Ex'rs v. Cincinnati, N. O. & Tex. Pac. Ry. Co.*, 89 Ky. 372, 12 S. W. 581, this court said: "But whether a signal was given at the approach of a train to a station or crossing on any particular occasion is a question of fact that cannot be affected one way or another by showing the conduct of the subordinate officers or servants in charge of some other train or trains, who may or may not be mindful of their duty." And in the case of *The Louisville & Nashville Railroad Co. v. Berry*, 88 Ky. 225, 10 S. W. 473, 21 Am. St. Rep. 329, this court cited in approval the principle announced in *Gahagan v. Railroad Co.*, 1 Allen, 187, 79 Am. Dec. 724, in the following language: "The issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which recovery was asked. The plaintiff offered to prove the habit of the company at other times in the use of the highway, to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded."

Appellant complains of the instructions of the lower court, in that they failed to prescribe with sufficient clearness the duty of appellee's intestate as to the care he should exercise before crossing the railroad, and also that a different degree of care is required of appellant from that required of appellee's intestate. We are not sure that this contention is altogether sound, or that the instructions of the court, upon the whole, are unfavorable to appellant. We think the law upon this subject is laid down with great clearness and accuracy in the case of *L. & N. R. R. Co. v. Cummins' Adm'r*, 63 S. W. 594; and, as this case is to go back for trial, we make the following extract for the guidance of the court. Speaking of the instructions in the case cited, this court said:

"They are also defective in not informing the jury that the duty of both parties as to care was reciprocal, and in imposing a different degree of care on the appellant from that imposed on the deceased. In using the railroad and the street crossing, both parties were required to exercise the same degree of care. It was incumbent on appellant to give such notice of the approach of the train to the crossing, to run the train at such speed, keep such lookout and use such care, to avoid injury to persons thereon, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances. It was incumbent on the intestate to use such care as might usually be expected of an ordinarily prudent person, situated as he was, to learn of the approach of the train, and keep out of its way. If the crossing was especially dangerous, it was incumbent on both parties to exercise increased care commensurate with the danger."

For the reasons herein given, the case is reversed for proceedings consistent with this opinion.

CRABTREE COAL MIN. CO. v. SAMPLE'S ADM'R.

(Court of Appeals of Kentucky. Feb. 19, 1903.)

SERVANT—NEGLIGENT DEATH—SUPERIOR IN EMPLOYMENT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—CONTINUANCES—INSTRUCTIONS.

1. A continuance on the ground of the unavoidable physical and mental exhaustion of defendant's attorneys was properly refused where it subsequently appeared that they were able to attend court, and interpose a skillful defense, without apparent injury to their health.

2. A continuance on the ground that an officer of defendant company, who was acquainted with the facts, had been unable to assist the attorneys in preparing the case was properly refused when such officer was present during the trial, and appeared as a witness.

3. No prejudice could have resulted from a denial of a continuance for absence of witnesses where consent was given to the reading before the jury of that part of the affidavit containing the facts to which it was claimed they would have testified.

4. No prejudice could have resulted to the defendant, a corporation, in an action for injuries resulting in death, by a denial of a continuance on account of public passion, where the verdict was for only \$1,500.

5. Whether or not a certain employe of defendant was the superior of plaintiff's intestate in the work of operating the mine in which intestate was killed, *held*, under the evidence, to be a question for the jury.

6. Whether plaintiff's intestate, who was killed by the fall of slate from the roof of defendant's mine, in which he was employed, was guilty of contributory negligence, *held*, under the evidence, to be a question for the jury.

7. Refusal of instructions already substantially given is not prejudicial.

Appeal from circuit court, Hopkins county. "Not to be officially reported."

Action by W. J. Cox, administrator of George M. Sample, against the Crabtree

Coal Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. J. Pratt, Roy Salmon, and C. J. Waddell, for appellant. J. F. Gordon, for appellee.

SETTLE, J. Appellant was sued in the Hopkins circuit court by appellee, W. J. Cox, as administrator of the estate of George M. Samples, deceased. The action being for the recovery of damages for the death of his decedent, which occurred, as averred in the petition, as the result of an injury to his person, received while at work in appellant's coal mine, and in its service, which injury is alleged to have been caused by the gross negligence of appellant, its agents and servants, and without fault on the decedent's part. It is alleged in the petition that the decedent was, when injured, engaged, with other servants of appellant, in the making of what is commonly called a "break through," which rendered it necessary to remove certain coal and slate overlaying same; that this work was being done under the direction and immediate supervision of one of the appellant's bank bosses, or mine foremen, one N. Sweeney; that said foreman was superior to the decedent in the service of appellant, and as such had the right to command and direct the labors of the decedent, and it was the duty of the latter to obey him; that while engaged in the work indicated the decedent objected to continuing under certain coal and slate, saying that it was not safe, but the mine boss directed him to continue thereunder, assuring him that it was safe for him to do so, whereupon the decedent, relying upon the assurances of the boss, did continue the work, when, without fault on his part, much of the slate, coal, and other substance overhead fell upon his body and limbs, thereby crushing him to the ground, and so injuring and wounding him as to cause his death a few hours later. The petition further avers that the mine boss knew, or by the exercise of ordinary care might have known, of the unsafe condition of the mine, and of the danger to the decedent from continuing said work, and that the latter did not know of the danger of remaining in that position; that the place where the decedent received his injury was a dangerous place, and not reasonably safe, but not so obviously so that an ordinarily prudent servant, situated as was the decedent, would not have incurred the risk, or refused to obey the orders of his superior to continue work therein. The answer specifically denies the acts of negligence complained of, or that the decedent died of the injuries received in its mine, and avers that the person designated in the petition as mine boss or foreman was not the superior of the decedent, but only his fellow servant; that his knowledge of the condition of the mine was no greater than that of the decedent, to

whom every part of the mine was familiar. The answer further alleges that the decedent was a miner of unusual skill and experience, and that on the occasion of receiving his injuries he saw and knew the danger of the place where he was at work, and in remaining therein and continuing work he was guilty of negligence, which contributed to his injuries to such an extent that, but for same, he would not have been injured. Reply was filed traversing the affirmative matters of defense contained in the answer, and upon the trial a verdict of \$1,500 in damages was returned by the jury in appellee's behalf. Appellant thereupon filed grounds and made motion for a new trial, which was overruled by the court, of which action of the court, and of the judgment rendered against it for the damages awarded by the jury, appellant complains; hence this appeal.

It is earnestly contended by counsel for appellant that the lower court erred in refusing to continue on its motion and the affidavit filed in support thereof the case at the term at which the trial occurred. The affidavit was made by the secretary and treasurer of appellant, and was signed also by its attorneys. It in substance states that appellant was not ready for trial—First, because of the exhausted condition of its two attorneys, who had been keeping night watch at the bedside of a sick member of their family, and constantly engaged during the day for three weeks in the trial of cases in court; second, that R. M. Salmon, the author of the affidavit for the continuance, who alone had control of appellant's mine, and had been acting with the appellant's attorneys in the preparation of the defense, had been so constantly engaged for several months in protecting appellant's property from injury at the hands of lawless men, then in the county, as to prevent his giving the attorneys needed assistance in preparing for trial; third, that, owing to the then existing mining troubles in the county, the state of lawlessness, and the inflamed condition of the public mind, appellant could not get a fair and impartial trial; and, fourth, that two important witnesses for appellant, whose names are mentioned in the affidavit, were then absent, by whom certain material facts could be proved, which facts were set forth in the affidavit, as well as the statement showing diligence in the effort to procure the attendance of the witnesses. The lower court—very properly, we think—overruled the motion for a continuance, for appellant's attorneys were both physically and mentally able to attend to the case on the trial, as the defense interposed by them appears from the record to have been ably and skillfully presented, and, if any injury resulted to the health of either of them from the labor performed in conducting the trial, that fact is not disclosed by the record. The affiant and officer of appellant, R. M. Salmon, was present to advise with its attorneys, and testified

as a witness at the trial. Appellant could not have been prejudiced by the absence of the two witnesses named in the affidavit, as appellee consented to the reading before the jury of that part of the affidavit containing the facts to which it was claimed they would testify, and the small amount of damages named in the verdict shows conclusively that the jury were not influenced by the alleged prevailing lawlessness, nor by the inflamed state of the public mind complained of in the affidavit. Counsel for appellant insist that the lower court did not properly instruct the jury, and that it erred in refusing the instructions asked by appellant. The evidence, though conflicting on the point as to whether appellant's servant Napoleon Sweeney was the superior of the decedent in the work of operating the mine, does tend to show that his position in the service of appellant was one of some sort of control or leadership. Some of appellee's witnesses denominate him "the boss of the night crew," and several of them testified that he was authorized to direct the decedent in his work, and that it was the duty of the latter to obey him; at any rate, the question of whether he was the superior of the decedent, under the pleadings and proof in this case, was one to be determined by the jury. They obviously came to the conclusion that he was, or else their verdict would have been for the appellant instead of appellee. The verdict cannot be disturbed on the ground that Sweeney was not the superior of the decedent, unless it could be said that there was no evidence conducing to show that fact; and, as we are not prepared to say that there was no such evidence, it is manifest that the lower court did not err in refusing the peremptory instruction asked by appellant.

Assuming, therefore, that there was some evidence to authorize the jury to find that Sweeney was the "boss or superior" of the decedent, there yet remains the further question of whether the latter, at the time of receiving his injuries, was put in a place of danger by the act or direction of his superior, Sweeney; and, further, whether, notwithstanding the order of the superior, the danger of complying therewith was so obvious and imminent that it would have been known to, and could have been avoided by, an ordinarily prudent man. In *Ashland Coal & Iron Co. v. Wallace*, 42 S. W. 744, 43 S. W. 207, which was an action by the servant to recover of the master damages for injuries received in a coal mine, this court said: "In actions like this, questions of negligence are for the jury to determine. The ordinary care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that the policy of the law to relegate these questions to the juries has been long settled." The court in the case *supra*, quoting with approval *Gib-*

son v. Ry. Co., 46 Mo. 163, 2 Am. Rep. 497, further said: "The degree of care required of the master and servant in particular cases is generally different, whilst each is required to exercise that degree of care in the performance of his duties which a reasonably prudent person would use under the circumstances. The primary duty on the part of the master of using care to furnish a reasonably safe place for the servant is more important than the duty of the servant to use reasonable care to protect himself, because the master is required to use a degree of care in the preparation and subsequent inspection of an entry to a mine that is not primarily demanded of a servant. The master must inspect the entries in which the servant is engaged in work, and the servant has the right to presume, when directed to work in a particular place, that the master has performed this duty, and to proceed with his work relying upon this presumption, unless a reasonably prudent and intelligent man in the performance of his work as a servant in a mine under like circumstances would be able to discern risks which defects in the mine indicate. * * * Defects in the roof of a mine, which might be perfectly apparent to the eye of an inspector, might have no significance to a laborer or an employé who has had no experience in this special employment; and it would be unreasonable to charge him with contributory negligence simply because he sees defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicated. The dangers, and not the defects alone, must be so obvious that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." The decedent, according to some of the witnesses, was drilling and blasting at the "break through." He seemed to fear danger from the overhanging slate, and stepped out of the way, saying he believed it was dangerous. Napoleon Sweeney stepped under it, and sounded it, and said, "No; he thought it was all right." Decedent then said, "Maybe it is," and returned to the place, and the slate fell. Appellant's counsel lay much stress upon the decedent's familiarity with the condition of the mine. Much of the evidence introduced by appellant was directed to this point, and to attempting to prove that the decedent did not die of the injuries received in the mine, but of heart disease. It was, however, the province of the jury to determine how and of what he died, and whether his own negligence caused his death.

The facts all went to the jury, and, if the instructions given correctly present the law of the case, this court will not disturb the verdict. We have carefully examined the instructions given and refused by the lower court, and are of the opinion that those given fairly and correctly presented to the jury the whole law of the case. They authorized a

verdict for appellee if the jury believed from the evidence—First, that Sweeney was appellant's servant, and the superior of decedent; second, that he assured the decedent that his place of labor was safe, when it was not so; and, third, that decedent relied on such assurance, and by reason thereof continued to work at the place of danger, and lost his life by the falling slate; and, fourth, that the danger before the falling of the slate was not so obvious and imminent that an ordinarily prudent man would not have continued at the work. Upon the other hand, the jury were fully instructed as to the law under which appellant might escape liability, as they were told by the court to find for the appellant if they believed from the evidence that Sweeney was not the superior in authority over decedent, or that the latter did not rely on Sweeney's assurance of safety, if any was given, or that decedent's death was produced by a cause other than the falling of the slate, or that his death was caused by his own negligence. The instructions also properly defined the measure of damages, ordinary care, and contributory negligence. We have also carefully examined the refused instructions, and, while two of them might with propriety have been given, yet, as the propositions of law contained in them were substantially presented in the instructions given, it cannot be said that appellant was prejudiced by the court's refusal to give them.

Being unable to find any error in the record, the judgment of the lower court is affirmed.

NUNN, J., not sitting.

LOUISVILLE & N. R. CO. v. MASON.

(Court of Appeals of Kentucky. Feb. 11, 1903.)

PERSONAL INJURIES—DAMAGES—PLEADING—INSTRUCTION—CONTRIBUTORY NEGLIGENCE—TREATMENT OF INJURY.

1. A complaint alleging that, in addition to plaintiff's suffering, he has been unable, since he received his injury, to do ordinary farm-work, and has been permanently injured, and has been damaged in a certain sum, in so far as it attempts to allege loss of time of a peculiar and special value, is insufficient.

2. The jury should be limited in assessing damages for personal injuries not resulting in death, independent of punitive damages, to compensation, which consists in remuneration for loss of time, necessary expenditures, mental and physical suffering, and permanent disability, where it is the result; and the jury should be so told, instead of that they may allow for certain things, "and all such further injury" * * * which they may believe from the evidence has accrued, or is reasonably certain to accrue, as the direct result of such injury."

3. An instruction, in an action for personal injuries, that plaintiff is not entitled to recover for damages to him from any unskillful or improper treatment of any injury he may have received in the accident, is not broad enough to properly present all the features of the question.

4. The allegation in the answer that plaintiff by his own negligence caused the injury of which he complains, and but for such contributory negligence the injury would not have occurred, has reference to the act by which the injury was inflicted, and does not plead contributory negligence subsequent thereto in the care and treatment of the injury.

Appeal from circuit court, Nicholas county.
"Not to be officially reported."

Action by John B. Mason against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

E. M. Dickson, E. W. Hines, and B. D. Warfield, for appellant. Kennedy & Williamson, for appellee.

O'REAR, J. Appellee, a passenger on one of appellant's trains, sues for an injury done to him by reason of having been jerked or thrown from the train as he was about to alight therefrom at his destination. He alleges that he sustained a serious injury to his hip, inflicting great and constant pain, and permanently impairing that member, so as to destroy, or at least materially affect, his ability to work. Appellee claims that after the station had been announced the train had stopped, and that he was in the act of going down the steps, when it suddenly started again with a violent jerk, and without warning, whereby he was thrown to the ground, and caught between the steps of the moving train and the platform, and dragged some distance, inflicting the injury complained of. A number of witnesses testify to having seen the accident, substantially corroborating appellee's version of it. An equal or possibly greater number, with apparently equal opportunities for seeing the occurrence, testify that the train had not stopped when appellee stepped from it, still holding to the iron railing at the steps, and that he was thereby thrown to the ground and injured. This question, however, was properly submitted to the jury for its determination, and they have found in favor of appellee. We cannot say that there is not sufficient evidence to support the jury's finding, or that it is palpably against the weight of the evidence.

The following instruction was given to the jury: "(1) It is admitted by the pleadings that on the 11th day of August, 1900, the defendant received plaintiff as a passenger on one of its trains, and agreed to carry him from Carlisle, Kentucky, to Pleasant Valley, Kentucky, both of said places being regular stations on the line of defendant's road; and if the jury believe from all the evidence that the defendant, by its agents and employés, cried out, 'All off for Pleasant Valley,' as said train was slowing up for said station, and that plaintiff then immediately left the car in which he was riding, as soon as the train stopped, and immediately proceeded to go down the steps leading from said car to the place where passengers usually alight at said point, but that before plaintiff had reasonable

time to get off said steps the defendant, by its agents and employes, carelessly and negligently caused said train to start forward with a jerk, and that said forward movement of the train threw plaintiff forward and off of said steps to the ground, whereby he was injured, they ought to find for the plaintiff in damages in such a sum as will reasonably compensate him for his physical and mental suffering, if any, and loss of time, if any, and all such further injury, if any, temporary or permanent, which they may believe from all the evidence has accrued, or is reasonably certain to accrue, as the direct result of said injury; and, if the jury further believe from all the evidence that said injury was the result of gross carelessness and negligence on the part of the defendant, they may, in addition to such compensatory damages as above indicated, award, in their discretion, punitive damages, not exceeding in all \$5,000, the amount claimed in plaintiff's petition." The complaint is against that part of the instruction defining the measure of damages. The first point made against the instruction is that it submitted to the jury the right to assess damages for loss of time suffered by appellee. The petition contains this allegation, only, on this subject: "That in addition to his (plaintiff's) suffering, he has been unable since he received said injury to do ordinary farmwork, and that he has been permanently injured and disabled by reason of the injuries and wrong aforesaid, and has been damaged in the sum of \$3,000." This allegation would seem more especially to refer to the extent and nature of plaintiff's injury, than to the fact that by reason of it he had lost time. But it also conveys the idea that, by reason of the injury, plaintiff had been unable to do farmwork, and because of that fact he had lost time of a peculiar and special value. It is not stated in the pleadings that he was a farmer, or had ever been so employed, nor is the damage resulting from his being impaired in his power to follow this special vocation set out. It is the well-settled rule, and a just one, that a claim for special damages, such as for loss of time, where it is of special value, medical bills, etc., must be specially pleaded, before either proof can be heard, or a recovery allowed therefor. *Jesse v. Shuck* (Ky.) 12 S. W. 304; *L. & N. R. R. Co. v. Reynolds* (Ky.) 71 S. W. 516. Appellant had a right to have the matters relied upon so pleaded that it could determine whether it would admit or deny the averments relating thereto. If the petition had been taken pro confesso by reason of the failure of appellant to plead, appellee could, as special damages, have recovered, at most, but a nominal sum. The instruction, however, is, in our opinion, subject to graver criticism than the one just made, in that it authorizes the jury to compensate appellee "for all such further injury, temporary or permanent, which they may believe, from all the evidence, has accrued, or

is reasonably certain to accrue, as the direct result of said injury." What other injury? What standard or measure is here given to the jury? No limitation is placed upon their imagination or conjecture. At best, it has been found extremely difficult, if not impossible, to accurately measure damages in such cases, under the most carefully guarded legal limitations. The jury should be limited in assessing damages for personal injuries, not resulting in death, independent of punitive damages, to compensation, which, in its legal signification, consists of remuneration for loss of time; necessary expenditures; for mental and physical suffering resulting from the injury; and for permanent disability, if such be the result, and where proper averments relative thereto are made; and the court should so inform the jury, instead of leaving to them to determine the legal import of the true damages sustained by the plaintiff. *Parker v. Jenkins*, 3 Bush, 591. The permanent disability referred to is a permanent reduction of appellee's power to earn money, resulting from an injury caused by the negligent act of appellant in question. *Muldraugh's Hill, C. & C. T. P. Co. v. Maupin*, 79 Ky. 105; *L. & N. R. R. Co. v. Case's Adm'r*, 9 Bush, 736. It was shown in this case that appellee was a man past middle age, and there was some evidence that for some years he had been of infirm health, and that he had frequently complained that he was unable to do more than a half day's or half a man's work. It was not proper, therefore, for the jury to have considered the injury sued for, assuming him to have been a robust person, sound in health; but they should have been told that, in estimating the amount of damages, they should take into consideration the age and situation of the plaintiff, and his earning capacity, in fixing the damage sustained by the want of the limb injured. *Greer v. L. & N. R. R. Co.*, 94 Ky. 177, 21 S. W. 649, 42 Am. St. Rep. 345. The phrase, "and all such further injury, if any, temporary or permanent, which they may believe, from all the evidence, has accrued, or is reasonably certain to accrue, as the direct result of such injury," should have been omitted.

Appellant asked, and the court refused to give, the following instruction: "The court instructs the jury that the plaintiff is not entitled to recover any sum for damage resulting to him from any unskillful or improper treatment of any injury he may have received in the accident complained of as occurring at Pleasant Valley." This instruction is predicated upon this line of evidence introduced by appellant at the trial. The condition of the injured limb at the time of the trial showed that it was lengthened about two inches more than normal. This was because the thigh bones had left the acetabulum. It was the theory presented by appellee that this condition of the hip joint was caused by the severe wrench and contusion

received when he was thrown from appellant's train, by which the ligaments about that joint were ruptured and torn, allowing the femur to slip down. There was evidence, however, for appellant, that appellee did not call a competent and skillful physician when injured; that he neglected the advice and directions his physician gave him, and refused to obey them; that by his own negligence in persisting in walking about upon the injured limb, and in failing to have it treated by a competent and skillful surgeon at the time, he has so aggravated his injury as to produce the permanent ill effect of which he complains; and that, but for this species of his negligence, the injury could have been and would have healed entirely, and within a few weeks, or, at most, a few months. A very satisfactory treatment of this subject may be found in Thompson's Commentaries on the Law of Negligence (section 202). It is there said, and sustained by the authorities cited: "Undoubtedly, the person injured is bound to use ordinary care in treating the injury, and cannot recover from the author of the injury enhanced damages growing out of his own want of ordinary care in procuring medical or surgical aid to treat it. In other words, if he neglects to use such means to effect a recovery as an ordinarily prudent person would use under like circumstances, he cannot recover damages for any aggravation of his injury growing out of such neglect. * * * But his neglect in this regard bears only upon the extent, and not upon his right of recovery for the injuries. * * * It is his duty to use ordinary care, under the circumstances, in employing surgeons, nurses, etc.; but, having done so, the law does not make him an insurer that they will commit no mistakes in treating him. * * * If he employs a reputable physician and surgeon, and follows his directions as to the treatment of the injury, until such physician or surgeon discharges himself from the case, the patient cannot be charged with negligence in causing an aggravation of the injury because the result of it was more severe than was anticipated. * * * Negligent injuries have been sometimes aggravated by delay in calling in the services of a physician or surgeon. In such a case it seems that it would generally be a question for the jury whether such delay was the result of negligence or of want of ordinary care under all the circumstances of the case." *L. & N. R. R. Co. v. Kingman* (Ky.) 35 S. W. 264; *Central Passenger Co. v. Rose* (Ky.) 22 S. W. 745; *Secord v. St. P., M. & M. R. R. Co.* (C. C.) 18 Fed. 221. The court is of opinion that the instruction asked for and quoted above is not broad enough to present all the features of this question as they should have been, and furthermore we are of opinion that, under the issues in this case, an instruction upon the law on this subject was not authorized. In this jurisdiction, contributory negli-

gence must be pleaded. In this case it is pleaded in this language: "The defendant, for further answer, says that the plaintiff, by his own carelessness and negligence, caused the injury or injuries of which he complains in his petition, and, but for such contributory negligence on the part of the plaintiff, said injury or injuries complained of by him in his petition herein would not have occurred to, or have been sustained by, him." This, however, has reference to the act by which the injury was inflicted. If the defendant contemplated putting in issue the plaintiff's contributory negligence subsequent to the occurrence for which he sued, which neglect went to aggravate his damages, the facts constituting it should have been alleged, so as to have allowed an issue to be joined thereon, and the production of the proof to meet it. Under the state of pleadings, the court is of opinion that the instruction was properly refused.

Upon the return of the case, however, the plaintiff should be allowed to amend his petition, if he elects to do so, concerning the loss of time asserted in his proof; and the defendant should be allowed to amend its answer, if it elects to do so, concerning the special matter of contributory negligence discussed.

Judgment reversed, and cause remanded for proceedings not inconsistent herewith.

PERCIFULL et al. v. COLEMAN.

(Court of Appeals of Kentucky. Feb. 18, 1903.)

TRESPASS—DAMAGES—INSTRUCTION—CHAMPERTY.

1. Where two adjoining lots are sold at an auction to different persons, and the one whose deed is executed first takes possession and erects a fence beyond the boundary line called for, the purchase of the other, who takes his deed subsequently, is not champertous.

2. In an action for trespass the court instructed that, if the trespass was wanton, the jury might award damages in excess of the actual injury, and "what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights." *Held*, that the giving of the quoted clause was error, since it was the province of the jury to determine whether the trespass was wanton.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by H. R. Coleman against A. F. Percifull and others. From a judgment for plaintiff, defendants appeal. Reversed.

Samuel Avritt and J. L. Williams, for appellants. Forcht & Field and Matt O. Doherty, for appellee.

HOBSON, J. Mary Gaetano Childs owned three lots in Louisville, lying together on the north side of Chestnut street, between Fourteenth and Fifteenth streets, each being 30 feet wide and 162 feet deep. There was a house on each lot, and the division fence ran from the corner of the house to

save the building of the fence clear through. In 1885 she sold these three lots at public auction. Appellee, Coleman, purchased one, and appellant Percifull, through his agent, Erdman, purchased another. In the conveyances the lots are described as 30 feet wide, and beginning at a point so many feet east of Fifteenth street. When appellant's lot is run out from the points indicated in the deed, it runs inside of the fence dividing his lot from Coleman's by a foot and a half or two feet. About the year 1891 Percifull wanted to build a barn on the back of his lot, and to make it as wide as the lot, 30 feet. The coal shed of Coleman then projected over on the lot 2 feet. By agreement a survey was made, which showed that this 2 feet belonged to Percifull, and then Coleman's shed was cut off at the line, and the stable erected. The fence remained where it was under an agreement, as Percifull says, that when a new fence was needed, it was to be reset on the line; but this Coleman denies. Things ran along in this way for some time, and, Coleman refusing to agree to move the fence, Percifull, getting apprehensive of limitation, employed a carpenter, and had the fence set up near the line, cautioning the man who did the work to stay on his side of the line. For this Coleman sued, and recovered judgment for \$300 damages. A part of Percifull's chimney stood on the strip in controversy, and the cornice of his house projected over it. The court instructed the jury that, if they believed from the evidence that when Percifull bought his lot Coleman had the strip in controversy inclosed in his lot, and was claiming it as his property, adversely to everybody else, then Percifull obtained no title to the strip, and he had no right to move his fence over so as to take it in. But if, when Percifull bought, Coleman was not claiming the strip in controversy as his own adversely to all the world, then Percifull had the right to move his fence so as to take in the strip, provided in doing so he did no damage to plaintiff's property. This instruction was erroneous. There was no question of champerty in the case, for, although the deed to Percifull was made after the deed to Coleman, they were both made pursuant to the sale made at public auction by the same auctioneer, under the same advertisement, and at the same time. We do not understand that there is any controversy as to these facts, but, in any event, the court should submit this question to the jury by a proper instruction if on another trial there is any controversy about the facts. The deeds related back to the time when the property was sold at auction, for they were made to carry out the contract then entered into between the parties. A deed which is made to carry out a previous contract is never champertous as to one who enters after the contract was made. So, although Coleman took possession after the auction sale, and before the deed to Percifull, the

purchase of the latter would not be champertous.

As to the measure of damages the court gave this instruction: "If you shall believe from the evidence that in moving the fence over he trespassed upon the plaintiff's property, trampled down his soil or his grass or his herbage, then the law is for the plaintiff, and you should find for him in such sum as will compensate him for the damage done him in that respect; and, if the moving over of the fence by the defendant was high-handed, and in wanton disregard of the plaintiff's rights, then you may, in your discretion, award him such a further sum in damages as you may think right and proper under the evidence, and what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights, not exceeding the sum of fifteen hundred dollars, the amount claimed in the petition." The following words in this instruction should have been omitted: "and what I have stated as a punishment of defendant for his evident disregard of plaintiff's rights." There was no substantial damage shown to the plaintiff, and we are at a loss to understand why so large a verdict was rendered, unless the jury understood from these words that the court directed them to find a verdict as a punishment of defendant for his evident disregard of plaintiff's rights, as stated by the court. These words were at least calculated to make that impression on the jury, who should have been left to determine for themselves, under the evidence, whether there was such a wanton disregard of plaintiff's rights as justified a verdict for more than the actual damage. Under the evidence the court should have told the jury that the question for them to determine was where the dividing line between the two lots ran, and that, if the defendant had not gotten over this line, they should find for him.

Judgment reversed, and cause remanded for a new trial.

WEBER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 20, 1903.)

STATUTES—TITLES—CONSPIRACY—ACCOMPLICE TESTIMONY.

1. Const. § 51, providing that no law shall relate to more than one subject, which shall be expressed in the title, is not infringed by Act May 20, 1897 (Ky. St. § 1241a), entitled "An act to prevent lynching and injury and destruction of real and personal property * * * at the hands of mobs or other riotous assemblages, and to prevent the posting and circulating of threatening letters," the general subject of the act being the better preservation of the public peace and the suppression of mobs and other unlawful confederations.

2. On a prosecution under Ky. St. § 1241a (1), for confederating to injure a person, subsection 10 of which provides that it shall be no exemption for a witness that his testimony may incriminate himself, but his testimony shall not be used against him except for perjury, and he shall be discharged from liability

for violation of the act disclosed in his testimony, a defendant may not complain that another defendant, who did not decline to testify, was not charged that he need not answer unless he voluntarily desired to do so.

3. On a prosecution under Ky. St. § 1241a (1), for confederating to injure a person, though subsection 10 thereof declares that a witness shall be discharged from liability for violation of the act disclosed in his testimony, another may be convicted on proof that he and the person testifying to the crime confederated together, without proof that another was in the conspiracy.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

John Weber appeals from a conviction. Affirmed.

Sweeney, Ellis & Sweeney, for appellant.
Clifton J. Pratt and M. R. Todd, for the Commonwealth.

HOBSON, J. Appellant, John Weber, was indicted under section 1241a, subsec. 1, Ky. St., for the crime of unlawfully, willfully, and feloniously confederating with certain other persons for the purpose of intimidating and injuring William Dowdell. He was convicted, and punishment was fixed at one year's confinement in the penitentiary.

The proof shows that a party of men came to Dowdell's house about half past 10 o'clock at night, tied him to a tree, and whipped him unmercifully. There is no controversy on this point in the evidence, and there is no attempt to show any facts in mitigation of the offense, or to attack in any way Dowdell's credibility or character. The only defense made by the defendant is that he was not present, and had nothing to do with the act. He introduced proof tending to establish an alibi, but the evidence was conflicting as to his whereabouts at the time the offense was committed, and, there being positive testimony of several witnesses that he was present, assisting in the whipping of Dowdell, we cannot disturb the verdict of the jury on the facts.

It is earnestly insisted that the statute is invalid, under section 51 of the constitution, which provides that no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title. The title to the act is in these words: "An act to prevent lynching and injury to and destruction of real and personal property in this commonwealth at the hands of mobs or other riotous assemblages and to prevent the posting and circulation of threatening letters and to prescribe penalties for the enforcement of its provisions." The act is in 11 sections, and all its provisions are germane to the subject expressed in the title. The general subject of the act is the better preservation of the public peace and the suppression of mobs and other unlawful confederations. The whole of the act relates to this subject. While the title of the act might have been more concisely expressed, it seems to us to state the subject of legisla-

tion with sufficient clearness to indicate to a person of ordinary intelligence what was meant. It is true the first section of the act provides against persons banding themselves together for the purpose of injuring or disturbing another; the second, against those banding themselves together for the purpose of injuring or destroying property; the ninth, against those who send or put up a threatening notice or letter. But all these things have a natural connection, and fall under the general subject which the Legislature had in mind. The work of the Legislature would be interminable if such matters as these must all be put in separate bills, and could not be united in one act. The sending of threatening letters has a natural connection with the subject of the act, because such letters and notices are means commonly employed to terrify and annoy citizens by the lawless persons aimed at in the other sections of the act. The subject of legislation under section 51 of the constitution may, as has often been held by this court, be very broad in its nature. Thus the act of February 15, 1854, was entitled "An act to provide for the appointment of special judges of the county court and police or city courts," and under this title there was a provision authorizing the holding of special terms of the county court by the regular judge. It was held that the general subject embraced was that of courts, and that the section referred to was not foreign to the subject expressed in the title, but had a natural connection therewith. *Jacobs' Adm'r v. L. & N. R. R.*, 73 Ky. 263. So the title to the act of March 20, 1876, was in these words: "An act to regulate the civil jurisdiction of justices of the peace, police judges and quarterly courts and the appellate jurisdiction of circuit courts from judgments and to authorize the quarterly courts to appoint clerks." The court said that the title went more into detail than it should have done, and was objectionable for want of precision, but the act related to only one general subject. *Allen v. Hall*, 77 Ky. 85. See, to same effect, in substance, *McArthur v. Nelson*, 81 Ky. 67; *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. 737; *Conley v. Commonwealth*, 98 Ky. 125, 32 S. W. 285; *L. & O. T. R. Co. v. Ballard*, 59 Ky. 165; *Chiles v. Drake*, 59 Ky. 146, 74 Am. Dec. 406. Section 10 of the act is as follows: "In any prosecution under this act it shall be no exemption for a witness that his testimony may incriminate himself; but no such testimony given by the witness shall be used against him in any prosecution except for perjury, and he shall be discharged from all liability for any violation of this act so necessarily disclosed in his testimony." Bud Speaks, who was jointly indicted with appellant, was introduced as a witness for the commonwealth on the trial. Appellant asked the court to charge Speaks that he need not answer any question unless he voluntarily desired to do so. The court

declined to so instruct the witness, and of this appellant complains. Speaks did not decline to testify, or to answer the questions asked him, and we are unable to see that appellant has any ground of complaint in this matter. Under the statute, when Speaks testified on the trial of appellant, he was discharged from all liability for the violation of the act disclosed in his testimony, and he could not thereafter be punished therefor. His testimony did not incriminate him, but, on the contrary, it put an effectual bar between him and punishment for the offense. The court gave the jury an instruction to the effect that appellant could not be convicted on the testimony of an accomplice, unless properly corroborated. But it is complained that the court refused to instruct the jury that they could not convict the defendant unless they believed from the evidence beyond a reasonable doubt that the defendant and one or more of the parties named in the indictment other than Speaks, confederated together for the purpose of whipping Dowdell. This instruction was properly refused, for, although the commonwealth had disabled itself from prosecuting Speaks by making a witness of him, the fact remained, if his testimony was true, that he did confederate with the appellant for the purpose of whipping Dowdell, and the charge in the indictment was, therefore, sustained by the evidence. To adopt the rule urged by the learned counsel would be to deprive the commonwealth of all benefit from this section where there were only two in the conspiracy; for if, in this event, one of the conspirators was introduced as a witness for the state, the other could never be convicted, however clearly his guilt might be shown. We therefore conclude that the statute in question is not in violation of the constitution and that there was no substantial error on the trial.

Judgment affirmed.

MARSDEN CO. v. BULLITT et al.

(Court of Appeals of Kentucky. Feb. 19, 1903.)

CARRIERS—LOSS OF CARGO—ACTIONS—PETITION—ALLEGATIONS OF NEGLIGENCE—DEFINITENESS—EVIDENCE—JUDGMENT—DEDUCTION OF FREIGHT.

1. A petition alleging that defendant agreed to transport plaintiff's corn by river as a common carrier, and that the sinking of the barge and the loss of the corn were caused by the negligence of defendant, its officers and employes, was not objectionable for indefiniteness of the allegation of negligence.

2. Where a petition alleged that plaintiff's corn was lost by the negligence of defendant, any indefiniteness of the allegation of negligence therein was cured by defendant's answer, which, after putting in issue all the affirmative allegations of the petition, alleged that the barge in which the corn was transported was in good condition when defendant began the voyage, until it was struck and injured, and that the boat was properly manned,

and was prudently and carefully operated, which allegations were controverted by a reply.

3. A carrier, in an action for the loss of corn by reason of the sinking of a barge, was not entitled to object to the testimony of plaintiff's witnesses describing the repairs to the barge after it was sunk, when the same facts were subsequently proved by defendant's witnesses.

4. Where, in an action for the loss of corn by the sinking of a barge, the proof showed that the corn was worth 42 to 43 cents per bushel at destination, and at the price of 42 cents, after deducting the value of the corn saved and the freight, there was left an amount due to plaintiff exceeding the amount of the verdict, an objection that the cost of transportation should have been deducted from the judgment was not sustainable.

Appeal from circuit court, Davless county. "Not to be officially reported."

Action by Bullitt & Co. against the Marsden Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Miller & Todd, for appellant. Birkhead & Clements and Chapeze Wathen, for appellees.

NUNN, J. This appeal is prosecuted from a judgment of the Davless circuit court obtained by appellee against appellant for \$1,252.80. It was alleged in appellee's petition, in substance: That it had a contract with appellant company whereby it agreed and undertook to furnish to it a barge and transport for it from French Island, on the Ohio river, to Hawesville, Ky., 3,314 bushels of corn, for which appellee agreed to pay appellant the sum of 1½ cents per bushel. That appellant did furnish a barge to appellee at said point, and the corn was loaded on the barge, and afterwards, on the 24th day of March, 1900, the appellant attached the said barge to one of its boats, and started to transport the same to Hawesville; and while going up the Ohio river, and long before it reached its destination, said barge sank in the river, and the corn was lost. That appellant failed to deliver said corn, and appellee recovered no part thereof, except to the value of \$72.75 in damaged corn. The sinking of said barge, and the loss and destruction of said corn, were caused by the negligence and carelessness of appellant, its officers, agents, and employes. Appellant demurred to this petition, which was overruled by the court, and then moved the court to require appellee to make its petition more specific with reference to the charge of negligence, and to state what negligent act or omission it would rely on. This motion was overruled by the court.

The court was right in this. In the case of Kentucky Central Railroad v. Thomas' Adm'r, 79 Ky. 173, 42 Am. Rep. 208, the court used this language: "The allegation is that the accident was occasioned by the negligence of the agents, officers, hands, and employes of the defendant. This was sufficient to admit evidence of every fact conducing to prove that the disaster resulted from either the misfeasance or nonfeasance of the

¶ 1. See Carriers, vol. 9, Cent. Dig. §§ 569, 570.

company or its agents or servants." See, also, *C. & O. R. R. Co. v. Smith* (Ky.) 39 S. W. 832, and *L. & N. R. R. Co. v. Wolfe*, 80 Ky. 82. But if the court had erred in this matter, the defendant, by its answer, cured the defect. After putting in issue all the affirmative allegations in the petition, it alleged "that the barge was sound and in good condition when defendant began said voyage, until it was struck and injured as aforesaid; that said boat was in good condition, and properly manned by licensed and competent officers and crew, and was prudently and carefully operated on said voyage." And the appellee, by reply, controverted these allegations, and the issues were made specific and complete. Appellee's evidence showed that the voyage was begun with the barge about 8 o'clock on a dark, rainy night; that the water was high and swift in the river, and much drift was moving; that the barge was old and partly rotten, and was poorly and insecurely constructed, and was not safe or fit to convey the corn, and in consequence thereof the corn was lost. Appellee's evidence further showed that there was no evidence of any bruise or indenture upon the front of the barge, or at any place, indicating that it had collided with any hard substance. Appellant's evidence agreed with that of appellee, except it proved that the barge was only about five years old, well and substantially constructed, and was sound and safe; that there was an indentation or bruise on the barge, showing that it had collided with some (supposed to be) moving object, which the witnesses did not see; that those in charge of the boat and barge were using ordinary care and caution in the movement of same. All agree that there was a rent in the barge, across the front and back, on the sides, below the water line, which caused the barge to sink, and, according to the evidence of appellant, caused the barge to sink within a very short time.

Appellant objects to the testimony of some of appellee's witnesses, describing the repairs and nature of repairs made on the barge after it was sunk. Even if this was error, the appellant's witnesses proved the same facts. The manner in which it was proved was not prejudicial to appellant.

Appellant also contends that the testimony of Bullitt and Bentley with reference to conversations with and statements of one Smith, one of appellant's managers, within a day or two after the sinking of the barge, was error. Even if incompetent, the statements, in our opinion, were harmless, as they had no application to the real questions at issue.

Appellant contends that the judgment was too large, by \$49.51,—the amount of its charge for the transportation of the corn. The appellee, in its petition, does not fix any price per bushel for its corn, but places the gross sum due it at \$1,252.80. The proof showed that corn was worth 42 to 43 cents per bushel, delivered at Hawesville; and at

the price of 42 cents, and after deducting \$72.75 and the \$49.51, it would still leave due the appellee more than the amount it claimed or recovered.

Appellant only complains of the latter clause of the third instruction. This instruction was correct. All the instructions were as favorable to appellant as it was entitled to.

Perceiving no error to the prejudice of appellant, the judgment is affirmed.

MOAYON et al. v. MOAYON.

(Court of Appeals of Kentucky. Feb. 13, 1903.)

HUSBAND AND WIFE—CONTRACT—CONSIDERATION—SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—STATUTE OF FRAUDS.

1. Where husband and wife are living apart because of grounds of divorce which she has, and on which she has had prepared a petition for divorce, her forgiving him and resumption of her relation of wife is sufficient consideration for his agreement to convey property for their children.

2. It is no defense against specific performance of an agreement for sale of an undivided interest in property that it may subsequently be sold to an undesirable person.

3. Where, in consideration of the mutual agreement of husband and wife, living apart because of her ground for divorce, to live with each other as husband and wife, he agrees to make a conveyance of property, and prior to the conveyance they resume their living together, it is no defense to specific performance of his agreement to convey that there is lack of mutuality of remedy, whereby he may compel her always to live with him.

4. A contract to convey a third of all one's estate, of whatever nature, acquired by him under his mother's will, or otherwise acquired and now owned by him, sufficiently describes the property, as it may be identified by parol evidence, to satisfy the statute of frauds.

5. A contract between husband and wife, by which he agrees to convey property, being just and reasonable, and such as would be good at law if made by him with a trustee for her, will be enforced in equity.

Appeal from circuit court, Christian county.

"To be officially reported."

Action by Beatrice Moayon and others against Max Moayon. Judgment for defendant. Plaintiffs appeal. Reversed.

Barker & Woods, Kohn, Baird & Spindle, and Hunter Wood & Son, for appellants. Landes & Allensworth, Jno. C. Duffy, Jno. Feland, Jr., Jno. Phelps, and Hazelrigg & Chenault, for appellee.

O'REAR, J. Appellant Birdie Moayon and appellee, Max Moayon, are husband and wife. They have two children, who are infants. The Fidelity Trust & Safety Vault Company is the guardian of these children. Prior to December 4, 1900, there was a separation of these parties on a ground, as is alleged, which entitled the wife to a divorce a vinculo. It is not material to this decision as to the nature of this cause. The wife had retained counsel, who had prepared for fil-

ing a petition for divorce from appellee. On the 4th of December, 1900, at the instance of appellee, the parties treated for a settlement of their differences, resulting in a contract in writing between them, which we copy in full, as follows:

"This agreement, made and entered into this fourth day of December, 1900, by and between Max J. Moayon and his wife, Birdie Moayon, and the Fidelity Trust & Safety Vault Company, trustee for Beatrice and Jessamine, children of the said Max and Birdie Moayon, witnesseth: That whereas, the said Max and Birdie are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day agreed mutually to forego their differences, and to be reconciled, and live with each other as husband and wife, after the full execution of this agreement: Now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education, and support, and future welfare, now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the acceptance of the trust by said Fidelity Trust & Safety Vault Company under this agreement, the said Max Moayon hereby agrees to convey, transfer, and deliver in fee simple to the Fidelity Trust and Safety Vault Company, as trustee, for the use and benefit of the said Beatrice and Jessamine Moayon, his children, one-third ($\frac{1}{3}$) of all of his estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him; the said personal property to be delivered according to the rules of law, and the real estate to be conveyed by deed properly acknowledged and recorded as soon as the deeds can be prepared. The absolute estate is to be conveyed to said trustee for the use and benefit of the said children, and in the event of the death of either of said children the estate of such child shall go to and belong to said Birdie Moayon, for her own sole and separate use forever. Said trustee shall have the authority to collect all income from said estate so conveyed, and pay the same over to the said Birdie Moayon for the use and benefit of the said children's care and education. She shall not be required to render any account of the moneys thus received by her, but her receipt shall be an absolute acquittance of the trustee. Said trustee shall be authorized to convey, sell, exchange, or dispose of any part of the estate so conveyed, and transfer a fee-simple title, whenever the

said trustee deems it proper to do so; and conveyance by the said trustee shall convey the fee-simple title, and the said trustee shall hold the proceeds received from any such conveyance for the same use, purposes, and to the same extent and in the same manner as the original estate is held under this agreement. It is agreed between the parties that within ten days a full inventory of all the estate of the said Moayon shall be delivered to the said Birdie Moayon and said Fidelity Trust & Safety Vault Company, and the deeds executed in accordance with this agreement, and the transfers of personalty made in accordance with the terms of this agreement and to carry into full effect the same. Witness the hands of the parties this 4th day of December, 1900, at Louisville, Kentucky. Max J. Moayon. Birdie Meyers Moayon.

"The Fidelity Trust & Safety Vault Company joins in the foregoing arrangement for the purpose of signifying its acceptance of the trust to be created by the deed of conveyance contemplated by its terms. Fidelity Trust & Safety Vault Company, by John W. Barr, Vice President."

The foregoing facts are gathered from appellant's petition filed in this case seeking a specific performance of the above contract, it being also alleged that in pursuance thereto appellant Birdie had forgiven the wrongs of appellee, and had returned to his home, and resumed her relations as a dutiful wife; and from the date of this contract, and in performance of her part thereof, had continued to live with appellee as his wife, and was yet doing so. It was also averred that appellee had wholly failed to comply with his part of the agreement, the one above copied, and that he refused to do so. A full description of his property, alleged to be that intended by the parties to be and that was embraced in the terms of the written contract, was given in the petition. It shows a number of pieces of real estate in Christian county, this state, and personal property of the value of about \$20,000. Appellee interposed a demurrer to the petition, which was sustained, and the petition dismissed.

In support of the judgment it is argued that the contract is unenforceable for the following reasons: (1) That it is not founded upon a valuable consideration, and that it is disfavored upon principles of sound public policy; (2) that it is indefinite and uncertain, and inequitable and unreasonable; (3) that it is lacking in mutuality of obligation and remedy on the part of the wife; (4) that the description of the property to be conveyed is not sufficiently certain, nor is it sufficiently identified to satisfy the statute of frauds; (5) that the wife cannot contract with her husband concerning her property rights, nor can she sue him therefor, other than in an action for divorce and alimony. As a determination for appellee of any one of the questions just outlined must result in an affirm-

ance of the judgment, we will take them up and discuss and dispose of them in the order stated.

1. It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its abandonment and satisfaction will constitute a consideration to support a contract based upon that fact. *Clarke v. McFarland's Ex'rs*, 5 Dana, 48; *Brown v. Buford*, 3 B. Mon. 508, 39 Am. Dec. 477; 6 Am. & Eng. Ency. of Law (2d Ed.) 947, and cases. Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration. *Ford v. Crenshaw*, 1 Litt. 70; *Gaines v. Scott*, 3 Ky. Law Rep. 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state); and that, therefore there is nothing upon which to rest the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay

the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. *Gaines' Adm'x v. Poor*, 3 Metc. 303, 79 Am. Dec. 559; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce. *Gaines' Adm'x v. Poor*, supra. It is the policy of the law, because it has been found best for social happiness and progress, that the state of marriage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration, and as being not contrary to the policy of the law, a fortiori must be a contract between them under like conditions founded on the consideration of the restoration or preservation of the marital relation. See *Bishop on Marriage, Divorce & Separation*, section 1279. As said in *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from foregoing a wrong committed by the other." To same effect is the case of *Phillips v. Meyers*, 82 Ill. 70, 25 Am. Rep. 295. In *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurances and promises, she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It

is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife it is not only partially, but entirely, performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue." In addition to the foregoing, we think the principle is also sustained by the following authorities: *Smith v. Smith*, 35 Hun, 378; *Shepherd v. Shepherd*, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799. We are consequently of opinion that the contract was based upon sufficient consideration, and is not opposed to a sound public policy.

2. That the contract is definite, certain, fair, and equitable, we have no doubt. The wife agrees to abandon, and it is alleged has abandoned, her suit for divorce, and has forgiven its cause. She agrees to resume the wifely relation, and has done so in pursuance to the agreement. The husband undertook, besides his promise of a fulfillment of the conjugal duties, to convey to a named trustee one-third of all his property for the maintenance and education of their two children; it in event of their death to go to the wife. It also was provided for the management of the trust. The only serious criticism of the paper as to its indefiniteness or lack of equity, besides the matters of description and mutuality, which will be discussed further on, is the suggestion that it is unfair and inequitable to appellee to enforce a contract that may let into joint ownership with him in his property, and in his mercantile establishment, other persons probably not desirable, and whose interference would jeopardize, if not destroy, the value of his business. As to the real property, it not infrequently happens that it is owned jointly by persons of incompatible tastes. Yet we have never before heard it urged as a defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person, entailing probably a disastrous suit to sell the whole property because of its indivisibility. Those are questions that might properly influence one in determining whether he will sell an undivided interest in his property. But, after he has contracted to do so for an adequate consideration, we perceive no reason why equity should relieve him from a specific execution of his contract on such a ground. Upon the face of the contract, it does not appear to us to be unfair. It settles upon the wife's children, certainly, no more than the allegations of her petition show would probably have been set apart to her as alimony, had she prosecuted her suit. That she saw proper to have this sum set-

tled on her children, instead of upon herself, is not a ground for objection by appellee.

3. It is very earnestly argued that the contract should not be enforced because of lack of mutuality in obligation and in remedy. It is asserted by appellee that, before a contract will be specifically enforced in equity, it must not only be reasonable and practicable, and supported by an adequate consideration, and be certain and definite in regard to the property to be conveyed, but it must be mutually binding upon the parties, and the remedy for its enforcement must also be mutual to the parties. It is the latter condition that we now address ourselves to. We concede the correctness of appellee's proposition. Yet it may be satisfied with less than an ideal fulfillment of its full text. For example, it is generally held that, under the statutes of frauds and perjuries, where the contract is not in writing, if one party, relying on the agreement, and induced thereby, has executed his part of the contract, the other party may be compelled to perform, or to respond in damages if specific performance is withheld. Not to do so would be to make the statute enacted to prevent frauds an instrument for effectuating a fraud. To examine minutely that part of the agreement bearing on this question, we again quote from it: "Whereas, the said Max and Birdie Moayan are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day mutually agreed to forego their differences, and to be reconciled and live with each other as husband and wife after the full execution of this agreement: Now, in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayan, in order to insure a sufficient estate for them, and for their maintenance, education, and support and future welfare: Now, in consideration of the love and affection which the said Max Moayan bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid," etc. We have not rested this contract on the consideration of the "love and affection" of the father to his children (though it seems that might alone have been sufficient in this state), any more than upon the \$1 recited as having been paid. In the case of an executed contract, reciting several matters as constituting the consideration, if any one of them is sufficient, probably that would satisfy the inquiry. But in an executory contract, the execution of which is resisted by one of the parties, the inquiry should embrace all the matters recited as the consideration, because we cannot say that the complaining party would have entered into the contract in the absence of any of the matters recited as the moving consideration for his action. The consideration of this contract may be thus stated: (a) The mutual agreement to forego differences; (b) the mutual agreement to be reconciled;

(c) the mutual agreement to live with each other as husband and wife; (d) love and affection of the husband for his children; (e) \$1. The last two are not questioned. Appellant Mrs. Moayon did forego the cause of their difference. That part of the contract is unquestionably executed. She did become reconciled to appellee. That is executed. The only remaining part of the contract is (c) "the mutual agreement to live with each other as husband and wife after the full execution of this agreement." The parties saw proper to anticipate the time of execution of this clause of the contract, and resumed their living together before the full execution of the agreement. This was necessarily by mutual consent, and neither party can take advantage by complaint of that act. The case is rested, however, on this point, upon the argument by appellee that the contract contemplated not merely going back to their former relation, but permanently continuing in it; that the wife's undertaking on this score cannot be fulfilled short of the death of one of the parties, for, so long as they both live, she might leave him. It is then argued that, so long as she owes him any part of this undertaking (i. e., to live with him as his wife), it is a duty that could not be enforced against her by the court; that no civil court ever has attempted to compel two people to so live together, no matter which was in fault. Therefore it is claimed there is lacking that mutuality of remedy necessary to the enforcement in equity of this contract. Marriage contracts and marriage articles have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation,—to live together as husband and wife,—in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain property or money. If they, in pursuance of the agreement, did marry and live together as husband and wife, the contract has been considered always as executed, so far as that part of the undertaking was concerned. It has been held that neither misconduct of a party after marriage (Moore v. Moore, 1 Atk. 272; Sidney v. Sidney, 3 P. Wms. 269; Seagrave v. Seagrave, 13 Ves. Jr. 439; Fisher v. Koontz, 110 Iowa, 498, 80 N. W. 551), nor the subsequent divorce of the parties, in the absence of some term in the contract providing against such contingency, or of some statutory regulation of the subject, affect the validity of the marriage settlement (Evans v. Carrington, 2 De Gex, F. & J. 481; Barclay v. Waring, 58 Ga. 86; Babcock v. Smith, 22 Pick. 61; Child v. Pearl, 43 Vt. 224). Bonds for the payment of money have been enforced upon the executed consideration of marriage. Smith v. Patterson, Cheves, Eq. 29; Ancker v. Levy, 3 Strob. Eq. 197; Logan v. Wienholt, 1 Clark & F. 611. The

promise of a woman to marry a man was held a sufficient and valuable consideration to support his deed to her, where it appeared that she had been prevented from executing the promise without her fault, but by his death. Smith v. Allen, 5 Allen, 454, 81 Am. Dec. 758. The marriage contract (that is, the agreement to marry) is complete and executed when the parties to it have entered into the married relation in the manner required by statute. Undoubtedly every valid marriage contemplates that the parties shall live together as husband and wife "till death them do part." In a case like the present one the agreement to live together as husband and wife could include nothing more on this point than the original vows of matrimony did. To say that marriage was not an execution of that part of a marriage settlement between a man and a woman, competent to marry, as would require the performance of the other undertakings in the settlement, would be to practically destroy that which for time out of mind has been regarded as a subject of such contracts, for it would necessarily postpone the execution of the remaining part of such contracts till the death of one of the parties; thereby substantially destroying their value, in many instances, to the party benefited, and intended to be protected by them. We must hold, in reason and under the authorities, that this feature of the contract under consideration was executed by the resumption of the parties of the marital relation and duties. What relief appellee would be entitled to, as to a restoration of the property, or some part thereof, if Mrs. Moayon should subsequently abandon him without cause, is a question we do not determine.

4. Does the contract sufficiently describe the property to be conveyed? The description in the contract is: "One-third of all his [appellee's] estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him." Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property concerning which a contract is made, to identify it. As said in Warvelle on Vendors, vol. 1, section 96: "While an unequivocal description, giving location, area, and boundaries, is a literal and perfect observation of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts or other instruments by means of which the land can be ascertained with sufficient certainty." The ideal, perfect description is preferred. But we cannot compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing

them when lawful and practicable. It is not necessary, then, that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract, or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: "All the other estate otherwise acquired or owned by me." In *Warvelle on Vendors*, sec. 135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me." The following descriptions have been held sufficient: "My lot on the plat in the town of S., on the plat of said town, on the river bank" (*Colenck v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505); the "Snow farm" (*Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536); "H.'s place at S." (*Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87); the "Knapp home property" (*Goodenow v. Curtis*, 18 Mich. 298); an agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson*, 85 Ala. 53, 3 South. 758; *Towle v. Carmelo Land & Coal Co.*, 99 Cal. 397, 33 Pac. 1126; *Doctor v. Hellberg*, 65 Wis. 415, 27 N. W. 176). In all such cases parol evidence was admitted not to identify, but to designate, the subject-matter, already identified in the minds of the parties, in the language of the contract when read in the light of the facts. In this state, in *Overstreet v. Rice*, 4 Bush, 3, 96 Am. Dec. 279, the expression, "We have swapped farms," naming the terms, but without further description of either farm, was held sufficient, after the parties had themselves identified the lands intended to be affected, by taking possession of them. In *Ellis v. Deadman's Heirs*, 4 Bibb, 466, the writing was: "4 January, 1808. Received of Jesse Ellis \$—, in part pay for a lot he bought of me in the town of Versailles; it being the cash part of the purchase of said lot. Nathan Deadman." This court said: "Had the receipt specified the terms of the agreement, there would have been no doubt of the propriety of decreeing the specific execution." It is as essential that the terms be specified as the description of the property. "Ten acres adjoining him on the north," in a bond for title to land of the vendor adjoining the vendee, was held sufficient in *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114. In *Henderson v. Perkins*, 94 Ky. 211, 21 S. W. 1035, the description was, "my home place and storehouse." It was held sufficient, on the authority of *Ellis v. Deadman's Heirs*, supra, and *Hanly v. Blackford*, supra. In the case of *Varnum v. State*, 78 Ala. 28, the description was: "My

entire crop of every description, raised by me, or caused to be raised by me, annually, till this debt is paid." While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was, by the statutes of frauds, required to be in writing. Concerning that description that court said: "It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification." Parol evidence cannot be introduced to vary, enlarge, or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, "That is certain which can be made certain." In this case it has been said, "all" means all. "All of my land" is a description, by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract.

5. It is true that, by the common law, contracts between husband and wife were void. Yet equity recognized numerous instances in which the parties had peculiar property rights which they were allowed to personally control, and to make contracts concerning. It would be an anomaly and a reproach to the law to say that it recognizes a legal property right in one, to whom all the doors of every court were closed. Therefore it was early held (*Story's Eq. Jur.* 1372) that, although contracts between husband and wife are void at law, they are not always so in equity. This court has repeatedly affirmed the same doctrine. In *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605, it was said: "Generally, if a contract between husband and wife merely be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity." This case was followed in *Bohannon v. Travis*, 94 Ky. 59, 21 S. W. 354. In *Ward v. Crotty*, 4 Metc. 59, it was affirmed that the husband's contract with the wife would be spe-

cifically enforced against him in equity, without the intervention of a trustee. This has been adhered to in *Maraman's Adm'r v. Maraman*, 4 Metc. 89, and *Campbell v. Galbreath*, 12 Bush, 459. It is further re-enforced by legislative enactment looking to the same end, viz., section 34 of the Civil Code, as follows: "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property, and in actions for personal suffering of or injury to her person and character, in which he refuses to unite, she may sue or be sued alone." The wife may maintain her action.

It follows that the judgment must be reversed, and the cause is remanded for further proceedings not inconsistent herewith.

STATE v. REYNOLDS.

(Supreme Court of Missouri, Division No. 2.
Feb. 3, 1903.)

MURDER — SELECTING JURY — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — INFORMATION.

1. Where, on a trial for murder, 40 persons from the venire summoned were found, on their voir dire, competent to sit as jurors, from whom the 12 were selected as a traverse jury, the failure of the court to accept on the list of 40 some of those summoned, whom defendant would have preferred to others who were accepted, was not error.

2. Where there was evidence that shortly before the homicide there was an exchange of shots between defendant and his companions, on one side, and deceased and his companion, on the other, and thereafter shots were again exchanged, when deceased was killed by a bullet from defendant's gun, and, under the instructions of the court, it was immaterial who fired the first shot on the first occasion, the real question being who shot first when the second shooting began, the refusal of a motion for new trial on the ground of newly discovered evidence, consisting of a statement made after the trial by the companion of deceased that deceased and himself fired on defendant first in the first instance, was not error, especially when the making of such statement was disputed.

3. An information by the prosecuting attorney charging that the defendant "therefore at said county, to wit, on the 1st day of January, 1902, did feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, assault and kill, with a Winchester rifle, — a dangerous and deadly weapon, — one W., " is in accordance with the most approved forms of indictments for murder in the first degree, and not subject to the objections that "it charges no offense, and is so vague, ambiguous, and uncertain that it does not inform the defendant of the offense of which he is charged."

Appeal from circuit court, Webster county; Argus Cox, Judge.

J. M. Reynolds was convicted of murder in the second degree, and appeals. Affirmed.

S. N. Dickey and Harrington & Wadlow, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. On the 11th day of February, 1902, the prosecuting attorney of Web-

ster county filed in the office of the clerk of the circuit court of said county an information, under his official oath, charging that the defendant, J. M. Reynolds, theretofore, at said county, to wit, on the 1st day of January, 1902, did feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, assault and kill, with a Winchester rifle, — a dangerous and deadly weapon, — one Willis Gale; and charging his two sons, Zeb Reynolds and Barney Reynolds, with being accessories before the fact. At the March term, 1902, of said court, the defendants were put upon trial. The defendants Zeb Reynolds and Barney Reynolds were found not guilty and the defendant J. M. Reynolds was convicted of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the penitentiary. From the judgment and sentence he appeals.

The facts, briefly stated, are that, at the time of the homicide, Gale, the deceased, owned a large tract of land in Webster county, upon which he, with his family, had resided for several years before the difficulty. A part of this land he had leased to Zeb Reynolds, a son of appellant, who was occupying it, and cultivating part of it, and cutting the timbers from another tract. Defendant J. M. Reynolds lived on a farm adjoining the Gale farm but on the opposite side of the farm from the part leased by the son. For convenience of all parties and neighbors to pass across the Gale land, a gate was erected at the foot of a hill on this land. It appears that a dispute arose between Reynolds and Gale concerning the leased land, and Gale posted notices forbidding hunting and trespassing. These notices were always torn down almost as soon as put up. Deceased then gave defendant, who had become sublessee in the land leased, written notice of his intention to terminate the lease on January 1, 1902, and directing him to move all of his crops and other property off of said land by that time. Defendant paid no attention to the notice, and on the afternoon of January 1, 1902, Gale closed the gate on the passway leading to his land leased by defendant and his sons, and locked it. He then kept watch on the gate, going there two or three times that afternoon. Zeb Reynolds lived on the opposite side of the Gale farm from his father. On the evening of January 1, 1902, he, with his team and wagon, started to his father's, going through the field. On coming to the gate, and finding it closed and locked, he turned back, and went around by the public road. Later on the same day he left his father's to return home, taking with him his two brothers. They each carried a shotgun or rifle, and drove direct through the field. On reaching this gate they removed some poles, broke the lock, and were about to drive through. At this time they heard some voices on the hillside near them, and, after a hasty consultation, decided to fire upon those whom they could

dimly see through the darkness, which they did. Gale and his farm hand, John Barnard, had gone to the gate to see if it was still undisturbed, and, while there, heard the Reynoldses coming, and retreated to the hillside, where they were fired upon. Barnard carried a shotgun, and Gale carried a 22-caliber target rifle and a 22-caliber pistol. With these they returned the shots, and several shots were exchanged. The state's contention was (and it was fairly well proved) that defendant was with his sons all the time; but defendant contended that he remained at home, and, on hearing the shots, took his Winchester rifle and hurried to the scene. The state contended and proved that the firing, after ceasing for some minutes, was again renewed, by the Reynoldses firing the first shots, as they had done in the first instance. Defendant contended that when he reached the scene he halted at the gate, where he was fired upon from the hillside. It was during this second encounter that Gale received a bullet shot from the Winchester rifle which struck him in the abdomen and passed entirely through his body. After Gale fell, he was fired upon several times. Reynolds then left the scene. Barnard went for the wounded man's wife and some neighbors, who came and carried Gale home, where he died before daylight next morning. Defendant was arrested at his home next morning. At the trial, defendant contended that Barnard and Gale made the first assault, and that he fired in self-defense and in the defense of his sons. The court instructed for murder in the first and second degrees, and on self-defense of defendant and on the defense of his son. We have not been favored with an argument or brief on the part of defendant in this case, and shall have to be governed in a great measure, in passing upon the record, by the errors complained of in the motions for new trial and in arrest.

The first error assigned in the motion for a new trial is the action of the court in rejecting from the venire summoned from which 40 persons competent to sit as jurors upon the trial of the cause were to be, and in fact were, found, upon their voir dire examination to be so qualified, from which 12 were to be selected as a traverse jury to sit in judgment upon the case. It is not asserted in the motion that the panel from which 12 jurors were to be selected as a traverse jury to sit in judgment on the case was not composed of 40 qualified jurors, but it seems that there were persons summoned on the venire in the first instance, who were not accepted by the court, whom defendant would have preferred to others that were accepted; but all that defendant was entitled to was a panel of 40 qualified jurors, from which to make his challenges, and this he had. He had no right to say that the panel should be, in whole or in part, composed of any particular person or persons; hence there was no error in this regard.

It is asserted that the court erred in permitting the state to introduce incompetent, irrelevant, and inadmissible testimony, and in excluding competent and material testimony offered by defendant; but, after a careful examination of the record, we have been unable to discover any ruling of the court which would justify either contention.

It is also said in the motion that the court erred in giving improper instructions to the jury over objections of defendant. The instructions are in form often approved by this court, and, in so far as the appellant is concerned, free from error, and all that he could have desired.

Another assertion in the motion is that the court failed to instruct the jury upon the law applicable to the case, but we are not advised in what particular it failed to so instruct, nor have we the remotest idea. This contention is therefore untenable.

The verdict of the jury was not only well warranted by the evidence, but it is difficult to see how they could have arrived at any other conclusion, under the evidence and the instruction of the court, than that of the guilt of the defendant.

It is also claimed that the court should have granted the defendant a new trial upon the ground of newly discovered evidence. As shown by the affidavits in support of this motion, the alleged newly discovered evidence is that one John Barnard, a witness for the state, after testifying in the case, and while it was being argued, said that deceased and himself fired on defendant first in the first instance, and this contradicted the statement made by him while on the witness stand with respect to the same matter. There were, however, affidavits presented by the state which contradicted the matters set forth in the affidavits filed by defendant. It is clear that the statements of the witness in question were with respect to the first shooting, which, under the instructions of the court, were entirely immaterial; the real question being who shot first when the second shooting began, or when the shooting was renewed. The evidence was, in the first place, immaterial; and, in the second place, it is not probable that a different result would have been produced had a new trial been granted. *State v. Miller*, 144 Mo. 26, 45 S. W. 1104; *State v. Ray*, 53 Mo. 349; *State v. Rockett*, 87 Mo. 666; *State v. Butler*, 67 Mo. 59; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443. And under such circumstances, there was no error in overruling the motion on that ground.

The information is challenged in the motion in arrest upon the grounds that it charges no offense, and is so vague, ambiguous and uncertain that it does not inform the defendant of the offense of which he is charged; but it is apparent, from a casual reading of the information, that neither of these positions is well taken. The information is in accordance with the most approved forms of

indictments for murder in the first degree, and is not subject to the objections urged against it in the motion in arrest, but is well enough.

For these intimations, the judgment is affirmed. All concur.

KNOLLENBERG v. NIXON et al.

(Supreme Court of Missouri. Jan. 26, 1908.)

DEED OF TRUST—FORFEITURE OF LIEN—REFUSAL OF TENDER.

1. Tender of the amount due, secured by a deed of trust, though refused, does not forfeit the lien of the deed of trust, but only stops the running of interest, unless the tender is kept up, which amounts to payment of the debt.

In banc. Appeal from circuit court, Laclede county; L. B. Woodside, Judge.

Suit by F. W. Knollenberg against J. P. Nixon and another to have the lien of a deed of trust declared released. Judgment for defendants. Plaintiff appeals. Affirmed.

J. J. Henderson and E. B. Kellerman, for appellant. J. P. Nixon, for respondents.

BURGESS, J. On the 8th day of April, 1892, one Clara B. Hoagland was the owner of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 11 in township 33, range 18, in Laclede county, at which time she was indebted to one Augustus Craemer in the sum of \$200, evidenced by her three promissory notes of that date,—one for the sum of \$50, due January 1, 1893; one for the sum of \$50, due August 1, 1893; and one for \$100, due January 1, 1894; all bearing interest at the rate of 8 per cent. per annum from date. And for the purpose of securing the payment of said notes, Clara B. Hoagland (her husband, S. G. Hoagland, joining with her) on the 8th day of April, 1892, made and executed to one M. F. Kellerman, as trustee for the use of said Craemer, a deed of trust on said land to secure their payment. On the 7th day of September, 1894, Clara B. Hoagland and her husband conveyed said land to M. M. Phillips, subject to said deed of trust to Kellerman, and for the balance of the purchase money, to wit, \$60, M. M. Phillips on the same day made, executed, and delivered to S. G. Hoagland his promissory note, due one year after date, with interest from maturity at 8 per cent. per annum, and, to secure the payment thereof, made, executed, and delivered to one W. I. Wallace, as trustee for the use of said Hoagland, a deed of trust dated September 14, 1894, on said land, which said deed of trust was duly recorded in said county. It specified that it was subject to the deed of trust made to Kellerman. Said M. M. Phillips having failed to pay the said last-mentioned note when the same became due, and the conditions in said deed being broken, at the request of the legal

holder and owner of said note said W. I. Wallace, trustee, advertised said land for sale under said deed of trust according to the terms thereof, and on the 25th day of October, 1895, sold said land; and John J. Henderson, being the highest and best bidder, became the purchaser thereof, and received a deed therefor from said trustee, which was duly recorded in the records of file of said county. In the meantime the defendant James P. Nixon had by transfer become the holder and owner of said three notes executed by said Clara B. Hoagland to said Augustus Craemer; and the defendant Harvey Bowman, to wit, on the 27th day of February, 1897, had purchased of A. M. Phillips, widow of M. M. Phillips, her equity rights in said land, receiving a quitclaim deed therefor, in which it is provided, "This deed is made subject to a deed of trust of \$200.00 (two hundred dollars), which grantee assumes." On the 20th day of December, 1898, said John J. Henderson and wife sold and conveyed said land to the plaintiff, Frederick W. Knollenberg, by deed, subject to the deed of trust from Clara B. Hoagland to Augustus Craemer for \$200, in which said deed it is recited that "the party of the second part [Knollenberg], on the accepting this deed, agrees to assume the payment of a mortgage to the amount of two hundred dollars in favor of J. P. Nixon, and one year's interest on same." Payments on said notes so held by respondent Nixon as assignee had been made from time to time as follows: By Clara B. Hoagland, the interest of said notes up to September 7, 1894. By M. M. Phillips, \$10 November 25, 1895; \$15 December 21, 1895; \$10 September 5, 1896. And by the defendant Harvey Bowman, the sum of \$100. After plaintiff became the owner of said land, he being a resident of Quincy, Ill., he addressed several letters to defendant Nixon, with notice to "return if not called for" on the back thereof; requesting him to furnish him the amount of the principal and interest due on said notes, as he desired to pay them off and clear up the title to said land. To these inquiries, Nixon made no reply. The evidence shows that, shortly after J. J. Henderson became the purchaser of said land, he addressed similar inquiries to said Nixon, informing him of his desire to pay off said debt and interest, and received no reply thereto. Afterwards, on the — day of February, Nixon, under an arrangement with said Bowman, knowing that this plaintiff, as well as said Henderson, was ready to pay off his incumbrance on said land, without their knowing anything about it, advertised it for sale under the Hoagland deed of trust, but advertised it to be sold by E. B. Kellerman instead of M. F. Kellerman. On the day the land was so advertised to be sold, the plaintiff, by his agent, J. J. Henderson, appeared, and after vainly applying to said Nixon for a statement of the amount

¶ 1. See Mortgages, vol. 35, Cent. Dig. §§ 334-337.

of principal and interest due on said notes, and announcing his wish to pay off the same, he then and there made to said Nixon, in the presence of said Bowman, a tender, and counted out and offered to pay him, in lawful money of the United States, the sum of \$296.25, in full payment of said notes and interest, and demanded the surrender of the same, and the release and discharge of said deed of trust; but said Nixon refused to receive the same and surrender said notes and cancel said deed of trust. It is not pretended by defendant but that the said sum of \$296.25 was in excess of the amount of principal and interest then due on said notes, but the excuse offered by Nixon for not accepting same was that he wanted his friend Bowman to have the benefit of the \$35 paid by Mrs. M. M. Phillips on the notes. The prayer of the petition is that the liens of said deed of trust on said land be declared to be released; that in the meantime said defendants be restrained and enjoined from exposing said land to sale under said deed of trust; and for such other and further orders, judgments, and decrees in the premises as the facts demand, and for general relief. The trial resulted in a judgment in favor of defendants, from which plaintiff, after motion for new trial being presented and overruled, appealed.

As J. J. Henderson acquired all of the equity of M. M. Phillips in the land in controversy by purchase at the sale made by W. I. Wallace, trustee, on the 25th day of October, 1898, and had the legal title to said land, subject to the deed of trust then held by defendant Nixon, when Knollenberg purchased from him (Henderson). It was subject to said deed of trust; and he had the right to pay off the debt and interest to defendant Nixon, who then held the notes secured by it, and have the land released from the mortgage lien. There can be no question with respect to the right of Phillips to redeem the land at any time before its sale under the deed of trust, and, as plaintiff acquired his interest in the land, he acquired the same right that Phillips had. *Lapsley v. Howard*, 119 Mo. 488, 24 S. W. 1020; *Wolz v. Parker*, 134 Mo. 459, 35 S. W. 1149. And the evidence showed that plaintiff, before the institution of this suit, tendered to defendants, Nixon and Bowman, who then held the notes as owners thereof, more than the amount that was due upon them, and demanded the release of the deed of trust, but that they refused to accept the tender unless it was increased to a sufficient amount to include \$35 claimed to have been paid by Mrs. Phillips for the benefit of defendant Bowman. The evidence, however, to support this claim, was very unsatisfactory, and was ignored by the court in estimating the amount due upon the notes at the time of the trial, which was held by it to be sufficient to cover debt, interest, and costs in advertising the land for sale. The

question, then, is with respect to the effect of the tender upon the lien of the deed of trust upon the land; that is, whether it released the lien, or only stopped the running of interest on the notes secured by it.

In *Thornton v. National Exchange Bank*, 71 Mo. 221, it was held by this court, in a per curiam opinion, that the release of a deed of trust given to secure the payment of one-half of several notes held by different persons, executed by the mortgagor's husband and another person, to secure whose liability a similar deed of trust was also given, is discharged as to one of such notes by the unaccepted tender of half of the amount of such notes. That case is cited with approval in the subsequent case of *McClung v. Trust Co.*, 137 Mo. 106, 38 S. W. 518, and in *Campbell v. Seeley*, 38 Mo. App. 298. See, also, *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37. But as to whether or not a tender of the amount due upon a debt secured by a deed of trust or mortgage upon real estate made after the debt becomes due, and before sale of the property under such deed of trust, releases the mortgage lien, or not, the authorities are in great conflict. At common law the rule is that such tender does not discharge the mortgage lien, but stops the running of interest upon the debt from that time. 13 Am. & Eng. Ency. of Law, 873; 1 Jones, *Mortgages* (4th Ed.) sec. 892; 1 *Pingrey on Mortgages*, sec. 1112; *McClung v. Trust Co.*, 137 Mo. 106, 38 S. W. 578, and authorities cited; *Hudson v. Glencoe Gravel Company*, 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722. But as a general rule, in those states where the mortgage is only a lien, as in this state, the mortgagee, after condition broken, may recover in ejectment the mortgaged land, if the debt, interest, and costs be not paid before judgment, yet when paid or tendered, even after suit brought if before judgment, the lien is extinguished, and operates to defeat his right to the possession, and no reconveyance is necessary in order to reinvest in the mortgagor the title or right to the possession. When the tender is made, the mortgagee's right to the possession is terminated. *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Potts v. Plaisted*, 30 Mich. 149; *Van Husan v. Kanouse*, 13 Mich. 303; *Caruthers v. Humphrey*, 12 Mich. 270; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Bailey v. Metcalf*, 6 N. H. 156; *Robinson v. Leavitt*, 7 N. H. 73; *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121; *McCellan v. Coffin*, 93 Ind. 456; *Potts v. Plaisted*, 30 Mich. 149. In *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145, it is said: "The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance, and that, payment being ac-

tually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is that tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. *Colt v. Houston*, 3 Johns. Cas. 243; *Raymond v. Beardon*, 12 Johns. 274; *Dunham v. Jackson*, 6 Wend. 22; *Hunter v. Le Conte*, 6 Cow. 728; *Coggs v. Bernard*, 2 Ld. Raym. 916. Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true, has been sufficiently shown. It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt, and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing, and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing that any inconvenience can possibly arise. But whatever may be the consequences of refusal, the creditor may justly charge them to his own folly." The question was first before this court in *Olmstead v. Tarsney*, 69 Mo. 399, wherein it is said: "A tender by the debtor to the mortgagee on the law day will undoubtedly discharge the lien of the mortgage; and it has been repeatedly held that a tender by the debtor to a mortgagee of the amount of his debt after the law day, or at any time before foreclosure, will discharge the lien of the mortgage." But in *Hudson v. Glencoe Gravel Co.*, 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722, it was held that a tender after maturity of the debt secured by deed of trust on land does not extinguish the lien. The same general rule was announced in *McClung v. Trust Co.*, 137 Mo. 106, 38 S. W. 578. *Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359, goes further, and holds that, in order to defeat the lien of a mortgage, the tender must not only be made, but must be kept up. That action was not, however, for the purpose of declaring a mortgage lien forfeited, but was for the purpose

of having declared paid a note for the sum of \$15,000 which plaintiff had executed to Saxton, and secured by deed of trust upon real property, and for which plaintiff sued to have declared paid, and the deed of trust satisfied, upon the ground that all of the debt and interest had been paid prior to the 10th day of June, 1881, except \$6,200, at which time plaintiff tendered to Saxton that sum,—being, as he claimed, the balance due on said note,—but which was refused by Saxton. The tender was not kept up. It was held that under section 1008, Rev. St. 1879, which provides that, "where a tender and no deposit shall be made as provided in the preceding section, the tender shall only have the effect, in law, to prevent the running of interest or accumulation of damages from and after the time such tender was made," the only effect of the tender, if sufficient in amount, was to stop the running of interest. The court said: "The tender cannot have the effect to deprive the defendant of his security created by the deed of trust for so much as may be found due at the time the tender was made. Authorities cited do say that, where a tender has been made of the amount due, it discharges the lien; still, without regard to the statute, a court of equity would not decree affirmative relief, such as the release or satisfaction of a mortgage or deed of trust, or other lien, without payment of the amount due at the date of the tender. A party who seeks equitable relief must do equity. Until plaintiff does make such payment, he cannot have the deed of trust declared satisfied, as prayed for in his petition. *Tuthill v. Morris*, 81 N. Y. 98; *Cowles v. Marble*, 37 Mich. 158. But so far as this case is concerned, the statute before quoted is conclusive, and, as before stated, the only effect of the tender was to stop the running of interest." To the same effect are *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Matthews v. Lindsay et al.*, 20 Fla. 962; *Cowles v. Marble*, 37 Mich. 158. In *Tuthill v. Morris*, 81 N. Y. 94, it is said: "A party coming into equity for affirmative relief must himself do equity; and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing; and, to entitle him to this relief, he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal, rather than on equitable, principles. The circumstance that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court

of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon. Even securities void for usury would not be canceled by a court of equity without payment of the debt, with legal interest, until by statute it was otherwise provided. This statute does not change the general principle of equity, but on the contrary, recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage." It thus appears that this court, with respect to the effect of a tender, after due, of a debt secured by a deed of trust or mortgage, adheres to the common-law rule,—that is, its only effect is to stop the running of interest on the debt from that time,—but that in pursuance of statutory enactment (sections 2937, 2938, Rev. St. 1889), and upon principles of equity, it has gone farther, and holds that, in order that the tender may extinguish the mortgage lien, it must be kept up (*Landis v. Saxton*, supra; *Hudson v. Glencoe Gravel Co.*, supra), which is practically much the same thing as a bill in equity by the mortgagor, or those holding under him, to redeem. It follows that there is no such thing in this state as the forfeiture of the lien of a deed of trust or mortgage by tendering the amount due which is secured thereby, although refused by the holder of the mortgage, but that the only effect of such tender is to stop the running of interest after that time unless the tender be kept up, which amounts to nothing more nor less than the payment of the mortgage debt, less the interest, from the time of the tender; for, if by the tender the lien is forfeited, it is forfeited *eo instante*, and cannot be reinstated by keeping up the tender.

The judgment is affirmed. All concur.

RITCHEY v. HOME INS. CO. et al.

(Court of Appeals at St. Louis, Mo. Feb. 8, 1903.)

ANSWER—DENIAL—INDEFINITENESS—PROCEDURE—WHEN CAUSE IS AT ISSUE.

1. Under Rev. St. 1899, § 604, providing that the answer of defendant shall contain a general or specific denial of each material allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and the statement of any new matter constituting a defense or counterclaim, an answer setting up several affirmative defenses, and concluding with the statement that, "further answering, defendant denies each and every allegation, matter, fact, and thing in the petition alleged not herein expressly admitted," is indefinite and uncertain, and subject to a motion on that ground.

2. An answer contained several affirmative defenses, and a general denial, defectively stated, and plaintiff moved to require defendant to make his answer more definite and certain by stating what allegations were admitted and

what denied. This motion was sustained, and defendant refused to plead further, and the court rendered judgment for plaintiff after hearing his evidence. *Held* that, as the motion to make more definite and certain only affected that part of the answer containing a denial, the affirmative defenses pleaded remained intact, so that plaintiff should have replied to these defenses, and the rendition of judgment on the *ex parte* hearing was before the cause was at issue, and erroneous.

Appeal from circuit court, Clark county; Edwin R. McKee, Judge.

Action by Elitha Ritchey against the Home Insurance Company and others. Judgment for plaintiff, and defendant company appeals. Reversed.

This is an action brought upon a policy of insurance, and in which, on motion of defendant insurance company, a portion of plaintiff's petition was stricken out, leaving remaining as plaintiff's declaration of her right of action the following: "Plaintiff, for cause of action, states that defendant Home Insurance Company was, on the 27th day of December, 1901, and for a long time prior thereto and ever since has been, and now is, a corporation duly organized, created, and existing under and by virtue of the laws of the state of New York; and as such corporation was, on said 27th day of December, 1901, and ever since has been, engaged in conducting a general fire insurance business in the state of Missouri, in accordance with the terms and provisions of the general fire insurance laws of the state of Missouri. Plaintiff further says that said defendant Home Insurance Company, by its contract and policy of insurance No. D. H. 148, dated on the 27th day of December, 1901, duly signed by its president and secretary, and countersigned by J. A. Whiteside, its local agent, at its Kahoka, Missouri, agency, and delivered to plaintiff, in consideration of a cash premium of twenty dollars, paid by plaintiff to defendant Home Insurance Company, defendant Home Insurance Company did contract, promise, and agree with plaintiff to insure plaintiff against all loss or damage by fire to the amount of two thousand dollars on the following described property, then owned by plaintiff, to wit: \$300 on the two-story frame building with shingled roof, and its additions adjoining and communicating, occupied as a dwelling house, including foundations, gas and water pipes and connection, gas fixtures and electrical equipments, plumbing work, stationary heating apparatus, door and window screens, storm doors and windows, and all other permanent fixtures belonging thereto and contained therein. \$100 on the shingle-roof frame building and its additions, including foundations, occupied as a private barn. \$1,500 on the shingled-roof frame building and its additions, including foundations, occupied as a private barn. \$50 on grain in barns above described. \$50 on hay in barns above described. Plaintiff further says that in said

policy of insurance all of the buildings and property aforesaid were erroneously described as being situate on 17-acre lot in sections 18 and 19, township 65, range 7, in Clark county, Missouri, adjoining the city of Kahoka, when in truth and in fact said 17-acre lot mentioned and described in said policy of insurance as adjoining said city of Kahoka was then and now is partly within the corporate limits of said city of Kahoka, and the buildings insured under and by said policy of insurance were situate upon that part of said 17-acre lot which lies within the corporate limits of said city of Kahoka, except the shingled-roof frame building and its additions, including foundation, occupied as a private barn, and insured under and by said policy of insurance for the sum of fifteen hundred dollars, which is situate partly within the corporate limits of said city of Kahoka, on the aforesaid 17-acre lot. Plaintiff further says that at the time of the insurance and delivery of said policy of insurance to said plaintiff it was intended by defendant Home Insurance Company to insure, and by the plaintiff to have insured, the buildings and property situate on 17-acre lot in sections 18 and 19, township 65, range 7, in Clark county, Missouri, in and adjoining said city of Kahoka, and plaintiff avers the fact to be that at the time of the issuance and delivery of the aforesaid policy of insurance defendant Home Insurance Company knew that said 17-acre lot was partly situate within the corporate limits of said city of Kahoka, and that the buildings and property thereon were situate upon that part of said 17-acre lot which lies within the corporate limits of said city of Kahoka, except the shingled-roof frame building and its additions, including foundation, occupied as a private barn, and insured under and by said policy of insurance for the sum of fifteen hundred dollars, which is partly situate within the corporate limits of said city of Kahoka, on the aforesaid 17-acre lot. Plaintiff further says that it was provided in said policy of insurance, by indorsement made thereon in writing, that in the event of a loss occurring thereunder such loss should be payable to Peter Wahl, mortgagee, as his interest therein might appear, that at the time of the issuance and delivery of said policy of insurance to plaintiff it was believed by plaintiff, and so represented to defendant Home Insurance Company by plaintiff, that said Peter Wahl had an interest in the aforesaid property as mortgagee, but plaintiff says that she was mistaken in her belief concerning the interest of said Peter Wahl in the aforesaid property, and avers the fact to be that at the time of the issuance and delivery of the aforesaid policy of insurance to plaintiff, and at all times thereafter, said Peter Wahl had no interest in the aforesaid property or said policy of insurance as mortgagee or otherwise. Plaintiff further says that on the 4th day of January, 1902, de-

fendant Home Insurance Company, by its instrument of writing attached to said policy of insurance and made a part thereof, consented that barn number two therein insured for fifteen hundred dollars might be occupied by a careful tenant. Plaintiff states that said policy of insurance was issued for a term of one year, commencing at noon on the 27th day of December, 1901, and terminating at noon on the 27th day of December, 1902, which said policy of insurance is herewith filed, and made a part of this petition, and marked 'Exhibit A.' Plaintiff further states that at the time of the issuance and delivery of the aforesaid policy of insurance, and at all times thereafter to the time of the fire hereinafter mentioned, she was the owner in fee of all the property mentioned and described in said policy of insurance and insured therein. Plaintiff states that at about the hour of one o'clock a. m. on the 22d day of January, 1902, during the life of said policy of insurance, and while the same was in full force and effect, the shingled-roof frame building and its additions, including foundations, occupied as a private barn, and insured in said policy of insurance for and in the sum of fifteen hundred dollars, and then and there owned by plaintiff, was wholly, totally, and entirely destroyed by fire, then and thereby causing a loss and damage to plaintiff in the sum of fifteen hundred dollars. Plaintiff further states that by the terms and provisions of said policy of insurance defendant Home Insurance Company did promise, contract, and agree with plaintiff to make good and pay to her all such loss or damage to the property therein insured as should happen there-to by fire during the life of said policy of insurance. Plaintiff states that she has duly kept and performed all of the conditions required to be kept and performed by her by the terms and provisions of said policy of insurance, and faithfully fulfilled all of the requirements thereof; that immediately after the loss by fire as aforesaid she caused notice thereof to be given to defendant Home Insurance Company, and requested of said defendant Home Insurance Company such blank forms of statement and proofs of loss as defendant Home Insurance Company might desire to have filled out by plaintiff concerning the aforesaid loss by fire; that defendant Home Insurance Company disregarded and ignored her said request, and failed and refused to furnish plaintiff with blank forms and statements and proofs of loss so requested by her of defendant Home Insurance Company. Plaintiff further states that on the 14th day of February, 1902, defendant Home Insurance Company notified plaintiff in writing that it, the said Home Insurance Company, denied any and all liability under said policy of insurance, and refused to pay plaintiff, and still refuses to pay plaintiff, the amount of her claim under said policy of insurance on account of her

aforesaid loss by fire; that by reason of the premises plaintiff says she is damaged in the sum of fifteen hundred dollars. Plaintiff further states that Peter Wahl is made a party defendant herein in order that his interest, if any, in the property insured under said policy of insurance, and his interest, if any, in said policy of insurance, may be determined and adjudged in this suit. Wherefore plaintiff prays judgment against defendant Home Insurance Company for the amount of her claim and damages under said policy of insurance, to wit, the sum of fifteen hundred dollars," etc. After defendant's motion to strike out part of plaintiff's petition was sustained by the court, by leave the answer of the defendant Home Insurance Company, as follows, was filed: "Defendant, for answer to plaintiff's petition, admits that it made the policy of insurance sued upon. Further answering, defendant alleges that it is provided in said policy, among other things, as follows: 'If the interest of the assured be or become other than the entire, unconditional, and sole ownership of the property, and if the buildings insured be on ground not owned by the assured in fee simple, then in all such cases this policy shall be void, unless otherwise provided by agreement indorsed hereon.' Defendant alleges that at the time said policy was issued and at the time of the fire the interest of the assured was other than entire, unconditional, and sole ownership of the property, and the said building insured stood on ground not owned by the assured in fee simple without provision by agreement indorsed on said policy, by reason whereof defendant says plaintiff is not entitled to recover. Further answering, defendant alleges that at the time said policy was applied for the said assured falsely stated and represented that said building was worth largely more than \$1,500, and that it was the intention of the assured to make material repairs to said building, so that the same would be placed in good condition; that at the time said policy was applied for and issued defendant was not familiar with the value or condition of said building, which fact plaintiff well knew; that insured, for the purpose of cheating and defrauding defendant, falsely represented that said building was of the value of \$1,500, and falsely represented and stated that it was the intention of insured to make material repairs to said building; that defendant, in issuing said policy, relied upon said representations; that the same were material; that said representations were false and untrue in this: That said building was not worth \$1,500, but did not exceed in value the sum of \$400; that it was not the intention of plaintiff to make repairs on said building, and put the same in good condition, and plaintiff did not, after said policy was issued, at any time make repairs thereon. By reason whereof defendant says plaintiff is not entitled to

recover. Further answering, defendant alleges that said building was insured as a private barn, and was to be occupied by careful tenant; that after said policy was issued, and without the knowledge of defendant, said building, or a portion thereof, was used as a creamery, whereby the risk of loss by fire was greatly increased, of which fact plaintiff had knowledge, so that defendant says plaintiff is not entitled to recover. Further answering, defendant alleges that at the time said policy was issued, and at the time of the fire aforesaid, said property described in said policy was incumbered by a deed of trust to secure the sum of \$6,672, which said deed of trust was in full force, and not satisfied, at the time of the fire aforesaid; that when said policy was issued, and ever afterwards previous to the fire, the plaintiff concealed from defendant the fact that said incumbrance existed upon said property; that said fact so concealed was material fact with reference to said risk; that, if defendant had known of the existence of said deed of trust, it would not have issued said policy. By reason whereof defendant says plaintiff is not entitled to recover. Further answering, defendant alleges that it now here offers to refund to plaintiff, and tenders into court for plaintiff, the premium paid on said policy, to wit, the sum of \$20, and asks, on account of the fraud and misrepresentations of plaintiff hereinbefore stated, that said policy be canceled, and for naught held. Further answering, defendant denies each and every allegation, matter, fact, and thing in the petition alleged, not herein expressly admitted, and, having fully answered, asks to go hence with its costs." Plaintiff then filed the motion following: "Now comes the plaintiff herein, and moves the court to require defendant Home Insurance Company to make its answer herein more definite and certain, by stating what allegations of the petition are admitted and what allegations are denied." Defendant Peter Wahl appeared and answered, claiming an interest in the property insured as mortgagee, but asserted no claim to the proceeds of the policy sued upon, and denied generally all other allegations of the petition. Plaintiff's motion was sustained by the court, and the defendant insurance company elected to stand upon its answer, refused to plead further, and, after evidence offered by plaintiff had been heard, the court rendered judgment for plaintiff in accordance with the prayer of her petition.

Fyke Bros., for appellant. W. T. Ruth-
erford, for respondents.

REYBURN, J. (after stating the facts). The form of answer permitted under the Code is set forth in section 604 of the Revised Statutes of 1899, which provides what the answer may contain in the following language: "The answer of the defendant shall contain: First, a general or specific denial

of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition." Section 607 provides that, where the answer contains new matter, the plaintiff shall reply to such new matter, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof sufficient to form a belief, and may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the petition, constituting a defense to the new matter. Section 609 provides that the reply shall be governed by the rules prescribed in relation to answers. Under the foregoing sections it will be observed that a pleading, either answer or reply, may contain a general or specific denial,—that is, such pleading may traverse the allegations of the opposite pleading in whole or in part; but a fair and just construction of these sections requires that the pleader should make it clearly appear what portions of the pleading to which answer or reply is made is intended to be controverted and put in issue, and such has been the construction placed upon the sections above quoted providing for the form of the answer or reply. The pleading filed by defendant in this case admits the execution of the policy sued on, and sets forth at length affirmative defenses relied on to defeat the action, concluding with the language: "Further answering, defendant denies each and every allegation, matter, fact and thing in the petition alleged not herein expressly admitted, and, having fully answered, asks to go hence with its costs." The exact language adopted in the concluding paragraph of this answer, or language similar in substance, whether contained in an answer or reply, has been continuously condemned as defective, and frequently stamped with disapproval, by the appellate courts of this state. In *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847, the answer consisted of a general denial of every allegation of the petition "except that which may be hereinafter expressly admitted." And in commenting upon such mode of denial Judge Sherwood says: "The central idea of code pleading is that an answer should not be evasive, but should meet the allegations of the petition fairly and squarely, thus presenting sharply defined issues for the triors of the facts to pass upon. Rev. St. 1889, § 2049. On a former occasion this court denounced the method here employed as a 'vicious method of pleading,' and this was an apt characterization of such a faulty way of pleading. It was never the design of the Code that a party plaintiff should have to carefully sift each denial of the answer, and to carefully compare it with each paragraph of the petition, in order to see what is admitted and what is denied. Such denials

may be general or they may be special, but in either event the issue must be sharply defined, and not left to surmise or conjecture." In *Long v. Long*, 79 Mo. 644, the reply was in the words: "Now comes plaintiff, and for reply says he denies each and every allegation in said answer not herein admitted, or otherwise pleaded to." In commenting on this form, Commissioner Phillips says: "(1) The reply in this case is bad pleading, and ought to be discouraged. The reply to new matter in the answer is similar to the answer to the petition, and it may contain a general or special denial. Vansant. Plead. 408, declares that the Code allows the defendant to elect whether he will answer by a general or special denial, and, having elected, he is bound by it. He cannot answer in both ways.' *Dennison v. Dennison*, 9 How. Prac. 247, is cited in support. We are not prepared to say that both modes of pleading may not be employed in the answer or replication. But we do not hesitate to hold that, when both are employed, the denials ought to be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what is admitted. This course not only sharpens the issues, but it aids in the preparation of evidence, and lessens expenses in bringing witnesses to meet matters not designed to be controverted at the trial. This reply says: 'Plaintiff denies each and every allegation not herein admitted or otherwise pleaded to.' Then what is admitted or otherwise pleaded to? To determine this the opposing counsel and the court must go through the pleading analytically, step by step, to discover what perchance may be admitted or denied." In *Walker v. Insurance Co.*, 62 Mo. App. 209, the replication was a denial "of each and every allegation therein contained, except as hereinafter admitted." The motion of defendant to require the plaintiff to make his reply definite and certain by stating what allegations of the answer were admitted and what denied was overruled by the trial court, which the appellate court pronounces error, stating that the trial court should have sustained the motion so as to have compelled the plaintiff to make certain what he denied and what he admitted. In like manner the form of general denial limited to "each and every material allegation" has been held an improper traverse, as not being in conformity to the statute, or clearly showing what allegations are meant to be put in issue. *Edmonson v. Phillips*, 73 Mo. 57; *Pry v. R. R. Co.*, Id. 123; *Collins v. Trotter*, 81 Mo. 275. Section 621 of the Code, which provides as follows: "When a petition, answer or reply shall be adjudged insufficient in whole or in part upon demurrer, or the whole or some part thereof stricken out on motion, the party may file a further like pleading within such time as the court shall direct; and in default thereof the court shall proceed with the cause in the same manner as if no such orig

final pleading had been filed,"—was construed in the case of *Munford v. Keet*, 154 Mo. 36, 55 S. W. 271, certified from this court. The answer therein was attacked by a motion to strike out a part of the defenses sought to be interposed, which was sustained, but leaving unchallenged a good defense to plaintiff's cause of action, even after the court had stricken out the part embraced in the motion. The trial court therein, after ruling upon the motion, asked defendant's attorneys whether they desired to file an amended answer, or stand upon the answer so filed, and in reply these attorneys informed the court that they desired to proceed to trial on the part of the answer not so stricken out (saving exceptions to the action of the court in striking out part of the answer), which the court refused to permit, and held that the defendant must file a new answer omitting the matter stricken out of the answer, or, on failure so to do, a default would be entered against him. Defendant refused to file a new answer, and the court entered an interlocutory judgment of default against him, and afterwards tried the case ex parte, refusing to allow defendant to participate in any way in the trial. The supreme court, reviewing this action of the lower court, held that the trial court erred in entering judgment by default against the defendant and in refusing to allow him to participate in the trial. In the case under consideration the motion of plaintiff did not attack the whole answer of defendant, but was restricted to that portion of its answer which presented the obscure and defective denial of plaintiff's cause of action, and the ruling of the court in sustaining such motion affected only the same paragraph of the answer, and adjudged only that part insufficient, and, after the court had passed upon the motion, defendant's answer remained in the same condition as if no attempted denial had originally been contained therein, but only affirmative defenses had been pleaded, and the cause should have been proceeded in the same manner as if that portion thrown out by the ruling of the court had never been incorporated in the answer of defendant. The proper course of plaintiff after defendant insurance company had refused to plead further was to file the proper pleading to the affirmative defenses contained in defendant's answer, join issue thereon, and let the case proceed to hearing on the merits. This course was not attempted, and, the cause not being ripe for trial, the issues not having been framed, without adjudging the defendant in default the court proceeded ex parte to hear evidence on plaintiff's petition, and rendered final judgment against defendant insurance company. Under the authority of *Munford v. Keet*, supra, this constituted error, for which the case is reversed and remanded, to be proceeded with in accordance herewith, and it is so ordered.

BLAND, P. J., and GOODE, J., concur.

CHOCTAW, O. & G. R. CO. v. DONAVAN.

(Supreme Court of Arkansas. Jan. 31, 1903.)

TRIAL—VARIANCE—CONTINUANCE—SURPRISE.

1. Where plaintiff alleged that he was injured by reason of the negligence of defendant's foreman, P., in starting a train on which plaintiff was working, and on the trial it was proved that P. was not on the train, but that it was in charge of D., and that the negligence, if any, was that of D., whereupon defendant moved for a continuance after its objection to the introduction of testimony showing D.'s negligence, was overruled, the denial of such continuance was error.

Appeal from circuit court, Prairie county; Geo. M. Chapline, Judge.

Action by John Donovan against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. W. McLoud and E. B. Pierce, for appellant. J. H. Harrod, for appellee.

BUNN, C. J. This is a suit for \$2,500 damages, alleged to have been done to the plaintiff by the negligence of an employé of the defendant. This was denied in the defendant's answer. Trial, and verdict for plaintiff for \$400.

The complaint recites, among other things: "That on January 11, 1900, plaintiff was working for the defendant in construction of track work, engaged in loading rock on a flat car. That plaintiff was working under the direction of one Patton, defendant's foreman, who had authority to employ and discharge men in said service; and the car on which plaintiff was loading rock was part of a construction train, and the train was moved under the direction of said foreman, and was under his control. That while plaintiff was at work loading rock on said car on said day, standing up in said car, the said car was moved under the order of said foreman, without giving any warning or notice to plaintiff, and plaintiff was thrown forward, falling on his hands, and a large rock was thrown on plaintiff's right hand, striking his right forefinger. That said forefinger was so greatly bruised that blood poisoning set in, and his finger had to be taken off. That plaintiff suffered great pain from the wound for five weeks, and is permanently disabled by the loss of his finger. That plaintiff's injury was caused by the negligence of defendant in moving the train without giving him any notice or warning." The answer denied the allegations of the complaint specifically. On the trial, plaintiff, testifying for himself, said that Patton was not in charge of the train on the day he received the injury, but that one Degan, his assistant, was in charge, and acting in his place. This was corroborated by Patton, who was present and testifying, and by all the other witnesses testifying in that behalf. The defendant objected to the admission of all testimony going to show that any other person

than Patton was in charge of the train and working gang on the day named. This objection being overruled, and exceptions saved, defendant asked a continuance to enable it to procure witnesses to meet this new phase of the issue, claiming that it was thus taken by surprise by the plaintiff. The motion for continuance was overruled, and defendant was forced into trial without an opportunity to procure the attendance of Degan and other witnesses, whose testimony might have changed the verdict.

The testimony which was objected to manifestly constitutes a variance with the complaint. It may not have been necessary for the plaintiff to make the allegation of negligence of a particular servant of the defendant, but, having been made, it was necessary to prove it, for by making it the defendant was necessarily and properly directed to the point of showing that Patton did not negligently occasion the injury complained of; and, if he were not the occasion of the injury at all, so much the better for the defense. Under the circumstances the conclusion is inevitable that the defendant was taken by surprise by the plaintiff's shifting of the issue in this way, and misled in making its defense by the conduct of the plaintiff. The objectionable evidence was not admissible at the time it was produced, but this error might have been corrected by giving defendant time to meet the issue thus changed in the midst of the trial. This was not giving a fair trial, and for the error committed the judgment is reversed, and cause remanded for new trial. *Nickins v. State*, 55 Ark. 568, 18 S. W. 1045.

There are other issues raised, but they may not arise on a new trial, and therefore need not be noticed here.

ERFURTH et al. v. STEVENSON.

(Supreme Court of Arkansas. Jan. 31, 1903.)

BUILDING CONTRACTS—MODIFICATION—SURETIES—RELEASE—ESTOPPEL.

1. Where a building contract provided that the owner, through his architect, might require alterations in the construction, arrangement, or finish of the work, and that the expense of the change should be added to or deducted from the contract price, and that, if the difference could not be agreed on, the owner might employ another to make the changes, such provisions only authorized such changes as did not materially increase the cost of the work, and did not justify a change in the roof from shingles to slate, and the metal work from tin to copper, causing an increase of more than 10 per cent. in the cost of the building; and such change, made without the consent of the sureties, released them from liability.

2. Where sureties on a building contract had been released from liability by a material change in the contract, their subsequent approval of orders drawn by the contractor on the owner did not estop them from pleading their release in an action on the bond.

Appeal from circuit court, Sebastian county, Ft. Smith district; Styles T. Rowe, Judge.

72 S.W.—4

Action by E. H. Stevenson against R. A. Erfurth and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

Read & McDonough, for appellants. Hill & Brizzolara, for appellee.

BATTLE, J. On the 4th day of April, 1898, Erfurth & Seibert entered into a written contract with E. H. Stevenson, by which they agreed to erect and construct for him a two-story brick residence, with a stone foundation, and roof covered with Oregon cedar shingles, "except foundation, cut stone, brick-work, plastering, painting, plumbing, and trimming hardware," in a good and substantial and workmanlike manner, and Stevenson agreed to pay them therefor the sum of \$2,670; and it was agreed that no sum exceeding 75 per cent. of the value of work done and materials furnished and used should at any time be paid to them before they fully complied with and performed their contract. A provision for alterations in the building was made in the contract, as follows:

"Art. 13. That the party of the first part, through his architect, may require alterations to be made in the construction, arrangement, or finish of the work from that herein, and in said specifications, plans, or drawings, expressed, without annulling or invalidating this agreement in any particular; and, in case of any such alterations, the increase or diminution of expense occasioned thereby shall be added to or taken from the contract price of the entire work; and that a description of the changes so to be made, together with the expense of making the same, shall be attached to this agreement before said changes are executed, or otherwise shall not be binding on said first party. And it is further agreed that, in case the parties hereto cannot agree as to the amount to be added to or deducted from the said contract price on account of the contemplated change, then and in such case the party of the first part shall have the right, under this contract, to have other than the said second party [Erfurth & Seibert] execute such changes, during the progress of the building and work aforesaid."

On the 4th of April, 1898,—the same day on which the contract was executed,—Erfurth & Seibert, as principals, and John Schaap and S. A. Williams, as sureties, executed a bond to E. H. Stevenson, and thereby bound themselves to him in the sum of \$2,670, conditioned that, if Erfurth & Seibert should perform their contract with Stevenson, the same should be void.

On the 7th day of May, 1898, Stevenson and Erfurth & Seibert agreed in writing as to certain changes in the said building, as follows:

"May 7, 1898. It is hereby agreed that all roofs and gables shall be covered with 7x14 best quality Bangor slate, with all hips con-

nected and made tight (instead of being covered with Oregon cedar shingles, as set out in the specifications). All slate shall be laid on heavy tar felt, and all sheeting shall be No. 1 com. M. D., with all defects cut out, thoroughly seasoned, close joint, and double-nailed at each heaving with 10d wire nails. All tin, galvanized iron, and zinc work (conductor supports coppered) shall be made of 120 Z copper, instead of tin, galvanized iron, and zinc, as specified in specifications (except floor of balcony, which shall be of tin, as specified), and all work and materials subject to the approval of the architect. Party 1st part, E. H. Stevenson. [Seal.] Party 2nd part, Erfurth & Seibert. [Seal.]

On the 9th day of September, 1899, Stevenson commenced this action against Erfurth & Seibert, Schaap, and Williams, on their bond; and Schaap and Williams answered, and stated that they were sureties on the bond, and had been released from their obligations by the changes made in the original contract without their consent.

In the trial that followed, it was proved that the changes in the contract were made without the consent of the sureties, and there was no evidence to the contrary, unless the original contract was evidence of such consent; and that they (the changes) were not within the contemplation of the parties at the time the original contract was entered into is shown by the testimony of Goddard, the architect who drew the plans and specifications for the building, and superintended the erection of the same. He testified as follows: "At the time we were receiving estimates on Dr. Stevenson's house for the construction of it, it was contemplated to use slate for the roof; but owing to the fact that we knew, of course, it would cost some more to use slate, * * * Dr. Stevenson decided that we would make the specifications to read for shingles, raised tin, and galvanized iron, and asked some of the contractors—in fact, all of them—to submit the amount extra it would cost to use slate and copper, instead of shingles, tin, and galvanized iron, for the roof. Some of them did so, and some of them did not."

It was proved that Erfurth & Seibert drew orders on Stevenson the 9th and 10th days of February, 1899, for the amounts due for work done and materials furnished to complete the building according to the alterations made in the original contract, and that Schaap and Williams indorsed their approval upon the same. Goddard, the architect, testified that their approval was required because Stevenson had paid Erfurth & Seibert more than 75 per cent. of the value of the work done and materials furnished at the time the orders were drawn, and the sureties testified that they indorsed their approval because they were informed that Stevenson would not pay the orders without it.

Plaintiff recovered judgment, and the defendants appealed.

Were John Schaap and S. A. Williams, sureties on the bond of Erfurth & Seibert for the performance of their contract to erect a building for E. H. Stevenson, discharged by the alteration of the contract?

In *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409, this court held that any material alteration in the contract, for the performance of which a surety is bound, without his consent, discharges the surety, and that "this is so even if the alteration be for the benefit of the surety; for, although the principals may change their contract to suit their pleasure or convenience, they cannot thus bind the surety."

In *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 66 Ark. 287, 50 S. W. 508, one Wickshire contracted with the appellee to build for it a one-story brick house, and to complete the same on or before the 14th day of October, 1895. The contract contained the following stipulation: "It is further agreed that the said party of the second part may make any alterations, deviations, additions, or omissions from the aforesaid plans, specifications, and drawings, or either of them, which they shall deem proper, and the said architect shall advise, without affecting or making void this contract; and in all such cases the architect shall value or appraise such alterations, and add to or deduct from the amount heretofore agreed to be paid to the said party of the first part the excess or deficiency occasioned by such alterations." Wickshire gave bond for the performance of his contract, with the Miller-Jones Furniture Company as surety. He afterwards, about the 1st of October, 1895, made a supplemental contract with the cold storage company, by which he agreed to make the building two stories high, instead of one, and was to receive an additional consideration of \$1,175. This court held that the surety was discharged by the alterations made. Mr. Justice Riddick, in delivering the opinion of the court, said:

"The cold storage company contends that the supplemental contract did not discharge the surety, for the reason that such supplemental contract was within the scope of the first contract, and was therefore assented to by the furniture company at the time it signed the bond. This contention of the cold storage company is based on a provision in the original contract permitting the owner to make alterations in the plans and specifications of the building. But we are of the opinion that the parties did not intend by this provision to authorize changes so extensive as the one complained of here.

"The provision referred to, which is set out in the statement of facts, permits such alterations to be made, even without the consent of the contractor, and provides that the architect shall determine the amount to be paid or deducted therefor. We cannot suppose that the parties intended by this provision to permit the owner to make great and extensive

changes in the plan of the building, and to force the contractor to complete it in conformity therewith, at such compensation as might be allowed by the architect. The fact that these alterations in the plan could be made without the consent of the contractor forces us to the conclusion that the alterations referred to were such minor changes as owners often wish to make in the plan of buildings while they are under construction, and which do not greatly affect the undertakings of the contractor."

In *Consaul v. Sheldon* (Neb.) 52 N. W. 1104, 1107, cited by the court in *Miller-Jones Furniture Company v. Ft. Smith Ice & Cold Storage Company*, it is said: "A number of changes and alterations were made in the buildings, which increased the cost thereof, after the letting of the contract and the signing of the bond. But such changes and alterations did not have the effect to release and discharge the sureties, for the reason the contracts expressly provided that the owner might make alterations in the plans of the building, and that the making of the same should not release the sureties. Each contract contained this stipulation: 'Should the proprietor at any time during the progress of the work require any alteration of, deviation from, or additions in the said contract, specifications, or plans, he shall have the right and power to make such change or changes, and the same shall in no way injuriously affect or make void the contract.' This provision was ample authority for all changes and alterations which were made in the buildings. We must not be understood as claiming that the owner had the right to make such changes as he saw proper, regardless of cost and the character and extent of such alterations. The changes and additions must be reasonable, and not materially increase the cost of the buildings beyond the original contract price."

In the contract before us, Stevenson, for whom the building was to be erected, was vested with the power to require alterations to be made in the construction of the building, and in the arrangement or finish of the work as specified in the contract, and the specifications, plans, and drawings referred to therein. He could do so without the consent of the contractors, Erfurth & Seibert. But they were not compelled to do the additional work or furnish the materials made necessary by the alterations. If they refused to do so, or failed to agree with Stevenson as to price, the contract provided that Stevenson might employ other parties to do such work and furnish the materials. But nevertheless, as said in *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, "the fact that these alterations * * * could be made without the consent of the contractors forces us to the conclusion that the alterations referred to were such minor changes as owners often wish to make in the plan of buildings which they

have under construction, and which do not greatly affect the undertakings of the contractor." Any other construction of the contract would place the contractors in the position of agreeing that alterations might be made in their contract which would be materially injurious to them, which would be unnatural and unreasonable.

The right to make the alterations that were made in the contract depends upon the following clause: "The party of the first part [Stevenson], through his architect, may require alterations to be made in the construction, arrangement, or finish of the work, from that herein, and in said specifications, plans, or drawings, expressed." The alterations made were not in the arrangement or finish of the work, as they consisted entirely of a change of materials. Were they made in the construction? In the construction of what? A two-story brick residence, with stone basement, and with roof covered with Oregon cedar shingles. Did Stevenson have the right to so alter the contract as to substitute a residence of granite for the brick residence? Certainly not. Why, then, could he substitute a slate for a shingle roof? Such a change would not be in the construction of a shingle roof, which the contractors agreed to make, but a substitute for it, which was not authorized by the contract. The evidence shows that such was not the intention of the contract. Stevenson, the party of the first part, had under consideration, before entering into the contract with Erfurth & Seibert, the building of the residence with a slate roof, but abandoned it because it was too expensive, and decided to use Oregon cedar shingles instead of slate.

The price which the contractors, Erfurth & Seibert, were to receive for the building under their contract with Stevenson, before it was altered, was \$2,670, and the alterations were worth and cost at least \$320, which increased the cost more than 11 per cent. The change made in the building by the amended contract materially increased the cost of it beyond the original contract price, and, if binding on the sureties on the contractor's bond, increased their liability to the same extent. But the change was unauthorized by the original contract, and was made without the consent of the sureties, and discharged them from liability on their bond.

But appellee insists that, if the sureties on the contractor's bond were relieved from their obligation by the alteration in the original contract, they are estopped from taking advantage of it by the indorsement of their approval upon the orders drawn by Erfurth & Seibert on Stevenson for the amount due for labor performed and materials furnished according to such alterations. They disavow any intention to approve the alteration of the contract by the approval of the orders, but contend that the object of their

approval was to relieve Stevenson from his contract to withhold from the contractors 25 per cent. of the contract price until they fully and completely performed their part of the original contract.

The alterations in the original contract were made, without the consent of the sureties, on the 7th of May, 1898, and released them from their obligation. Their approval of the orders was indorsed thereafter, on the 9th or 10th of February, 1899, and therefore could not have induced Stevenson to change his position in respect to his liability for the amounts paid by him on the orders of Erfurth & Seibert. He was already bound to pay for the work done and materials furnished according to the contract as altered. His position in that respect could not have been changed by the approval of the orders of Erfurth & Seibert by the sureties, and they are not thereby estopped from setting up their discharge from liability to Stevenson as such. *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 66 Ark. 287, 50 S. W. 508.

The judgment of the court below against the sureties is reversed, and as to Erfurth & Seibert it is affirmed. Judgment upon the merits will be rendered here against the appellee in favor of the sureties.

AYERS v. McRAE et al.

(Supreme Court of Arkansas. Feb. 7, 1908.)

MORTGAGE-FORECLOSURE-IRREGULARITIES-LACHES-ESTOPPEL.

1. Where a mortgagor had notice of the foreclosure of the mortgage, and sale of the premises thereunder, and, through a friend, purchased a portion of the premises at the sale, and made no objection to the sale or account until four years after the time for redemption had expired, and the debt was barred by limitations, he was guilty of laches, and should not be permitted to question the validity of the sale for irregularities either substantial or technical.

Appeal from Mississippi chancery court; Edward D. Robertson, Chancellor.

Action by G. W. McRae and others against E. M. Ayers. From a judgment in favor of the plaintiffs, defendant appeals. Affirmed.

G. W. Thomason, J. M. Moore, and W. B. Smith, for appellant. S. S. Semmes and Norton & Prewitt, for appellees.

BUNN, C. J. This is a suit for trespass and taking and carrying timber to the value of \$2,500; damages being laid at \$5,000,—double the value of said timber. The cause was transferred to the equity docket, and judgment and decree for plaintiffs, and defendant appealed.

The controversy is over the title to the timber. The lands upon which the timber was grown, and from which it was taken by defendant, were originally the lands of the defendant. He mortgaged the same to the firm of which McRae is the surviving partner,

in a deed of trust in which W. J. Booker was trustee, to secure a debt on account, as we infer; and, the debt not having been paid, the mortgage was foreclosed, and plaintiffs became purchasers of the lands at the sale had on the 8th of November, 1894. The lands were never redeemed from the foreclosure sale. This suit was instituted on 30th April, 1899.

The principal contention of the defendant is that the lands were not valued, as the law directs in such cases, before the foreclosure sale, and as a prerequisite thereto. He also avers that the account due him was not rendered by plaintiffs previously to said sale. The sale was made on the 8th of November, 1894. The defendant was cognizant of the facts, and had notice thereof, and in fact, through his friend and agent, purchased a portion of the property included in the deed of trust, and sold at the same time with the lands upon which the trespass complained of was committed after the sale and purchase by plaintiffs. He (the defendant) made no objection to the manner of the sale. He was presented with the account just before the sale, and made no objection to its correctness. Since the sale he had made propositions to purchase the lands from the plaintiffs, and to settle the indebtedness, but never carried any of them into effect. In the meantime he cut the timber from the land, and carried the same away, as charged in the complaint, and did so for the first time in his answer in this suit, filed on the 13th of May, 1899,—four years or more after the time for redemption had expired. Whether his defense as to the irregularity of the foreclosure sale was substantial, or merely technical, it is unnecessary to determine, since he is clearly guilty of laches; waiting until the account of plaintiffs had become barred by statute of limitations, before disclaiming his purpose of making such a defense. It would be inequitable to consider his objections to the sale, under the circumstances.

The decree is therefore affirmed.

MYERS et al. v. ROLFE et al.

(Supreme Court of Arkansas. Feb. 7, 1903.)

STANDING TIMBER-SALE-ST. FRANCIS LEVEE BOARD.

1. Under the amendment to Act Feb. 15, 1893, by which the St. Francis district levee board was authorized to purchase lands sold for nonpayment of the assessments made thereon, the restrictions imposed by the original act as to the power of the board to dispose of the lands originally granted to it were not extended to lands so purchased, but its power of disposal of such lands was left unrestricted, and a sale by the board of the timber standing on such lands without selling the land was valid, and conveyed full title and right to such timber to the purchaser.

Cross appeals from circuit court, St. Francis county; Hance N. Hutton, Judge.

Action by W. J. Myers and others against E. A. Rolfe and another. From a judgment

for plaintiffs, both parties appeal. Reversed, and judgment entered for defendants.

S. H. Mann and McCulloch & McCulloch, for appellants. Norton & Prewett, for appellees.

BUNN, O. J. This is an action in replevin for a number of saw logs, and the question turned upon the ownership of the trees from which the logs were cut. Judgment for plaintiffs, and both parties appealed.

The saw logs in question were cut and taken by the defendants, E. A. Rolfe and C. A. Walker, from the N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, and S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, section 32, township 6 N., range 6 E., containing 320 acres, more or less. One Peter Jackson, as the agent of the St. Francis levee board, sold the timber on the lands above described to the said E. A. Rolfe, and gave him a bill of sale therefor, dated January 16, 1899, and, acting and by virtue of this bill of sale, the defendants cut and removed the logs involved in this litigation to their sawmills or place of shipment, where they were replevied by plaintiffs in this action, but redelivered to defendants on their giving a retention bond. The plaintiffs claim title to the logs by virtue of a deed from the St. Francis district levee board to the lands aforesaid from which the logs were taken, dated October 5, 1899. So the bill of sale antedated the deed about 10 months. Both parties claim title from the same source, the St. Francis district levee board; the plaintiffs contending that the bill of sale of the timber on said lands to the defendant Rolfe was invalid, as the levee board was not authorized by law to sell the timber on the land without selling the land itself in the same sale. Under the act entitled "An act to donate to the St. Francis District all the lands of this state within the limits of said levee district, and for other purposes" (Acts 1898, p. 172), the lands, except sixteenth section lands, within the levee district, then belonging to the state, or which might become the lands of the state within five years from and after the passage of the act, were given to the said levee district; and the second section of the act provides that the levee board might sell the same, after causing the same to be graded under the rule therein made, for the price of 50 cents, \$1.50, and \$2.50 per acre, according to the grade and classification thus made, for the purpose of contributing to and maintaining the levees contemplated in the several acts organizing said district. This and the general tenor of other parts of the act determined the manner of disposal of these donated lands as to the prices at least, and, without determining the particular question (for it is not involved in this discussion), they seem to constitute a statutory provision regulating the disposal of the same. Under the provisions of the act entitled "An act to amend certain sections of the St. Francis levee act of Feby. 15, 1898, and to exempt from tax-

ation certain lands in St. Francis Levee District" (Acts 1895, p. 88), the district board was authorized to purchase for the district lands sold for nonpayment of the assessments made thereon for the district, and lands so acquired by the district constituted a second and distinct class, without any statutory provision regulating the manner of their disposal. It is the opinion of the majority of the judges of this court that the board of the levee district, having full power to do any and everything to carry out the purposes of the act, except in so far as restricted by the statute, and being without statutory restrictions or directions, has power to dispose of such lands, by virtue of its inherent power, as the absolute and unconditional owner of the fee for the purpose aforesaid, and that, therefore, the sale of the timber on said lands by and through its recognized and authorized agent was valid. This being true, and this being the controlling question, there is error in the judgment against the defendants, who claimed under said bill of sale of the timber, which was prior in point of time to the deed to the land under which the plaintiffs claimed; and the same is therefore reversed, and judgment will be entered here for the defendants E. A. Rolfe et al.

BALDWIN et al. v. THOMAS.

(Supreme Court of Arkansas. Jan. 31, 1903.)

HOMESTEAD—HEAD OF FAMILY—LOSS OF FAMILY—EFFECT—RIGHTS OF JUDGMENT CREDITORS.

1. Where an owner of a farm lives on it with his widowed mother and a single sister, and supports both of them, he is the head of a family, and entitled to statutory homestead rights.

2. One who has acquired a homestead as head of a family is not deprived thereof by the subsequent loss of his family, provided he still resides thereon.

3. The fact that a debtor has mortgaged his homestead to secure a debt does not preclude him from claiming it as exempt as against a judgment obtained in an action at law on the debt, and not in a suit to foreclose the mortgage.

Appeal from Ashley chancery court; J. G. Willamson, Special Chancellor.

Suit in equity by Willis D. Thomas against Baldwin & Putnam and Geo. W. Norman to enjoin the enforcement of two judgments. Judgment for plaintiff, and defendants appeal. Affirmed.

Baldwin & Lake recovered judgment against Willis D. Thomas in Ashley county for \$1,037.86. Afterwards an execution issued on the judgment, and was levied upon 110 acres of land belonging to Thomas. The land was sold under the execution, and purchased by Norman, and after the expiration of the time for redemption the sheriff executed a deed to Norman, who purchased for Baldwin & Putnam. Norman brought an ac-

¶ 2. See Homestead, vol. 25, Cent. Dig. § 311.

tion of ejectment, and recovered judgment for possession of the land. Afterwards Thomas brought this action to enjoin Baldwin & Putnam and Norman from enforcing either of the judgments, on the ground that no summons or notice of the proceedings in which they were recovered was served upon him, and that they were therefore void. He further alleged that he had good and valid defenses to said judgments, among which was the allegation that the land was his homestead, and not subject to sale under execution. The defendants appeared and filed their answer to the complaint, in which answer they deny that the judgment recovered against Thomas for money was without service, and they set out the summons issued in that action, with return of the officer who they say served the summons; but they made no reference in their answer to the ejectment suit, and make no denial of the allegation of Thomas that he had no notice of the pendency of the action in which that judgment was recovered. But they denied that the land of Thomas was a homestead, or exempt as such. On the hearing the special chancellor before whom the case was tried found that the money judgment was based on a sufficient service of summons, and was valid, but that the land levied upon was the homestead of Thomas, and exempt from execution. He therefore enjoined the enforcement of the judgment against the land, for the reason that it was, in his opinion, a homestead, and exempt. Baldwin & Putnam and Geo. W. Norman, defendants, appealed.

Geo. W. Norman, for appellants. Turfer Butler and Robert E. Craig, for appellee.

RIDDICK, J. (after stating the facts). This was a suit in equity to enjoin two judgments—one a judgment for money, and the other a judgment in ejectment for the recovery of land; the latter judgment being based on an execution sale under the former judgment. It seems to have been conceded on the trial that the judgment in the action of ejectment was invalid by reason of the fact that there was no summons served upon Thomas, the defendant in that action, and no question is made here as to that judgment. As to the money judgment, the special chancellor found that the evidence was not sufficient to overcome the presumption arising from the recital of service in the record, and the return of the officer that he had served the summons upon the defendant. He therefore held that the judgment was valid and binding upon defendant. After considering the evidence, we are of the opinion that this ruling was correct.

On the next point—as to whether the land seized and sold under the execution was the homestead of the defendant—the chancellor found that Thomas was for a period of about 10 years the head of a family, and resided

upon the land in question, of which he was the owner, and that he has continued to reside upon this land, and still resides upon it, and claims it as a homestead. The chancellor thereupon held that the land was his homestead, and exempt from execution. On this question we feel that there is more room for doubt, but, after consideration of the evidence, we think it is sufficient to uphold the finding that Thomas, after the death of his father, owned and lived upon this 110 acres of land; that his mother and a single sister lived with him; that he supported them, and was the head of the family. This being so, it follows that he was entitled, as the head of a family, to claim this land as a homestead. Afterwards, in the course of time, his mother and sister died, and he has now no family. But though a man cannot acquire a homestead right without a family, yet, when the homestead estate is once acquired, he is not, under the law as construed by the decisions in this state, deprived of it by the loss of his family. "When the association of persons which constitutes the family is broken up, whether by separation or the death of some members of the family, the right of homestead continues in the former head of the family, provided he still resides at his old home." This ruling was made in the case of *Stanley v. Snyder*, 43 Ark. 429, and, though it has often been criticised, it has been followed in so many cases since that it must now be considered as settled. Under these decisions, we are of the opinion that the decision of the chancellor that the land in question was a homestead is supported by the evidence, and must be affirmed.

Counsel for appellants further contend that Thomas cannot claim his homestead as exempt against the judgment in this case for the reason that he had heretofore mortgaged his homestead to secure the debt for which the judgment was rendered. But if that be so, the question as to whether such mortgage is a lien on the homestead will be presented when an action is brought to foreclose the mortgage, or when he seeks to obtain possession of the land by virtue of the mortgage. No such question is presented here, for the judgment against which Thomas sets up the right of homestead is a judgment at law on the debt, and not a judgment foreclosing the mortgage.

On the whole case, we think the judgment should be affirmed, and it is so ordered.

GARRISON v. COOKE.

(Supreme Court of Texas. Feb. 16, 1903.)

SUBSCRIPTION—CONTRACT—TIME OF ESSENCE.

1. Where defendant contracted to pay plaintiff a subscription in consideration of plaintiff's constructing, equipping, and operating a railroad between two points specified on or before October 1, 1898, and the time of completion was thereafter extended to November 1, 1898, time

was of the essence of the contract, and a failure to complete the road by the latter date was a complete defense to an action on the subscription.

Certified questions from court of civil appeals of First supreme judicial district.

Action by T. S. Garrison against J. W. Cooke. From a judgment in favor of defendant, plaintiff appeals. On certified questions from the court of civil appeals.

Blount & Garrison and Claude Pollard, for appellant. J. G. Woolworth, J. H. Long, H. N. Nelson, W. R. Anderson, and Spencer & Scott, for appellee.

GAINES, C. J. The following questions have been certified for our determination:

"In this cause now pending before this court on motion for rehearing we are advised that a number of other claims of a like nature, growing out of the same transaction, are dependent upon the result of this case, and for that reason, and because this court is not unanimous in the conclusion already reached to affirm the judgment, and are in doubt as to the correctness of our judgment, we certify for your decision the questions hereafter set out. The facts, as disclosed by the record, are as follows: Some time in the spring of 1898 T. S. Garrison, the appellant, induced J. W. Cooke and other citizens of Carthage, Texas, to execute and deliver to him the following instruments, with the amount for which each was to be bound set opposite the respective signatures: 'The State of Texas, Panola County. Know all men by these presents, that we, and each of us, whose names are subscribed below, for and in consideration of T. S. Garrison constructing, equipping, and operating a line of railroad from Timpson, Shelby county, Texas, to Carthage, Panola county, Texas, and the running of daily trains between said points for the accommodation of freight and passenger traffic on or before the 1st day of October, 1898, agree to pay the amounts set opposite our respective names to such persons as said T. S. Garrison designates; said amounts to be paid when the road is completed and daily trains are running over same to the town of Carthage. J. W. Cooke, \$350.00.' The time of completion to Carthage was subsequently extended by agreement of parties to November 1, 1898. The appellant proceeded with the construction of the proposed road, which was known as the 'Marshall, Timpson & Sabine Pass Railroad,' and by about the first of the year 1899 had completed it to within about half a mile of Carthage. Appellant then sold the road to the owners of a competitive railroad, the Texas, Sabine Valley & Northwestern Railroad; and these parties, by March 1, 1899, but not before, completed the proposed road to Carthage, and had daily trains running thereon as stipulated in the contract. When the road was sold to them by appellant, it was stipulated by him that it should be com-

pleted to Carthage as per contract, though it would have suited the purchasers better to construct it by a different route to another point. On the completion of the line to Carthage, appellant demanded the subscription, but appellee refused to pay, whereupon this suit was brought. Appellee defended—First, upon the ground that time was of the essence of the contract, and that, as the road was not completed by November 1st, his liability for the subscription did not attach; and, second, that, as the road was not built to Carthage by appellant, but was sold out to and completed by parties who already had a railroad to Carthage, he was discharged from liability. Parol evidence was admitted to the effect that the subscribers had contracted that the road should be in operation to Carthage by October or November 1st, because they expected it, by competition with the other railroad, to affect the rate of freight on cotton to their advantage. A trial by jury resulted in a judgment for appellee.

"Questions: (1) Does the subscription contract show upon its face that time was of the essence of the contract? (2) Did the trial court err in hearing proof as to the situation of the parties, and the fact that the subscribers expected to derive benefit from the construction of the road by the date named in the way of reduction in freight rates on cotton? (3) Would the fact that appellant did not complete the road himself, but sold out to a rival road, which completed it, constitute a defense to the action? (4) If parol evidence as to the situation of the subscriber at the date of the contract is admissible in explanation of its meaning and in aid of its construction, must such evidence be confined to the subscriber in question, or may such inquiry include his co-subscribers who signed contemporaneously with him? (5) Do the facts show that time was of the essence of the contract?"

"It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and 'where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or, if it be not done, at least that he has performed everything that was in his power to do.' Accordingly, when, by the terms of a contract, one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterwards claim the performance of the contract if the stipulation as to time were construed according to its literal terms. The rule of the common law was that 'time is always of the essence of the contract.' When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it." Pollock on Principles of Contract, 462. The rule is also announced by the elementary text-writers that at law time is, in general, of the es-

sence of the contract. Bishop on Contracts, sec. 1344; Anson on Contracts, 331; Clark on Contracts, 596. See, also, Beach on the Modern Law of Contracts, sec. 617 et seq. We understand the rule to apply where one party agrees to pay money to the other in consideration of the doing of an act by such other within a specified time. In general, in such a case, the promise to pay cannot be enforced, unless the act be performed within the time. Questions calling for its application have frequently arisen in cases like the one now before us,—that is to say, in cases of subscriptions for the construction of railroads and other like improvements,—and, so far as we have been enabled to discover, where there is nothing on the face of the contract itself tending to show that time was not of the essence of the engagement, it has been nearly, if not quite, uniformly held that, if the work was not completed within the specified time, the promisor was not liable. Such was the case of *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360. There “a railroad company became embarrassed, and was unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day”; and it was held that the contractor could not recover, because he had not finished the work within the stipulated time. The case was cited with approval, and the rule was followed, in the following cases: *Jones v. United States*, 98 U. S. 28, 24 L. Ed. 644; *Jordan v. Newton*, 116 Mich. 674, 75 N. W. 130; *Persinger v. Bevill*, 31 Fla. 364, 12 South. 366. See, also, to same effect, *The Indianapolis, etc., R. R. Co. v. Holmes*, 101 Ind. 848; *Bohn Manufacturing Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652. The principle has been applied even as to subscriptions for stock in a railroad company, where the subscription is made upon condition that the road is to be completed within a certain time. But the case before us is a stronger one. A stockholder acquires an interest in the company,—a property right. A promisor of a bonus to a railroad company acquires no right by a construction of the road. He looks only to the incidental advantages that may result from such construction. It would seem but reasonable that in the latter case the promisee should be held to a rigid compliance with the conditions of the contract. In the case of the *Presidio Mining Company v. Bullis*, 68 Tex. 581, 4 S. W. 860, this principle was held applicable to a contract for the sale of real estate, to which ordinarily a less rigid rule applies. In that case the court say: “It was left entirely at the option of Cook whether he would take the land at the end of the year or not; and, in such cases it is the general rule, to which this case is no exception, that time is of the essence of the contract.” So, in this case, the appellant did not bind himself to do anything, and the appellee merely

promised to pay in consideration of the construction of the railroad on or before a certain day.

A contract to pay money in consideration that the promisee will build a railroad by a certain time implies very clearly that that money is to be paid only on condition that the road be constructed within the time; and, in our opinion, time in such a case is of the essence of the contract. The fact that the parties by subsequent agreement extended the time for the completion of the road shows that such was their own construction of the contract, and, even if it were a doubtful matter, ought to have a controlling effect in determining their intention. The cases mainly relied upon by counsel for appellant are *Traer v. Stuart*, 46 Iowa, 15, Front Street, etc., *Railway Co. v. Butler*, 50 Cal. 574, and *Seley v. Railway Co.*, 2 Willson, Civ. Cas. Ct. App. § 87. The contract in each of the two cases first mentioned contained special stipulations as to the time of payment, from which the court drew the inference that the time of special performance was not an essential feature of the contract. They are, therefore, whether correctly or incorrectly decided, distinguishable from the present case. *Seley v. Railway Company* is based principally upon the authority of the other two cases, and may also be distinguished from the case before us by reason of a difference in the stipulations in the contract.

We answer the first question in the affirmative, and, since the parol evidence introduced did not tend to show that the intention of the parties was not to make time an essential element in the agreement, we deem it unnecessary to answer the others.

BEKKELAND v. LYONS.

(Supreme Court of Texas. Feb. 19, 1903.)

MALICIOUS PROSECUTION—WANT OF PROBABLE CAUSE.

1. In an action for malicious prosecution, the fact that plaintiff was acquitted on the criminal trial does not tend to prove malice or want of probable cause.

Certified questions from court of civil appeals of Second supreme judicial district.

Action by J. A. Lyons against Emil Bekkeland for malicious prosecution. Judgment for plaintiff, and defendant appeals to the court of civil appeals, which certifies a question to the supreme court.

J. A. Gillette, for appellant.

GAINES, C. J. This case comes to us upon the following certificate:

“The above styled and numbered cause is now duly pending before us on appeal from the county court of Bosque county, upon facts and pleadings as hereinafter substantially stated, to wit: The action is for dam-

¶ 1. See *Malicious Prosecution*, vol. 33, Cent. Dig. §§ 50, 69.

ages for an alleged malicious prosecution. Appellee, who was the plaintiff below, pleaded that appellant voluntarily appeared before a justice of the peace and instituted a criminal prosecution against him by falsely and maliciously charging him with theft, and with cutting and hauling timber from the land of another, etc. That a capias was duly issued by the said magistrate upon said charge, and the appellee arrested and placed in the county jail of Bosque county; that he had violated no law of Texas, as appellant well knew, and that appellant prosecuted him willfully, maliciously, and without probable cause; that appellee was duly tried in the county court of Bosque county upon said charge and acquitted, and he prayed judgment against appellant for his damages. Appellant in defense pleaded the general denial. Judgment for appellee. The evidence establishes the institution and result of the criminal prosecution as alleged, and there was also evidence tending to prove that appellant acted maliciously and without probable cause. The preponderance of the evidence, however, tends to show that such prosecution was neither malicious nor without probable cause. The appellant upon the trial prepared and requested the court to submit to the jury the following special charge, which the court refused, and to which ruling he has assigned as error: 'You are instructed by the court, at the request of defendant, that the fact of plaintiff's acquittal upon the charge complained of cannot be considered by you for the purpose of showing malice or want of probable cause, but you can consider said fact for the purpose of showing that the prosecution in said cause had ended in plaintiff's favor.' In view of the apparent conflict among the decisions and text-writers, and of the fact that the members of this court are not wholly agreed upon the subject, we deem it advisable to certify to your honors for answer the following question, viz.: Upon the facts above stated, was the action of the court in refusing the requested instruction of appellant erroneous? Among the authorities apparently bearing upon the question we cite: *Cook v. Company*, 6 Tex. Civ. App. 326, 25 S. W. 1084; *Jackson v. Jones* (Tex. Sup.) 11 S. W. 1061; *Kitchen v. State* (Tex. App.) 9 S. W. 461; *Estill v. State* (Tex. Cr. App.) 42 S. W. 305; *Griffin v. Chubb*, 7 Tex. 603; *Thompson v. Company* (Conn.) 16 Atl. 557; *Bell v. Percy*, 33 N. C. 233; *Bigelow on Torts* (Ed. 1891) 63; *Stewart v. Somnborn*, 98 U. S. 187, 25 L. Ed. 116; *Sutor v. Wood*, 76 Tex. 407, 13 S. W. 321; *Heldt v. Webster*, 60 Tex. 207; *Raleigh v. Cook*, 60 Tex. 438; *Jones v. Finch* (Va.) 4 S. E. 342; *Womack v. Circle*, 32 Grat. 347; *Whitfield v. Westrock*, 40 Miss. 317; *Wright v. Fansler*, 90 Ind. 494; *Williams v. Norwood*, 10 Tenn. 336; *Smith v. Ege*, 52 Pa. 421; 2 Greenleaf on Evidence, 455."

In *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85, the trial court instructed the jury

that "a verdict of not guilty and discharge of the defendant from prosecution raises the presumption that there was no probable cause." This court held that the charge was erroneous, and in deciding the question the court say: "The defendant's acquittal did not raise the presumption of the want of probable cause." In *Heldt v. Webster*, 60 Tex. 207, a similar charge was held erroneous, and in course of the argument the court say: "Whether there was want of probable cause was for the jury to determine under the facts in evidence, and they might consider, in making up their verdict, the fact that the appellee had been discharged by the examining court; but the charge of the court was incorrect as matter of law, and gave to that fact a prominence to which it was not entitled." It seems to us, however, that the question whether, save for the purpose of showing that the prosecution had ended, the fact of acquittal or discharge has any probative force whatever, was not involved in that case. The same may be said as to the remarks in the course of the opinions in subsequent cases. *Raleigh v. Cook*, 60 Tex. 438; *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321. In each of the cases referred to, the question was as to the propriety of a charge which made either the discharge by a magistrate, or the acquittal by a jury of the party charged, presumptive evidence of the want of probable cause. It seems to us, therefore, that neither of these cases can be considered as having decided the question. We think, however, that the principle which should govern its decision was involved in the case of *March v. Walker*, 48 Tex. 372. That was a suit by the children of a deceased person to recover damages against the slayers of their father. During the course of the trial the defendants offered evidence to show that the defendants had been acquitted upon a trial for murder growing out of the same homicide. For the reason, evidently, that the evidence was without probative force, it was held that it was properly excluded. In case of a suit for malicious prosecution, it is proper to introduce in evidence the fact of the acquittal in order to show that the prosecution is at an end. But if the fact of acquittal was without probative force in the case last cited, for a stronger reason it would have no tendency to prove anything in a case like the present, except that the prosecution was at an end. In the criminal case against *March*, and in the civil suit, one issue was the same (that is to say, was the homicide justifiable?), it being necessary in the former for the state to prove the negative beyond a reasonable doubt, whereas in the latter it was incumbent upon the plaintiff to show justification by a preponderance of evidence. Upon a trial for a criminal offense the question is, does the evidence show beyond a reasonable doubt that the offense has been committed? but upon the trial of a suit for malicious prosecution of such offense

the issue is, was there probable cause to believe that an offense had been committed? The fact that a verdict of not guilty is returned in the former case neither shows nor does it reasonably tend to show that there was no probable cause for the prosecution. Besides, we fail to see how, in a suit to recover damages for the malicious prosecution of a criminal charge, the verdict or judgment upon the trial of the charge should in any manner affect the prosecutor when he is not a party to the suit.

We recognize, as does the court of civil appeals, the conflict of authority upon the question, but we are of the opinion that the weight of authority and the better reason are in favor of the proposition that in such a case the acquittal of the plaintiff of the criminal charge is not evidence tending to show the want of probable cause. We cite some of the recent cases: *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116; *Allen v. Codman*, 139 Mass. 139, 29 N. E. 537; *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480; *Eastman v. Monastes*, 32 Or. 291, 51 Pac. 1095, 67 Am. St. Rep. 531. See also note to *Ross v. Hixon* (Kan. Sup.) 26 Am. St. Rep. 155 (s. c. 26 Pac. 955, 12 L. R. A. 760).

We answer the question in the affirmative.

NEW YORK LIFE INS. CO. v. ENGLISH.

(Supreme Court of Texas. Feb. 23, 1903.)

LIFE INSURANCE—INSTALLMENTS—FAILURE TO PAY—JUDGMENT FOR WHOLE AMOUNT.

1. A life policy called for the payment of the insurance in 10 annual installments, commencing with the death of the insured. The company refused to pay the first installment when due. *Held* that, though action on the policy put the company's liability on the contract in issue, judgment could not be rendered against it for the whole amount, with execution to issue for the various installments as they fell due.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Annie E. English against the New York Life Insurance Company. Judgment of court of civil appeals (70 S. W. 440) amending a judgment in favor of plaintiff, and each party brings error. Reversed.

Denman, Franklin & McGown, for plaintiff in error. F. Vandervoort, for defendant in error.

BROWN, J. The application of plaintiff in error presents the same questions that were decided by this court in answer to certified questions propounded by the Court of Civil Appeals. 67 S. W. 884, 4 Tex. Ct. Rep. 605. In determining those questions, we construed the law of New York as we understand it in the light of the decisions of the courts of that state, and we see no reason to change our conclusion as to the proper construction of that statute. We shall, there-

fore, not further discuss the questions which have heretofore been determined. The facts will be found in the report of our former decision, and we will only state here such as are necessary to the determination of the questions herein discussed.

The New York Life Insurance Company issued a policy of insurance upon the life of William E. English, payable to Annie E. English, his wife, for the sum of \$3000, to be paid in 10 annual installments of \$300 each; the first payment to become due upon the delivery to the insurance company of proof of death of said William E. English. William E. English died October 19, 1900, and proof of his death was presented to the insurance company December 20, 1900, when demand was made for payment of the first installment of \$300, which being refused by the insurance company, this suit was instituted on February 2, 1901, in the district court of Dimmit county, to recover of the insurance company the full amount of the policy, with interest at 6 per cent. per annum, 12 per cent. damages, and attorney's fees. It was alleged that, by reason of the failure and refusal of the insurance company to pay the first installment, the entire sum named in the policy became due. At the trial in the district court the presiding judge instructed the jury to find for the plaintiff, Annie E. English, a verdict against the insurance company for the sum of \$3,000 with 6 per cent. interest from the 20th day of December, 1900, 12 per cent. statutory damages, and 10 per cent. attorney's fees. The jury returned a verdict in accordance with the charge, and judgment was entered in conformity to the verdict. Upon appeal to the Court of Civil Appeals, the judgment of the district court was reversed, and a judgment rendered in favor of Annie E. English against the insurance company for \$3000, with execution for the first installment of \$300, and 6 per cent. interest, 12 per cent. damages, and 10 per cent. attorney's fees upon that amount; and that, at the end of each year from the 20th day of December, 1901, execution should issue in favor of the plaintiff against the insurance company for \$300, with interest from that date until paid. The Court of Civil Appeals gave judgment for Annie E. English against the insurance company for the costs of the district court, and against her in favor of the insurance company for the costs of the Court of Civil Appeals. A writ of error was granted in favor of each party.

The insurance company objects to the judgment of the Court of Civil Appeals because it provides for the collection of the installments which were not due at the time this suit was instituted, and we are of the opinion that the objection is well taken, and the judgment of the Court of Civil Appeals must be reversed for that reason. A contract for the payment of money will not support an action until it becomes due and payable ac-

according to its terms. *Culbertson v. Cabeen*, 29 Tex. 254. To this rule there are some exceptions not necessary to be stated, because the policy sued upon does not come within any one of the exceptions. A failure to pay any one of the installments provided for in the policy sued upon gave plaintiff a right of action for that installment. 1 Enc. Pl. & Pr. 154. We have not been able to find any precedent, nor any principle of law, which would permit suit upon the installments of this policy which had not matured because there had been a failure to pay the first. The honorable Court of Civil Appeals cite, in support of its judgment in this case, *Tinsley v. Boykin*, 46 Tex. 596. That case does not give support to the judgment rendered in this case. In the case cited there were several notes which held a lien upon one tract of land which was not susceptible of division, and the court held that a suit might be brought upon the first note, it being past due, and, by making the holders of the other notes parties, the lien could be foreclosed upon the land, and the proceeds of the sale equitably distributed in payment of all the notes. The judgment in that case rests upon the fact that it was necessary to dispose of the land, and therefore necessary that all of the notes should be foreclosed at the same time. No such necessity is involved in the determination of the rights of the parties in this case.

In its opinion upon a motion for rehearing, the honorable Court of Civil Appeals supports the judgment entered by it by the proposition that the failure to pay the first installment entitled the plaintiff to sue upon "the entire policy, in order that a multiplicity of suits might be avoided." The same reasoning would apply to every contract payable by installments, yet we have been unable to find any precedent for such a proceeding. Out of the multiplicity of such contracts the occasion for such action must have occurred frequently, and "it is a strong presumption that that which has never been done cannot, by law, be done at all." *Russell v. Men of Devon*, 2 Durnford & East, 673. The liability of the insurance company, so far as put in issue by the pleading, would have been determined as to the whole policy if the suit had been instituted for one installment only. *Lumber Company v. Buchtel*, 101 U. S. 638, 25 L. Ed. 1073; *Cromwell v. County of Sac*, 94 U. S. 356, 24 L. Ed. 195. It does not follow that, because the liability of the insurance company under the contract was in issue, the entire sum became due.

Since this case will be remanded to the district court for further trial, the other questions presented in the applications for writs of error become immaterial, and will not be discussed.

The evidence as to the attorney's fees is undisputed, but the witnesses had in view the suit for \$3,000, and we do not feel authorized to fix the attorney's fees in favor of the defendant in error at that per cent. upon

\$300, the sum for which we believe the judgment should have been rendered.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be, and the same are hereby, reversed, and that this cause be remanded to the district court for further trial. It is further ordered that the plaintiff in error recover of the defendant in error the costs of the Court of Civil Appeals and of this court.

LENTZ v. CITY OF DALLAS.

(Supreme Court of Texas. Feb. 23, 1903.)

MUNICIPAL CORPORATIONS—REPAIR OF SIDEWALKS—POLICE POWER—INJURIES—CHARTER PROVISIONS—EVIDENCE—INSTRUCTIONS—REVERSIBLE ERROR.

1. The police power of a city having entire control of its streets and sidewalks is sufficient to enable it to cause the repair of a hole in a sidewalk.

2. A city's charter gave it complete control of its sidewalks, and provided that the cost of constructing and keeping them in repair should be borne by the property owners in such manner as the council should provide. In another section it provided for a method of enforcing the construction of walks by means of resolutions, notice to the property owner either actual or by publication, assessment of the cost on the property and sale thereunder, and that if, for any reason, the city should be unable to compel the owner to "construct and repair" a sidewalk by fixing a lien on the property, the city should not be liable for "any defect" therein. *Held*, that neither the method of procedure of the section nor its exemption was meant to apply to the repair of minor defects in a sidewalk, and therefore, conceding that the section should be referred to the taxing power, and that the method authorized was on that account unconstitutional and unenforceable, the exemption clause of the section would not release the city from its liability for injuries resulting from a failure to repair a hole in the walk.

3. In an action against a city for injuries caused by a defective sidewalk, where the petition alleged that a grating where the injury occurred was originally too light, a witness was asked, "Those grates were mighty light to start with?" *Held*, that the question was leading.

4. The witness, a nonexpert, replied that he would judge the grating was too light, since it did not stand the test of use. *Held* objectionable, as a conclusion.

5. In a personal injury action against a city, testimony by a physician that injuries apparently trifling in their nature will produce effects that no one can foresee, was objectionable for not being confined to the probable effect of the injuries.

6. In a personal injury action against a city, where there was a large verdict, the admission of evidence as to future results of the injuries, not reasonable to be anticipated, and a refusal to give an instruction restricting the recovery for future results to such as would reasonably and probably result, necessitated reversal.

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Addie Lentz against the city of Dallas. Judgment in the Court of Civil Appeals (69 S. W. 166) reversing a judgment in favor of plaintiff, and plaintiff brings error. Reversed.

Crawford & Crawford, for plaintiff in error. W. T. Henry and J. J. Collins, for defendant in error.

WILLIAMS, J. Plaintiff, a child 10 years of age, stepped into a hole in a grating upon one of the sidewalks in Dallas, and for the injuries sustained recovered a judgment against the city, which on appeal was reversed by the Court of Civil Appeals (39 S. W. 166), and judgment was rendered by that court in favor of the city. This action of the Court of Civil Appeals was based upon a provision of the charter of Dallas, which was construed as exempting the city from the liability asserted against it. The evidence showed that the owner of a building which abutted upon the sidewalk had made an excavation under it, and had inserted the grating to cover the opening in the walk thus made. At the time of the accident, according to testimony adduced for plaintiff, there was a hole in this grating, into which the child stepped; and which had existed so long that the city ought to have known of and remedied it. The charter gave to the city complete control over the streets and sidewalks, and contained these further provisions:

"Sec. 55: The cost of constructing sidewalks and keeping the same in repair, together with the cost of collection, shall be entirely defrayed by the property owners in such manner as the city council may provide, and shall be a perpetual lien on the property in question until paid."

"Sec. 159: Whenever the city council, by resolution or otherwise, orders the construction of any sidewalk it shall specify the kind of sidewalk required to be constructed and the width of same to be so constructed, and thereupon the city engineer shall issue a notice which shall be served upon the owner of such property, if in the city, or if such owner shall be out of the city, such notice shall be published in some newspaper published in the city of Dallas five consecutive days. Such notice shall state the place where such sidewalk is required to be constructed, the kind of sidewalk required to be constructed and the width thereof, and the length of time, which shall not be more than thirty days from the date of the service of such notice, within which such sidewalk is required to be constructed, and that such property owner must proceed to construct the same, or appear before the city council at a regular meeting giving the date of such meeting, and show cause why the same should not be constructed; and if such property owner shall not construct the same within the time required by the city council in the order or resolution of the city council requiring the same to be constructed, or shall not be excused from constructing the same by the city council, the city council shall advertise for bids for the construction of such sidewalk, and shall let a contract

therefor to the lowest responsible bidder, in the discretion of the council; such contract may be for any length or amount of sidewalk. As soon as practicable after the letting of such contract the city engineer shall furnish the city council a statement showing the name of the owners of the property abutting on the sidewalk so constructed, if known, if not known, shall so state, and a description of the property owned by such owners and the cost of the sidewalk immediately in front of the property so improved, and such cost shall be levied and assessed by the city council by ordinance against the property according to such statement by the city engineer, and said tax shall be a lien against such property from the date of the letting of such contract. Such ordinance shall state the amount of such tax against such respective lots or subdivisions of land, and the time when the same shall become due and delinquent; and if the same shall not be paid when due, the city collector shall proceed, as soon as practicable, to advertise and sell such property for the payment of such taxes, provided in cases of sale of such property for ad valorem taxes: provided, that it shall not be necessary that such sale shall take place at the same time as sales of property for ad valorem taxes. In the event that because the same adjoins a homestead, or for any other reason, the city is unable to lawfully compel the owner to construct and repair a sidewalk by fixing a lien on his property for the cost, the city of Dallas shall never be liable for damages to any person or property by reason of any defect in any such sidewalk not immediately occasioned by the direct act of the city, or of some officer for whose acts the city is responsible at law; and in all cases the property owner on whose property any sidewalk abuts, shall be under the duty to the public, as well as to the city, to keep the said sidewalk in repair, and shall be primarily liable to any and all persons for any injuries whatever occasioned to them or their property by reason of any such defect occurring by reason of the neglect or omission of such property owner to repair such sidewalk and to keep the same in repair, or by reason of his unlawful or wrongful act. In the event of a judgment against the city in all such cases where the property owner is made liable for damages by the provisions of this section, the city shall be entitled to a recovery over against any such property owner held to be primarily liable for such damages under the provisions aforesaid."

Sp. Laws 1899, c. 8.

The defense sustained by the Court of Civil Appeals is that, under the authority of *Hutcheson v. Storrie*, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884, and *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, those parts of section 159 which prescribe a mode of con-

structing and repairing sidewalks and of charging the cost thereof against the abutting property are unconstitutional and void; that, therefore, "the city is unable to lawfully compel the owner to construct and repair the sidewalk by fixing a lien upon his property for the cost," and hence is exempted by the latter part of the article from liability for the injury to plaintiff. In the two cases referred to, assessments for improvement of streets were involved; assessments which could only be lawfully imposed in the exercise of the taxing power, exerted in subordination to the fundamental principles which limit the exercise of that power. The principle held to be disregarded in those cases was that which restricts the special burden to be imposed upon the adjacent property to an amount not in excess of the benefit resulting specially to such property from the improvement. Whether or not, if the principle of those decisions were applied to the provision quoted, it would, on its face, appear to be unconstitutional, is a question which this case, as we view it, does not present. Besides the taxing power, under which local assessments are levied, the city was invested with the police power, which was ample to have enabled it to have caused the removal of the dangerous defect which existed in this sidewalk. Says Judge Cooley: "The cases of assessments for the construction of walks by the side of the streets in cities and other populous places are more distinctly referable to the power of police. These footwalks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and in case of their failure so to construct them to provide that it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is the law, the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use. Upon these grounds the authority to establish such regulations has been supported with little dissent. No doubt this requirement is sometimes, in a measure, oppressive, since the actual cost may exceed the pecuniary advantages to the lot owner; but this, in case of police regulations, is never a conclusive objection."

Another question which we need not determine is whether or not article 159 is a

legitimate exercise of police power, or is to be referred to the taxing power. For, conceding, for the purpose of argument, that the latter view of it is the correct one, the general power given to the city of Dallas over its sidewalks was sufficient to enable it to prevent or remedy such conditions as were shown to exist in this case. *Macon v. Patty*, 57 Miss. 407, 34 Am. Rep. 451; *Greensburg v. Young*, 53 Pa. 280; *Franklin v. Mayberry*, 6 Humph. 368, 44 Am. Dec. 315; *Washington v. Nashville*, 1 Swan. 177; *Goddard v. Petitioner*, 16 Pick. 504; *Woodbridge v. Detroit*, 8 Mich. 309. These authorities, as well as the quotation from Cooley, go much further than it is necessary for us to go in this case. It was not at all necessary for the city to resort to the power given in cited provisions of the charter in order to have filled a hole in a sidewalk already constructed. Those provisions evidently contemplate construction and repairs of such magnitude as to make proper the adoption of the method thus provided for the doing of the work and fixing and defraying the expense, and are wholly inapplicable to such an inconsiderable work as the repairing of this grating; and since, in order to make such a repair, the city would not be required to resort to the proceeding provided in section 159, it follows, we think, that the provision giving immunity has no application. While the language in which the exemption is couched is that the city, in the event supposed, shall not be liable because of "any defect," the context makes it evident that the defects meant are such as are intended to be prevented by the exercise of the power just granted, and which exist because such power proves futile. The exemption has no application when the machinery, because of the failure of which such exemption is granted, is not to be relied on. It is unreasonable to suppose that the legislature proposed that the city should resort to the cumbrous method devised for the construction and repair of sidewalks whenever it should become necessary to fill a hole therein. For such conditions the police power was entirely adequate, and there was no purpose to exempt the city from liability for damages resulting from a negligent failure to exercise that power, when the exercise of it, and not the proceedings provided in section 159, were called for. We are therefore of the opinion that the Court of Civil Appeals erred in sustaining this defense; and this makes it necessary that we examine the other grounds for reversal urged by the city before that court. We shall notice only those assignments which are held to present reversible error, and those upon which an expression may aid in another trial.

The petition alleged the defects in the grating to be that the iron was originally too light and insufficient to afford protection to passers, and that the frames and bars of it were broken. Plaintiff was allowed to ask a witness who showed no qualification to give an opinion this question, "Those grates were

mighty light to start with?" to which the witness answered, "I am not an iron man, but I would judge they were rather light for that purpose, as they were broken out, and they did not stand the test they were used for." The question was plainly leading, and the answer expressed a mere conclusion of the witness, and a conclusion which the jury could draw as well as the witness. The objections made to them should have been sustained. The charge of the court submitted to the jury whether the bars of the grating were "broken or misplaced," and the point is urged that, the petition having specifically alleged only that the parts were broken, a recovery because they were misplaced should not have been allowed. It is difficult to determine from the way in which the evidence is stated whether or not there was anything material in the part of the instruction assailed. Plaintiff's evidence tended to show that the bars were broken, and there is much other evidence as to the condition of the grating, but whether there was any to which the word "misplaced" would have applied so as to make its use material, we do not clearly see from the evidence. As this may be easily remedied, there is no need for further comment; and it is likewise unnecessary that we determine whether or not, in either of the matters just discussed, there is reversible error. The physician who treated plaintiff, when giving his opinion as to the nature, extent, and duration of the injuries, was asked: "Is it not a fact that in medicine and surgery injuries apparently trifling in their nature, like broken ribs, etc., will produce effects in themselves that no one can foresee?" and answered in the affirmative. The objection to this—that it was not confined to the probable effects of the injuries—should have been sustained. Both question and answer assumed to speak of results not reasonably to be anticipated. *G., C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 83, 15 S. W. 556. The court should also have given the charge requested by defendant restricting plaintiff's recovery for future results of the injuries to such as would reasonably and probably result. Both of these rulings affect the amount of the recovery, which is large, and necessitate a reversal.

Reversed and remanded.

NORMAN v. THOMPSON et al.

(Supreme Court of Texas. Feb. 16, 1903.)

LIQUORS—LOCAL OPTION—ELECTION—LEGALITY—NOTICE—CONTEST.

1. Rev. St. art. 3397, provides that, after the result of an election under the liquor law has been declared, the election may be contested, and that if it appear that it was illegally or fraudulently conducted, or such a number of voters were denied the privilege of voting as might have changed the result, or the true result of the election cannot be ascertained, another election shall be ordered. *Held*, that the word "election" plainly means the things done

on the day of election, and not acts done prior thereto, and a failure to post one of the required notices of an election is no ground for a contest.

2. On the contest of an election under the liquor law, the question whether the decision of the court of civil appeals was in conflict with a decision of the court of criminal appeals was immaterial, as a contest of election concludes no question which may be involved in a prosecution for the violation of the law after it has been declared in force.

Certified questions from court of civil appeals, Fifth supreme judicial district.

Petition of W. F. Norman and others to contest an election held under the liquor law; R. D. Johnson, contestee. From a judgment for the contestee, contestants appealed to the court of civil appeals, which affirmed the judgment (72 S. W. 64), and which certifies questions.

Looney & Clark, for appellants. C. E. Meade, for appellee.

BROWN, J. Certified questions from the court of civil appeals for the Fifth supreme judicial district, as follows:

"An election was held throughout Hunt county on May 3, 1902, to determine whether or not the sale of intoxicating liquor should be prohibited in said county. The election resulted in favor of prohibition. On May 29, 1902, W. F. Norman, J. A. Brown, and Jim Beckham filed in the district court of Hunt county their petition to contest said election; R. D. Thompson, the county judge of the county, being made contestee. It was alleged in the petition that the contestants were resident citizens, qualified voters, and property owners of said county, and that they were engaged in business in said county as retail liquor dealers, and had procured licenses to carry on such business, as required by law, which licenses had not expired. As ground of contest, it was charged that only four copies of the order of election were posted for twelve days prior to the day of election. The contestee replied that, if such was the case, the fact did not affect the result of the election, and that the voters of the county had actual notice of the election, and participated therein. The contestants demurred to this plea of the contestee on the ground that the posting of statutory notices for the time and in the manner required by law is a jurisdictional fact, without which, under our law, no legal local option or prohibition election can be held. The demurrer was overruled, and exception duly reserved. The case was tried before the court without a jury, and judgment was rendered in favor of the contestee, from which judgment the contestants have prosecuted an appeal to this court. There is no statement of facts in the record. At the request of the parties, the trial judge filed conclusions of fact, wherein he found that four copies of the order for the election were posted for more than twelve days prior to the day of election, and that one copy thereof was posted

for only nine days prior to the day of the election, and that these were the only copies of said order that were ever posted; that the voters of the county had actual notice of the election, and participated therein, and that the result of the election was not affected by the failure to post the fifth copy of the order for the full twelve days. In the brief of appellants, three assignments of error are presented. They read as follows: '(1) The court erred in overruling contestants' special exception to that part of contestee's first amended answer wherein it is alleged that, if there was a failure to post the notices required by law, it did not affect the result of the election; that the voters of Hunt county were informed of the election, its purpose, and the day on which it was to be held, and had full notice thereof; that the full voting strength of Hunt county was obtained in said election. (2) The court erred in admitting the evidence shown in bill of exceptions number one. (3) Having found as a fact that but four copies of the order for, and the statutory notice of, said election, were posted twelve days prior to the election, the court erred, in his conclusion of law, in holding that the election was not void, and in rendering judgment in favor of contestee.' These assignments are grouped, and under them three propositions are urged. They read as follows: '(1) The local option law, being for a particular locality only, is a quasi local or special law, and depends for its validity upon its adoption in strict conformity with the law permitting its adoption. (2) The posting of at least five copies of the order for at least twelve days prior to the election in the places required by law is a jurisdictional fact, without which the people have no authority to assemble and vote, and the election is void. (3) The local option law can only be enforced by the criminal courts. The court of criminal appeals being a court of last resort in criminal cases, the construction placed by it upon the statute is binding upon the civil courts.' No other assignments or propositions are presented or urged. The evidence referred to in the second assignment of error was that offered by the contestee in support of his special plea above set out, and which was admitted over the objections of the contestants; the ground of objection being that such testimony was immaterial and irrelevant, and that the character of notice sought to be proved by said evidence is not notice for such elections prescribed by law, and does not comply with the statute. A proper bill of exceptions was reserved to the admission of this testimony.

"Question 1. Did the failure to post one of the five copies of the order of the election for twelve days prior to the day of the election render the election void, regardless of the fact that the voters of the county had notice of the election, and participated therein, so that the result thereof was not affect-

ed by the failure to post said copy in due time?

"Question 2. The question just propounded has been decided by this court in this case in the negative, and the contestants, in a motion for rehearing, have asked us to reconsider our said holding. Is our said holding in conflict with the decisions of the court of criminal appeals in all or any of the following cases, viz.: *Ex parte Kramer*, 19 Tex. App. 124; *Smith v. State*, Id. 444; *James v. State*, 21 Tex. App. 356, 17 S. W. 422; *Irish v. State*, 20 S. W. 778; *Bowman v. State*, 40 S. W. 798; *Bowman v. State*, 41 S. W. 635; *Shields v. State*, 42 S. W. 898; and *Frickie v. State*, 45 S. W. 810,—and, if so, should we adhere to our said holding, or reconsider the same, and decide the question in accordance with the decision of said court?

"Question 3. Each and all of the said assignments of error and propositions of appellants were overruled by this court, and the judgment herein affirmed. The same are again presented and urged in a motion for rehearing filed by appellants. Was there error in the action of this court in holding that said assignments and propositions were not well taken, and should the judgment herein have been affirmed or reversed?"

The contest of an election is a special proceeding authorized by the statute, and the courts are limited in their investigation to such subjects as are specified in the law. *Wright v. Fawcett*, 42 Tex. 206; *Rogers v. Johns*, Id. 340. The following article of the Revised Statutes prescribes the ground of contest: "Art. 3397. At any time within thirty days after the result of the election has been declared, any qualified voter of the county, justice's precinct or sub-division of such county, or in any town or city of such county in which such election has been held, may contest the said election in any court of competent jurisdiction, in such manner as has been or may hereafter be prescribed; and should it appear from the evidence that the election was illegally or fraudulently conducted; or that by the action or want of action on the part of the officers to whom was entrusted the control of such election, such a number of legal voters were denied the privilege of voting as had they been allowed to vote might have materially changed the result; or if it appears from the evidence that such irregularities existed as to render the true result of the election impossible to be arrived at, or very doubtful of ascertaining, the court shall adjudge such election to be void, and shall order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of ordering such election." As used in the foregoing article, the term "election" means the act of casting and receiving the ballots from the voters, counting the ballots, and making returns thereof. *State v. Tuck-*

er, 54 Ala. 210. That is the meaning of the word "election" in ordinary usage, and it must be so construed; there being nothing in the law to suggest that the legislature intended to use it in a different sense. On the contrary, wherever the word "election" appears in the acts of the legislature upon this subject, it seems to have in view those things to be done on the day of the election, in contradistinction to the acts which are to be done preparatory to the election. Article 3397 expresses the policy of the legislature to be that a law of this character shall not be put in force unless the election has been fairly conducted, and resulted in a fair expression of the will of the voters. To accomplish this end, the statute confines the inquiry to those proceedings which are directly connected with the conducting of the election itself. The posting of the notices of election not being embraced in the terms of the statute, the failure to post one of such notices for 12 days prior to the election constitutes no ground for a contest of election. We answer the first question in the negative.

A contest of election concludes no question which may be involved in a prosecution for the violation of the law after it has been declared in force. Therefore the question of conflict between the decisions of the court of criminal appeals and the decision of the court of civil appeals is immaterial.

It follows from what we have said that the court of civil appeals correctly affirmed the judgment of the district court.

NORMAN et al. v. THOMPSON et al.
(Court of Civil Appeals of Texas. Nov. 29, 1902.)

LOCAL OPTION ELECTION—VALIDITY—NOTICE—TIME OF POSTING.

1. Under Rev. St. art. 3387, relative to local option elections, and providing that the clerk of court shall post five copies of the order of election at different places within the proposed limits for at least 12 days prior to the day of election, etc., the fact that one copy of the order was posted only nine days before the election does not render it invalid, where the voters of the county had actual notice of the election, and the result was not affected by a failure to post the copy of the order the full 12 days.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Election contest by W. F. Norman and others against R. D. Thompson and others. From a judgment for contestees, contestants appeal. Affirmed.

For opinion of supreme court on certified questions, see 72 S. W. 62.

Looney & Clark, for appellants. C. E. Meade, for appellees.

TEMPLETON, J. A local option election held throughout Hunt county on May 3, 1902, resulted in favor of prohibition. W. F. Norman and others instituted proceedings to

contest the election, the county judge being named as contestee. It was alleged as ground for the contest that one of the five copies of the order for the election, which were posted as notices, was not posted 12 days before the election. The contestee replied that the qualified voters of the county had notice of the election, and that, if the copy of the order in question was not posted at the proper time, the failure to post the same did not affect the result of the election. On a trial judgment was entered for the contestee, and the contestants have appealed.

There is no statement of facts in the record. The trial judge filed conclusions of fact, wherein he found that the particular copy of the order was posted only 9 days before the election, that the qualified voters of the county had actual notice of the election, and that the result thereof was not affected by the failure to post the copy of the order 12 days before the election. Upon this state of facts he held as a matter of law that the election was valid. The question presented in this appeal is whether the failure to post the copy of the order 12 days before the election rendered the election void, notwithstanding the fact that the qualified voters of the county had notice of the election, and the further fact that the failure to post the copy of the order in due time did not affect the result of the election.

The method of giving notice of a local option election is prescribed by article 3387, Rev. St., which provides that "the clerk of said court shall post or cause to be posted at least five copies of said order of election at different places within the proposed limits for at least twelve days prior to the day of election, which election shall be held and returns thereof made in conformity with the provisions of the general laws of the state and by the officers appointed and qualified under such laws." The first contention of appellants is that the court of criminal appeals has repeatedly construed this article of the statutes, and has uniformly held that the election is void if the statutory notice has not been given; that, since the said article has been so construed, the legislature has amended the same, and has not provided that the failure to give the statutory notice shall not invalidate the election if the voters have notice otherwise of the election, and the result is not affected, thereby accepting the construction placed on the said article by said court, and concluding the question as to the legislative intent. The following cases are relied on by appellants, viz.: *Ex parte Kramer*, 19 Tex. App. 124; *Smith v. State*, 19 Tex. App. 444; *James v. State*, 21 Tex. App. 356, 17 S. W. 422; *Irish v. State* (Tex. Cr. App.) 29 S. W. 778; *Bowman v. State* (Tex. Cr. App.) 40 S. W. 798; *Bowman v. State* (Tex. Cr. App.) 41 S. W. 635; *Shields v. State* (Tex. Cr. App.) 42 S. W. 398; and *Frickie v. State* (Tex. Cr. App.) 45 S. W. 810. In the *Kramer Case*, which was a habeas corpus

proceeding, the court said: "In the statutes providing for such elections it is required that the clerk shall post or cause to be posted at least five copies of the order for election at different public places in the county for at least twenty days prior to the day of election. It appears from the record in the case before us, and is a fact admitted by the prosecution, that this requirement of the law was not observed. But one copy of the order for the election was posted twenty days prior to the election. The other four copies were posted less than twenty days prior to such election. There are other defects in the election, which are perhaps also fatal to its validity; but this one alone is sufficient to render it void under our view of the law and the previous decisions of this court." None of the decisions referred to relate to the question of notice. The relator was discharged. The Smith Case was an appeal from a conviction for violating the local option law. The record showed an agreement to the effect that, "after the court had ordered the election, and prior to the holding of the same, only three certified copies of the order of election were posted, * * * and that these were the only notices of said election that were ever posted." It was held that the election was void, and the prosecution was dismissed. In the James Case it was held that the evidence was not sufficient to show that the notices were posted, and the judgment was reversed, and the cause remanded. This case was overruled by the Irish Case, and it was held that under the statute making the order declaring the result of the election prima facie evidence of the regularity of the proceedings the burden was on the defendant to show that the notices had not been posted. The judgment was affirmed. The Bowman Cases were to the same effect, and both judgments were affirmed. This holding was again followed in the Shields Case, and it was held that the evidence offered by the defendant to show that the notices were not posted was not sufficient to require the submission of the issue to the jury. This judgment was also affirmed. In the Frickie Case, which was a charge of violating the identical law involved in the Shields Case, it was held that the evidence tending to show that the notices were not posted was such that it was the duty of the court to submit this issue to the jury. Because this was not done, the judgment was reversed, and the cause remanded. After the decisions in the Smith and Kramer Cases had been rendered, the legislature amended the article in question, and changed the time for posting the notices from 20 to 12 days, and omitted the word "public" from the the provision regarding the place of posting the notices.

A careful examination of the cases cited shows that in none of them was the court considering the question involved in this case; that is, whether the election was void if the statutory notice was not given, notwithstand-

ing the fact that the voters had notice, and that the result of the election was not affected by the failure to give the notice prescribed by law. The records before the court in the Kramer and Smith Cases showed that the notices were not posted. In the Kramer Case the fact was admitted by the prosecution, and in the Smith Case was shown by an agreed statement. In this condition of the records it was held—and, we think, properly—that the elections were void. It is evident that the admissions and agreements made by the state in these cases, as above set out, controlled the court in its action in making final disposition of the prosecutions. It was conceded by the state in each of the cases that the statutory notice had not been given, and there was no suggestion that the voters had actual notice. Notice to the voters is essential to the validity of such elections, and, if it appears that the notice required by the statute was not given, the presumption is that the electors did not have notice. An appellate court passes upon a case on the record made before it, and, if the record shows a void election, it will be so adjudged. The record on appeal may show a state of facts which will render the election void, when, if all the facts were disclosed, the election would be valid. An election is either void or valid. If it is void for any reason, it cannot be made valid. But a valid election may be made to appear void by a record on appeal, and the court will dispose of the case on the record, and not on some theory not suggested by the facts contained in the transcript. On the other hand, a void election may appear to be valid. In the very list of cases cited by appellants the court of criminal appeals recognized and applied the rules stated. In the Shields Case the election was held valid, and the appellant was compelled to pay the penalty of a violated law. In the Frickie Case it was held that the same law as that involved in the Shields Case may not have been legally adopted, and the cause was remanded for a further trial of the issue. Again, if the election is void, it is not made valid by the order of the court declaring the result, and yet it was held in the Irish, Bowman, Shields, and Frickie Cases that convictions for violating the law would be sustained, so far as the question of giving notice of the election was concerned, upon proof of the entry of such order. It is therefore clear that because a particular election has been held void on a record showing that the statutory notice of election was not given is not decisive of the question whether all elections held without that character of notice are invalid. The very question which was before the court of criminal appeals and considered and decided by that court in the cases cited was whether an election shown by the record to have been held without the statutory notice being given, there being no suggestion that the voters had actual notice, was a valid election. This is not the question presented

in this case. The question here is whether, if the statutory notice was not given, the election would nevertheless be valid, provided the voters had actual notice, and the failure to comply with the statute did not affect the result of the election. That this question was not passed on by the court of criminal appeals is shown by the fact that in none of their opinions is there the slightest reference to it. When the state of the law upon that question is considered,—as it will be later on in this opinion,—it is inconceivable that the court should have determined the question without paying it “the cold respect of a passing glance.” The fact is that the question has never been considered, much less decided, by the court of criminal appeals, and the legislature, in amending the article of the statute respecting notice, did not have in mind a decision which was never rendered. The contrary contention has been urged by counsel for appellants with zeal and ability, but our conviction is strong that their contention is unsound.

We now come to a consideration of the question on its merits. The case turns on the construction to be placed on article 3387, quoted in the beginning of this opinion. It is our duty to ascertain the legislative will and follow it. Was it the intention of the legislature that a failure to comply with the statute in respect to giving notice of the election should render the election void, regardless of whether the voters had actual notice and of whether the failure to comply with the statute affected the result? Where such intention exists, it is usually manifested by incorporating an express declaration to that effect in the statute. It must be held that the legislature had in mind this rule of law when the article in question was adopted, and, as the article contains no such declaration, it will be presumed that no such intention existed, unless the language of the article forbids such presumption. The statute is expressed in mandatory terms, but this fact does not necessarily require the construction propounded by appellants. In discussing the effect of the use of the word “shall” in another article of the statute relating to the designation of election precincts, our supreme court, in *Davis v. State*, 75 Tex. 433, 12 S. W. 962, said: “It may be said that the use of the word ‘shall’ shows that the provision is mandatory. That it is a command to the commissioners’ court may be granted, but it does not follow that it is mandatory in the sense that it makes a compliance with the provision essential to the validity of the election. The word ‘shall’ has been frequently construed as not mandatory when the provision in which it was found did not confer a private right, and the public interest did not demand such construction.” In that case the court declared that “the main design of all election laws is, or should be, to secure a fair expression of the popular will in the speediest

and most convenient manner; and we think that a failure to comply with provisions not essential to attain that object should not avoid the election, in the absence of language clearly showing that such was the legislative intent.” The court called attention to the fact that the statute there considered did not contain an express declaration that a failure to comply with its requirements should avoid the election, and it was held that the statute was directory, although the article there construed was couched in mandatory language. To similar effect is the decision of the court of criminal appeals in *Snead v. State*, 40 Tex. Cr. R. 262, 49 S. W. 595. The object of the legislature in enacting the article under consideration in the case at bar was to insure notice to the voters of the election. *Voss v. Terrell* (Tex. Civ. App.) 34 S. W. 170. Notice to the voters is essential to the validity of such elections, but, if the voters have actual notice, it is apparent that the statutory notice is unnecessary. In the very nature of things, the posting of only five notices in a great county like Hunt would amount to no more than constructive notice to the mass of the people. In such case it is easily conceivable that the notice received by the voters in the progress of the campaign would be more general and effective than that derived from the statutory notices. The object of the law requiring copies of the order of election to be posted being simply to provide for notice to the voters, to hold the election void because one of the copies was not posted for quite the full time would accomplish no good purpose if the voters had actual notice of the election. We think that literal compliance with the statute should be required only when necessary to protect the electors in their right of suffrage, and that such was the intention of the legislature. To hold otherwise would be to sacrifice the purpose and spirit of the law to form and literalism, and this cannot be permitted. It is significant of the intention of the legislature that the article providing for notice contains a clause, also in mandatory language, requiring the election to be held and the returns thereof to be made in conformity with the provisions of the general laws regulating elections. Many of the provisions referred to, although mandatory in form, have been held to be merely directory. It is not an unreasonable conclusion that the legislature intended a like construction to be placed on the provision respecting notice, since that provision is incorporated in the same article with the requirements concerning the manner of holding the election. And by article 3390 it is provided that the order of the court declaring the result of the election shall be prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding such election, again placing the giving of notice on the same footing with

the provisions regarding the holding of the election. The very question raised in this case has never before been presented for decision in this state. In *Swenson v. McLaren* (Tex. Civ. App.) 21 S. W. 800, it was held that a school tax election was void because the notices of election were issued and signed by the county judge when the law required the same to be signed by the sheriff. The court said that the voters were required by law to assemble only at the call of the sheriff, and not at the call of the county judge. In *Field v. Hall* (Tex. Civ. App.) 40 S. W. 749, it was held that a stock-law election was invalid because the county judge, without authority from the commissioners' court, changed the time of holding the election, the court alone having power under the law to fix the time of election. It is obvious that these cases are not in point. In the first case the notices were null and void because not issued by the proper officer, and there was no attempt to show that the voters had notice otherwise of the election. In the second case the election was held on a day different from that fixed by the court having power to set the time of holding the election and was, therefore, a nullity. The question has, however, received consideration in other jurisdictions. In *Am. & Eng. Enc. of Law*, vol. 10, p. 626, the rule is thus stated: "In the case of special elections, however, when the law does not fix the time and place for holding same, but they are to be fixed by some authority, failure to give such notice or issue a proclamation of the election will render it a nullity, unless the people have actual knowledge, and attend, so that the result is not affected. If it appears that the people generally had actual notice of a special election, so that the result would not have been different if proper notice had been given, failure to give such notice does not vitiate the election." In *McCrary on Elections*, secs. 178 et sequa, the question is discussed, and the rule announced that, when the election has been held at the proper time and place, and the electors had notice and participated in it, the want of such notice as the law provides will not render it void. One of the earliest cases involving the question arose in Ohio, and was considered by the supreme court of that state in *Foster v. Scarff*, 15 Ohio St. 532. Legal notice was not given, and the election was held void. But in concluding the opinion the court uses this language: "In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation as prescribed by law is per se, in all supposable cases, necessary to the validity of an election. If such were the law, it would be in the power of a ministerial officer by a misfeasance always to prevent a legal election. We have no doubt that, when an election is held in other re-

spects as prescribed by law, and notice in fact of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid." In the case of *Wheat v. Smith*, 7 S. W. 161, the very point was decided by the supreme court of Arkansas. That case was a contest of a special election held to fill a vacancy in an office. It was doubtful from the evidence whether the notice required by law had been given, but it was shown that the voters had notice in fact, and that the result was not affected by the failure to give the statutory notice. In discussing the issue the court said: "When a special election to fill a vacancy is ordered, there is no presumption that the voters know the date fixed by the writ of election, and they must be informed of it. But the established rule is that the particular form and manner pointed out by the statute for giving notice is not essential. Actual notice to the great body of electors is sufficient. The question in such cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election. When the election is legally ordered, and the electors are actually apprised of the time and place for holding it, the misfeasance or nonfeasance of the officer upon whom the statute devolves the duty of giving the election notice cannot deprive the electors of the power to express their will through their ballots." Another case in point is that of *In re Rowley*, 70 N. Y. Supp. 208, decided by the supreme court of that state in 1901. A local option election was ordered, and it was the duty of the town clerk, under the statute, to post notices of the election. This he wholly failed to do, but the voters had actual notice. It was held that the election was valid, the court saying: "As I have said before, it was the duty of the town clerk to give notice of the vote on local option. * * * The statute in respect to his duties is directory only. In case of a failure of the town clerk to post and publish the notice, where the electors were not given other notice, the vote cast would be void, and the will of the people thwarted by the willful refusal of that officer to perform his duties. But that is not the case here. The end sought to be attained by the statute, to wit, the giving of notice of the questions to be voted for at the town meeting, was accomplished in this case, as already clearly appears." To the same effect is the case of *Little v. Langlie*, 67 N. W. 956, 32 L. R. A. 723, decided by the supreme court of North Dakota. The question voted on related to the location of a county seat. The sufficiency of the notice was assailed, and the court held that there was a substantial compliance with the statute, but that, as the voters had notice in fact, and a full vote was polled,

the defect in the notice, if any, did not affect the validity of the election.

The authorities quoted from above and the cases cited therein, are believed to be decisive of the question. The overwhelming weight of authority is unquestionably in favor of the contention of appellee that the failure to give the statutory notice of an election, if the voters had knowledge of and participated in the election, so that the result thereof was not affected by the failure to give notice in the manner prescribed by law, will not vitiate the election. We do not desire to be understood as disparaging the notice required by the statute. When such notice is not given, the evidence offered to show actual notice will be closely scrutinized, and, unless it is sufficient to show with reasonable certainty that no injury has resulted from the failure to give precise legal notice, the election will be declared void. No question concerning the sufficiency of the evidence is presented in this case.

The judgment of the trial court was in accordance with the views above expressed, and will therefore be affirmed. Affirmed.

INTERNATIONAL & G. N. R. CO. v. YOUNG et al.

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

CARRIERS—LIVE STOCK—NEGLIGENT INJURY—INSTRUCTIONS—DUTY OF CARRIER—LIMITATION OF LIABILITY—MEASURE OF DAMAGES.

1. In an action for damages to stock shipped over defendant's road, a charge that a common carrier is required to carry stock to its destination in as safe and speedy a way "as possible" is erroneous, only reasonable diligence being required.

2. In an action against a railroad company for damages for injuries to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock, or their propensity to injure one another.

3. Where a railroad company's contract for the shipping of stock limited the liability of the carrier to its own line, an instruction should be given, in an action for injury to the stock, that defendant would not be liable for injuries resulting after the stock passed out of its possession.

4. In an action against a railroad company for injuries to stock while in transit over defendant's road, the measure of damages was the market value of the stock at the point of destination, and evidence of what the stock sold for at a different time and place was inadmissible.

Appeal from Travis county court; Geo. Calhoun, Judge.

Action by J. R. Young and others against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. John Dowell, for appellees.

FISHER, C. J. This is an action by Young and others against the railroad company to recover damages for injuries alleged to have been sustained to two cars of horses and mules shipped by the appellees over the appellant's road from Austin, Tex., to Longview, and from there, over the Texas, Saline Valley & Northwestern Railroad to Carthage, Tex. Verdict and judgment were in favor of the plaintiffs for \$522. As grounds of recovery, plaintiffs pleaded that there was a delay in the transportation of the stock to their destination, and rough handling and usage, of such a character as caused loss and damage to the plaintiffs.

The court, among other charges, instructed the jury as follows: "The law requires a common carrier who receives stock for transportation to carry and transport the same from place of shipment to the place of destination in as safe and speedy a way as possible, and to deliver the same in like order and condition as received, ordinary wear and tear excepted." The common-law liability of a carrier for the transportation of stock is the same as that imposed upon it in the carriage of other freight, except as to such injuries that may have been caused by the inherent vice and the nature of the stock itself, and, as stated in the charge of the court, "ordinary wear and tear excepted," which we construe to mean the depreciation in value which results from the mere transportation itself, unaccompanied by negligence of the carrier. But in expediting the shipment, the law does not require that it should be transported in as speedy a way as possible. The carrier must exercise reasonable diligence to transport and deliver the property at its destination, exercising the care necessary to comply with its contract of shipment; keeping in view the character of the commodity, its likelihood of deterioration and loss in value by reason of delay. The burden placed by the charge of the court, to transport in as speedy a way as possible, was too great, and therefore the court erred in giving the charge quoted.

The court did not err in the charge complained of in appellant's second assignment of error. Upon another trial of the case, we would suggest that in addition to relieving the appellant from liability for the usual wear and tear incident to the transportation, as stated in the charge of the court, the charge should also be framed so as to relieve the appellant from liability for injuries to the stock occasioned by their inherent viciousness, or propensity to injure one another.

The facts of the case did not call for the charge which the appellant, in its third assignment of error, contends should have been given to the jury. If the plaintiff could be burdened with the duty of feeding and watering the stock, it does not appear that he was guilty of any negligence or want of care in this respect.

¶ 4. See Carriers, vol. 9, Cent. Dig. § 964.

What we have said in disposing of the second assignment disposes of appellant's fifth assignment of error, as the court upon another trial will doubtless submit the issue raised by this last assignment of error. The same ruling also applies to appellant's sixth assignment of error.

We are of the opinion that appellant's seventh and eighth assignments of error are well taken. Under the averments of the plaintiff's petition, in seeking to hold the appellant liable for damages that occurred, if any, upon a different line of road, together with the contract of transportation, which limited the liability of appellant to its own line, the instruction to the jury insisted upon by the appellant was authorized,—to the effect that it would not be liable for injuries that may have resulted to the stock after it passed out of its possession at Longview.

The evidence complained of in appellant's ninth assignment of error was not admissible. The market value of the stock at Carthage was the measure of damages. This value being proven, it was error for the court to admit evidence of what the property sold for at a different time and place.

For the errors pointed out, the judgment is reversed and the cause remanded. Reversed and remanded.

ROUNTREE v. THOMPSON et al.

(Court of Civil Appeals of Texas. Feb. 19, 1903.)

TRESPASS TO TRY TITLE—FINDINGS OF FACT.

1. The court of civil appeals is not required to make a finding of fact based on testimony consisting of written instruments, concerning which there is no conflict.

2. In trespass to try title, the court of civil appeals will not make a finding of fact that a deed which is the first link in a party's chain of title embraces the land sued for; that being a question of law, which the court is not required to determine where the case is decided on other grounds.

3. Where the chain of title in trespass to try title is set out in the statement of facts, the court will not make a finding of fact as to the sufficiency of the deeds to pass title; that being a question of law.

On motion for additional conclusions of fact. Motion denied in part and granted in part.

For former opinion, see 71 S. W. 574.

KEY, J. Appellant has filed a motion requesting us to file what are termed "additional conclusions of fact"; but, in the main, the motion is a request that we state certain testimony, consisting of written instruments, such as deeds. This we are not required to do. There is no conflict in the testimony bearing on the questions referred to in the motion; and, this being the condition of the record, if this court makes a finding of fact without evidence to support it, the supreme court will disregard such find-

ing. Therefore, without setting out the testimony upon which the findings are made, we make findings on the issues referred to in the motion as follows: (1) The instrument from Resin Byrn to Wm. W. Thompson applies to the land in controversy. (2) We hold (as matter of law, however) that the title thus conveyed was a legal title. (3) We hold that the defendants failed to show that John P. White and John Ireland were innocent purchasers of the land. (4) We hold (as matter of law, however) that the plaintiffs did not recover more land than the proof shows they were entitled to.

As stated above, on the issues referred to, there is no conflict in the testimony, the most of which consists of written instruments.

On the third question the motion requests us to find as a fact that the deed from Resin Byrn to the administratrix of the estate of Richard R. Royall, dated March 13, 1850 (being the first link in appellant's chain of title from Byrn), correctly described the east or lower one-third of the league and labor survey in question, and embraces the land sued for. This we decline to do. There was no other testimony aiding the description given in the deed referred to, and it is not a question of fact, but a question of law, whether the deed conveys any particular portion of the Thompson league and labor; and, as we affirmed the judgment on another ground, we are not required to decide that question. The description in the deed is as follows: "One-third of a league and labor patented to me by the republic of Texas,—patent bearing date the 18th day of Feb'y, 1846,—and situated on the Llano river, about 85 miles north, 10° west, from San Antonio; said one-third of said league and labor to be taken off from said league and labor as follows, to wit: Commencing in the margin of said river at the northeast corner of said league and labor at a hackberry marked HH, from which a hackberry marked W bears north, 66° west, 10 varas, and a hackberry marked X bears north, 43° east, 2 varas; thence with the front line of said league and labor, with the meanders of the Llano, to a point from which a line drawn and run parallel to the side lines of said league and labor to the back line thereof, and following the said back line to the corner of said league and labor, and then following the side line of said league and labor to the place of beginning."

We are also asked to find as a fact that, if the deed from the administratrix of the estate of Richard Royall to John S. Royall is sufficient to pass title to the land in controversy, appellant's chain of title is otherwise regular. The chain of title referred to is set out in the statement of facts, and whether or not it is regular is a question of law. Several objections are urged to it in appellees' brief, one of which we decided in appellees' favor, and therefore deemed it unnecessary to pass upon the others. We still adhere to that view, and leave undecided

quite a number of questions of law urged by appellees in support of the judgment.

The motion is in part granted, and in part denied.

GULF, C. & S. F. RY. CO. v. DENSON.

(Court of Civil Appeals of Texas. Feb. 4, 1903.)

NEGLIGENCE—PERSONAL INJURIES—AGGRAVATION—INSTRUCTIONS—FAILURE TO MAKE SPECIFIC APPLICATION.

1. In an action for personal injuries, defendant specifically pleaded that plaintiff did not use ordinary care to effect a cure, and did not follow the directions of his physician, whereby his trivial injury was aggravated. The court charged that it was the duty of plaintiff to exercise such care as a person of ordinary prudence would have exercised to effect a cure, and that he could not recover for any injury which, by the use of such care, he could have avoided. *Held* that, though this instruction was abstractly correct, it was error to refuse to charge that, if plaintiff negligently violated the instructions of his physician, and negligently used his injured leg, and thereby prevented recovery, he could not recover additional damages caused by such neglect.

Appeal from Milam county court; R. B. Pool, Judge.

Action by J. S. Denson against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry and A. H. Culwell, for appellant. U. S. Hearrell, for appellee.

STREETMAN, J. Appellee obtained judgment for personal injuries sustained by him at night in striking his leg against a steel rail, alleged to have been negligently placed by appellant in the approach to its depot at Milano, Tex. The injury did not at first appear to be serious, and after a little while appellee undertook to work for the International & Great Northern Railway Company, but he was unable to continue his work, and then consulted a physician, who advised him not to use his leg and stay off his feet for a few days. The doctor also, either at that time or afterwards, directed him to use crutches. Appellant, among other defenses, made the following special allegation: "That plaintiff did not use ordinary and proper care and diligence to effect a cure, and did not give his injured limb proper rest, and that he did not follow the directions of the physician whom he employed to give his limb proper rest and his disobedience of the directions of his physician, as well as in other respects, plaintiff was guilty of negligence, which aggravated his alleged trivial injury; but for which negligence his said trivial injury would have been cured in a few days." There was evidence tending to show that appellee had not followed the instructions of his physician, and that, if he had done so, his injuries would not have been so serious. The only charge given

by the court upon this subject was as follows: "It was the duty of plaintiff to exercise such care as a person of ordinary prudence would have exercised under similar circumstances to facilitate the cure of his injuries, and he cannot recover for any injury which, by the use of such care, he could have avoided." The court refused to give the following special instruction requested by appellant: "If you believe from the evidence that after the defendant received his injury (if you believe he received any) he did not properly care for same, but negligently violated the instructions of his physician, and negligently used and walked upon his injured leg, and thereby prevented and delayed the recovery of said injury or wound, you cannot find for any additional damages caused by such neglect." This special charge should have been given. Appellant was entitled to have the court explain to the jury the principles of law applicable to the very facts constituting his defense. The charge of the court correctly stated appellee's duty in the abstract, but, appellant having requested this instruction applying the rule pertinently to the issue as presented by the pleading and the evidence, it was error to refuse it. *M., K. & T. Ry. Co. v. McGlamory* (Tex. Sup.) 35 S. W. 1058.

We have carefully considered all of the assignments, and find no other error. Because of the refusal to give said special instruction, the judgment is reversed, and the cause remanded.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. ROBINSON.

(Court of Civil Appeals of Texas. Feb. 4, 1903.)

PERSONAL INJURIES—INSTRUCTIONS—LOSS OF TIME—DOCTORS' BILLS—EVIDENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries, an instruction that, if the jury found for plaintiff, they should allow him such a sum as would compensate him for the loss of time, for the expenses for doctor's bill, etc., for any physical pain or mental anguish which he had endured, for such as would be caused by the injury in the future, and also for the probable effect of such injuries in impairing his ability to earn a livelihood in the future, was not objectionable as authorizing a double recovery.

2. In an action for personal injuries, where the jury might have inferred from the evidence that the plaintiff lost some time, but there was no evidence of the value of his services or the amount of time lost, a charge authorizing compensation for loss of time was erroneous.

3. In an action for personal injuries, an instruction authorizing a recovery by plaintiff for his doctor's bill is not proper, where there is no evidence that the amount of the bill is reasonable.

4. Where there was some of plaintiff's evidence from which the jury might have concluded that he was guilty of contributory negligence, a charge that, if plaintiff had shown to the satisfaction of the jury that his injuries were caused by defendant's negligence, it devolved upon the defendant to show plaintiff's contributory negligence, was erroneous.

Appeal from district court, Milam county; J. C. Scott, Judge.

Action by Dan Robinson against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry and A. H. Culwell, for appellant. Monta J. Moore, for appellee.

FISHER, C. J. Robinson sued the appellant for damages on account of personal injuries received by him while in the service of the appellant as a section laborer, it being alleged that plaintiff was injured by reason of a rock thrown at a cow by a colaborer, under the direction and command of the section foreman, which rock struck the plaintiff in the eye, causing permanent injury. Defendant answered by general denial, and specially that the plaintiff was injured by the negligence of a fellow servant, and that he was guilty of contributory negligence in failing to exercise reasonable and ordinary care in placing himself in a place of danger. The trial court, among other charges, instructed the jury as follows: "If you find for the plaintiff, you will allow him by your verdict such a sum of money as you may believe from the evidence will fairly compensate him for the loss of time to him that you may believe from the evidence has been caused by such injury; for the expenses that you may believe from the evidence he has incurred by reason of such injury in the way of doctor's bill in treating such injury, for any physical pain and mental anguish that you may believe from the evidence he has endured by reason of such injuries, for such mental and physical pain and suffering that you may believe from the evidence will with reasonable certainty be caused to him by such injury in the future; and if you further believe from the evidence that such injuries, if any, were of a permanent nature, you will also, in estimating his actual damages, consider the probable effect of such injuries in impairing his ability to earn a livelihood in the future." The objection that this charge authorized a double recovery is not tenable; but the charge is erroneous in submitting as an issue the right of the jury to compensate the plaintiff for loss of time. There is no evidence upon this point. The jury might assume from the facts that the plaintiff, by reason of the injuries sustained, did lose time in his employment, but there is not a word of evidence in the record tending to show the value of his services or the time lost.

It is also contended that this charge is erroneous, because it submits the issue as to the expenses incurred by the plaintiff in the way of doctors' bills. There is evidence in the record that the plaintiff had expended in doctors' bills the sum of \$5, but there is no testimony that this amount was reasonable. We do not make the charge submitting this last item ground of reversal, as

doubtless the error will not arise again upon another trial, as proof will be offered upon the point as to whether the doctor's bill or the amount paid was a reasonable sum for the services rendered by the physician.

The charge of the court in submitting the issue as to loss of time was erroneous, and for this reason the judgment of the trial court will have to be reversed.

The court, on the burden of proof, charged as follows: "The burden of proof is on the plaintiff to show that the injuries to plaintiff, of which he complains, were caused by the negligence of the defendant, its agents and employés; and, unless he has done so by a preponderance of evidence, you should find for defendant. If this, however, has been shown to your satisfaction, the burden of proof then shifts upon the defendant, and it devolves upon the defendant to show that it is not liable for damages by reason of the contributory negligence of the plaintiff, as heretofore charged." In view of the evidence in the record, this charge should not have been given. There is some evidence which arises in the development of the plaintiff's case from which the jury might have reached the conclusion that the plaintiff was guilty of contributory negligence. This being true, the court should not have given the charge complained of. *G., C. & S. F. Ry. Co. v. Hill* (Civ. App.) 70 S. W. 108, 4 Tex. Ct. Rep. 799.

Every other assignment of error has been carefully examined, and we are of the opinion that they are without merit.

For the reasons stated, the judgment is reversed, and the cause remanded. Reversed and remanded.

GULF, C. & S. F. RY. CO. v. HARRIS.

(Court of Civil Appeals of Texas. Feb. 4, 1908.)

CARRIERS—DESIGNATION OF DESTINATION IN WAYBILL—MISTAKE—LIABILITY—EVIDENCE—SECONDARY EVIDENCE—HARMLESS ERROR.

1. A railway company limiting its liability to its own line in a contract of shipment of freight is liable for the negligence of its agent in billing the freight to a different place on the line of the connecting carrier from that called for in the contract.

2. The act of an agent of a railway company in billing sheep to a different place on the line of the connecting carrier from that mentioned in the contract was the proximate cause of the shipper's losing the benefit of the market where he expected to sell his sheep, where they would have been seasonably delivered by the company's connecting carrier but for the agent's mistake.

3. The exclusion of evidence, in an action against a carrier for failure to seasonably deliver sheep, as to the condition of the market at the time the same should have been delivered, was harmless error, where the evidence was based on a publication which showed that the sheep were worth the principal amount awarded by the jury to the shipper as damages.

4. Where the evidence showed that the original waybill of sheep delivered to a carrier for shipment was given to the conductor in charge of the train handling the property, and was

carried to the destination along with the sheep, and was not returned to the shipper, the shipper was entitled to show the contents of the waybill by secondary evidence.

Appeal from Coleman county court; B. F. Rose, Judge.

Action by E. W. Harris against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry and Ballinger Mills, for appellant. John C. Randolph, for appellee.

FISHER, C. J. We are of the opinion that the pleadings of the appellee relied upon in the county court did not set up a new cause of action. They presented substantially the same issues that were raised by his pleadings in the justice's court. The error of the appellant's agents in wrongfully billing the sheep (that is, naming in the waybill a different place as their destination than that called for in the contract of shipment) is the basis of the plaintiff's cause of action. It is true that the appellant, under the contract of shipment, limited its liability to its own line of road, but it would be responsible for its negligence in billing the sheep to a place different from that called for in the contract of shipment. This act of the agent of the appellant was the proximate cause of appellee's losing the benefit of the market where he expected to sell his sheep, and where they should and would have been delivered by the appellant's connecting carrier, but for the error, mistake, and negligence of appellant's agent in giving in the waybill a different destination.

We agree with the appellant in its sixth and seventh assignments of error, wherein it is contended that the court erred in striking out the answers of the witnesses named in these assignments. The interrogatories to which these answers were in response, in our opinion, were not leading. But in our opinion the ruling complained of is harmless error, for, if the answers to these interrogatories had been admitted in evidence, it is not likely that a different result would have been reached in the trial court, for it appears that the evidence of these witnesses was based upon the National Live Stock Reporter, a publication, it seems, which the witnesses all agree correctly stated the condition of the market at the National Stock Yards in Illinois. The statement contained in this publication accompanied the answers of the witnesses to these interrogatories, and would have been considered by the jury and the trial court in determining the importance and weight to be attached to the answers of the witnesses. This report shows that, at the time inquired about, sheep of the class and character that the plaintiff had sent to market were worth at the National Stock Yards in East St. Louis the principal amount awarded to the plaintiff by the verdict of the jury.

The evidence of which the eighth and ninth assignments of error complain was admissible. The witness Mitchell testified that the original waybill is given to the conductor in charge of the train handling the stock, and is carried to the destination, going along with the shipment, and is not returned to the shipper. These bills were not in possession of the plaintiff, and, if they were in existence, it appears that they were at St. Louis, beyond the control of the plaintiff, and in the possession of the appellant's connecting carrier. Therefore secondary evidence of their contents was admissible.

We find no error in the record, and the judgment is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. RYON.

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

RAILROADS—RIGHT OF WAY—CONSTRUCTION—SLUICeway—FLOW OF SURFACE WATER—INTERRUPTION—OTHER PARTIES—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Under Rev. St. art. 4436, providing that no railroad company shall construct its roadbed without first constructing culverts and sluices, as the natural lay of the land requires, an instruction, in an action for injuries to land by reason of a failure to construct necessary culverts, that if the company, in opening a drain under its roadbed, so interfered with the natural drainage as to cause more rain water to flow across the land of plaintiff's intestate than would have flowed across it if the road had not been built, and if the additional flow injured the land plaintiff was entitled to recover, was not objectionable as not correctly defining the railroad company's duty, and as assuming that the facts recited amounted to a breach of such duty.

2. Where witnesses in an action for damages to land gave estimates of the amount thereof, and on cross-examination it was shown that they took into consideration improper elements of damage, the overruling of a motion to strike out such estimates was error.

3. Where in an action for injuries to land the court erroneously permitted improper evidence of damage to stand, and, though the court charged the correct measure of damage, there was nothing to exclude the improper evidence from the jury's consideration, the error was not harmless.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by Hattie E. Ryon, as administratrix, etc., against the Gulf, Colorado, & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alexander & Thompson and J. W. Terry, for appellant. T. J. Gwinn and C. F. Cohron, for appellee.

TEMPLETON, J. Suit by Hattie E. Ryon, administratrix of the estate of J. V. Ryon, deceased, against the Gulf, Colorado & Santa Fé Railway Company to recover damages to a tract of land belonging to said estate, alleged to have been caused by surface water having been diverted from its natural course

and onto said land on account of the defective construction of the company's road. By the verdict of a jury the plaintiff was awarded the sum of \$250, and the defendant has appealed.

The court instructed the jury that if the company, in opening a drain under its roadbed, so interfered with the natural drainage as to cause more rain water to flow across the land of the plaintiff's intestate than would have flowed across it if the road had not been built, and if the additional flow injured the land, then the plaintiff was entitled to recover. Complaint is made of this paragraph of the charge on the ground that the same did not correctly state the duty of the defendant as prescribed by the statute, and on the further ground that the question as to whether such facts authorized a finding for the plaintiff should have been left to the decision of the jury. It is provided by article 4436, Rev. St., that "in no case shall a railway company construct its road bed without first constructing necessary culverts and sluices as the natural lay of the land requires for the necessary drainage thereof." The clear intention of the legislature was to require railway companies, in constructing their roads, to put in such culverts or sluices as might be necessary to prevent interference with the natural flow of surface water, and the failure of a railway company to perform this statutory duty renders it liable, as a matter of law, for the resulting damage. *Railway Co. v. Helsley*, 62 Tex. 593. If the defendant in this case opened a drain under its roadbed, and the natural drainage was thereby interfered with, and more water caused to flow over the land belonging to said estate than would have flowed over it had the natural conditions remained unchanged, then such drain was not the culvert or sluice required by statute, and the court did not err in assuming that such facts amounted to a breach of the duty imposed by the statute upon the defendant. It was not necessary to charge in the exact language of the statute, and the charge given was sufficient, as the same correctly construed the statute and followed the intent and meaning thereof.

Two witnesses for the plaintiff, on direct examination, gave estimates of the damage caused to the land by the increased flow of water over it. On cross-examination it was developed that in making their estimates the witnesses took into consideration improper elements of damage. The defendant thereupon filed motions to strike out the said estimates. The motions were overruled, and the defendant excepted. The estimates having been made upon a wrong basis, the defendant was entitled to have the same withdrawn from the jury. The method proposed by the defendant would have effected that object, and, as the court did not resort to any other means of counteracting the incompetent testimony which had been inad-

vertently admitted, it was error to overrule the motions to strike out. While the court gave in charge to the jury the correct measure of damage, we cannot say that the charge was so worded as to exclude from the consideration of the jury the improper evidence. The testimony concerning the amount of the damage sustained by the plaintiff is not such that we can say that the error was harmless. The judgment will therefore be reversed, and the cause remanded.

Reversed and remanded.

GREER v. FORD et al.

SAME v. MORRISON et al.

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

GUARDIAN AND WARD—BOND—OATH—SALE OF LAND—ORDER—IRREGULARITY—CONFIRMATION OF SALE—COLLATERAL ATTACK—PROBATE COURT—JURISDICTION TO PARTITION LAND.

1. The estimated value of the ward's estate as set out in the application for letters of guardianship is not binding on the court, which may itself estimate the value, and if the guardian's bond is made in double the amount of such estimate and the amount of the inventory, Rev. St. art. 2600, which requires a bond "in amount equal to double the estimated value of the property," is complied with.

2. Where the application, the appointment, and the bond of the guardian all show that he is guardian of the person and estate of the ward, and the oath is on the same paper with the bond and is otherwise sufficient, a sale of land made by the guardian under order of the court cannot be avoided on the ground that the oath describes him as "guardian" without also reciting "of the person and estate."

3. Order for a guardian's sale of the ward's realty which did not mention the time and place for the sale, as required by law for a public sale, and which was treated by both the guardian and the court as an order for a private sale, was irregular but not void, and could not be collaterally attacked.

4. Order confirming a guardian's sale made before the expiration of five days, the time allowed by statute between the filing of the report of sale and action thereon, is irregular only but not void.

5. A ward could not equitably object that the probate court had no jurisdiction to partition lands in which he had an undivided interest, where in the partition objected to he received property of about twice the value he was entitled to, and all the land had since passed into the hands of other parties, and it appeared that the ultimate loss would fall on the other parties to the partition proceedings.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Consolidated actions by W. K. Greer against D. J. Ford and others, and against J. D. Morrison and others. Judgment for plaintiff for part only of the relief asked, and he appeals. Affirmed.

W. K. Greer, as plaintiff, instituted suit against Thos. J. Greer, P. R. Henson, and J. D. Morrison in the county court of Hunt

¶ 2. See *Guardian and Ward*, vol. 25, Cent. Dig. § 351.

county, in which plaintiff sought, by bill of review, to have the court, review, vacate, set aside, and annul certain orders of the probate court of Hunt county, Tex., in the matter of the estate of W. K. Greer, a minor, No. 301, pertaining to the estate of this plaintiff, and also, to set aside the guardian's sale of his interest in 50 acres of land in controversy. The county court having given judgment against plaintiff, he appealed to the district court. At the same term of the district court he filed his suit in trespass to try title for the 50 acres of land to which the probate orders related, and also for the 320-acre tract described in the petition, said suit being against D. J. Ford, J. L. Bule and wife, M. A. Bule, J. D. Morrison, Albert Treadway, and J. W. Taylor. The said causes, upon motion of plaintiff, were consolidated, and the plaintiff, by amended petition filed in said cause April 3, 1902, reiterated his allegations as made in his bill of review, in which he sought to annul the orders of the probate court in so far as they applied to the 50 acres, and claimed that he was the owner and entitled to the possession of one-tenth portion of both tracts of land, claiming title thereto by inheritance from his deceased mother and sister. The two tracts of land were the community property of Ben Jones and the mother of appellant. Jones died, leaving surviving him his said wife and their four children, to wit, M. A., C. D., Effie, and Flora Jones, who were all minors. The surviving wife married T. J. Greer, and appellant is the only child of that marriage. When appellant was only a few months old his mother died. His father, T. J. Greer, was appointed and qualified as guardian of both his person and estate, and one E. J. Head qualified as guardian of the Jones children. On application of the guardian and father of appellant, and by order of court, the two tracts of land were partitioned between the appellant and the Jones children, and in said partition, the 50-acre tract was set apart to appellant. Appellant was only entitled to a one-tenth interest in the estate of his mother, but the 50 acres of land was worth about one-fifth of the entire estate. On the 2d day of April, 1880, T. J. Greer, as guardian of appellant, made application to the court for an order to sell this 50 acres of land for the support and maintenance of appellant, and, on the same day, he filed a report showing the condition of the estate. Notice of said application was duly given, and on the 26th day of July, 1880, an order of sale was granted. On the 27th day of July, 1880, the said guardian reported that he had sold the said land to appellee P. R. Henson for \$300, and on the same day this report was duly confirmed by the court after proof was made that the land was sold for a fair price. In pursuance of this order, said guardian deeded said land to P. R. Henson by deed recorded August 17, 1880. On the 4th day of May, 1881,—

nearly a year after said sale,—appellant's guardian filed an annual report in which he accounted for the money received from Henson for said land. This report was duly approved and recorded as required by law. In September, 1881, the appellee Henson sold the said land, and the same was thereafter, for valuable considerations, transferred eight times, when, on the 26th day of June, 1894, the same was purchased by appellee J. D. Morrison from the owner thereof for a consideration of \$1,700. On the 9th day of February, 1901, before appellant entered suit or filed his bill of review in the county court, said Morrison deeded the land to defendant Albert Treadway for the sum of \$1,800. Both Morrison and Treadway purchased and paid for the land in good faith, and had no actual notice of any of the irregularities in the probate proceedings set up in appellant's petition. The defendants in the court below answered by separate answers, setting up by metes and bounds the lands claimed by each respectively, and disclaiming as to the balance, and pleading a general denial and not guilty as to the land claimed by them. A trial before the court resulted in a judgment for the plaintiff for 5½ acres of land inherited from his deceased sister against Ford, Taylor, and Bule out of the 320-acre tract. Judgment was rendered in favor of Morrison, Treadway, Henson, and Greer as to the 50-acre tract. From this judgment plaintiff prosecuted an appeal to this court.

J. G. Matthews, for appellant. Bennett & Jones, for appellee Ford. Looney & Clark, for appellees Treadway, Morrison and Henson. Montrose & Starnes and Wm. Pierson, for appellees J. L. and M. A. Bule.

BOOKHOUT, J. (after stating the facts). It is insisted that the amount of the guardian's bond is not double the amount of the estimated value of the estate of the ward, and that for this reason the order of sale of the 50 acres of land was erroneous, and that, upon the ward arriving at the age of 21 years, he can have the orders reviewed and annulled upon offering to refund the amount received by the guardian from the sale of the land. In his application for letters of guardianship of the person and estate of the minor, W. K. Greer, T. J. Greer stated that the minor had an estate of the estimated value of \$500. The amount of the bond was fixed by the court at \$600. The inventory shows that the estate was valued at \$142. The bond in the sum of \$600 was approved two days after the filing of the inventory. The estimated value of the estate set out in the application for letters of guardianship was not binding on the court, but the court could estimate its value, and where the bond is made in double the value of such estimate and the amount of the inventory it fully meets the requirements of the statute. Rev. St. art. 2600; *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

Again, it is contended that, in order to qualify as guardian of the estate of a minor, it is necessary that the person qualifying shall take an oath to faithfully discharge the duties of guardian of the estate of the ward according to law, which oath shall be indorsed on the bond of such guardian. The application for guardianship was for both the person and the estate of the minor. The appointment was for both the person and the estate, and the bond so recited. The oath is indorsed on the bond, and is on the same paper, and recites: "I do solemnly swear that I will faithfully perform and discharge all the duties as prescribed by law, as guardian of William K. Greer, a minor. (Signed) Thomas J. Greer,"—and is duly sworn to. Where the application, the appointment, and the bond of the guardian all show that he is guardian of the person and estate of the ward, and the oath is on the same paper with the bond, and is otherwise sufficient, a sale of land made by the guardian under order of the court cannot be avoided on the ground that the oath describes him as guardian and omits to say "of the person and estate." *Poor v. Boyce*, 12 Tex. 440; *Martin v. Robinson*, 67 Tex. 308, 3 S. W. 550.

Complaint is made of the order of sale in that it authorizes the guardian to sell the 50 acres of land for cash or on credit, but does not show whether the land shall be sold at public auction or private sale. No time and place is mentioned in the order, as required by law for a public sale. The order was treated by both the guardian and the court as an order for a private sale. By virtue of the order the guardian sold the land at private sale, and reported his action to the court, and the sale was confirmed. The order was irregular, but it is not void, and cannot be collaterally impeached. Both of appellees Treadway and Morrison were innocent purchasers for value, and, as to Treadway, this is a collateral attack upon the order. It is, however, contended that, as the order of confirmation was entered before the expiration of five days,—the time allowed by statute between the filing of the report of sale and action thereon,—the order of confirmation was erroneous, and is subject to attack in this proceeding. The order of sale was for 50 acres of land, and was made July 26, 1880. The land was sold to P. R. Henson, and the report of sale filed July 27, 1880, and on that day the sale was confirmed by the court. The statute does not prohibit the confirmation of sale before the expiration of five days after filing report of sale, but makes it the duty of the court at the expiration of that time to inquire into the matter of the sale and act thereon. An order made before the expiration of five days is a mere irregularity which would not affect the title of appellees Morrison and Treadway in this proceeding. *Taffinder v. Merrill* (Tex. Sup.) 65 S. W. 177. Again, the sale of the land was shown by the annual

report filed by the guardian the following year, and the proceeds thereof accounted for, which report was duly approved by the court. *Robertson v. Johnson*, 57 Tex. 62.

The contention is made that the probate court has no jurisdiction or power to partition land in a suit brought by the guardian of one ward against the guardian of another, and that the orders based on such a suit are void. T. J. Greer, as guardian of his son, W. K. Greer, brought suit against E. J. Head, guardian of the estate of M. A., O. D., Effie, and Flora Jones, by petition filed in the county court of Hunt county on November 22, 1879, for the partition of the two tracts of land in controversy. He set up that his ward was the owner of and entitled to one-tenth of the said lands, and that E. J. Head's wards owned the balance. Head accepted service, and judgment for the partition of the lands was duly entered. Commissioners were appointed, and their report partitioning the land was confirmed. The 50-acre tract was set apart to plaintiff, and the 320-acre tract was set apart to the wards of E. J. Head. The appellee Ford claims title to 150 acres of the 320-acre tract, and the remainder thereof is claimed by and in the possession of J. L. Bule and wife. Title to the 50-acre tract is now in appellee Treadway, and, as indicated in the above remarks, Treadway's title is not affected by any irregularity in the partition of the lands between the guardians. It must be conceded that as a proposition of law the probate court is without jurisdiction to partition lands in the administration of the estates of minors. *League v. Henecke* (Tex. Civ. App.) 26 S. W. 729; *Glasgow v. McKinnon*, 79 Tex. 116, 14 S. W. 1050. The probate court is authorized, on a final settlement of the guardianship, to deliver the estate remaining in the hands of the guardian to the ward or other person legally authorized to receive the same. *Sayles' Ann. Civ. St. art. 2770*. The said two tracts of land—50-acre tract and 320-acre tract—composed the community estate of Ben Jones and his wife, Kittie Jones, both of whom were deceased, and the entire estate by inheritance vested in the said minors. T. J. Greer testified that he qualified as guardian of the appellant, and that E. J. Head qualified as guardian of the Jones children. He further testified as follows: "We had a partition, and I got the 50 acres of the Mary Morris headright as guardian for my child, and E. J. Head got the 320 acres of the Hase headright as guardian for the Jones children, as shown by the county records. I considered that my boy, the plaintiff, got fully one-fifth of the value of the estate. He was entitled to only one-tenth. I thought I got the best end of the bargain for him. I sold the 50 acres that were set apart to W. K. Greer under orders of the county court, as appears of record. I sold the land to P. R. Henson. I did this for the purpose of getting money to pay off

the debts against the Jones estate." It thus appears that there was a partition of the lands, and that, while appellant was only entitled to one-tenth interest in said lands, by the partition between his father as guardian, and E. J. Head, as guardian of the Jones children, he received a one-fifth interest in said lands. The parties acted in good faith in making the partition, and the same has been acquiesced in for more than 22 years. The trial court found, as shown by the judgment, that the price paid appellant's guardian for the 50 acres of land was its full value, "and more than the entire interest of the minor, W. K. Greer, in his mother's and Ben Jones' estate was really worth." The county court had jurisdiction of the entire estate of the minor, W. K. Greer, and could have ordered his one-tenth interest in the two tracts of land sold. This is, in effect, what was done by the partition of the lands setting aside the 50-acre tract to the plaintiff and the 320-acre tract to the Jones children. Having thus segregated the interest of the plaintiff in the two tracts of land, the court, on the application of plaintiff's guardian, ordered the 50 acres sold as his property. The sale was made, and the ward's estate received the entire proceeds of the same,—about double the value of his interest in the two tracts of land. The result was more favorable to plaintiff than a sale of his undivided interest in the two tracts of land. To permit the plaintiff now to recover a one-tenth interest in the 320-acre tract would be inequitable. The Jones heirs would ultimately be the losers. Under the facts they would have no recourse against the owners of the 50-acre tract.

The court found that appellee was entitled to recover, as heir of his deceased half-sister, an undivided interest of $5\frac{1}{2}$ acres of the land belonging to Buie and Ford, and gave judgment therefor, and also gave judgment against J. W. Taylor, warrantor of D. J. Ford, for \$55, and all of Ford's costs. The evidence shows that Effie Bussey, formerly Effie Jones, had died intestate and without issue, leaving her husband, Nathan Bussey, surviving. It was through her that appellant inherited said $5\frac{1}{2}$ acres.

In view of the facts, we think the proper judgment has been pronounced in this case, and that the same should be affirmed. Affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. McARTHUR.*

(Court of Civil Appeals of Texas. Jan. 14, 1903.)

LIBEL—PRIVILEGED COMMUNICATIONS—MALICE—EXEMPLARY DAMAGES—LIABILITY OF CORPORATIONS—PRACTICE.

1. Whether or not a letter written by a railway company to a newspaper, and stating that certain persons, who it understood were rep-

resenting themselves to be its special advertising agents, had no connection with it, was privileged, depended on whether the company, in writing it, was actuated by express malice.

2. A railway company which makes an agreement whereby a third party is to solicit advertising, and which thereafter denounces him as a swindler, is guilty of libel, even though the agreement is not supported by any consideration.

3. Where, in an action for libel, the court charged the jury to find the publication was false before finding for plaintiff, it was unnecessary to give defendant's request to find in its favor if the publication was true.

4. Where the court fails to submit a particular defense, but defendant fails to ask a proper instruction relative thereto, he cannot complain, unless the record indicates that the court would have refused to give a proper charge if requested.

5. Action of defendant's agent in refusing to answer plaintiff's letters denying charges made against him, and explaining what he was doing, and in immediately publishing a letter stating that plaintiff and another, who he understood were representing themselves as defendant's advertising agents, had no connection with the company, tended to show express malice warranting exemplary damages.

6. Where the party writing a libelous letter respecting plaintiff was defendant's general passenger and ticket agent, it was unnecessary to show that defendant had ratified his conduct to render it liable for exemplary damages.

7. Under Dist. Ct. Rule 56 (20 S. W. xv), providing that "exceptions to evidence admitted over objections made to it on the trial may be embraced in the statement of facts in connection with the evidence objected to, provided the statement of facts be presented to the judge within the time allowed for presenting bills of exceptions, and filed in term time," exceptions to evidence embodied in the statement of facts which was filed after the court had adjourned for the term cannot be considered.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by N. J. McArthur against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins and Clark & Bolinger, for appellant. Eugene Williams, for appellee.

KEY, J. This is a libel suit, resulting in a verdict and judgment for the plaintiff for \$500 actual and \$1,250 exemplary damages, and the defendant railway company has appealed.

The alleged libel reads as follows: "Cotton Belt Route. St. Louis Southwestern Railway Company. Office of General Passenger and Ticket Agent. St. Louis, April 21st, 1897. Daily Times, Waco, Texas: I understand from newspaper clippings that a Mr. H. T. Stafti and Mr. N. J. McArthur are traveling around through Arkansas & Texas, representing themselves as being connected with the Cotton Belt Route as special advertising agents, claiming that the Cotton Belt Route proposes to issue a folder descriptive of the territory, and that they are soliciting advertisements and writeups for this folder in the name of the Cotton Belt Route. This is to advise that the gentlemen referred to have no connection whatever with this com-

*Rehearing denied February 12, 1903.

pany. This company does not propose to issue any such folder as intimated by them, and disclaim any responsibility whatever for any of their acts in such matter. Please notify the public accordingly. E. W. Le Baume, G. P. & T. A." This document was published by the defendant in the Times Herald at Waco, and in several other newspapers in the state.

The first assignment of error reads as follows: "Verdict of the jury is contrary to the evidence, and is not supported by the evidence, in this: That the undisputed testimony, including the statements and admissions of the plaintiff himself, showed that the publication complained of was true in every respect, in substance and in fact, and the same constituted no libel, and the jury should have found a verdict for the defendant on this issue." We overrule this assignment, because the plaintiff's testimony warranted a finding to the effect that he had a valid contract with the defendant, by which the latter obligated itself to place within folders issued by it certain printed matter, to be prepared by the plaintiff, descriptive of towns in the territory along and tributary to the defendant's railroad, and to circulate said printed matter with said folders. This being the case, the undisputed testimony does not show that the publication complained of was true in every respect, as stated in the assignment of error. On the contrary, giving credence to the testimony of the plaintiff, as the jury doubtless did, the statement that the plaintiff had no connection whatever with the defendant company was untrue and misleading and the statement that it did not propose to issue any such folder was also misleading; and the publication, considered as a whole, was calculated to produce in the minds of its readers a belief that the plaintiff was attempting to cheat, swindle, and defraud the public.

The second assignment of error complains of the verdict upon the ground that the publication was privileged, the contention being that it was made for the protection of the defendant's interests, and that there was no evidence of express malice. The court did not submit to the jury the question of privileged communication, and the only instruction requested on that subject declared, as a matter of law, that the communication was privileged, and that the plaintiff could not recover unless the jury found that the publication was made with express malice. The publication was not absolutely privileged, and, whether or not it fell within the class denominated "qualifiedly or conditionally privileged," among other considerations, depended upon whether it was made either upon express malice or in bad faith. If made in bad faith, though not upon express malice, it was not a privileged communication; and, as the instruction requested on that subject omitted the question of bad faith, it was properly refused. *Davis v. Wells* (Tex. Civ. App.) 60 S. W. 566. Therefore, the issue

of privileged communication not having been submitted to the jury, and the defendant not having requested a correct instruction on that subject, we hold that it cannot complain of the verdict upon that ground.

Nor can we sustain the contention asserted under the third assignment, to the effect that the contract between the plaintiff and defendant was without consideration. But, if such were the fact, it would not necessarily follow that the publication was not libelous. If, in the absence of a binding contract to circulate the printed matter, which the plaintiff was preparing, the defendant voluntarily promised so to do, and induced the plaintiff to pursue the course which the testimony shows he did pursue, the defendant had no right to denounce him as a swindler.

The charge of the court required the jury to find that the publication was false before they could find for the plaintiff, and this rendered it unnecessary to give the defendant's special charge to find for it if the publication was true. And therefore the fourth assignment is overruled. *Ry. Co. v. Mliam*, 60 S. W. 591, 1 Tex. Ct. Rep. 453.

The sixth assignment complains of the charge of the court because it did not cover the question of privileged communication. On that issue we think the burden of proof rested upon the defendant, and we understand the rule to be that, when the court fails to submit a particular matter of defense, and the defendant fails to ask a proper instruction on that subject, he is not in a position to complain, unless the record indicates that the court would have refused to give a proper charge on the subject if it had been requested.

The seventh assignment complains of the verdict for exemplary damages, upon the ground that the evidence failed to show malice, and failed to show that the defendant had ratified any malicious act of its agent who caused the publication to be made. The evidence tending to show express malice may not be strong, but we cannot say that there was no testimony tending to establish that fact. The arbitrary action of the defendant's agent Le Baume in refusing to answer the plaintiff's letters, denying charges made against him, and explaining what he was doing, and the conduct of the agent in proceeding at once to make the publication complained of, tended to show gross indifference to the plaintiff's rights, and the perpetration of a wanton, if not willful, wrong. E. W. Le Baume, who authorized and instigated the publication complained of, was the defendant's general passenger and ticket agent; and, this being the case, we hold that it was unnecessary to show that the defendant had ratified his conduct, in order to render it liable for exemplary damages. In *Western Union Telegraph Co. v. Brown*, 58 Tex. 174, 44 Am. Rep. 610, it is said: "It is now the settled law of this state that, to make a corporation liable for exemplary damages, the

'fraud, malice, gross negligence, or oppression' which must authorize and justify the same must have been committed by the corporation itself, or some superior officer representing it in its corporate capacity; or, if committed by a subordinate servant or agent, the act must have been either previously authorized, or subsequently ratified or approved by the company or such superior officer after knowledge of the facts." The doctrine there announced recognizes the rule of original liability of a corporation for punitive damages when a malicious act is done by a superior officer representing it in its corporate capacity; and draws the distinction between superior officers and subordinate servants and agents, and holds that the malicious conduct of the latter must have been authorized or ratified by the corporation before it can be held liable therefor. In our opinion, Le Baume was not a subordinate servant or agent, but was a general officer, representing the corporation in its corporate capacity. And therefore the latter is responsible for his malicious conduct, although the same may not have been either authorized or ratified by the corporation. For an instructive discussion on the subject of the liability of corporations for exemplary damages, see vol. 5, Thompson on the Law of Corporations, secs. 6383 to 6395.

The other assignments of error relate to the action of the court in ruling upon the admissibility of testimony, but, as the exceptions thereto are embodied in the statement of facts, which was filed after the court had adjourned for the term, the assignments referred to cannot be considered. Dist. Ct. Rule 56 (20 S. W. xv); Howard v. Mayor of Houston, 59 Tex. 76; Tom v. Sayers, 64 Tex. 339; Ivey v. Williams, 78 Tex. 685, 15 S. W. 163; Schaub v. Brewing Co., 80 Tex. 634, 16 S. W. 429.

After giving the case careful consideration, our conclusion is that no reversible error has been presented, and the judgment will be affirmed. Affirmed.

GALVESTON, H. & S. A. RY. CO. v.
BAUMGARTEN et ux.*

(Court of Civil Appeals of Texas. Jan. 21,
1903.)

RAILROADS—INJURIES TO WIFE—COMMUNITY
PROPERTY—ACTION—PARTIES—MISJOINDER—
EFFECT—VENUE—OBJECTIONS—WAIVER—
APPEARANCE—EVIDENCE—HYPOTHETICAL
QUESTIONS—DEPOSITIONS.

1. Where defendant filed a general demurrer and a general denial, it thereby waived all questions of venue, and conferred jurisdiction on the court in the county where the action was brought.

2. Gen. Laws 1901, p. 31, providing that suits against railroad companies can only be prosecuted in the county where the plaintiff resides or where the injury occurred, is a statute of personal privilege, and failure to comply there-

with may be waived by defendant's voluntary appearance.

3. Where a physician, previous to answering a hypothetical question, had testified that he had examined plaintiff, and found a swelling in the lumbar region of the back, and there was other testimony that she was bruised on the breast, hip, knee, and wrist, and received the injuries in an accident on which the suit was based, a question assuming that plaintiff was previously a strong, healthy woman, and that she met with an accident by being thrown from a buggy, and received several severe bruises, one on the small of the back, and a number of other severe bruises were indicated on her person, and that since that time she had not been well, and asking the witness' opinion as to what was the cause of the accident, was not objectionable as not sufficiently specific, and as assuming facts not sustained by the evidence.

4. Where a physician, who had examined plaintiff, on being asked for his opinion as to what produced the condition he found, answered that he believed the preponderance of testimony required the conclusion that the condition was the result of physical injury, and stated that by the preponderance of testimony he meant facts which came to his own knowledge outside of anything said to him by any other person, his answer was admissible.

5. An objection to the introduction of evidence cannot be reviewed where the same evidence was otherwise received without objection.

6. Where the deposition of a witness showed no desire to conceal anything, but that her failure to fully answer a question as to whether any one had talked to her concerning her testimony, etc., was unintentional, and her testimony was corroborated by other witnesses, the refusal of the trial judge to suppress the deposition for failure to answer such question was not an abuse of discretion.

7. Where, in that part of a physician's deposition which was received, he testified that he had been plaintiff's physician, and had treated her for her injuries, the fact that his answers to certain cross-interrogatories were suppressed did not justify the exclusion of another, in which he stated that plaintiff's back and spine had, by such injuries, been permanently impaired, and that the injuries had produced female complications, which had made her a permanent invalid for life.

8. A wife is not a necessary or proper party to a suit by the husband for injuries to her arising from defendant's negligence, the damages recoverable being community property.

9. Where a suit to recover for injuries to a wife was erroneously prosecuted by the husband and wife jointly, but no objection was made thereto at the trial, and no prejudice resulted to the defendant therefrom, a judgment for plaintiffs will not be reversed for such misjoinder.

10. In an action for damages to the community by injuries to the wife, plaintiff can recover damages directly resulting from the injury and its subsequent consequences, whether permanent or temporary, for pain, suffering, and wounded feelings, the cost of nursing, medical attendance, and medicines, and the loss of the wife's services in the household.

Appeal from district court, Bexar county;
S. J. Brooks, Judge.

Action by Emil H. Baumgarten and wife against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

*Rehearing denied February 13, 1903.

§ 8. See Husband and Wife, vol. 26, Cent. Dig. § 973.

Newton & Ward and Baker, Botts, Baker & Lovett, for appellant. Robson & Duncan, Perry J. Lewis, and H. C. Carter, for appellees.

FLY, J. This is a suit instituted by Emil H. Baumgarten and Susie J. Baumgarten to recover damages alleged to have been received by the latter through the negligence of appellant in having a decayed culvert, through which the horse of Mrs. Baumgarten fell, and she was thereby precipitated from her buggy, and permanently injured.

The statement of facts justify the conclusion that Mrs. Baumgarten, while crossing a culvert erected and maintained by appellant on one of the streets of the town of Schulenburg, in her buggy, was thrown from the same, and seriously and permanently injured. The accident to Mrs. Baumgarten occurred by reason of the planks having been negligently allowed to become rotten on appellant's culvert, and the horse's feet broke through, and by his struggles Mrs. Baumgarten was thrown violently to the ground, and appellees sustained damages in the sum found by the jury. The negligence of appellant in permitting the culvert to remain in its decayed condition was the cause of the injury.

This suit was instituted on July 8, 1901,—one day before the act of the legislature entitled "An act to fix the venue of suits against railroad corporations," etc., went into effect. Gen. Laws 1901, p. 81. Appellant demurred to the petition and filed a plea to the jurisdiction on the ground that the injury of which complaint was made occurred on July 25, 1900, in Fayette county, and that the plaintiffs resided in Fayette county, and therefore said suit could not be prosecuted in Bexar county, but could only be prosecuted in Fayette county, where the plaintiffs reside, and where the injury occurred. It is the contention of appellant that every pending suit was affected by the passage of the act, and that, wherever a suit was pending in a county where the plaintiff did not reside or where the injury was inflicted, the court in which it was pending was at once deprived of jurisdiction to try it. Appellant, on October 7, 1901, by filing a general demurrer and general denial, waived all questions of venue, and gave the district court of Bexar county jurisdiction, whatever may have been the effect of the statute in question. The demurrer and plea to the jurisdiction were filed May 19, 1902. That statute, like any other of its class, is one of personal privilege, and can be and was waived by the voluntary appearance of appellant. We see no question of public policy that was to be subverted by its passage, or that will be interfered with by a waiver of it on the part of a railroad corporation.

On the trial of the cause, Dr. Owens, who had treated Mrs. Baumgarten while suffering from her injuries, after he had fully describ-

ed the nature of her injuries, was asked: "Assuming that the testimony in the case showed that Mrs. Baumgarten was a strong, healthy woman, and that she met with an accident, being thrown from a buggy, and received several very severe bruises, one on the small of the back, and a number of severe bruises were indicated on her person, and since that time she has not been well, what, in your opinion, would be the cause of her present conditions?" He answered, "I would be bound to consider it came from the accident, in the absence of anything else." The question and answer were objected to on the ground that the question was not sufficiently specific to form the basis for an opinion, and because it sought to elicit an opinion upon a hypothetical case not sustained by the evidence. The trial judge states that the witness was placed on the stand before the facts of the case had been developed, because he was compelled to leave, with the understanding that the evidence would be withdrawn from the jury unless the hypothetical case was sustained by the testimony. The testimony did fully support the hypothetical case, and the question was sufficiently specific to form a basis for the opinion of the physician. The doctor, previous to the answer to the hypothetical question which was put to him, had testified that when he first examined Mrs. Baumgarten she had a swelling in the lumbar region of the back, and there was other testimony to the effect that she was bruised on her breast, hip, knee, and wrist, and that she had received the injuries in the accident upon which this suit is based. Previous to the time of the accident she had been a strong, healthy woman, and since had not been well. On the cross-examination, by appellant, of Dr. Harrison, a witness for appellees, the opinion was elicited that the condition of Mrs. Baumgarten was the result of a physical injury, and on the redirect examination the witness was asked, "From your examination of Mrs. Baumgarten, what, in your opinion, produced the condition she was in?" He answered, "I have already stated that I believe the preponderance of testimony takes me to the conclusion that the condition she was in was the result of physical injury, traumatism, violence." The appellees then asked what the witness meant by "preponderance of testimony," and he answered: "Embodies a consideration of all the facts in connection with the case that have come within my knowledge,—physical conformation, the condition of the bruises as I found them,—and the circumstances which have resulted in those conditions appealed to my mind, and I selected that which my judgment told me is the most probable." Appellant then moved that the testimony be excluded on the ground that it was hearsay, irrelevant, and not the subject of expert testimony. The court then said to the witness, "Do you mean by 'preponderance of testi-

mony' something you have heard?" and he answered, "No, sir; I mean that which comes within my observation." The court then said, "Nothing she or any one else told you?" and the witness replied: "No, sir; it is what I found. I find a woman of fine proportion, and I take into account the facts that have come to my own personal knowledge." The court then said, "You don't base it on anything she or any one else told you?" and the witness answered in the negative. The evidence was admissible. *Railway v. Burnett*, 80 Tex. 536, 16 S. W. 320; *Railway v. Williams* (Tex. Civ. App.) 62 S. W. 808. There is no merit in the sixth assignment of error. The question was not leading, and the answer was material as to the issue of the condition of Mrs. Baumgarten's health before the accident. The issue was presented by the petition.

The seventh assignment of error complains of a certain question propounded to Mrs. Baumgarten as to what induced her to come to San Antonio for medical treatment, and her answer thereto. The bill of exceptions presents no objection to anything except the question, and while it, as well as the answer, may have been irrelevant and immaterial, appellant could have suffered no injury whatever from them; and the same evidence was given by Emil Baumgarten without objection on the part of appellant.

The question and answer complained of in the eighth assignment of error were not open to the objections urged against them, and, had they been objectionable, appellant cannot urge objections because the same testimony from other witnesses went unchallenged to the jury. The testimony was abundant to the effect that Mrs. Baumgarten was a strong, healthy woman prior to the accident, and had been delicate and almost an invalid since. What is said in regard to the eighth assignment of error disposes of the matters raised in the ninth assignment.

Complaint is made that the deposition of Mrs. Wolters should have been suppressed, because she failed to answer a cross-interrogatory propounded to her by appellant as to whether any one had talked to her about her testimony, who it was, how he came to talk to her, and when the conversation occurred. To the question she answered: "Mr. H. C. Carter, attorney, spoke to me about the case prior to May, 1902, and told me that, if I was not able to testify in this case, my deposition would be taken." If the answer of the witness should be held to be a refusal to answer the cross-interrogatory, still it does not appear, nor is even claimed by appellant, that the failure to suppress the deposition had operated prejudicially to appellant. Mrs. Wolters testified that she was with Mrs. Baumgarten when she was hurt, and that the injury occurred by the feet of her horse going through appellant's culvert, which was decayed, thereby throwing her out of the buggy. She also testified as to Mrs. Baum-

garten's state of health before and since the accident. As to circumstances surrounding the accident, there was no attempt to contradict the statement made by Mrs. Baumgarten, although she stated that an employé of appellant saw the accident; but, on the other hand, the testimony of Tanner, appellant's agent, corroborates her as to the condition of the culvert. As to the condition of Mrs. Baumgarten before and after the accident, the witnesses were numerous who swore as did Mrs. Wolters. It appears from the answer itself that there was no desire to conceal anything, but that it was merely an unintentional failure to fully answer. In such cases, as said in the case of *Railway v. Shirley*, 54 Tex. 125, "much must be left to the discretion of the court," and we see no abuse of it in this instance.

The answer of Dr. Matthews to certain cross-interrogatories propounded to him by appellant were, on its motion, suppressed, and it objected to the introduction by appellees of an answer to another cross-interrogatory, on the ground that the question was predicated upon the answers that had been suppressed, and were, therefore, unintelligible. In the testimony of Dr. Matthews, elicited by the direct examination, which went to the jury, it was stated he had been the physician for Mrs. Baumgarten, and that he treated her for her injuries. This formed a sufficient predicate for the statement that Mrs. Baumgarten's back and spine had, by such injuries, been permanently impaired, and that the injuries had produced internal female complications, and had made a permanent invalid of her. This suit was instituted by the husband and wife for damages arising from injuries inflicted on the wife. Damages arising from personal injuries inflicted either on the husband or wife are community property. *Sayles' Ann. Civ. St. art. 2968; Ezell v. Dodson*, 60 Tex. 331; *Railway v. Burnett*, 61 Tex. 638. It is the settled law of this state that the wife cannot sue alone, or when joined by her husband pro forma, for the recovery of community property, and the wife is not a necessary, or even a proper, party in a suit brought by the husband for community property. *Edrington v. Newland*, 57 Tex. 634; *Railway v. Burnett*, 61 Tex. 638; *Middlebrook v. Zapp*, 73 Tex. 29, 10 S. W. 732. This is not a suit brought by the wife, in which the husband is joined pro forma, but it is a suit prosecuted jointly by husband and wife, and, had exceptions been presented in the trial court to the wife being joined in the suit, the exceptions should, and doubtless would, have been sustained by the trial judge. But no such exceptions were presented, and the question is raised for the first time in the appellate court. In a similar case to this, where the husband and wife had joined to recover damages sustained by the wife, it was said by the supreme court: "In actions to recover money which will be community property when realized, the wife is

not ordinarily a necessary or proper party; but in this case no objection was taken to her joinder with her husband as a plaintiff, and it cannot be raised here for the first time. No injury results to the appellant from the rendition of a judgment in favor of the husband and wife: *Street Railway v. Helm*, 64 Tex. 147. It was further held in that case that, if no injury is shown to have resulted, a judgment will not be reversed even where an exception to the joinder of the wife with the husband has been overruled. See, also, *Lee v. Turner*, 71 Tex. 265, 9 S. W. 149; *Midlebrook v. Zapp*, 73 Tex. 29, 10 S. W. 732; and *Johnson v. Erado* (Tex. Civ. App.) 50 S. W. 139. The damages inflicted on Mrs. Baumgarten were damages to the community estate of herself and husband, as well as to her, and the court did not err in instructing the jury that the measure of damages was the mental and physical pain suffered by her and the amount of the impairment of her capacity to labor in the future. It would not matter to whom the capacity to labor might have been an advantage. Whether to the husband or wife, one or both, the damages resulting from such impairment would be community property, and the husband could recover for them. At common law, when a wife received personal injuries through the negligence or fault of another, she had the right of action, and could sue for the damages inflicted, if joined by her husband. The husband alone could recover for the loss of the wife's services, and for the amount paid to restore her to health. The common-law rule does not prevail in Texas, but the husband, as an equal owner and sole manager of the community property, is alone authorized to sue for damages to the wife, and he can recover all the damages growing out of or flowing from the injuries inflicted upon her. As said in the case decided by the supreme court of the state of Washington which is cited and relied upon by appellant: "The first element of these to be considered is that directly connected with the person of the wife,—the injury, and its subsequent consequences, whether permanent or temporary, and her pain, suffering, wounded feelings, etc.; next the cost of her nursing, medical attendance, and medicines, which, although they could, at common law, be recovered by the husband alone, are with us presumptively expenses incurred and paid by the community; and, lastly, the loss of the wife's services in the household." *Hawkins v. Street Railway*, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72. The same measure of damages applies in this case that would have been applicable had the wife been a feme sole and brought the action. The pleading and evidence were sufficient to warrant the charge as to the measure of damages. *Railway v. Burnett*, 80 Tex. 538, 16 S. W. 320; *Railway v. Lacy*, 86 Tex. 244, 24 S. W. 269.

The suit was a joint one by the husband and wife, and there is nothing in the charge

72 S.W.-6

to lead the jury to give a larger verdict than would have been given had the husband sued alone, and the verdict does not indicate that the jury were in any manner misled by the joinder of the parties into giving a larger sum than would have been awarded had the husband sued alone. The charge did not authorize or permit the recovery of double damages. The verdict is not excessive.

The judgment is affirmed.

TEXAS & P. RY. CO. v. ADAMS.*

(Court of Civil Appeals of Texas. Jan. 17, 1903.)

CARRIERS—INJURY TO PASSENGERS—TRANSPORTATION ON FREIGHT TRAIN—CONTRIBUTORY NEGLIGENCE—ACTIONS—INSTRUCTIONS.

1. In an action for injuries sustained by a passenger riding in a freight car, an instruction that plaintiff assumed the risks "incident to whatever jerking and pushing of said car against other cars that was necessary" in the handling of the car, was not erroneous in the use of the word "necessary," and in failing to charge that a recovery could not be had if the car was handled in the usual and proper manner.

2. Where plaintiff in an action for injuries while in a freight car with his furniture testified that the car was kicked back onto a track with considerable force, and struck some other cars in a train which was being made up, and defendant's employees testified that they did not remember its occurrence, an instruction was not erroneous as assuming that the injury occurred while defendant was making up a train.

3. Where plaintiff, who had been employed as a railroad station agent, telegraph operator, and expressman, was injured while being transported in a freight car with his furniture, testified that he remained in the car at a junction point where the injury occurred for the reason that he did not know when the car would continue the journey, it was not error to refuse to charge that, if he remained in the car while in the yards at the junction on the side tracks, his act in so doing was negligence.

4. Where plaintiff was injured by the jerking of a freight car, in which he was transported as a passenger, while it was being switched in a junction railroad yard, the fact that he was standing at the time of his injury did not constitute contributory negligence, as a matter of law.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by C. M. Adams against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Freeman and Head & Dillard, for appellant. Randell, Wood & Hassell, for appellee.

TEMPLETON, J. C. M. Adams shipped his household furniture and his horse and cow from Timpson to Sherman. The property was transported in a car chartered by him from the Texas & Sabine Valley Railway Company. The car was billed over the

*Rehearing denied February 7, 1903, and writ of error denied by supreme court March 12, 1903.

¶ 4. See *Carriers*, vol. 9, Cent. Dig. § 1871.

line of said company from Timpson to Longview, and from that point, through Texarkana Junction, to its destination, over the line of the Texas & Pacific Railway Company. Adams, together with his minor son, accompanied the car, riding therein, under and by virtue of his contract with the railway companies. The car was incorporated in a freight train, and carried to Texarkana Junction, as contracted. From thence it was carried east about five miles, to the city of Texarkana, and then back through the junction to Sherman. The car arrived at Texarkana about 6 o'clock in the morning, and was set out in the railroad yards, where it remained until about noon. Adams and his son did not leave the car during the time it was at Texarkana. While the car was in the yards, it was switched from the track where it was originally placed onto another track. It was kicked into its new position against a lot of other cars with such violence as to throw Adams, who was standing up at the time, against a box, and injure him. He brought suit on account of the injury so received, and, on a jury trial, obtained a judgment, from which the company has prosecuted an appeal.

The last clause of that paragraph of the charge of the court wherein the defenses of the company were submitted to the jury reads as follows: "You are further instructed that in taking passage in said car, to be transported therein, the plaintiff assumed the risks and danger incident to whatever jerking and pushing of said car against other cars that was necessary and proper to be done in the handling and transportation of said car; so, if you should believe from the evidence that plaintiff was injured, but you further believe from the evidence that such injuries resulted from such jerking or pushing said car against other cars as was necessary and proper in order to couple same onto other cars when making up the train with which said car was to be transported, then you will find for the defendant."

In its first assignment of error, appellant complains of that part of said clause of the charge where the law is applied to the facts, and, in the same connection, complains of the action of the trial court in refusing to give a special charge which reads thus: "Plaintiff assumed all such risks as were attendant upon the proper and necessary handling of the freight car in the yards at Texarkana, and, if this car was handled in the usual and proper manner, then you will return a verdict for the defendant, even if you believe plaintiff was injured in the handling of said car." The proposition presented under this assignment is that the use of the word "necessary" in the charge complained of was improper, all that was required to release defendant being that the car was handled in the usual and proper way. In our opinion, the charge given correctly expressed the law upon the issue

therein presented. If the car was unnecessarily and needlessly switched about the yards, the fact that the doing so may have been the "usual" way of handling such cars would not excuse the company. That the employees of the company were bound to handle the car properly is conceded, and it cannot be said that they did so, if it was moved without any necessity for such action.

Further complaint is made of that part of the charge above considered, in the second assignment of error. It is insisted that the court erred in assuming in said charge that the car was being incorporated into a train, and requiring of the company the use of such care as was necessary and proper in coupling the same onto other cars in making up a train in which said car was to be transported, for the reason that there was no evidence that the car was being handled for the purpose of coupling it onto other cars in doing what is known as "making up a train." The plaintiff testified that the car "was kicked back on this track, and went back with considerable force. It went back and struck some other cars in a train which was being made." The plaintiff was not further examined on this point, and there was no other evidence offered bearing on this question. The witnesses for the company, who were its employees in the yards at Texarkana, and who are, no doubt, the men who handled the car, did not remember the occurrence. In this state of the record, we are of the opinion that it should be held that appellant's contention is not well taken. It is a reasonable, if not a conclusive, inference from the plaintiff's testimony that the car was being moved for the purpose of incorporating it into a train. The point does not seem to have been regarded by the parties at the time of the trial as of any consequence, and we think it was not. It makes no difference whether the car at the time of the accident was being placed in position in a train, as the company, in any case, was bound to use ordinary care in handling it, which was the measure of care laid down in the charge. We believe what is said above is sufficient to dispose of all the objections to said charge, including the contention that the same was upon the weight of the evidence.

In its third assignment of error, appellant complains of the action of the trial court in refusing to give a special charge which reads thus: "If you believe from the evidence that plaintiff remained in the car when it was put in the yards at Texarkana, and was there on the side tracks, and that his so remaining was negligence, and that because of such negligence the accident and his injury, if any there were, were brought about or proximately contributed to, then you will return a verdict for defendant." The answer to this complaint is that the evidence does not raise the issue of negligence on the part of plaintiff, based on the fact that he

remained in the car while it was in the yards at Texarkana. The only evidence on this point was that of plaintiff himself, who testified as follows: "I arrived at Texarkana, if it was Texarkana to which I went, about six o'clock in the morning, and stayed there, I presume, until twelve o'clock. My car was left on the farthest track from the depot until about 9:30 o'clock. Then it was switched to another track. * * * I knew when I was in Texarkana, but did not know that it was Texarkana. I had never stopped there. I did not leave the car. I was afraid to do so, as I had no notice when we would leave town. I did not know how big Transcontinental (Texarkana) Junction was, and really supposed that Texarkana was Transcontinental Junction, as I was billed through that point. I was hurt about 9:30 o'clock. * * * While I was at Texarkana I did not leave the car and go uptown. I remained in the car all the time. I was in the railroad yards. * * * Yes; when I was in Texarkana I knew that I was in the railroad yards. I saw trains switching back and forth. I knew my train was likely to be moved at any time. I did not leave the car on that account." He further testified that he had been engaged for years in the railway service, in the capacity of station agent, telegraph operator, and expressman. This evidence is not sufficient to raise the issue that it was the duty of the plaintiff, in the exercise of proper care for his own safety, to leave the car. He had a right to remain in the car, and his reasons for doing so furnish an adequate excuse for his conduct. The danger which he ought to have anticipated as a result of his remaining in the car was that incident to a necessary and proper handling of the car, and the accident was not occasioned by his exposure to such risk, but by the careless and negligent handling of the car. He was not required to leave the car, where he had a right to be, in order to avoid injury from such source, and cannot be charged with contributory negligence on that account.

The court instructed the jury, in substance, that if the fact that plaintiff was standing up in the car at the time he was injured contributed to the injury, and if an ordinarily prudent man would not have been standing up under such circumstances, then the plaintiff was not entitled to recover. Appellant, in its fourth and last assignment of error, contends that the evidence on this issue is such as to require a finding that the plaintiff was guilty of contributory negligence, and that the verdict of the jury is therefore contrary to the evidence. The plaintiff testified simply that he was standing up when the accident occurred. His son's testimony was of like character. No other witness testified on the subject. The parties do not appear to have attempted to develop the reasons for the plaintiff's conduct in this respect, though the evidence sug-

gests the theory that he had gone or started to the car door to see what was being done with his car. Usually one traveling in such car should keep his seat, but, if he does not, negligence on his part is not implied as a matter of law. Under the system prevailing in this state, the question whether an ordinarily prudent man would have been on his feet, in view of all the surroundings, must be submitted to the jury; and the finding of the jury is conclusive of the question, unless the attendant circumstances are such that the finding is incompatible with sound reason and good judgment. We cannot say that the verdict in this case was not warranted.

The judgment is affirmed.

HOUSTON & T. C. RY. CO. v. CLUCK et ux.*

(Court of Civil Appeals of Texas. Jan. 14, 1908.)

CONTRACTS — ASSIGNABILITY — HOMESTEAD — CONTRACT FOR WATER AND OCCUPANCY — WIFE'S SIGNATURE — EVIDENCE — DAMAGES.

1. Rev. St. art. 308, which provides that the obligee of any written instrument, not negotiable, may transfer his interest therein by assignment, authorizes a railway company to assign its interest in a contract empowering it to take water from a spring located on the land of the other party to the contract, and to enter on the land and erect necessary pumping works.

2. A husband alone cannot contract with a railway company empowering it to use water from a spring located on his homestead, and to enter on the homestead to erect necessary pumping works.

3. Where, in an action to recover the value of water taken by defendant from a spring located on plaintiff's land and the value of land occupied by defendant's pipes and pumping works, there was no evidence showing the market value of the land so occupied or the value of the water used, a verdict for plaintiff for a designated sum was not supported by the evidence.

Appeal from district court, Travis county; R. L. Penn, Judge.

Trespass to try title by George W. Cluck and wife against the Houston & Texas Central Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed in part; reversed in part.

S. R. Fisher and Baker, Botts, Baker & Lovett, for appellant. John Dowell, for appellees.

FISHER, C. J. This is a suit by Cluck and wife against the Houston & Texas Central Railway Company in trespass to try title and for damages and for injunction. The land sought to be recovered is situated in Williamson county, a part of the Samuel Damon league, and described as follows: "Beginning at the northwest corner of the original survey of 500 acres, known as the 'Floyd Farm,' on the road from Austin to Burnet, on the west boundary line of said Damon league,

*Rehearing denied February 13, 1908, and writ of error denied by supreme court.

a pile of rocks for corner; thence south, 19 E., 2,240 varas, to a corner on the bank of Brushy creek, a live oak 5 in. dia., north, 25 west, 11 vrs.; thence, with the meanders of said creek, as follows: N., 82 W., 237 vrs.; S., 75 W., 170 vrs., to the mouth of a small branch; thence up said branch, running west, 121 vrs.; S., 51 W., 71 south, 30 vrs., to corner of the aforesaid road and a bluff of said branch, a Spanish oak, 7 in. dia.; N., 58 E., 5 vrs.; thence S., 71 W., 298 varas, to a rock pile for corner on the aforesaid west boundary line of said Damon league; thence N., 19 W., 2,132 varas, with said line, to beginning."

It is averred in the petition that the dwelling house, stables, and lots belonging to the plaintiff and his wife are situated upon the premises above described, and constitute the homestead of the appellees, and have been so occupied and used as a homestead since the 3d day of December, 1873; that the appellant on the 23d day of August, 1901, forcibly entered upon and took possession of a part of the premises, and has placed and erected thereon, and is now operating and maintaining thereon, an engine, piping, and engine house, and has taken possession of a large and valuable spring on said premises, and has connected the same to a water tank, for supplying engines on appellant's road, and is using same and appropriating the water out of the spring to the value of \$600 per month. It is also averred that the fair and reasonable rental value of the land, independent of the water appropriated and consumed by the defendant, is the sum of \$25 per month.

Defendant answered with a plea of not guilty, and disclaimed all right, title, and interest in and to any part of the land, except the following: "(1) So much thereof as is embraced and contained within the land appropriated for the purpose of laying and in laying a pipe line from the water tank of defendant at Cedar Park Station to a spring at or near the house of plaintiffs, and for the erection thereof of a pump connected with said pipe line and tank, as more fully appears from the contract of April 22, 1895, hereinafter set out. (2) So much and such parts thereof as are embraced in a deed of conveyance from G. W. Cluck and H. L. Cluck, his wife, to the Austin & Northwestern Railroad Company, of date December 7, 1881, conveying a right of way to said railroad over and through the land sued for. (3) So much thereof as is embraced in a deed of date August 5, 1892, executed by the said G. W. Cluck and H. L. Cluck, his wife, to the Austin & Northwestern Railroad Company, upon which tract is situated the section house of defendant. Defendant pleaded the act of the legislature authorizing and the deed of date August 22, 1901, carrying out the sale of the Austin & Northwestern Railroad to the Houston & Texas Central Railroad Company, conveying to said company all and singular the property, real, personal, and mixed, railroad, franchises, privileges, contracts,

chooses in action, and property of every sort and description of the Austin & Northwestern Railroad Company."

Plaintiffs replied by supplemental answer, which contained the following averments: "And plaintiffs further aver that said defendant, the Houston & Texas Central Railroad Company, pretend and claim to be the assignees of a written contract by and between the Austin & Northwestern Railroad Company, by A. N. Leitnaker, vice president and general superintendent, of date on or about the 22d day of April, A. D. 1895, and one of these plaintiffs, G. W. Cluck, which said contract is in words and figures substantially as follows, viz.: 'State of Texas, County of Travis. This agreement this day made and entered into between the Austin & Northwestern Railroad Company of the one part, and G. W. Cluck, of the county of Williamson, state of Texas, of the other part, witnesseth: That the said G. W. Cluck, for and in consideration of the sum of one dollar cash to him in hand paid, and other valuable considerations to him from the said Austin & Northwestern Railroad Company, moves, agrees, and consents that the said Austin & Northwestern Railroad Company, its agents, servants, and employes, shall and may freely enter in and upon his land, and dig in and break the surface thereof, and lay therein and thereon a pipe line from the water tank of the Austin & Northwestern Railroad Company at Cedar Park Station to the spring at the house of the said G. W. Cluck, and erect thereat a pump connected with said pipe line and tank, for the purpose of drawing and conveying water from said spring to said tank, and that said Austin & Northwestern Railroad Company shall have free use of the water the spring will afford, without charge, with permission at all times for the officers, agents, servants, and employes of said company to enter in, upon, and go over and along the land and premises of the said G. W. Cluck, and all permission to said Austin & Northwestern Railroad Company, its officers, agents, and servants and employes to remove said pipe and pump, when in their judgment they may desire so to do. That the said Austin & Northwestern Railroad Company shall, for and in consideration of the rights and privileges conceded to it by the said Cluck, put in and furnish him, inside the boundaries of his land at Cedar Park Station, one hydrant of one-half inch diameter for watering stock from the tank of the Austin & Northwestern Railroad Company; also one-half hydrant at his residence. In testimony whereof the parties hereto have on this, the 22d day of April, 1895, executed this instrument in duplicate, the said G. W. Cluck subscribing his name thereto, and the said Austin & Northwestern Railroad Company, through A. N. Leitnaker, its vice-president and general superintendent, subscribing thereto its corporate name. The Austin & Northwestern R. R. Co., by A. N. Leitnaker, Vice

President and General Superintendent. G. W. Cluck,—which fact of ownership is not admitted, but expressly denied, and that by virtue of the same the said defendant is and has been trespassing upon said land as aforesaid. Plaintiffs aver that said contract is invalid and void, and is not now and never was binding upon them or either of them, and that the said land, at the time of the making of said contract, was the homestead of plaintiffs, and has been ever since, with plaintiffs actually residing thereon as their homestead, as averred in their original petition in this case, and that said H. L. Cluck, one of the plaintiffs, the wife of the said George Cluck, and who was his wife at the time of executing said contract, did not sign and acknowledge said contract in the way and manner required by law for the disposition of their homestead, and that said contract is also void and of no force and effect for and because the same is for an indefinite and uncertain period of time; and, further, that the said contract does not authorize the said Austin & Northwestern Railroad Company to transfer the same to defendant or any one, and that for and on account of these facts the said defendant is and are, and have always been, trespassers, as alleged in plaintiffs' original petition; that the use and occupation of said land by said defendant and its assignees materially interferes with these plaintiffs' homestead rights and their occupation of said land as a homestead, and that said defendant has been digging large holes therein, taking the water therefrom, and converting it to its own use and benefit, and has erected a pump-house 10 by 12 feet, and coal pen of about 15 by 12 feet, with coal stand therein, and is pumping and running said pump day and night, and on Sundays, at times making noise and annoying said plaintiffs and their family, and has absolutely taken charge of his spring and dug it out to a width of about 10 by 12 feet, and has absolutely taken and deprived plaintiffs of the land converted by said springhouse and coalhouse. Wherefore plaintiffs say that said contract is invalid, and plaintiffs should have judgment as prayed for in their original petition. And plaintiffs further aver that if said contract was and is valid, that the said defendant succeeded and has the rights of the Austin & Northwestern Railroad Company in said contract, all of which are not admitted, but expressly denied, then plaintiffs say that the consideration of said contract has failed in part, if not in whole, all of which facts said defendant, its agents and representatives, well knew; that said contract between the said Austin & Northwestern Railroad Company and G. W. Cluck was for one dollar and other valuable considerations as expressed therein; that one of the other valuable considerations was that one of these plaintiffs, to wit, G. W. Cluck, was to have the running and operation of the pump at Cedar Park, Tex., for the conveyance of the water into the tank of the

Austin & Northwestern Railroad Company, and of distributing the same from said tank into the engines and other places needed by said Austin & Northwestern Railroad Company, so long as said Austin & Northwestern Railroad Company kept and maintained the same there, and used and acted under said contract, for which the said Austin & Northwestern Railroad Company was to pay plaintiff G. W. Cluck the sum of fifteen dollars per month; that in accordance with such the said Austin & Northwestern Railroad Company turned said pump, work, and labor, and the operation of said pump at said place, over to the said G. W. Cluck only for a very short and limited period of time, to wit, the space of only about two or three months, viz., from about the 25th of April, 1895, to about the 25th of June, 1895, and then removed him, and took said work and labor and employment from him, over his objection, and gave it to another, to his great damage and detriment, thereby breaking said contract; that the principal consideration and objection plaintiff G. W. Cluck had in making said contract was to get said employment and the wages resultant therefrom. These plaintiffs further aver that in violation of said contract, and in detriment to plaintiffs' rights in said water and spring, the said Austin & Northwestern Railroad Company, also for profit to itself, took water from said spring, and sold the same to others, to wit, for the operation of a cotton gin and mill at Cedar Park, Tex., which were not authorized in the use and taking of said water under said contract, and which also broke and forfeited said contract; and that for and on account of all such there is a failure of consideration of said contract, and a breach of the same, and for all of which plaintiffs pray judgment as in their original petition."

The trial resulted in a verdict and judgment for the defendant for tracts 2 and 3, and for plaintiffs for the balance of the land, including tract 1, but with the proviso that the defendant might enter upon said land, and remove therefrom its appliances, machinery, and property occupying the same. Said verdict and judgment were in favor of plaintiffs on their prayer for injunction, restraining defendant from entering upon tract 1 for any purpose except for removing its property therefrom, and from taking and using water from the above-mentioned spring, and, further, for damages against the defendant in the sum of \$50. From this judgment the appellant appealed.

We find the following facts: That the land and property described in the plaintiffs' petition is a part of the plaintiffs' homestead, and was their homestead on the 22d day of April, 1895, and long prior thereto. That on the 22d day of April, 1895, the Austin & Northwestern Railroad Company and the plaintiff G. W. Cluck entered into the contract as above described and set

out in the plaintiffs' supplemental petition. The appellee Mrs. Cluck did not join in the execution of that contract. The spring, and the premises therein described, was then and is now situated upon the homestead of appellees. After the execution of that contract the Austin & Northwestern Railroad Company entered upon the premises, and erected at the spring a pump, pumphouse, boiler, and shed for coal, and from the spring laid a pipe about 400 or 450 yards long to a tank on the right of way on the Austin & Northwestern Railroad. From the time of the erection of said pump, etc., the Austin & Northwestern Railroad used the water in the spring and occupied and controlled the improvements so erected at the spring. On the 28th day of March, 1901, by special act of the legislature, the appellant, the Houston & Texas Central Railroad Company, was authorized to purchase, own, and operate all the property, real, personal, and mixed, franchises, privileges, contracts, and choses in action of the Austin & Northwestern Railroad Company, and authorized the latter road to sell and convey the same to the Houston & Texas Central Railroad Company. In pursuance of this act, the Austin & Northwestern Railroad Company on August 22, 1901, executed a conveyance to the Houston & Texas Central Railroad Company. Thereafter the appellant took charge of said road, and used the water in the spring, and controlled and operated the pump, pumphouse, etc., located at the spring, and the pipe running from there to the tank on appellant's right of way. About 25 feet square is the amount of land occupied by the pump, pumphouse, and coal bin at the spring. There are also pipes leading to the store of one Emmet Cluck, son of the plaintiffs, and also to the premises of the plaintiffs, through which water is furnished to them. The estimate is that about 12,500 gallons of water is pumped daily from the spring. Some of this is used by Mr. Emmet Cluck and by the plaintiffs and by the railway company, and some is used by a gin, as long as the ginning season lasts.

There is evidence to the effect that the plaintiffs use about 400 gallons of the water a day. The appellee Mrs. Cluck did not give her consent to the Austin & Northwestern Railroad Company or the appellant to enter upon the premises in question and use the water in the spring, and such entry and use was against her will. There is evidence tending to show that the water from the spring could be used by the plaintiffs for domestic purposes and for irrigating.

It does not appear that the plaintiffs consented to the assignment of the contract in question, as set out in their supplemental petition, by the Austin & Northwestern Railroad Company to the appellant. From the manner in which the question is treated in the briefs of the parties, it appears that the trial court held that the contract in

question was not assignable. This upon the ground that it was an easement in gross, and this ruling is assigned by the appellant as error. It is unnecessary for us to undertake to distinguish between an easement in gross and appendant, or to review the rules of the common law that authorize an assignment of the latter and deny it to the former; for, except in matters of personal trust or skill, article 308 of the Revised Statutes has, in effect, changed the rule of the common law upon this subject, and by virtue of this provision of the statute many contracts and rights can be transferred which were not assignable at common law. And we think that the contract in question falls within the class that may be assigned under the section of the law mentioned. This construction of the statute is, in a measure, warranted by what is said by the supreme court in the case of M., K. & T. Ry. Co. of Texas v. Carter, 68 S. W. 169. Therefore we are inclined to the view that the trial court erred in not holding that the appellant acquired all the right and interest of the Austin & Northwestern Railroad Company under the contract in question. But this view will not lead to a reversal of the judgment of the trial court upon the main question in the case, because the undisputed evidence in the record shows that the property in controversy was at the time that the contract was executed, before and since, the homestead of the appellees, and that by reason of Mrs. Cluck's not having joined in its execution the contract is void.

The use of the spring in question and the land surrounding it, occupied by the improvements erected thereon by the Austin & Northwestern Railroad Company, together with the pipe laid from the spring to the right of way, was a use and appropriation of a part of appellees' homestead without the consent of Mrs. Cluck. The spring and the land adjoining it is a valuable part of the homestead, which the appellant, under the contract in question, would have the right to control and use at will, for as long a time as it should see fit to use it, or until the railroad in question should cease to exist. There is no limitation as to time when the contract should terminate. The effect of its terms is to permit the railroad company to invade the homestead of the appellees, and to take possession of so much of the land, and use the same, as is necessary to erect pipe lines from the tank to the spring, and to erect pump and appliances necessary to obtain water from the spring. The conveyance in question, while under the guise of a contract, is really tantamount to an attempted conveyance of an interest in the spring, and land sufficient upon which to erect pumps and appliances, etc., and pipe lines to the appellant's right of way. The spring and the soil from which it flows, together with the portion of the premises occupied by the improvements erected and

used by the railroad company, is a part of the realty, the conveyance of which would have a tendency to curtail the homestead interest, and would, to some extent, interfere with its beneficial use and enjoyment.

An attempted conveyance of a part of the homestead without the consent of the wife is as much within the prohibition of the law as a conveyance of the entire homestead. The principle announced in *Southern Oil Co. v. Colquitt* (Tex. Civ. App.) 69 S. W. 169, controls this question. A writ of error was denied by the supreme court in that case. The contract in question, in order to be effective, in effect authorized the railroad company to enter upon the premises, the homestead of the appellees, in order to obtain the beneficial use and enjoyment of the water, there to dig into the soil and break the surface, lay pipes, and erect a pump and structures that they might deem necessary. The right here granted necessarily implies the use and possession, to some extent, of the premises, in order to accomplish the purposes intended by the contract; and not only occasionally, such as might be acquired by a license from the husband alone, but as frequent and as often and for as long a time as the appellant might desire. This view of the question is analogous to the point decided in *Coates v. Caldwell*, 71 Tex. 21, 8 S. W. 922, 10 Am. St. Rep. 725. The exemption of matured crops growing upon the homestead was, in that case, conceded upon the principle that, in order to make the levy and seize the crops, the officer must necessarily invade a part of the homestead and take possession of the same for a time.

Appellant has an assignment of error which complains of the charge of the court in submitting to the jury the issue of damages. The plaintiffs recovered a judgment for \$50 damages. There is no evidence in the record which shows the market value of the land occupied by the appellant, or the value of the water used and consumed by the railroad company. There is evidence which shows that the land and the water furnished by the spring were serviceable and useful to the appellees; but there is no evidence whatever showing what was the value of the water used and consumed by the appellant, or what was the rental value of the land occupied and used by the railroad company. While it might be assumed as a matter of common knowledge that land and water might be of some value, still proof must be offered showing the amount of this value, in order that the jury might intelligently reach some conclusion as to the amount of damages sustained by the injured party. The evidence on this branch of the case is not satisfactory. In fact, there is no evidence in the record tending to show the amount of damages sustained by the plaintiffs; and so much of the judgment as is in plaintiffs' favor for damages will be reversed.

The judgment of the trial court on the oth-

er branch of the case is affirmed. The costs of the appeal will be taxed against the appellees. Affirmed in part and reversed and remanded in part.

NEASE et al. v. JAMES.*

(Court of Civil Appeals of Texas. Jan. 7, 1903.)

NOTES — ATTORNEY'S FEES — COLLECTION — DEATH OF MAKER BEFORE MATURITY — CLAIMS AGAINST ESTATE — PRESENTATION — EFFECT — ACTION FOR FEES — LIMITATIONS.

1. Plaintiff was the owner of two notes signed by defendant's decedent, both of which provided for an attorney's fee of 10 per cent. for cost of collection. Before either note matured the maker died, and defendant qualified as executor, after which plaintiff employed an agent not an attorney to present the notes against the maker's estate, which he did before maturity, without claiming attorney's fees, and the amount due, with interest, was allowed. The claims on the notes not having been paid when the notes matured, plaintiff procured attorneys, who procured an order of the county court for the sale of the decedent's property to pay the notes, after which such attorneys presented a claim for attorney's fees, which was disallowed. *Held*, that the failure to claim attorney's fees when the notes were originally presented, and the allowance of the claims without attorney's fees, constituted a bar to a subsequent action to recover them.

2. Where notes provided for attorney's fees if not paid at maturity, the claim for attorney's fees arose on maturity of the notes, and a suit to recover the same was barred if not brought within four years thereafter.

Appeal from district court, Bexar county; S. J. Brooks, Judge.

Action by E. A. T. Nease and others against John H. James, as executor of the estate of James P. Hickman, deceased. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Geo. C. Altgelt and Denman, Franklin & McGown, for appellants. Ball & Ingram, for appellee.

FLY, J. This is a suit to recover attorney's fees alleged to be due appellants on two promissory notes, one for \$18,000 and the other for \$7,000, the attorney's fees being for 10 per cent. on those two sums. The case was tried by the court, and resulted in a judgment for appellee.

The evidence showed that James P. Hickman had in 1892 executed a note to E. D. L. Wickes for the sum of \$18,000, and in 1893 executed to Mrs. E. A. T. Nease, then Wickes, a note for \$7,000, each of said notes providing for interest and attorney's fees. This language was used in the first-named note: "Should I fail to pay this note promptly at maturity, I further promise to pay the attorney's fees for the cost of collection, to wit: 10%." That note was due on January 18, 1897. In the other note, which was due on same date as the first, it provided for "an attorney's fee of ten per cent. should

*Rehearing denied February 18, 1903, and writ of error denied by supreme court March 12, 1903.

judicial proceedings be used in collecting." It was shown that Mrs. Nease, who was the widow of E. D. L. Wickes, was the owner of the two notes. Before the notes became due, James P. Hickman died, and appellee qualified as executor of his will. Henry Laager, as attorney in fact for Mrs. Wickes (now Nease), made the statutory affidavit to the claims evidenced by the two promissory notes, and presented the same to the executor, who allowed the same for the principal and interest. In the affidavit to the claims, the attorney's fees were not specifically mentioned, the affidavits being merely that the claims represented by the notes were just, and that all legal offsets, payments, and credits known to the affiant had been allowed. The two claims were approved as third-class claims by the county judge of Bexar county on July 28, 1894. The claims have not yet been paid. In 1900, Mrs. Nease employed attorneys to collect the claims that had been approved by the county judge, and orders of sale of certain real estate were obtained, and the property was sold, but the sales were not confirmed. In 1901 the property was sold, and the sale was confirmed by the county judge. On October 16, 1901, the attorneys of Mrs. Nease presented a claim for \$3,035 attorney's fees, being 10 per cent. of the amount of the two notes and interest, which was rejected by the executor, and on October 25, 1901, this suit was instituted. The claims evidenced by the two notes were not placed in the hands of an attorney for presentation to the executor, but were placed in the hands of an agent. The language used in the affidavits made to the claims by the agent of Mrs. Nease was that the "claim represented by said note and deed of trust * * * was just," and was broad enough, it would seem, to comprehend and embrace the whole of the debt evidenced by the instruments, whether principal, interest, or attorney's fees; and we think an allowance of principal and interest was equivalent to a rejection of the attorney's fees, but we deem it proper to discuss the questions presented by appellants on the basis that they did not present their claim for attorney's fees, but left it for future action.

It is the contention of appellants that claims for the principal and interest were segregated by the agent from the claim for attorney's fees, and two items alone were presented to the executor for allowance, and consequently the allowance of those items could not be a rejection of the attorney's fees. It seems to us that it would be an anomalous proceeding, and one utterly without precedent, to present a note to an administrator or executor for a portion of the debt evidenced by it, and hold the other in reserve for a "more convenient season." When the claim was presented to the executor for allowance, and was allowed, and then approved by the county court, a judicial proceeding had been instituted, prosecuted, and carried to a success-

ful termination, as much so as though a regular suit for debt and foreclosure had been obtained in a district court; and we cannot conceive for a moment that it would be contended that a plaintiff in an ordinary suit could go into court and obtain a judgment for a part of a debt evidenced by a promissory note, and years afterwards another suit could successfully be prosecuted for another item of the same note, which was omitted in the original suit.

It is urged by appellants that the claim for attorney's fees could not be demanded at the time that the claim was approved by the county court, because at that time they were not a just claim, the debt not having matured, and therefore the affidavit could not and did not include the fees. The principal and interest were no more due than the attorney's fees, and, if the services of an attorney were necessary in the presentation of the claim, why would not a claim for the fees have been just? If the attorney's fees were not just at the time the judgment for the debt was obtained, they could not be held in reserve and be made just by waiting until the debt had matured. The services for which the attorney's fees were to be allowed were those rendered in the presentation of the claim, and if they were not included in the claim at that time they were forever waived, and a claim for them could not be revived more than four years after the debt and interest had become due. If they could be and were segregated by the agent from the principal and interest, those on the \$18,000 note must, according to the language of the note, have become due on January 18, 1897, when the note matured and was not paid, and the statute of four years began running and had barred the claim when the suit was instituted. The opinion in the cases in which attorney's fees have been permitted for the mere presentation of claims to an executor or administrator for allowance have justified such fees on the ground that it took professional skill to present the claims, and the fees were held to be due when the claim was presented to the executor or administrator, and, such being the case, those cases will not be extended to include services that may be performed after the claim had for years been merged into a judgment. If appellants could ever have claimed the attorney's fees, it was when their claim was presented, and by not claiming them, and by not employing a lawyer, they waived any possible right they might have had to the fees, and cannot, years after they have obtained their judgment on their claim, begin proceedings for attorney's fees. It is true that they may have needed attorneys to accelerate and expedite the collection of their claim, but it was never contemplated by the contract that they could inaugurate a suit and prosecute it to judgment without retaining the services of an attorney, and afterwards employ attorneys in connection

with the judgment and compel the maker of the notes to pay their fees.

The claim is made that the language of the allowance by the executor, and of the judgment of the probate court, is broad enough to include, and does include, the attorney's fees. Then why this suit? If the fees are included in the judgment, appellants cannot with any show of consistency contend that they have the right to select a part of that judgment, present it to the executor for another allowance, and, when refused such allowance, institute a suit upon such refusal in the district court. If the contention of appellants is based on the law, their full claim is secured by the judgment of the probate court fixing a lien on certain property, and they cannot wage a successful prosecution for a part of the claim allowed by the executor and fixed by the judgment. Article 2082, Sayles' Ann. Civ. St.

The contingency upon which the attorney's fees were to be paid on the \$18,000 note was a failure to pay at maturity, and, if the contingency had not arisen at the time of presentation of the claim, it could never arise, because there was no failure upon the part of the maker of the note or his estate to pay the debt, but it was in the hands of the probate court, and could be paid only in due course of administration. There has been no default in payment of the debt, unless such default arose by virtue of the death of the maker, for which he was in no way responsible. If the suit had been one by attachment, justified before maturity of the debt by some act of the maker of the note, the attorney's fees would become payable when the debt matured, but even in that instance they must be claimed as a part of the debt in instituting the attachment proceedings. *Stansell v. Cleveland*, 64 Tex. 660. The doctrine of the case cited has been questioned in so far as it holds that one who wrongfully sues out a writ of attachment before the debt is due is entitled to recover attorney's fees, but it is not questioned in so far as it holds that attorney's fees can be recovered on such attachment lawfully sued out, and in fact that doctrine is reiterated. *Lanning v. Bank*, 89 Tex. 601, 35 S. W. 1048. By the language used as to attorney's fees in the note for \$7,000, they became payable if "judicial proceedings be used in collecting." Undoubtedly, collecting through the probate court was collecting by "judicial proceedings," which became necessary through no fault of appellants, and they could have made the affidavit, with consciences "void of offense towards God and man," that the claim was just. *Stansell v. Cleveland* and *Lanning v. Bank*, above cited. They did not do so, and thereby waived all right to the attorney's fees.

Should it be held that the death of James P. Hickman compelled appellants to go into the probate court, and that it was contemplated in the contract evidenced by the prom-

issory note for \$18,000 that appellants should be at no expense in collecting their debt, then it can be said that appellants did not employ an attorney to present their claim and prosecute it to judgment, and consequently expended no attorney's fees, and if they had they did not, in making their claim, according to their contention, ask for the fees, and cannot afterwards be heard to make claim for them, but are estopped by their conduct. Certainly, if the claim for attorney's fees was not concluded by the allowance and approval of principal and interest, it became due in January, 1897, and, more than four years having elapsed from the maturity of the notes before this suit was instituted, it was barred by limitation. If there was a claim for attorney's fees presented to the executor, and there was a rejection of it by the allowance of principal and interest, then the claim is barred because suit was not instituted within 90 days from time of rejection. In either event appellants should not recover.

The judgment is affirmed.

JAMES, C. J., disqualified and not sitting.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SELEY et al.*

(Court of Civil Appeals of Texas. Jan. 7, 1903.)

CARRIERS OF GOODS—ERRONEOUS DELIVERY—LIABILITY TO CONSIGNOR.

1. Where a railway company delivered a consignment of wheat to another than the consignee, subject to the consignor's order, such erroneous delivery constituted a technical conversion, rendering the railroad company immediately liable for the price of the wheat; so that it was not relieved by its subsequent destruction in the hands of such third person by an unprecedented storm.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by Seley & Early against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. S. Miller and Clark & Bolinger, for appellant. John G. Winter and Davis & Cocke, for appellees.

KEY, J. This is a suit to recover the value of certain grain, resulting in a judgment for the plaintiffs for \$1,160.15, and the defendant has appealed.

The trial court filed conclusions of fact, which are as follows: "I find that on August 30, 1900, plaintiffs delivered to defendant at Lorena, Texas, one car No. 2 bulk wheat, containing 814½ bushels; on September 1, 1900, one car containing 995 bushels and 39 pounds No. 2 bulk wheat; and on September 2, 1900, one car containing 601 bushels 40 pounds No. 2 bulk wheat,—for shipment to

*Rehearing denied February 18, 1903, and writ of error denied by supreme court.

† 1. See Carriers, vol. 9, Cent. Dig. § 357.

Galveston, Texas, consigned, as shown by bills of lading and way bills for each car to 'shipper's order, notify Seley & Early, Galveston, Texas, care Star Mills.' According to usage, this meant and was understood by both plaintiffs and defendant as a direction by plaintiffs to defendant to deliver said wheat to the Texas Star Flour Mills, known as and commonly called 'Star Mills,' at its elevator in Galveston. The wheat arrived in Galveston on September 4 and 5, 1900, but defendant did not notify plaintiffs or the Star Mills of its arrival in Galveston, and they had no knowledge thereof; but it did notify, and on the 6th and 7th of September deliver same to, Galveston Wharf Company at its Elevator A, an entirely different concern to the Star Mills, and the elevators of the two were located some considerable distance apart. This delivery was for account of plaintiffs, and the wharf company accepted and held the grain subject to plaintiffs' order. At this time, the value of this wheat in Galveston was 70½ cents per bushel, and the freight thereon to defendant was 9 cents per bushel. The Galveston Wharf Company had not unloaded the cars on September 8th, and they were at that time standing on its switch track, and were there destroyed by an unprecedented storm, which swept over the island on that day. The bills of lading contained, among other things, an exception as to its liability from loss by act of God. Had the defendant promptly notified the Star Mills of the arrival of the wheat, the evidence shows that it would, in all probability, have been unloaded to the Star Mills elevator before the storm, and not been lost; but, if it had not been unloaded, and the cars containing it had been delivered before the storm to the Star Mills by defendant on the switch tracks used by the Star Mills for cars shipped to it, as was the custom of defendant, the wheat would not have been destroyed by the storm, as the water was not of sufficient depth on those tracks to have entered the cars. The wheat in these cars had been sold by plaintiffs to the Star Mills, subject to its inspection, but defendant had no knowledge of that fact, and plaintiffs had been shipping other cars of wheat prior to these shipments over defendant's line, consigned to their own orders, care the Galveston Wharf Company, and this shipment was delivered to the wharf company through mistake of defendant's agent at Galveston. Defendant had made mistakes of this character before in handling grain for other parties, and such mistakes had theretofore been rectified by defendant by delivering a like quantity and grade of wheat, which had been shipped to the wharf company to the Star Mills; and defendant's said agent testified that this mistake would have been likewise corrected had the wheat not been destroyed by the storm, and I find that such would have been the case. At the time these cars arrived in Galveston there were a great num-

ber of cars of wheat—some 300—consigned to the Star Mills, standing on the switch track controlled by defendant, of the arrival of which the Star Mills had been notified, and it could not receive and unload them because that part of its elevator devoted to storing grain for its customers was full; and defendant's said agent thought that its entire elevator was full, but as a fact a part of its elevator, which it had reserved for storing wheat bought by it, was not full, and if it had been notified of the arrival of this wheat it would have received and unloaded it into its elevator. After the storm a part of this wheat was found and unloaded into the wharf company's elevator, and sold by it, and plaintiffs received on the — day, of —, 1901, out of the proceeds thereof, the sum of \$441.82."

Opinion.

The testimony supports the foregoing findings of fact, and they are adopted by this court. We also approve and adopt the trial judge's conclusion of law, announced in the following language: "The defendant had delivered the grain to the Galveston Wharf Company, in violation of its contract of shipment, before the storm, and thereby, in my opinion, converted it, and immediately upon such wrongful delivery became liable to plaintiffs for the value thereof. The cause of action for the value of the grain having arisen before its destruction, defendant cannot excuse itself by showing a subsequent destruction, for which it would not have been liable had it not parted with the possession. It is true that the delivery to the Galveston Wharf Company was for account of plaintiffs, and the grain was held by it subject to their orders, but such delivery was made without plaintiffs' knowledge or consent, and in direct violation of its contract of shipment, and, in my opinion, constituted a technical conversion. It could not thus force upon plaintiffs business relations with others in regard to this shipment of grain without plaintiffs' knowledge or consent, and in violation of its contract with plaintiffs. The case might, perhaps, be different if the wheat had been delivered to the wharf company subject to defendant's order, for in that event plaintiffs would not have been forced to look to others with whom they had not contracted, and defendant might have been in position to reclaim possession of the identical grain, and deliver same according to its contract, being responsible only for damages, if any, caused by the delay. Even this seems doubtful, but such is not the case here. The grain was not delivered to the wharf company subject to the defendant's order, but to plaintiffs, and defendant thereby lost control over it entirely, and, in my judgment, became immediately liable to plaintiffs for its value."

No error has been pointed out, and the judgment is affirmed. Affirmed.

FOSTER et al. v. FRANKLIN LIFE INS. CO.

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

INSURANCE—AGENT'S BONDS—EMBEZZLEMENT—LIABILITY OF SURETIES—DISCHARGE—INCREASE OF RISK—ACTIONS—PLEAS—EXCEPTIONS—DEMURRER—INSTRUCTIONS.

1. Where a petition in an action on the bond of an insurance agent alleged that plaintiff, through W., its general agent, contracted with R. to become its agent, for certain purposes specified, and the agreement recited that it was between such general agent party of the first part, and R., party of the second part, and that the party of the first part thereby appointed the party of the second part agent of the company, and the signature to the contract was "W., general agent (party of the first part). R. (party of the second part)." "The foregoing agreement is approved. Franklin Insurance Company, by B., general manager of agencies,"—there was no variance between the contract and the petition on the ground that the contract was that of W. and not that of the company.

2. In an action on the bond of an insurance agent for moneys embezzled, it was no defense that the general agent who appointed defendant's principal was also liable to plaintiff for the default.

3. Where, in an action to recover from an insurance agent's sureties moneys embezzled by him, the complaint alleged in detail every item sought to be recovered, a plea that almost all the money sued for came into the agent's hands in transactions conducted by him as a district manager, which employment was not within the bond, was not sufficiently specific in the absence of an allegation that defendants were not in a position to specify the protested items.

4. Where an exception to a plea was in effect a general demurrer, and was properly sustained, the plea must be held to have set up no sufficient ground of defense.

5. Where an insurance agent's bond was conditioned that he should pay to the company all moneys which might come to his hands as such, and all advances made to him by the company, or to any special or subagents appointed by him, and that he should faithfully keep all the conditions which ought to be fulfilled by him in any contracts theretofore or thereafter made between him and the company or its general agent, or contained in any change of the same, a plea, in an action to recover embezzlements by the agent, that a large part of them occurred after he had been appointed district manager in his dealings with subagents appointed under a subsequent contract, stated no defense, such contracts being contemplated by the bond.

6. Where a bond of an insurance agent was not executed until after the agent had been appointed a district manager, and there was no fact stated showing that any artifice was practiced to mislead the sureties as to his position, they cannot escape liability for his embezzlements on the ground that they understood they were becoming sureties for a soliciting agent only, and that the position was altered without their consent and without notice.

7. Where sureties on an insurance agent's bond claimed freedom from liability on the ground that they were released by the appointment of the agent as a district manager, but there was no evidence showing that any of the defalcations related to any transactions or funds derived from the employment of subagents, which was the only increase in the principal's duties, error, if any, in sustaining an exception to a plea alleging such discharge from liability, was harmless.

8. Where in an action on an insurance agent's bond the only issue submitted to the jury was whether the company, with knowledge of the

agent's embezzlement, retained him and permitted him to continue, without notifying the sureties, an instruction that the burden of proof was on the defendants was not error.

9. Where in an action on an insurance agent's bond there was only one witness who testified concerning the amount of the agent's defalcation, and his testimony showed a liability in excess of the penalty of the bond, and there was no controverting evidence or anything to cause suspicion as to his testimony, it was not error to charge that, if the jury found for plaintiff on the only issue submitted, they should find in plaintiff's favor for the full amount sued for.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by the Franklin Life Insurance Company against A. B. Foster and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Alexander & Thompson and G. H. Goodson, for appellants. Cockrell & Gray, for appellee.

TEMPLETON, J. J. M. Reynolds was agent of the Franklin Life Insurance Company. On May 23, 1899, he executed a bond in the sum of \$1,000, with A. B. Foster and William Reese as sureties, to secure the faithful performance of his contracts with the company. Thereafter he made default and fled the country. The company thereupon brought suit against the said sureties, and on a jury trial obtained judgment, from which the defendants in the suit have appealed. The judgment was for the full amount of the penalty of the bond, with interest.

The defendants objected to the introduction in evidence of the contract between Reynolds and the company, on the ground that the contract offered varied from that pleaded, in that the plaintiff pleaded an express contract between Reynolds and the company, while the contract offered was, on its face, a contract between Reynolds and J. Y. Webb, Jr., general agent of the company, and there was no pleading authorizing the consideration of such contract as a contract with the company. The contract is a voluminous document, and was not set out verbatim in the petition or copy attached as an exhibit. The petition, however, contained full and specific averments concerning the terms and conditions of the contract. It was alleged that on May 16, 1899, the plaintiff, through J. Y. Webb, its general agent for the state of Texas, entered into a contract of agency with J. M. Reynolds, whereby plaintiff appointed Reynolds its agent for certain purposes, specifying the same. The beginning clause of the contract introduced in evidence reads thus: "This agreement, made this the 16th day of May, 1899, between J. Y. Webb, Jr., of Dallas, Tex., general agent of the Franklin Life Insurance Company, of Springfield, Illinois, party of the first part, and J. M. Reynolds, of Comanche, county of Comanche, state of Texas, party of the second part, witnesseth: First. Said party

of the first part does hereby appoint said party of the second part agent of said company," etc. The signatures to the contract appear in this form: "J. Y. Webb, Jr., General Agent (party of the first part). J. M. Reynolds (party of the second part). The foregoing agreement is hereby approved. The Franklin Life Insurance Company, by S. C. Bolling, General Manager of Agencies." We find no material variance between the contract alleged and that offered. It appears from the above quotations from the contract that Webb, acting as general agent of the company, appointed Reynolds agent of the company, and that the contract constituted Reynolds such agent, and bound both Reynolds and the company. It was therefore the contract of the company, and the allegation that the company, through its state agent, Webb, appointed Reynolds as its agent, correctly and truly expresses the effect and meaning of the contract. When the entire contract is considered, there is no doubt as to its purpose or in regard to the legal effect thereof. The suit was on the bond, which was payable directly to the company, and was not on the contract, and, the contract being collateral to the obligation sued on, it was unnecessary to plead it with that particularity which otherwise might have been required. The contract was set out, in *hæc verba*, in the answer of the defendants, and there is no pretense that they were surprised or injured by the failure of the plaintiff to plead the same more specifically. The court did not err in admitting the contract in evidence. The question just considered is presented in another form, but what is said above is sufficient to dispose of the issue in all its phases.

The defendants complain of the action of the court in refusing to permit them to prove that there was a contract between Webb and the company, by the terms of which Webb had authority to appoint agents and sub-agents in the state of Texas, who were responsible to him, and that Webb was responsible, on his bond to the company, for the acts of such agents. The proposed testimony was wholly immaterial. Reynolds was agent of the company, and, as such agent, had received money belonging to the company, and had embezzled a portion of the same. The company held his bond, payable to it, with the defendants as sureties, to protect it against loss on such account. This is a suit on the said bond, and the sureties thereon, who are the defendants herein, are not entitled to defeat a recovery against them on the ground that the company was also indemnified against loss by a bond given to it by Webb. The primary debtor was Reynolds, and the primary sureties for the debt were the bondsmen of Reynolds. The evidence was properly excluded.

The defendants by special plea alleged that the bond sued on was executed to secure the

performance of the contract of agency above mentioned; that by said contract Reynolds was employed only as solicitor of insurance; that after the execution of the bond Webb made a secret parol contract with Reynolds, in connection with one Griffin, by which Reynolds was given authority, in connection with Griffin, to act as a district managing agent for the territory named in the contract, with authority to appoint any number of solicitors or other agents, Reynolds agreeing to become responsible for the acts of Griffin and such other agents. It was further alleged that as a part of said parol contract Webb caused Griffin to enter into a written contract in terms similar to the contract with Reynolds, and procured Reynolds to assume such contract. It was charged that the defendants knew nothing of said additional contracts, and that the same were fraudulently concealed from them by Webb. It was also claimed in said plea that the defendants had become sureties for Reynolds only as solicitor of insurance, and that, by the additional contracts alleged, his employment was changed from personal solicitor to district manager, which change was insisted upon as sufficient to release them as sureties, the change having been made without their consent. There was a further allegation that the principal portion of the losses were in the transactions of Griffin and the special agents appointed by Reynolds as district manager. The plaintiff urged a general demurrer and a number of special exceptions to said plea, and the same were sustained by the court. The correctness of this ruling is the question now to be considered. One of the special exceptions was to the effect that the allegations that Griffin and the subagents collected and embezzled almost all the money sued for were insufficient, for the reason that the same did not show which of the amounts were so collected and embezzled by said parties. As the facts were alleged only in the most general terms, and no excuse given for the failure to make the allegations more specific, this exception was properly sustained. The plaintiff, in its petition, had alleged in detail every item of its account against Reynolds, and, if some of them were to be attacked as not arising out of the contract which was admitted to be covered by the bond, it was entitled to know which of the items were so disputed. If the defendants were not in position to specify the protested items, the fact should have been alleged. Without allegations showing that the items of the plaintiff's account, or some of them, did not grow out of the contract which the defendants admitted they had guaranteed, the plea presented no defense to the plaintiff's suit, since it was, of course, immaterial what additional contracts may have been made with Reynolds if no transactions arising thereon are involved in this suit. So the exception we are considering was, in effect, a general demurrer, and, having been prop-

erly sustained, the plea must be held not to have set up any good and sufficient ground of defense. Again, it was alleged in the plea that changes and modifications were made in the original contract, and that the same were fraudulently concealed from the defendants, but it was not alleged that such changes were unauthorized, nor were any facts stated showing that it was the duty of the company to notify the defendants of such changes. One of the special exceptions to the plea questioned its sufficiency on these grounds. As a matter of fact, the bond sued on and described in the petition, and which was copied verbatim in the answer of the defendants, and which was introduced in evidence on the trial, was conditioned that Reynolds should pay to the company "any and all moneys which may come into his hands as agent of and for said company, and shall pay or cause to be paid to said company all loans or advances made to him by said company, or to any special or sub agents appointed by him on account of future commissions or otherwise; * * * and shall and do in all things well and truly observe, fulfill, and keep all and singular the articles, clauses, provisions, conditions, and agreements whatsoever which on the part of the said J. M. Reynolds are or ought to be observed, fulfilled, and kept, comprised, and mentioned in any or all contracts or agreements heretofore or hereafter made between him and the said the Franklin Life Insurance Company, or its general agent, according to the purport, true intent, and meaning of the same, or contained or mentioned in any change or modification of the same." When considered in connection with this bond, the utter inadequacy of the plea is apparent. Complaint is made in the plea of the appointment of special or sub agents not provided for by the original contract of agency, when the bond itself, the instrument signed by defendants, recognizes his right to appoint such agents and binds the defendants and their principal for the accounts of the agents so appointed. Complaint is made in the plea of the contracts other than the original contract of agency, when the bond sued on binds the defendants as sureties of Reynolds on all contracts or agreements which then existed or which might thereafter be made between Reynolds and the company or its general agent. Complaint is made in the plea that additional contracts and certain changes in contracts were made and were concealed from the defendants, when the bond provides for other contracts and for changes and modifications of contracts, and, in effect, dispenses with notice to the defendants of such contracts, changes, and modifications. But it is urged that, notwithstanding all this, the defendants in fact became sureties of Reynolds only in his capacity as personal solicitor and not as district manager. There is no contention that the territory in which Reynolds was to act as

agent was ever changed. The power of a district manager exceeded that of a personal solicitor only in his right to appoint sub-agents, and the only additional liability assumed was responsibility for such agents. We have seen above that the bond covered the appointment of special agents and responsibility for their acts. So, even if it be conceded that Reynolds was originally appointed personal solicitor and was afterwards promoted to the position of district manager, the fact would not avail the defendants. Besides, the two positions are merely different grades of agency in the same line of business, and appear to come fairly within the terms of the bond providing for the making of additional contracts and for changes in contracts. Of course, the company, under the provision of the bond referred to, could not have contracted with Reynolds to act as its agent in a matter foreign to the subject to which the original contract and the bond related and held the sureties on the bond for the acts of Reynolds as such agent. While this is true, it cannot be held that any change in the duties and responsibilities of his position would release the sureties on the bond, as such holding would destroy the provision of the bond authorizing changes in the contract. The provision would not have been inserted if only immaterial changes were to be permitted. Material changes were contemplated, and so long as the changes were of the character pleaded by the defendants they come within the bond. Another matter may be mentioned here. The written contract with Griffin set out in the plea, and which was assumed by Reynolds, was executed on May 16, 1899, the date of the original contract with Reynolds. The bond was not executed until May 23, 1899. It follows that the appointment of Reynolds as district manager, and the creation of the partnership with Griffin, occurred before the bond was executed. The bond unquestionably covered all existing contracts, and it was not alleged in the plea that the plaintiff, when it secured the bond, represented to the defendants that there was no contract with Reynolds except in the capacity of personal solicitor. The facts as stated in the plea do not show that any artifice was practiced upon defendants to secure their signatures to the bond. We conclude that the trial court did not err in sustaining the exceptions to said plea. But even had there been error in this action of the court, it does not follow that the same would have required a reversal of the judgment. On the trial, the plaintiff offered no proof relating to embezzlement of any funds derived from the employment of subagents. The plaintiff's proof was confined almost entirely to embezzlement by Reynolds of sums received by him as personal solicitor, and, as to such sums, the plea we are considering sets up no defense whatever. The only additional amount shown by plaintiff's evidence to have been embezzled was a small

sum received by Reynolds and Griffin jointly. That Reynolds was liable for such amount is beyond question. The liability having accrued under a contract which existed when the bond was executed, and the bond, on its face, being sufficient to cover such contract, it was necessary for the plea to show that the sureties were induced by fraud and misrepresentations to sign the bond. We have seen above that the plea wholly failed to do so, hence it was fatally defective in that particular, and it is of no consequence whether the matters of defense alleged in the plea relating to issues not material to the plaintiff's right to recover were sufficiently pleaded.

The defendants alleged in their answer that, soon after he was employed as agent of the company, Reynolds began failing to account for the moneys coming into his hands, and that the company, with knowledge of the fact, retained him in its employ and permitted him to continue his embezzlements, and did not notify the defendants of the facts. The issue thus raised was submitted to the jury, and the jury was instructed to find for the plaintiff the full amount sued for, unless they found for the defendants on the said issue, and the jury was further instructed that the burden of proof was on the defendants. As the defendants held the affirmative on the only issue submitted to the jury, the instruction concerning the burden of proof was correct, and the complaint urged against that paragraph of the charge is not well taken. It is insisted that the court erred in giving the peremptory instruction to the jury to find for the plaintiff the entire sum sued for, unless they found for the defendants on the other issue submitted, and that the question as to what amount the plaintiff was entitled to recover in that event should have been left to the decision of the jury. The only witness who testified concerning the amount of Reynolds' liability to the company was its state agent, Webb. His testimony showed a liability considerably in excess of \$1,000, and there was no controverting evidence. It is urged that he was interested in the result of the suit, and that the jury should have been permitted to pass upon his credibility. As a general rule, the proposition contended for may be conceded to be correct. But unless there is something in the testimony of the witness, or in the circumstances of the case as disclosed by all the evidence, to raise a doubt as to the veracity of the witness, the court may, in the exercise of a sound discretion, when there is no controverting testimony, assume that the facts testified to by such witness are established, and instruct the jury accordingly. We find nothing in the record calculated to cast suspicion upon the testimony of Webb, or which would have justified the jury in disregarding it. The fact that Reynolds had embezzled money of the company was conclusively shown, and was admitted by the defendants in their answer. There is no sug-

gestion that on another trial the defendants might be able to produce evidence tending to overcome the testimony of Webb upon any point. In this state of the record no error is shown.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. GOSS et al.*

(Court of Civil Appeals of Texas. Jan. 24, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANTS—RAILROADS—FLAGMAN—NEGLIGENT RUNNING OF TRAIN—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff's decedent, a flagman, was run over at a grade crossing by a switch engine, running backward, pulling several empty coal cars. The tender was equipped with a square tank, which prevented the engineer from seeing the track. The tender was also provided with a footboard to permit a switchman to ride thereon while the engine was being backed, so that he could control the air brakes and stop the engine. At the time of the injury no switchman was stationed on the footboard, in violation of a rule of the company, and the engine was running at a speed exceeding the limit prescribed by the city ordinance. Held to justify a finding of negligence on the part of the company.

2. While a flagman stationed at a highway grade crossing in a city assumed the risks of injury incident to his employment, he did not assume the risk of being run down and killed by an engine run over the crossing at a speed exceeding the limit prescribed by the city ordinances, and not provided with a switchman on the tender who could have stopped the same by the use of the air brakes provided for that purpose, as required by the rules of the company.

3. Where a flagman at a railroad grade crossing, prior to being struck, saw two women about to cross, and was engaged in warning them of their danger, in doing which he was required to turn his back to the approaching train, and he was prevented from appreciating his own danger by reason of his efforts to save the women from injury, and there was not sufficient time before he was struck to retire from the track to a place of safety, he was not guilty of such contributory negligence as barred a recovery for his death, occasioned by the negligent operation of the train.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by Sallie Goss and others against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant. W. J. Mathis, H. H. Cummins, and Wolfe, Hare & Semple, for appellees.

TEMPLETON, J. Robert Goss was engaged in the service of the Missouri, Kansas & Texas Railway Company of Texas in the capacity of flagman at the Main street crossing in the city of Denison. He was struck by a switch engine and killed while on duty on April 12, 1901. His wife and children brought suit to recover the damages sustain-

*Rehearing denied February 14, 1903, and writ of error denied by supreme court.

ed by them on account of his death, and on a jury trial obtained a judgment, from which the company has appealed.

The assignments of error presented and urged by appellant question the sufficiency of the evidence to sustain the verdict, and a reversal is asked on that ground alone.

Main street, in the city of Denison, runs east and west, and is 100 feet wide. Appellant's depot is situated just north of said street, and its freight house is located directly west of the depot. Eight tracks of appellant cross Main street at right angles between the depot and the freight house. The flagman's shanty is situated between the fourth and fifth tracks, and at the south edge of the street. The said two tracks are 23 feet apart, and the other tracks some 8 or 10 feet apart. There is a plank walk on each side of the street, which extends across the tracks. The ground is practically level at the crossing, and for some distance north and south thereof, and the tracks are substantially straight in both directions. The engine which struck Goss was backing north, pulling 31 empty coal cars, which were being made into a train. It was on the track which lay immediately east of the flagman's shanty, and struck Goss at a point almost opposite the shanty. When struck he fell back on the track, and caught hold of the footboard of the tender. He was dragged across the street in that position. When he struck the walk on the north edge of the street he was dragged under the engine and killed. The engine was stopped just after it crossed the walk. The accident occurred about the middle of the afternoon.

The occupation of Goss was a hazardous one, and he assumed the risks ordinarily incident thereto, but did not assume any risk arising from the negligence of his employer. If he was killed as a result of exposure to the risks assumed by him, his wife and children are not entitled to recover herein; but, if he lost his life in consequence of the negligence of the company, they are entitled to recover unless he was himself guilty of negligence which contributed to his death. *Bonnet v. Railway Co.*, 89 Tex. 72, 33 S. W. 334; *Railway Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Railway Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508.

The first question to be considered is whether the evidence was such as to justify the finding of the jury that the death of Goss was caused by the negligence of the company. As stated above, the engine which struck Goss was backing down the track pulling a number of coal cars, the tender being in front. The tender was equipped with a square tank, which prevented the engineer from seeing the track in the direction he was going. A tender with a sloping tank would not have so obscured the view of the engineer. The tender was provided with a footboard at the back end thereof, which end was being operated in front at the time of

the accident. The footboard was about 12 inches above the track, and the object of its use was to enable some one to ride there whenever occasion required. There was an angle-cock which could be used by one riding on the footboard, and by means of which the air could be applied and the engine stopped. There was no one on the footboard when Goss was struck. There was a rule of the company which required a switchman to be stationed on the footboard when the engine was being backed over a street crossing. Some question as to the application of the rule to this particular engine is raised, but we think the rule must be held to apply. The evidence is decidedly conflicting in regard to the speed of the engine in question at the time of the accident. It is sufficient to warrant the conclusion that the engine was being operated at a rate of speed in excess of six miles per hour, which is the limit fixed by an ordinance of the city at which an engine may be operated at such places. A passenger train had arrived a few minutes before the accident. Another passenger train was in the yards, and was expected at the depot. The said crossing is more frequented than any other in the city, and a large number of people were on the grounds about the depot at the time.

In our opinion, the facts stated are sufficient to warrant the inference drawn by the jury that the company was guilty of negligence as charged against it. The running of such an engine backward, without a switchman on the footboard, at such place and at the rate of speed shown, was not an exhibition of that care which prudence would seem to require. The shape of the tank made it impossible for the engineer to see in the direction he was going at the point most important to be under his observation, and rendered it necessary for some one to be on the footboard. The failure to have a switchman on the footboard would be excusable, if at all, only when the engine was being run at the very slowest speed. The danger of striking some person at the crossing was manifest, and required the utmost circumspection on the part of the operatives of the engine.

But do these facts constitute negligence as to the flagman? We think so. The duties of his position made it necessary for him to be continually crossing the tracks, and to be on the lookout for trains, in order that he might warn passers-by of their danger. Those in charge of the engine were not required to so operate the engine as to protect the flagman from dangers which he might have foreseen as being likely to arise in the ordinary and proper conduct of the company's business. With as much reason they should not have operated the engine in such manner as to expose Goss to hazards not incident to the business when so conducted. The flagman had a right to assume that engines passing the crossing would be operated with the caution required under the circumstances and in ac-

cordance with the ordinance of the city and the rule of the company, and would be justified in acting on the assumption. The manner in which the engine in question was operated was not only negligence as to passers-by, but was negligence as to the flagman, since it exposed him to unnecessary danger, which he ought not to have been expected to foresee and guard against. If the engine had been run at the proper speed he might have avoided injury, and if a switchman had been on the footboard the engine might have been stopped by the use of the angle-cock, or Goss warned of his danger in time to have escaped from the track. It is not unreasonable to attribute his death to the failure of the company in its duty to him, if he was not guilty of negligence which contributed to the loss of his life.

Was he guilty of such negligence? He was on the track when struck. The track was level and straight, and there was nothing to prevent him from seeing the approaching engine had he looked, and it was his duty to be on the lookout for engines. On the other hand, it was shown that just before the accident occurred two ladies were crossing the tracks by way of the walk on the north side of the street, and that they appeared to be in danger of being run over, and seemed insensible of their peril; that Goss observed their situation, and warned them of their dangerous position by waving his flag and calling out to them; that in order to accomplish his purpose it was necessary for him to face the north or northwest, and to turn his back in the direction the engine which struck him was coming. And we think it is a reasonable inference from the evidence that he was on the track in the performance of his duty; that he was prevented from becoming aware of his own danger, and from protecting himself by reason of his efforts to save the lives of the two ladies, and that after he had warned the ladies there was not sufficient time, before he was struck, to look out for the engine which struck him and retire to a place of safety. These facts explain and excuse his conduct. "One who endangers his own life in order to save the life of another person is not chargeable with being a trespasser upon the railroad track, nor does his entering upon the track in the presence of danger for such purpose lay him liable to the charge of contributory negligence." *Railway Co. v. Gray* (Tex. Sup.) 67 S. W. 763. "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive serious injury, is negligence which will preclude a recovery for an injury so received; but when the exposure is for the pur-

pose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless." *Eckert v. Railway Co.*, 43 N. Y. 503, 3 Am. Rep. 721. So, even if Goss knew that the engine was approaching,—and it is not clear that he did,—the question as to whether his going on the track was necessary, and was not rash or reckless, considering the reason for his action, was properly left to the jury, and their finding thereon is conclusive. The evidence regarding the movements of the deceased immediately preceding the accident is hopelessly conflicting, but there is no real controversy about the fact that just before he was struck his attention was absorbed in warning the ladies off the tracks, and that his conduct indicated that he considered them to be in a perilous position. It seems clear that this fact accounts for his failure to observe and avoid the danger to himself. The conclusion follows that he lost his life in the performance of the duties of his position, and is not chargeable with negligence. *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173.

Since his death resulted from the careless operation of the engine, and not from one of the ordinary risks of his employment, the verdict of the jury, holding the company liable in damages to those dependent upon him, should be affirmed.

Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. BUCHANAN.*

(Court of Civil Appeals of Texas. Jan. 14, 1903.)

ACCIDENTS TO PASSENGERS—ALIGHTING FROM TRAINS—ASSISTANCE—NEGLIGENCE.

1. Plaintiff's wife was injured by a fall in alighting from a train. When she entered the train, plaintiff requested the conductor to assist her and her child in alighting, and advised him that she had a large valise and bundle with her. Before the train arrived at her destination, she requested the conductor to have the porter take out her valise. After waiting for the porter, but who did not come, she left her seat, holding a valise and bundle behind her in one hand, and directing her child in front with the other. When reaching the step of the car, she felt her way down it with her foot, and fell. *Held*, that the jury were warranted in finding that defendant was negligent in not assisting her to alight.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by Coke Buchanan against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Clark & Bolinger, for appellant. Baker & Ross, for appellee.

FISHER, C. J. Action by the appellee against the appellant for damages arising

*Rehearing denied February 12, 1903, and writ of error denied by supreme court.

from personal injuries sustained by his wife in alighting from appellant's train at Waco, Tex. Plaintiff, in his petition, alleges: that he purchased a ticket from Dallas to Waco for his wife, and at the time she entered the car at the first-named place he requested the conductor to look after her and child, and advised him that she had a large valise and bundle with her, and requested him to assist her and child in alighting at Waco. That, before the train upon which she was riding reached the depot at Waco, she requested the conductor to have the porter take out her valise at the depot. After waiting a reasonable time for assistance from the porter, who did not come to aid her, she left her seat in the car, in order to alight from the train, holding a large valise and bundle behind her in one hand, and directing her child in front of her with the other hand; and when she reached the step of the car, feeling her way down it with her foot in order to step upon the platform, she fell partly upon the platform and between it and the car track. That the distance from the lower step of the car to the platform was about two feet. That the place where she fell was the proper place to alight, and was the place used by the defendant for that purpose. That the defendant was in the habit of using a stool for passengers to step upon in leaving cars at this place, but that at this time the defendant negligently failed to use a stool or anything for her to step upon to break the distance between the lower step and the platform; which platform, it is alleged, is too low to be used without a stool, and is carelessly and negligently and defectively constructed, so that passengers are liable to step off the edge of it, or between it and the rails, in alighting. That the defendant, notwithstanding it was requested to aid, did not assist her in alighting from said car, but carelessly and negligently allowed her to alight unaided, but for which act of negligence she would not have fallen. The defendant pleaded general demurrer, general denial, and that the injury to plaintiff's wife was caused solely by her contributory negligence in undertaking to alight from the plaintiff's train with a large valise and a bundle in one hand and a child in the other; and that it was her duty to look before undertaking to step from the coach to the ground; that on account of her incumbering herself with said bundle and child, and her negligence in not looking, and not properly holding to the railing or arms of said coach, she was negligent, and such negligence contributed to her injury, and was the sole cause of the same. Verdict and judgment were in appellee's favor for the sum of \$2,500.

There is evidence in the record which warrants the conclusion that the appellant was guilty of negligence in the manner pleaded by the plaintiff, and that by reason of that negligence plaintiff's wife sustained the injuries complained of, and that she was not guilty of contributory negligence, as alleged by the

appellant. Our findings of fact dispose of appellant's first and second assignments of error. We cannot agree with appellant's contention urged in its fifth assignment of error. The pleadings authorized the submission of the issues covered by the charge of the court. The charge of the court, in our opinion, presented in the proper way all the questions that it was proper for the jury to pass upon, and there was no error in refusing those charges that were requested and that were refused by the trial court. The general rule is, as insisted upon by the appellant, to the effect that it is only the duty of the carrier to furnish safe appliances and facilities for alighting from its train, and give passengers a reasonable time within which to alight upon arrival at their destination, and that ordinarily the carrier is not burdened with the duty of extending personal assistance to a passenger in alighting from and leaving the train; but the failure to do this in this particular instance is made one of the grounds of negligence relied upon, and there is proof which authorized the submission of the issue to the jury. The rule contended for might be made to yield to the circumstances of the particular case if the facts and circumstances were such as to indicate to those in control and management of the train that the passenger needs assistance in alighting. It might become the duty, under such circumstances, for the carrier to aid the passenger, in order that he might safely disembark. This principle is announced in *T. & P. Ry. Co. v. Miller*, 79 Tex. 83, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308. We cannot say from the evidence but what the jury had the right to conclude that under the peculiar facts and circumstances of the situation of the appellee's wife, the railway company owed her the duty of extending assistance to her in alighting.

Judgment affirmed.

COLLINS v. OLARK et al.*

(Court of Civil Appeals of Texas. Nov. 8, 1902.)

DAMAGES — INJURY TO REPUTATION — EVIDENCE — COMPETENCY — INSTRUCTIONS — BURDEN OF PROOF — ARGUMENT OF COUNSEL.

1. Where, in an action against an officer and his associates for an alleged unlawful search of plaintiff's premises, special damages are asked for the deep humiliation and disgrace to plaintiff and his family and the injury to their standing in the community, caused by said search, it is competent for defendants to prove that two women who had occupied the same house in which plaintiff's family resided, one of them in the capacity of plaintiff's servant, were common prostitutes.

2. In a civil suit it is not necessary to prove a contested point to the "satisfaction" of the jury.

*Rehearing pending.

¶ 2. See Evidence, vol. 20, Cent. Dig. § 2446.

3. A charge that plaintiff must make out his case by a preponderance of the evidence does not require him to prove immaterial facts pleaded by him.

4. Where defendant's counsel declines to argue the case after hearing counsel for the plaintiff in the opening, it is not error for the trial court to refuse to allow counsel for plaintiff a second argument.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by A. B. Collins against S. P. Clark and others. Judgment in favor of defendants, and plaintiff appeals. Affirmed.

Stillwell H. Russell and Greene & Stewart, for appellant. Capps & Cantey and Theodore Mack, for appellee Clark.

STEPHENS, J. In August, 1900, S. P. Clark, the sheriff of Tarrant county, and L. T. Lyle, without warrant or other written authority, and while appellant was in Colorado for his health, entered and searched the house occupied by appellant's family in Ft. Worth. Suit was consequently brought against Clark and Lyle for general, special, and vindictive damages, and resulted in a verdict and judgment in their favor, from which this appeal is prosecuted.

Whether the search was made with the consent or over the protest of appellant's wife was the main issue in the case, and on it the evidence was decidedly conflicting, but quite sufficient to sustain the verdict.

Under the first assignment of error it is earnestly and plausibly insisted by counsel for appellant that the court erred in permitting appellees to prove that two certain women, called "Dempsey" and "Edna," one of whom, a short time before the search, occupied a part of the house in which appellant's family resided, though separated by a hall, and the other roomed with appellant's family, though in the capacity of a servant, were common prostitutes. The proposition submitted under the assignment is that the evidence was "too remote," and "wholly immaterial." Appellee sought to recover special damages for the deep humiliation and disgrace and for the "great mental suffering and anguish" of himself and family, consisting of a wife and two children, alleging that they had lived "honest and honorable lives," and, prior to the wrongs complained of, "had the good will and esteem of their neighbors, friends, and acquaintances, and had been regarded by them as honest and honorable people, entitled to and receiving and enjoying the respect and confidence of all their said acquaintances, friends, and neighbors"; and further alleging that "the family was thereby brought into disgrace among their neighbors and acquaintances," that "the children of the neighbors pointed the finger of scorn at his poor little girl, and refused to associate with her," etc. The court, in admitting the testimony (which came in part from one of appellant's near neighbors), expressly limited it to the issue so tendered by

appellant. It is insisted in argument that appellant's wife had no knowledge of the bad character of the women, and this may be true; but it appears to have been notorious, and, after a careful examination of the testimony, including even that of appellant's wife, we have come to the conclusion that it was for the jury, and not for the judge, to determine how this was. We cannot very well distinguish the ruling complained of from the one made in *H. & T. C. Ry. Co. v. Ritter* (Tex. Civ. App.) 41 S. W. 753, where the reason of the rule was succinctly stated in the opinion of Chief Justice Tarlton, to which we refer with approval. Besides, as this evidence was limited to the measure of damages, and the only ground of objection submitted in the proposition under the assignment is that of irrelevancy, and as the jury found against appellant's right to recover at all, the assignment would probably have to be overruled without reference to the merits of the question involved. True, it is argued that it had a tendency to prejudice the jury against appellant on the main issue, but this is not submitted as a distinct proposition in the brief.

We overrule the assignment complaining of the court's refusal to give the special charge quoted therein, because it required appellees to prove, not merely by a preponderance of the evidence, but to the "satisfaction" of the jury, that they had permission to make the search. It has been repeatedly decided that such a charge requires more than is required by law in a civil suit. But it is argued in the next assignment that the following charge given by the court erroneously placed the burden of proof on appellant to show that appellees did not have consent to make the search: "The burden of proof is upon plaintiff to make out his case by a preponderance of the evidence, and, if he has not done so, then your verdict will be in favor of said defendants, Clark and Lyle." Appellant affirmatively charged the search to have been made without the consent and against the protest of his wife; but if, as contended by him, it was not necessary for him to prove this fact in order to make out his case, the charge complained of imposed no such burden upon him, for it only required him to make out his case. Other wrongful acts besides the unlawful search were made grounds of recovery in the petition, and were submitted as such in the charge. The assignment itself does not embody the proposition—and no proposition is submitted under it—that this charge, as the issues stood when the testimony was all in, was misleading, and should not, therefore, have been given, so as to bring the case within that line of decisions cited in *Root v. Baldwin* (Tex. Civ. App.) 52 S. W. 588.

The charge complained of in the fourth assignment submitted the issue just as appellant had tendered it both in his pleadings

and evidence,—that is, that the search had been made without the consent and over the protest of his wife,—and is, therefore, not subject to the criticism that it was onerous for requiring proof of both these facts. If the jury had accepted the version of appellant, the evidence was such as to require a finding in his favor not only of a want of consent, but also of protest on the part of his wife.

The only remaining assignment complains of the court's refusal to allow two arguments for appellant, counsel for appellees declining to argue the case after hearing counsel for appellant in the opening; but we find no merit in this complaint.

The judgment is therefore affirmed.

LAKE et al. v. COPELAND et al.

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

TRESPASS—PUBLIC LANDS—RIGHTFUL POSSESSION—QUESTION OF FACT—ASSUMPTION IN INSTRUCTION—PROPRIETY—VIOLATION OF PRELIMINARY INJUNCTION—DENIAL OF CREDIT AS WITNESS—OBEDIENCE TO INJUNCTION—REWARD BY VERDICT.

1. Sayles' Rev. Civ. St. art. 1317, provides that the judge shall submit all controverted questions of fact to the jury. In trespass, the defendant testified that he had moved upon a section of unsurveyed, unleased, and unsold school land located in plaintiff's pasture, improved it and occupied it in good faith as his home, and had applied to the commissioner of the general land office to purchase it. By an agreed statement of facts it appeared that, at the date of this entry and settlement, the plaintiff was in possession of the pasture, and had a lease on this particular section which was unexpired and all rentals under which had been paid. *Held*, that it was improper to charge that, if defendant did not have in his close more stock than allowed by law, the jury should find for defendant, as assuming ownership of the land in defendant.

2. Defendant further testified that he had purchased the lease upon another section in the pasture. *Held* that, notwithstanding his testimony, the instruction was still improper with regard to defendant's home section.

3. It is error to punish the violation of a preliminary injunction by defendant by instructing that testimony in his own behalf is in that event not to be considered, as it is also error to reward obedience to a preliminary injunction by instructing that defendant is therefore entitled to a verdict.

Appeal from Lubbock county court; W. D. Crump, Judge.

Action by Lake, Tomb & Co. against W. N. Copeland and another. Judgment for defendants, and plaintiffs appeal. Reversed.

Beaty & McGee, for appellants. J. J. Dillard and E. M. Overshiner, for appellees.

SPEER, J. This is an appeal by Lake, Tomb & Co. from an adverse judgment in the county court of Lubbock county, in an action against W. N. Copeland and E. D. Copeland. Appellants' petition alleged that they were in the peaceable and lawful possession of a large pasture of grazing lands,

describing them, inclosed with good and sufficient wire fences. That on about August 1, 1901, the appellees unlawfully broke and entered said pasture, and with cattle and horses wasted and destroyed appellants' grasses and stock water, and otherwise injured their cattle, for which injuries they asked damages, and, to prevent a continuance of such trespass, sought and obtained a writ of injunction. The appellees answered by exceptions, a general denial, and plea of not guilty. Upon the trial appellee W. N. Copeland testified that in June or July, 1901, he moved upon a section of unsurveyed, unleased, and unsold school land located in appellants' pasture. That he built a house, bored a well, and occupied said land in good faith as his home, and that he had applied to the commissioner of the general land office to purchase the same. He further testified that he had purchased the lease upon another section—No. 52—in the pasture, and carried with him about 30 head of horses and 12 head of cattle, turning them into the pasture. By an agreed statement of facts it appears to have been proved that, at the date of the entry and settlement of appellees upon the section in question, the plaintiffs were in the peaceable and lawful possession of the pasture, and upon this particular section had a lease from the state for the term of five years from the 7th day of May, 1900, and that all rentals due the state under the contract of lease had been paid.

It will thus appear—stating the case most favorably to appellees—that it was a controverted question under the pleadings and proof whether appellees owned or controlled the section upon which settlement had been made in such pasture, and upon this state of case the trial court instructed the jury, at the request of appellees, as follows: "You are further charged that if you believe from the evidence in this case that the defendants did not have in their said close or pasture more stock than the amount allowed by law, to wit, one for every ten (10) acres, you will find for the defendant and so say by your verdict." This was clearly erroneous. The court could not properly assume that W. N. Copeland was the owner of the section upon which he had settled, and that the defendants therefore had the right to turn into said pasture the number of stock indicated in the charge, or any other number. Sayles' Rev. Civ. St. art. 1317; *Golden v. Patterson*, 56 Tex. 628; *Boaz v. Schneider & Davis*, 69 Tex. 128, 6 S. W. 402. If the charge be predicated upon appellees' leasehold interest in section 52, the error is none the less apparent. Concede that there was no controversy as to the appellees' right to this section, it does not follow that they would be at all justified in committing the trespasses complained of in this suit with respect to the other section claimed by them.

Error has also been assigned to the action of the court in permitting evidence tending

to show appellees' ownership of the section involved, because the same was in no way pleaded; the answer, as already stated, consisting only of the general issue and plea of not guilty. A decision upon this point would be entirely superfluous, since the case must be reversed for the error already discussed, and the question will doubtless be avoided upon another trial.

We will remark further, however, that it was improper to instruct the jury not to consider appellee W. N. Copeland's testimony in his own behalf if he had disobeyed the writ of injunction previously served upon him. Nor was it the law that he was entitled to a verdict in his favor if the jury were of opinion he had obeyed the writ, as they were told in the fourth special charge. It was his duty to obey the mandate of the court, but his doing so would not entitle him to a verdict, nor his disobedience deprive him of the right to be heard as a witness.

The judgment is reversed and the cause remanded.

CLARK v. WEST et ux.*

(Court of Civil Appeals of Texas. Jan. 17, 1903.)

PARENT AND CHILD—CONTRACT FOR SERVICES—AGREEMENT TO WILL—BREACH.

1. In an action for services, plaintiff testified that, when she was 12 years old, defendant and his wife agreed with plaintiff's father that, if he would allow them to keep plaintiff as their own child, plaintiff should have their property at their death; that they would either adopt her, or will their property to her. *Held*, that an instruction that if defendant and his wife jointly agreed with plaintiff's father that, if he would permit plaintiff to perform services for them as their own child until she was grown, they would adopt her, or fix it so she would get their property, was not erroneous, on the ground that an agreement to adopt was not proved, since the word "adopt" was used merely to mean a performance of an agreement to leave plaintiff their property.

2. Where defendants contracted to make plaintiff their heir if she would perform services for them until she became of age or married, and thereafter defendant's wife made a will in which plaintiff was not remembered, and defendant attempted to disinherit her by will, such acts constituted a breach of the contract, and entitled plaintiff to recover for the reasonable value of her services.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Action by J. R. West and wife against G. W. Clark. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Parker & Carlton and Martin & George, for appellant. Daniel & Keith and Eli Oxford, for appellees.

STEPHENS, J. Louisa West, née Hethcock, lived with G. W. Clark and wife from childhood till she was 24 years old, when she became the wife of J. R. West, who joined

her in suing G. W. Clark for the value of the services rendered by her during that time. From a verdict and judgment for \$1,680 against Clark, this appeal is prosecuted.

The controverted issue of fact in the case was whether or not the services were rendered in pursuance of a promise on the part of Clark and wife to compensate her by leaving all their property to her when they died. The testimony of Louisa West and G. W. Clark—the only testimony upon this issue—was sharply conflicting; the former testifying, in part, as follows: "When I was twelve years old, Clark and wife took me back to Jack county to see my father; and when we got there my father wanted me to stay with him, but Clark and wife told my father, and agreed with him, that if he would allow me to go back with them, and let them keep me as their child, that they would in some way fix things so that I should have their property at their death; that they would either adopt me, or will their property to me; that they would make me their heir,"—while the latter denied that any such agreement or promise was ever made. The verdict therefore establishes the case made by the testimony of Louisa West. It is, however, insisted that the court, in submitting this issue to the jury, erred in making the agreement to adopt Louisa West a ground of recovery, provided she was thereby induced to perform said services, and provided Clark, after the services were rendered, renounced and repudiated said agreement, and did not, at the time of the trial, "intend to carry the same out." The language of the charge complained of was as follows: "Now, if you believe and find from the evidence in this case that at the time G. W. Clark and his wife took plaintiff Louisa West to see her father, in Jack county, Texas, the said defendant and his wife jointly agreed with plaintiff's father that if he, the father of plaintiff, would permit plaintiff Louisa West to return home with defendant, G. W. Clark, and his wife, and remain with them, and work for and perform services for them as their own child, till she, the said plaintiff, was grown, and until she married, that they, the said defendant and wife, would adopt her, or would fix it so that she, the plaintiff, would get their property," etc. It may be, as contended by appellant, that an agreement to adopt one as an heir is not equivalent to an agreement that one shall receive by will or inheritance a given estate, as seems to have been held in the case of *Davis v. Hendricks* (Mo.) 12 S. W. 887, so much relied on, which, however, was a suit for specific performance. But it seems manifest from the testimony of Louisa West, who alone testified to the agreement alleged, that, if any agreement was made, the word "adopt" was used and understood in that agreement to mean that G. W. Clark and wife "would in some way fix things so that I [she] should have their property at their death." It was in this sense, also, we think, that the

*Rehearing denied February 14, 1903, and writ of error denied by supreme court March 12, 1903.

court used the word in the charge. Read in the light of the testimony, the charge must have been so understood by the jury. The issue became really one of veracity between Louisa West and G. W. Clark, so that, if the jury credited her testimony, she was entitled to a verdict, and, if they credited his, he was entitled to a verdict. The defect in the charge is therefore more theoretical than substantial. Besides, we would hesitate to hold that, when valuable services have been obtained on the faith of a promise to adopt the person rendering them, as sole heir, the person making such promise can both destroy the effect of the adoption by will, as Mrs. Clark had done, and G. W. Clark attempted to do, and avoid payment for the reasonable value of the services. While the adoption may be a literal compliance with such agreement, to strip the adoption of all its benefits by will would be a substantial breach. It would seem that the law ought in such case to imply a promise to pay for the reasonable value of the services so rendered. *Von Carlowitz v. Bernstein* (Tex. Civ. App.) 66 S. W. 464; *West v. Clark* (Tex. Civ. App.) 66 S. W. 215 (former appeal); *People v. Congdon*, 77 Mich. 357, 43 N. W. 986, and cases there cited, including *Sharkey v. McDermott* (Mo.) 4 S. W. 107, 60 Am. Rep. 270.

The sixth paragraph of the charge, complained of in the second assignment, was a charge in favor of appellant, and the use of the words "or otherwise," when read in connection with the rest of the charge, and in the light of the evidence, could hardly have been prejudicial. There was no error in refusing the special charges requested by appellant, the issues having been sufficiently covered by the main charge.

Judgment affirmed.

PYRON et al. v. GRAEF.

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

PROCESS—WAIVER OF OBJECTIONS—PLEADING TO MERITS.

1. Exceptions to the citation were not waived by at the same time and on the same paper filing a plea to the merits, Rev. St. art. 1262, providing that "the defendant in his answer may plead as many several matters, whether of fact or law, as he shall think necessary for his defense, and which may be pertinent to the cause; provided that he shall file them all at the same time and in due order of pleading."

Appeal from Donley county court; B. H. White, Judge.

Action by Charles Graef against Pyron and Davidson. Judgment for plaintiff, and defendants appeal. Reversed.

Ware & Smith, for appellants. A. W. Cole, for appellees.

STEPHENS, J. The exceptions to the citation for not showing the number of the case and because the return thereon failed to

show the requisite personal service on the defendants were well taken, and this does not seem to have been controverted; but were stricken out on motion because appellants had filed an answer to the merits. The exceptions and pleas to the merits were all filed at the same time, having been written upon the same piece of paper, and in due order of pleading, the exceptions preceding the pleas to the merits. This was in accordance with our statute on that subject. Rev. St. art. 1262. The defense interposed by the exceptions went to the jurisdiction of the court over the persons of the defendants, and was in the nature of a plea in abatement, which has long been recognized as matter "pertinent to the cause," and therefore within the provisions of the statute. See rule 7 for the district and county courts, and Townes on Pleading, pages 353 to 363. The court erred in treating this defense as waived, which necessitates a reversal of the judgment.

The tenth paragraph of the charge is subject to the criticism urged against it in appellants' brief, for being on the weight of the evidence, but we need not determine whether this would require a reversal of the judgment. There is no merit in any other assignment.

Because the court erred in striking out the exceptions to the citation, the judgment is reversed, and the cause remanded for a new trial.

RIGGS v. GRAY et al.*

(Court of Civil Appeals of Texas. Jan. 21, 1903.)

LANDLORD AND TENANT—DISTRESS—GROUNDS—ACTS OF TENANT—REPAIRS—REIMBURSEMENT—WATER PRIVILEGES—WITHDRAWAL—DAMAGES—PROOF—PROPERTY DISTRAINED—CONVERSION.

1. That a tenant carried cotton to a gin for the purpose of having it baled, and then returned it to the premises, and the use by the tenant of a reasonable amount of food produced on the premises for feeding stock used in producing the crop, was not such an appropriation of the products produced on the premises as justified the issuance and levy of a distress warrant.

2. Where at the time of the making of an affidavit for a distress warrant the tenant had not removed any cotton from the premises, but on the next day, and before the levy, did remove cotton from the premises, sold the same, and applied the proceeds to the payment of cotton pickers and to his individual purposes, such acts established an allegation that at the time the affidavit was made he was about to remove the property from the premises.

3. Where a tenant claimed damages for loss of the use of water and improvements, but there was no evidence as to the amount of damages sustained thereby, he was not entitled to recover therefor.

4. Where there was no evidence of a promise on the part of a landlord that he would reimburse his tenant for the amount expended in

*Rehearing denied February 18, 1903.

¶ 4. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 555.

repairing a house occupied by such tenant, the value of such repairs cannot be recovered.

5. Where, in an action of distress, the defendant alleged, by cross-petition, that plaintiff had converted 200 bushels of corn to which defendant was entitled, of the value of \$175, and there was evidence that such corn was seized by the officer in executing the distress warrant, and was delivered to the landlord, and consumed by him and others, defendant was entitled to recover therefor.

Appeal from McLennan county court; G. B. Gerald, Judge.

Action by P. W. Riggs against W. Gray and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Sleeper & Kendall, for appellant. J. B. Scarborough and J. T. Kimball, for appellees.

FISHER, C. J. We cannot agree with appellant in his construction of the averments of appellees' cross-answer, as contended for in his first assignment of error. The amount sued for in the answer is less than \$1,000, and therefore within the jurisdiction of the county court.

In disposing of this appeal, it is unnecessary for us to discuss each of the assignments of errors, for, in reversing, we will so indicate our views that upon another trial the questions presented will not be likely to again arise.

As one of the grounds for the distress warrant, the affidavit states that the defendant Gray is about to remove his property from the rented premises. This is one of the grounds upon which the statute authorizes the issuance of the warrant. The facts beyond dispute, which are clearly established by the appellee's own testimony, establish a breach of this provision of the law.

We agree with the trial court that carrying cotton to the gin for the purpose of being baled, and then returning it to the premises, thereby subjecting it to the control of the landlord, and the mere use by the tenant of a reasonable amount of feed produced upon the premises for the purpose of feeding the stock used in producing the crop, would not be such a removal or appropriation of the products produced upon the rented premises as would justify the issuance and levy of a distress warrant. But the removal of cotton, and the sale of the same, the proceeds of which were appropriated and used by the tenant in part for his individual purposes, and in part for paying off hands who assisted in picking the cotton, and such appropriation being without the consent of the landlord, would be a wrongful and unauthorized removal, within the meaning of the law. At the time that the affidavit for the distress warrant was made, the appellee Gray had not removed any of the cotton from the rented premises, but on the day following, and before the levy of the distress warrant, he did remove one bale of cotton from the premises, conveyed it to market, and there sold

it, the proceeds of which were in part applied to the payment of cotton pickers, and in part appropriated and used by Gray for his individual purposes and uses. This fact is admitted by Gray in his testimony, and this evidence clearly establishes the fact that, at the time that the affidavit was sued out he was about to remove his property from the rented premises, and that at the time of the levy of the distress warrant he had in fact so removed it and appropriated it. In our opinion, this fact clearly authorized the issuance and levy of the distress warrant, and it removed from the cause all elements of a wrongful and malicious suing out and levy of the warrant. Therefore upon another trial the court should not submit to the jury any question as to whether the distress warrant was wrongfully or maliciously issued and levied.

But we think the facts pleaded and stated in appellees' cross-action or plea in reconvention leave in the case the issues as to whether or not he had sustained any damages by reason of the breach of the rental contract with appellant, and as to whether or not the appellant was guilty of conversion of the corn to the value claimed in his answer, and whether the appellee Gray should be entitled to a credit upon the judgment obtained by appellant, to the extent of the value of the corn after it was seized by the officer in executing the distress warrant. We will indicate our views as to these several items, so that they may be properly disposed of by the trial court upon another trial.

The evidence found in the record does not justify a judgment for any sum in Gray's favor for the loss of the use of the water and improvements situated upon the premises, which he claims he was entitled to under the contract with appellant. While it is true that there is evidence tending to show that he was deprived of the use of the water, there is no evidence in the record showing the amount of damages, if any, he sustained by reason of the breach of contract in this respect. The trial court and the jury could not know, as a matter of common knowledge, what this water was worth, or what amount of damages the defendant has sustained by being deprived of its use.

The defendant's answer also contains this averment: "That defendant rented from plaintiff one certain house for a tenant to live in; that, after going upon the rented premises and taking possession thereof, the plaintiff refused to permit the defendant's tenant to occupy said house, and defendant was forced to buy material and provide another place for said tenant, at a cost of \$25, to defendant's damage in that sum."

There is some evidence upon this point, but it is not sufficient to authorize the defendant to recover. If the evidence would warrant the conclusion that the appellant was to furnish Gray with a tenant house there is no evidence showing the amount of

damages, if any, he sustained by reason of the breach of the contract in this respect, if there was such a contract. The value of the repairs made by Gray upon the house occupied by permission of the appellant cannot be recovered, for there is no evidence in the record indicating a promise, either express or implied, upon the part of appellant, that he would reimburse Gray for the amount expended in repairing the house. In the absence of such an agreement, the landlord would not be responsible for the amount expended by the tenant in repairing the premises.

The answer of the defendant Gray contains an allegation to the effect that the appellant converted 200 bushels of corn that Gray was entitled to of the value of \$175. There is evidence tending to show that the corn was seized by the officer in executing the distress warrant, and was delivered to the appellant, and which was used and consumed by him and other parties. If this is true, there are two grounds upon which appellee Gray would be entitled to recover the value of the corn in question: If the fact should be established that the officer, by virtue of the distress warrant, actually levied upon and seized the corn belonging to appellee Gray, the appellant would be responsible for its value, whether he did or did not use or appropriate any part of the corn after its seizure. This upon the ground that a levy and seizure of personal property by the officer by virtue of the writ operate as a satisfaction of the plaintiff's demand, to the extent of the value of the property actually seized by the officer. This question is fully discussed in the following case: *Taylor v. Felder*, 5 Tex. Civ. App. 417, 24 S. W. 313. Independent of the view mentioned, the plaintiff would also be responsible if he was a party to the appropriation and conversion of the corn after appellee Gray was deprived of the possession of the same. There is an averment in the answer raising this issue, and there is some evidence which tends to support it.

The appellant is correct in the point urged in the fourteenth and fifteenth assignments of error. Having held that the distress warrant was not wrongfully sued out, the appellant will be entitled to judgment for costs.

Judgment reversed and cause remanded.

WRIGHT v. FARMERS' NAT. BANK.

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

MONEY PAID—AGREEMENT TO REPAY.

1. Voluntary payment by plaintiff of a judgment recovered against defendant by a third party, wholly discharging the same, would constitute a sufficient consideration for a subsequent promise by defendant to repay the amount paid.

2. Promise by defendant to pay money "as soon as he could" was conditional, and could not be enforced without proof of subsequent ability.

Appeal from Clay county court; H. A. Allen, Judge.

Action by the Farmers' National Bank against G. C. Wright. Judgment for plaintiff, and defendant appeals. Reversed.

L. C. Barrett, for appellant. R. E. Taylor, for appellee.

CONNER, C. J. Appellee, who was plaintiff below, instituted this suit in the county court of Clay county to recover \$320.41, because of a payment of that sum in satisfaction of a judgment and execution against appellant, and which it was alleged appellant subsequently promised to pay. The petition, charge of the court, and trial, all evidently were predicated upon the theory of the subsequent promise. Hence the exceptions to the petition, and to the charge of the court, and to the refusal of special charges based upon appellant's theory that the payment was voluntary, seem immaterial. Voluntary though appellee's payment may have been, if, as alleged and proven, the judgment was thereby wholly discharged, appellant's resultant benefit constituted a sufficient consideration for a subsequent promise to repay appellee the amount paid in satisfaction of the judgment. 1 *Parsons on Contracts* (8th Ed.) p. 473; *Tiedeman on Commercial Paper*, sec. 102.

One defect fatal to appellee's recovery, however, appears as assigned in both allegation and proof. It is alleged: " * * * That, after plaintiff had paid said amount of \$320.41 for defendant, said plaintiff, through its president, called upon said defendant to pay said debt, and that defendant thereupon told this plaintiff that he could not pay said debt at that time, but would pay the same as soon as he could; that said defendant did at divers times and places agree with this plaintiff, by and through its officers and attorneys, to pay said amount; that, by reason of said promises and agreement to pay said sum of \$320.41, this defendant became liable to, and promised to, pay said plaintiff said amount," etc. Construing the petition most strongly against the pleader, this can amount to no more than a conditional promise of repayment on appellant's part,—a promise to pay "as soon as he could." No subsequent ability of appellant to pay is alleged. The only testimony on the subject is that of appellant himself, who was sworn as a witness for appellee. Appellant testified: " * * * Yes; it is a fact that you [R. E. Taylor], as the attorney for the bank, called upon me some time after the 12th day of June, 1900, and asked me to pay the sum of \$320.41, and I promised I would pay it as soon as I could, but that I was not able at that time. I made you this promise on two different occasions in the

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 353.

town of Henrietta, Texas." Say our supreme court in the case of *Lange v. Caruthers*, 70 Tex. 722, 8 S. W. 606: "The existence of the indebtedness as alleged upon account being shown, the words 'I will, if I am ever able, pay it,' evidently refer to it, and constitute a conditional promise to pay it. To entitle plaintiff to recover, he was bound to allege and prove that defendant was or had been able to pay the account subsequent to the promise, and before suit. [*Coles v. Kelsey*] 2 Tex. 544 [47 Am. Dec. 861]; [*Mitchell v. Clay*] 8 Tex. 443; [*Salinas v. Wright*] 11 Tex. 576; [*McDonald v. Gray*] 29 Tex. 84; [*Leigh v. Linthecum*] 30 Tex. 100; [*Ex parte Towles*] 48 Tex. 420." The doctrine so declared has since received no modification in this state, so far as we have been able to discover; and in accord therewith the judgment herein must be reversed, and the cause remanded for a new trial. The effect of appellant's discharge in bankruptcy pleaded by him need not be considered, inasmuch as the promise to pay relied upon by appellee appears to have been subsequent to such discharge.

Judgment reversed and cause remanded.

GREER COUNTY v. STATE.*

(Court of Civil Appeals of Texas. Jan. 14, 1903.)

STATES—GRANT OF LAND FOR SCHOOL PURPOSES—DEFEAT OF PURPOSE OF GRANT—RECOVERY OF LAND.

1. The legislature of Texas granted certain land to Greer county for school purposes. Subsequently the United States supreme court decided that Greer county was not a part of Texas, but belonged to Oklahoma. The land granted to the county had not passed into the hands of third persons. *Held*, that the grant having been for a special purpose, and that purpose having been defeated, the state was entitled to have the patents canceled and to recover the land.

Error from district court, Travis county; R. E. Brooks, Judge.

Action by the state of Texas against Greer county, Okl., and others. Judgment for plaintiff, and the county brings error. Affirmed.

This is a suit by the state to recover from Greer county, in Oklahoma territory, four leagues of land; and from a judgment in favor of the state, Greer county has appealed. The case was submitted in the court below, and is also submitted here, on the following agreed facts:

"(1) The land sued for comprises four leagues in Hockley and Cochran counties, and was granted to Greer county, as an organized county of the state of Texas, under the provisions of the general laws of the state, granting four leagues of land to each county of the state for school purposes.

"(2) Patents (five in number) issued to

Greer county July 18, 1887; being Nos. 519, 520, 521, 522, and 523, vol. 24. The original or certified copies of such patents may be introduced in evidence by either party, and for any purpose deemed advisable.

"(3) 7,236 acres of said land is now claimed by Greer county, Oklahoma territory, under and by virtue of said patents to Greer county, Texas. Said 7,236 acres is described as follows: 7,236 acres of land off the north end of the Greer county school land leagues; consisting of all that part (the south part) of league No. 109 which is patented to Greer county by patent No. 523, vol. 24, consisting of 13,354,549 square varas of land, and all of league No. 88, of 4,423 acres, and the balance of said 7,236 acres off the north side of league No. 87, as follows: Beginning at the N. E. corner of said league 87; thence south 500 varas; thence west 5,000 varas; thence north 500 varas; thence east 5,000 varas to the place of beginning; situated in Hockley and Cochran counties, Texas.

"(4) The balance of said four leagues is claimed by the heirs and devisees of Wm. Cameron, deceased, under and by virtue of a certain deed of conveyance thereof to Wm. Cameron from Strain & Swinburne, dated January 17, 1888. Strain & Swinburne claimed title thereto under and by virtue of a deed of conveyance to them from and on the part of Greer county, Texas, by the county judge of said Greer county, Texas, dated January 12, 1888. The land referred to is described as follows: 10,476 acres of land off of the south end of the Greer county school land leagues, as follows: Beginning at the S. E. corner of that portion of league No. 85, which is patented to Greer county by patent No. 520, vol. 24; thence N., at 2,329½ varas, the N. E. corner of said league, No. 85; at 7,329½ varas, the N. E. corner of league No. 86; at 11,829⁴⁸/₁₀₀ varas, a point on the east line of league No. 87; thence W. 5,000 varas; thence south 11,829⁴⁸/₁₀₀ varas; thence east 5,000 varas to the place of beginning,—so as to include all that part of league No. 85 that is patented to Greer county, all of league No. 86, and the balance of the 11,476 acres out of the south side of league No. 87, situated in Hockley and Cochran counties, Texas.

"(5) The defendant Greer county is now an organized county of Oklahoma territory, one of the territories of the United States, and comprises the same territory which was at one time organized under the laws of the state of Texas, as Greer county, Texas, to which the aforesaid four leagues of land were patented.

"(6) Wm. Cameron, the grantee in the above-described deed of conveyance, died testate on the 6th day of February, 1898. By the terms of his will, which was duly probated in the probate court of McLennan county, Texas, the other defendants were made executors of his will and devisees of his estate, and are also his heirs at law, as set

*Rehearing denied February 18, 1903, and writ of error denied by supreme court March 12, 1903.

out in plaintiff's amended petition, and as such they claim title to the aforesaid land.

"(7) The territory now organized as Greer county, Oklahoma territory, was, up to the date hereinafter set out, claimed by the state of Texas to be a part of her territory, and up to said date jurisdiction and control was claimed and exercised over the same by the state of Texas. The government of the United States did not, except in so far as was done by the act making Greer county a part of the Northern judicial district of Texas, as hereinafter shown, concede said claim, but during all of said time, claimed said territory as a portion of her own territory outside of the limits of the state of Texas, and the legislative and executive departments of the said state had full knowledge of said claim prior to the issuance of the patents mentioned herein. Attempts were made from time to time to settle the dispute between the state of Texas and the United States as to the ownership of this territory, without success.

"(8) Greer county, comprising the aforesaid territory, was created by the legislature of the state of Texas by the act of February 8, 1860, and was organized as a county under the provisions of said act on the — day of —, A. D. 1886.

"(9) By an act of the congress of the United States of May 2, 1890, the attorney general of the United States was directed to commence in the name and on behalf of the United States, and prosecute to final determination, a proper suit in equity in the supreme court of the United States against the state of Texas, setting forth the title and claim of the United States to the tract of lands lying between the South and North Forks of Red river, where the Indian Territory and the state of Texas adjoin, east of the 100th meridian of longitude, and claimed by the state of Texas as within its boundary, and a part of its land, and designated on its maps as 'Greer County.' Under the authority of this act, a suit was instituted in the supreme court of the United States, styled 'The United States vs. The State of Texas,' in which the state of Texas appeared by her attorney general and other counsel.

"(10) At the October term, 1895, a decree was rendered in said cause [16 Sup. Ct. 725, 40 L. Ed. 867] as follows: 'This cause having been submitted upon the pleadings, proofs, and exhibits, and the court being fully advised, it is ordered, adjudged, and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the North Fork of Red river, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course and along the south bank both of Red river and of the river known as the Prairie Dog Town Fork, or south Fork of Red river, until such line meets the 100th meridian of longitude, which territory is some-

times called "Greer County," constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and is not within the limits nor under the jurisdiction of that state, but is subject to the exclusive jurisdiction of the United States of America. Each party will pay its own costs.' After this decree was rendered, the state of Texas exercised no further control or jurisdiction of said territory, and the same was afterwards organized into Greer county, Oklahoma territory, and as a part of said territory. The territory described in said decree is the same as was embraced in Greer county, Texas, as created and organized as aforesaid. The recitals in the report of said cause of United States v. Texas, as reported in the 162d volume of United States Supreme Court Reports [s. c. 16 Sup. Ct. 725, 40 L. Ed. 867], and the printed record in said cause, may be used as full evidence of the facts therein stated, as to the institution of the suit, the appearance and pleadings of the parties and the decree of the court, without the necessity of producing certified copies thereof from the records of said court."

In addition to the foregoing, the trial judge made a finding of fact to the effect that the patents referred to for the four leagues of land purport on their faces to have been issued by virtue of an act of the legislature of the state of Texas approved April 7, 1883 (chapter 55, Gen. Laws 1883).

Clark & Bolinger and H. N. Atkinson, for plaintiff in error. O. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for the State.

KEY, J. (after stating the facts). In addition to the usual averments in trespass to try title, the state averred in its petition that the defendant claimed title to the land by virtue of the patents issued by the governor of Texas, July 18, 1887, to Greer county, Tex., comprising the same territory as is embraced in the defendant Greer county, Okl. T.; that the patents were issued without legal authority, and prayed that the same be canceled and held for naught. The supreme court of the United States, in the case referred to in the agreed statement (16 Sup. Ct. 725, 40 L. Ed. 867), decided that the territory embraced in what was originally considered and treated by the legislature and other officers of Texas as a part of the state was in fact within the territory of Oklahoma, and was no part of the state of Texas. This being true, if it be conceded that the patents issued by the governor of Texas vested title in a de facto county, and that the defendant in this case (Greer county, a political division of Oklahoma territory) has succeeded to the legal title granted by the patents, still, as the lands referred to were granted for public school purposes, and were held in trust by Greer county for such

purposes, and as Greer county will not and cannot use them for such purposes within the limits of Texas, we are of the opinion that the state was entitled to have the patents canceled, and recover the land. This case is distinguishable from *Cameron's Ex'rs v. State*, 68 S. W. 508. The land involved in that case had been sold by Greer county; and, as between the state and the vendees of the county, it was held by the supreme court that the patents vested title in Greer county, and that Greer county had the power to convey the land to the purchasers. But the court did not hold that if the land in that case had not been sold by the county, and it had become impossible for the county to execute the trust, the state could not recover the trust fund.

We find no error in the record, and the judgment is affirmed. Affirmed.

BENCHOFF v. STEPHENSON.*

(Court of Civil Appeals of Texas. Dec. 3, 1902.)

WRIT OF ERROR—JURISDICTIONAL AMOUNT—DENIAL OF PLEA IN RECONVENTION—ABANDONMENT OF APPEAL—EFFECT—JUSTICE'S COURT ACTION—COMMENCEMENT ON SUNDAY—WAIVER OF OBJECTION—EFFECT ON APPEAL.

1. Defendant appealed from justice's court to the county court from a judgment denying his plea of reconvention, on the amount of which the jurisdiction of the latter tribunal depended. Here both parties were defeated, and plaintiff sued out writ of error, while defendant gave notice of appeal, but abandoned it. *Held*, that defendant's abandonment of his appeal was not an abandonment of his plea in reconvention so as to reduce the amount in controversy below the jurisdiction of the appellate court.

2. Suit was instituted in justice's court on Sunday, and 15 days later attachment sued out. Defendant then filed, at the same time, an exception to the suit as commenced on Sunday, a denial of the grounds of attachment, and a plea in reconvention. *Held*, that by filing the plea in reconvention defendant waived the irregularity of commencement on Sunday, the court's jurisdiction of the cause of action attaching on the filing of the plea.

3. Jurisdiction having thus attached, it was error for the county court on appeal to dismiss the action, even though it dismissed defendant's plea in reconvention.

Error from Menard county court; J. D. Scruggs, Judge.

Action by D. G. Benchoff against Warren Stephenson. Judgment for defendant for costs, and plaintiff brings error. Reversed.

W. E. Adkins, for plaintiff in error. L. N. Ainsworth, for defendant in error.

FLY, J. Plaintiff in error instituted suit in the justice's court against defendant in error, on a promissory note for \$11.10, and obtained a writ of attachment, which was levied on certain horses belonging to the defendant. The latter reconvened for dam-

ages for the illegal issuance and levy of the attachment in the sum of \$108. In the justice's court, judgment was rendered in favor of plaintiff for the amount of the note, and against defendant on his plea in reconvention. Defendant appealed to the county court, where exceptions of defendant to the suit of plaintiff were sustained, and the same dismissed, and exceptions of plaintiff to the plea in reconvention were also sustained. Both parties gave notice of appeal. Plaintiff in error perfected his writ of error to this court, but defendant took no further steps after giving notice of appeal, and now seeks to dismiss the writ of error on the ground that his failure to perfect his appeal was an abandonment of his plea in reconvention, and the amount in controversy was thereby reduced to a sum from which an appeal will not lie to this court from the county court.

It has been held that, when a counterclaim filed in the county court is essential to make the amount in controversy exceed \$100, it must have been a matter of controversy in the county court and not have been abandoned. *Bledsoe v. Railroad Co.* (Tex. Civ. App.) 25 S. W. 314; *Railroad Co. v. Perkins* (Tex. Civ. App.) 44 S. W. 547; *Schulz v. Tessman*, 92 Tex. 490, 49 S. W. 1031. These cases have no application to the facts of this case. Defendant in error did not abandon his plea in reconvention in the county court, but on the other hand resisted its dismissal, and gave notice of appeal from the order dismissing it. After having used the plea in reconvention to give the county court jurisdiction, and after insisting on his rights under his plea, he cannot now defeat the appeal of plaintiff because he (defendant) failed to file an appeal bond.

The motion to dismiss the writ of error is overruled.

On the Merits.

This suit was instituted in the justice's court on Sunday, September 2, 1901, and afterwards, on September 17th, a writ of attachment was sued out by plaintiff, who brings the cause by writ of error to this court, and afterwards the defendant filed his exceptions on the ground that the suit was instituted on Sunday, and denied that he was about to dispose of his property with intent to defraud his creditors, and pleaded damages in reconvention. The justice of the peace rendered judgment in favor of the plaintiff, and against the defendant on his plea in reconvention. On appeal to the county court the cause was dismissed because the suit was instituted on Sunday. That action of the court was the proper one, unless the filing of the denial of the ground for attachment and plea in reconvention was a waiver of the objection in regard to the irregularity in beginning the suit on Sunday. Evidently, from the language used in the denial of ground of attachment, it was

*Motion for a rehearing of motion to dismiss overruled January 7, 1903, and for a rehearing on the merits overruled February 25, 1904.

filed at the same time that the exception to the jurisdiction was filed. It does not clearly appear when the plea in reconvention was filed, but, as only one indorsement on the answer appears, it may be presumed that it was filed at the same time that exceptions and denial were filed. In *Railway Co. v. Whitley*, 77 Tex. 126, 13 S. W. 863, and *Mortgage Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576, it is held that, where pleas are filed in due order, an answer to the merits does not waive a plea of privilege. In the case of *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548, exceptions to the filing of a suit on a holiday is placed in same category with pleas of privilege, and it is held that such irregularity is waived by filing an answer before the exceptions are filed. Had there been nothing but a denial and answer to the merits filed in due order of pleading, we think the exceptions would not have been waived, but a plea in reconvention was filed which constituted a demand for independent relief, and it has been held that such action waived the question of jurisdiction raised by the exceptions. *Douglas v. Baker*, 79 Tex. 489, 15 S. W. 801.

The county court obtained jurisdiction of the cause of action through the filing in the justice's court of the plea in reconvention, and, no matter if the plea in reconvention was dismissed by the county court, that action did not defeat the jurisdiction which had attached, and the county court should try the cause on the demand of plaintiff in error. *Dwyer v. Bassett*, 63 Tex. 274; *Tidball v. Elchoff*, 66 Tex. 58, 17 S. W. 263.

The judgment of the county court in dismissing plaintiff in error's cause of action was erroneous, and for that error the judgment is reversed and the cause remanded.

INTERNATIONAL & G. N. R. CO. v. LISTER.*

(Court of Civil Appeals of Texas. Dec. 10, 1902.)

CARRIERS—SALE OF TICKETS—FAILURE TO KEEP OFFICE OPEN—NEGLIGENCE—INJURIES TO PASSENGERS—PETITION—DAMAGES—HUMILIATION—STATUTORY DUTY—VERDICT—AMENDMENT IN OPEN COURT.

1. A petition alleging that by reason of defendant's failure to have its ticket office open 30 minutes before train time, as required by statute, plaintiff's wife was separated from plaintiff, and carried to her destination without plaintiff, and by reason thereof suffered embarrassment and humiliation, and was made ill, by being compelled to present herself to her husband's relatives, who had no knowledge of his marriage, unaccompanied by him, was not objectionable on the ground that such injuries were insufficient to support an action.

2. A petition alleging that, by reason of defendant's failure to keep its ticket office open 30 minutes before train time, plaintiff's wife was separated from plaintiff, and suffered embarrassment and humiliation, from which she subsequently became ill, was not objectionable

on the ground that such allegations with reference to damages were vague, indefinite, and uncertain.

3. Failure of a carrier to keep its ticket office open 30 minutes before the departure of a passenger train, as required by statute, is negligence per se.

4. Where a verdict in an action for injuries showed on its face that nothing was awarded plaintiff for medicine and medical services, an objection to the court's charge in reference to such issue will not be reviewed.

5. Where a verdict was ambiguous, and the jury, on the court's refusing to accept the same, stated that the use of the word "defendant" was a clerical error, and it was intended to find for plaintiff, it was not error for the court to permit plaintiff's counsel to write out a verdict for plaintiff for the same amount as the one returned, and have the same signed by the foreman of the jury, and assented to by the jury, in open court.

Appeal from Milam county court; R. B. Pool, Judge.

Action by E. T. Lister against the International & Great Northern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Plaintiff's petition alleged that on the 14th day of October, 1900, plaintiff and his wife arrived in the town of Milano early in the morning, over a connecting road, where they stopped for the purpose of taking defendant's regular passenger train for the town of Gause, which was scheduled to arrive at 12:30 p. m.; that plaintiff had a trunk, containing his baggage, for which it was necessary to procure a check before the same could be carried as baggage on defendant's train, and that no check could be procured, under the company's rules, until plaintiff had purchased tickets, which passengers were required to procure before boarding the train; that plaintiff went to defendant's passenger depot at least one-half an hour before defendant's train was due to arrive, and waited in defendant's waiting room provided for passengers, for the purpose of procuring tickets for himself and wife, and having their baggage checked, but that defendant's ticket agent wholly neglected to open the office to sell tickets to passengers until said train had arrived at the station, and for some time thereafter; that plaintiff was waiting for an opportunity to purchase tickets and have his baggage checked for more than 30 minutes before the arrival of the train, but no opportunity was given him to purchase tickets by the agent of the company; that, on the arrival of the train, plaintiff directed his wife to enter, while he endeavored further to procure tickets and have their baggage checked, and, immediately on the opening of defendant's office for the sale of tickets, plaintiff applied therefor, but while he was procuring the same the train left plaintiff and his baggage, and carried plaintiff's wife to her destination; that plaintiff's wife was a young woman with little experience of traveling, and that at the time she was enroute, had no money or ticket, and was an entire stranger at Gause; that

*Rehearing denied January 4, 1903.

plaintiff and his wife had only been married about three months, and were on their way to visit plaintiff's relatives, who were not aware of plaintiff's marriage, and that his wife was greatly embarrassed and humiliated by being compelled to present herself to her husband's relatives and convince them that she was his wife; that defendant's passenger trains going north stopped at Gause only once a day at said time, and plaintiff was unable to join his wife for 24 hours thereafter; that by reason of the aforesaid embarrassing circumstances and inconveniences, caused by defendant's negligence, plaintiff's wife suffered great mental anxiety, and was greatly distressed and embarrassed, and her nervous system was so excited and wrought up that she became violently ill a short time thereafter, and a physician was summoned and remained in constant attendance on her for several days, and furnished her medicine. To this petition defendant specially excepted on the ground that the allegations of embarrassment and humiliation, and consequent illness, caused as alleged, were insufficient, in law, to subject defendant to liability, and that the allegations of damage were too vague, indefinite, and uncertain to authorize a recovery. These exceptions were overruled, and a trial was had, at which the jury returned a verdict as follows: "We, the jury, give the defendant judgment in the sum of \$800,—\$660 for the plaintiff's injuries, and \$140 for the time lost. J. H. Snap, Foreman." The court refused to receive the verdict, and, after it was explained by the jury that the word "defendant" was a clerical error,—it being the jury's intention to find for plaintiff,—plaintiff's counsel, in open court, wrote out an amended verdict for the same amount, and had the foreman of the jury sign the same, and the jury indicate their assent thereto, in open court, to which defendant objected and excepted.

S. R. Fisher and N. A. Stedman, for appellant. Nelson & Little and U. S. Hearrell, for appellee.

KEY, J. We have carefully considered appellant's assignments, and find no reversible error. The plaintiff's petition stated a cause of action, and the general demurrer thereto was properly overruled.

We also hold that the special exceptions to the petition were not well taken. If the jury gave credence to the testimony of the plaintiff and his wife, as they had the right to do, the verdict is supported by testimony; and we cannot say that the trial court committed error in refusing to set it aside.

It has been often held that a failure to perform a duty required by statute is negligence per se, and, as we have a statute which requires railroad companies to keep their ticket offices open one-half hour before the departure of trains, it was not error in this case for the court to charge the jury

that, if appellant so failed to keep its ticket office open on the occasion in question, such failure constituted negligence. However, in order for such negligence, or any other negligence, to constitute ground for recovery, it must be the proximate cause of the injury complained of, and the court's charge in this case so instructed the jury. That the statute referred to was intended for the benefit of the public, otherwise than a regulation of railway charges, see *Mills v. Railway Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497. The objection to the court's charge in reference to medicine and medical services is eliminated by the verdict, because it shows upon its face that nothing was awarded to plaintiff for those items. The other objections to the court's charge, and refusal of special instructions, are not regarded as well taken.

The objection urged to the action of the court in allowing the form of the verdict to be corrected is without merit.

Judgment affirmed.

STREETMAN, J., did not sit in this case.

OVERTON v. NASHVILLE TRUST CO. et al.

(Supreme Court of Tennessee. Feb. 14, 1903.)

WILLS—CONSTRUCTION—LIFE ESTATES— TRUSTS—INVESTMENT—PAY- MENTS OF INCOME.

1. Where testator devised his real estate and bequeathed his personality to his six children after the termination of a life estate in his wife, and provided that the land devised to each of the children, and the share going to each in the corpus of the estate, was settled on each of them for their use during life, and should vest absolutely in their children after their death, and if any should die, leaving issue, the issue should inherit the interest of the parent, such children only took a life estate in their several shares, which the executor was required to invest and hold in trust during their lives.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Action by John Overton, as executor of the estate of John Overton, deceased, against the Nashville Trust Company and others, for a construction of the will. From the decree, complainant appeals. Reversed.

John J. Vertrees and Wm. O. Vertrees, for appellant. Turley & Turley, for appellee J. M. Goodbar. Perkins Baxter, for appellee Nashville Trust Co. W. L. Granbery, for appellees Elizabeth Overton and others. J. C. McReynolds, for appellee Henry Dickinson. M. H. Meeks, for appellees Conne Thompson and others. W. G. Hutchison, guardian ad litem.

BEARD, C. J. This bill was filed to obtain a construction of the will of the late John Overton, who died in Davidson county, in this state, during the year 1900. The deceased left a large and valuable estate, all

of which he undertook to dispose of in this will. After designating a fund for the payment of his debts, and giving to his wife absolutely certain personalty, the testator then provided that she was to enjoy an estate for life in all of his "other property and estate." Subject to this life estate, he made six divisions of certain of his real estate, and allotted to each of his children one of these divisions. The will then provides as follows:

"The corpus of my estate given to my wife for life, not including the foregoing divisions, I wish after her death to be equally divided among my children.

"My executor is hereby authorized to sell any part thereof not susceptible of division and make title thereto, and he is hereby instructed to invest any money going to either or all of the shares as he may think best.

"The land devised to each of my children, together with the share going to each in the corpus of my estate, is hereby settled on each of them for their sole and separate use during life and vests absolutely in their children after their death. Should either of their issue die leaving issue, the issue shall inherit the interest of the parent.

"The shares going to my daughters to be free from the debts, contracts and liabilities of their present or any future husband.

"Should any one or more of my children die without issue at the time of his or her death, his or her share shall pass to and vest in my living children, and if any child has died leaving issue, said issue to represent and take the share of the parent."

The widow of the testator died a short time after the probate of the will, and the record discloses that at the time of the filing of the present bill the executor had in his hands, ready for disposition, about \$80,000, derived from what is called in the will the "corpus" of the estate, with other sums from the same source, to come at an early day into possession. The question presented by complainant is, what is his duty, under the will? It is axiomatic that the intention of the testator, if not inconsistent with some settled rule of law, is to be carried into effect; and it is true, if it is fairly inferable from the present will that the testator intended these shares, as money or other personal property, to go direct into the possession of the several life tenants, without any protection to the remainderman, then it would be the duty of the court to effectuate this intention without regard to the hazard to the remainderman. But we do not think any such purpose is discernible in this will. On the contrary, while it is clear the testator had in mind the interest of his children, still it is equally so that he was solicitous the shares of his estate given to these children should not be wasted or consumed by them, but should simply furnish income to them. This general purpose is discoverable from the whole body of the will. Another purpose, altogether consistent with that just named, and a complement to

it, apparent on the face of the will, is that the money derived by his executor was not to pass into the hands of the tenants for life. Whatever else may be true, these parties are not entitled, either with or without security, to their several shares of the money now in the possession of the executor. This follows from the language of one of the paragraphs of the will quoted above, to wit:

"He [the complainant] is hereby instructed to invest any money going to either or all of the shares as he may think best."

By this clause the executor is converted into a testamentary trustee, and the duty of investing the money so received is imposed upon him; the only discretion left him being as to the character of the investment. The will does not say in whose name the investment is to be made, or who shall have possession of the property in which the investment is made. But it is fairly inferable from the fact that the testamentary trustee is to make it, and it is for the benefit of the life tenant and the remainderman that at least this trustee should retain control of it. If the investment is in real estate, there would be no occasion for his withholding possession from the life tenant, but, apart from authority, it would seem otherwise where the investment was in personal property, easily convertible into money. In the latter case we cannot think it was the intention of the testator to put the remainderman to the hazard of loss by authorizing the testamentary trustee to turn over, without restriction and uncontrolled, such property to the tenant for life. If such was his intention, why should he have required an investment by the testamentary trustee? Why should he not have directed the money to be put in the possession of the tenant for life, with power in him to invest as he saw proper? But let it be conceded the will is silent on this subject; then what direction will a court of equity give with regard to this money? Where there is a specific bequest for life, with or without limitation in remainder, of articles, such as wine, corn, etc., whose use consists in being consumed, the first taker is entitled absolutely. *Henderson v. Vaulx*, 10 Yerg. 30. But where there is a bequest for life of articles not consumable in the use, such as books, plate, etc., with a limitation over, the first taker, it seems, was formerly required to give security for the forthcoming of the articles at the termination of the life estate, when the remainderman must take them in the condition to which a prudent use has brought them. The modern practice, however, in such case, is only to require an inventory of the articles, specifying that they belong to the first taker for a limited period only, and afterwards to the remainderman, and security will not be required unless there is danger that the articles may be averted or otherwise lost to the remainderman. *Foley v. Burnell*, 1 Brown, Ch. 279; *Covenhoven v. Shuler*, 2 Paige, 124, 21 Am.

Dec. 73. But when the bequest is residuary, and not specific, then such chattels must be sold, and the interest on the proceeds paid to the first taker, and the principal be preserved to the remainderman. *Henderson v. Vaulx*, supra; *Covenhoven v. Shuler*, supra.

In the present case the court is not called to deal with specific bequests, but with a residuary fund realized by the executor from property coming into his hands, in which legatees for life and in remainder are interested. In such case, why does not the principle in the citation last above apply and control? Why should not the court see that this property be so managed as that, while the life tenants derive from it the fullest advantage to which they are entitled, yet it shall be preserved intact to those in remainder? We can see no reason for a refusal to do so. In *McHaney v. McNelly*, 10 Helsk. 535, an executor had failed to protect the rights of a remainderman to a fund in his hands, and the court said it was his plain duty to retain the fund, paying the interest of it to respondent the life tenant, or, if he let her have the corpus of the fund, it was his imperative duty to take bond to secure its forthcoming at her death, for the benefit of the remainderman. It is true, this was said by way of dictum, yet we think it has been understood by the court and the bar of the state to announce the true rule on this subject, and it has been accepted generally as fixing a correct practice. In the present case, to turn over to the legatees for life the money in question, and leave unguarded the remainderman, would be to abuse the interest of the latter, and disappoint the intention of the testator. This will and should not be done.

A decree will therefore be entered remanding this cause to the chancery court of Davidson county. The testamentary trustee will be directed to invest the shares of the respective parties in such income-bearing property as he may select, taking title to himself as trustee, or, on his deciding to execute the trusts, then they will be executed under the decree of that court.

WEBB v. FISHER.

(Supreme Court of Tennessee. Feb. 7, 1903.)

JUDGES—JUDICIAL ACTS—MALICIOUS ABUSE OF POWERS—CIVIL LIABILITY.

1. An action for damages cannot be maintained against a judge of a court of record for oppressively, maliciously, and corruptly entering a decree of disbarment against plaintiff as attorney.

Appeal from circuit court, Dekalb county; Joseph C. Higgins, Judge.

Action by B. M. Webb against T. J. Fisher. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Webb & Cantrell, for appellant. Wade & Robinson, for appellee.

McALISTER, J. The question presented upon this record is in respect of the liability of a judicial officer for certain official acts which are alleged to have been done oppressively, maliciously, and corruptly. The more specific allegations of the declaration are that the defendant, T. J. Fisher, as chancellor of the Fifth chancery division of Tennessee, decided against plaintiff the cause of W. H. Cummings, relator, against B. M. Webb, in the chancery court at Smithville, Tenn., in which a decree of disbarment was made and entered against plaintiff, a practicing attorney and counsel and solicitor in the courts of said state, and that said decree was pronounced corruptly, maliciously, wickedly, and oppressively. There are other allegations in the declaration, which are not necessary to be mentioned, since the statement already made presents the real case as made, stripped of useless verblage and immaterial recitals. To this declaration defendant filed a plea of not guilty. At the July term, 1902, defendant asked leave of the court to withdraw his plea, and file a demurrer to the declaration, assigning for cause the exemption of a judicial officer from such a suit; but this motion was disallowed. At the November term, 1902, the presiding judge, Hon. Joseph C. Higgins, being of opinion that the declaration stated no cause of action, dismissed the suit. Plaintiff appealed, and has assigned errors.

The precise question with which we are now confronted has not heretofore been decided in this state, so far as we are advised by any reported opinion. The case of *Hoggatt v. Bigley*, 6 Humph. 237, involved the liability of a justice of the peace for acts done in his official capacity. Green, J., in delivering the opinion of the court, said: "The only question is whether the justice of the peace had jurisdiction of the case against the slave, Jim, whom he committed to prison; for it is not contended that a judicial officer is responsible for mere errors of judgment in a case of which he has jurisdiction, and in which, without malice, he honestly pronounces what he believes to be the judgment of the law." It was not contended in that case that the official act was done maliciously or corruptly, but the contrary appeared. The case of *Cope v. Ramsey*, 2 Helsk. 197, was a bill filed by the next friend of a minor against the defendants, as justices of Warren county, to hold them personally liable for a sum of money paid into the hands of the clerk of said court in Confederate money. The bill charged that all the parties defendant combined and confederated together to cheat and defraud said minor in this transaction; but the court found there was no proof to throw suspicion on the defendants. A demurrer was incorporated in the answer, which assigned that

¶ 1. See *Judges*, vol. 29, Cent. Dig. § 165.

defendants were not responsible for acts done in a judicial capacity, and that the bill failed to charge that said acts were done with a corrupt, malicious, or fraudulent purpose. Sneed, J., said: "If they (the justices), in the rendition of the order complained of, have done the complainants wrong by an honest error of judgment, they are not responsible for it, pecuniarily or otherwise. But," continues the court, "if they have acted corruptly, maliciously, and with purpose, to defraud the complainant of his rights, then in an appropriate proceeding they are responsible. The bill does not make out such a case. It does not impute to these justices any corrupt or dishonest motive touching this judicial act, and the bill is therefore demurrable." It will be observed that the rule announced in the two cases last cited related to the official liability of justices of the peace, who are held exempt when the act is within the justices' jurisdiction, unless it is inspired by motives of malice and corruption. But with respect to courts of superior and general jurisdiction a different rule has long obtained. It was thus announced in *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285, viz.: "Now, it is a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that, if this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." But in the case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, it was held that the qualifying words were incorrect, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. "A distinction," said the court, "must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much question for his determination as any other question involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may

depend." It was further stated in that case, viz.: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action, whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecutions in the form of impeachment, or in such other form as may be specifically prescribed. In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, or suspended or removed from office. In some states they may be thus suspended or removed without impeachment by a vote of the two houses of the legislature." As said in *Scott v. Stansfield*, 3 L. R. Exch. 220: "This provision of the law is not made for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Philbrook v. Newman* (O. C.) 85 Fed. 139. In the *Am. & Eng. Ency. Law* (2d Ed.) vol. 17, page 728, it is said, viz.: "The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly;" citing numerous cases. The only cases cited as holding a contrary doctrine are several cases from Kentucky and two cases from Tennessee. The latter, as we have already seen, lay down the rule with respect to the liability of justices of the peace, namely, *Cope v. Ramsey*, 2 Helsk. 197; *Hoggatt v. Bigley*, 6 Humph. 237. A reason for a different rule with respect to the liability of justices of the peace may be found in the fact that under our constitution they are not

liable to impeachment for crimes and misdemeanors in office, or removal from office for cause by a two-thirds vote of the general assembly. They are made liable to indictment and removal from office by the court upon conviction. Article 5, § 5, Const. 1870; Const. 1834, art. 5, § 5. The rule exempting judges from liability for judicial acts is based upon the consideration that the judge represents the public. If, says Mr. Cooley, the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or an erroneous performance, must be a public, and not an individual, injury, and must be redressed, if at all, in some form of public prosecution. The duty is public, and the end to be accomplished is public. The individual loss results from the proper or improper and imperfect performance of a duty, for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. But, as the duty neglected is not a duty to the individual, civil redress, as for a civil injury, is not admissible. This is only one reason for judicial exemption from individual suits. Cooley on Torts, 380, 381. The necessary result of the liability would be to occupy the judge's mind and time with the defense of his own interests. The effect would be to lower the dignity of the court. Said Lord Tenterden, viz.: "In the imperfection of human nature it is better even that an individual should suffer a wrong than that the general courts of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who administer it." Quoted in *Williamson v. Lacy*, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 503. These principles we believe to be sound, and apply in the present instance.

The result is the judgment below is affirmed.

NOTE. The decree of disbarment was reversed by the court of chancery appeals on the facts, and Mr. Webb reinstated as an attorney.

SHELTON v. CAMPBELL et al.

(Supreme Court of Tennessee. Jan. 31, 1908.)

INHERITANCE TAX—MATURITY—FUNDS TAX—ABLE—ACTIONS—ATTORNEY'S FEES—STATE REVENUE AGENT—COMPENSATION.

1. Shannon's Code, § 729, provides that, if the collateral inheritance tax shall be paid within three months after decedent's death, a discount of 5 per cent. on the amount of the tax shall be allowed, and if not paid at the end of a year from decedent's death, at which time it shall be due, interest shall be charged on the tax at the rate of 6 per cent. per annum. *Held*, that where, notwithstanding a will contest, the

tax will be payable at the same rate, whether the will is sustained or disallowed, such contest does not affect the date when the tax accrues, and, if unpaid at the expiration of a year from decedent's death, interest is chargeable thereon.

2. A collateral inheritance tax would be assessed only on the clear value of the estate, which is the amount remaining after all debts and expenses of administration or execution of the will are paid, including the fees and expenses of a contest of the will.

3. Where a will is contested, it is the duty of the executor and the clerk of the county court to make an estimate of the fees and expenses of the contest, etc., and to approximate the amount of the inheritance tax to be paid, and pay the same at maturity, subject to revision on a final settlement of the executor's accounts.

4. General Inheritance Tax Act 1893, c. 174, makes it the duty of the county court clerk to collect the tax, and provides that, when suit is necessary, it should be brought in the county court. The clerk is given authority to employ an attorney, who is required to be paid a reasonable compensation by the party liable for the tax. The act also provides that an appeal may be taken to the circuit court, in which it shall be tried by the district attorney, and for a further appeal to the supreme court, which shall be tried by the attorney general and reporter. *Held*, that where a county clerk employed the state revenue agent to sue to recover a tax under the act, and an action was brought in the chancery court, and tried there without objection, such revenue agent was entitled, in his capacity as attorney, to a fee of 5 per cent. of the tax, which was in addition to the salary as revenue agent.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Action by P. A. Shelton against James H. Campbell and others for the collection of an inheritance and succession tax. From a judgment in favor of plaintiff, defendants appeal. Modified.

Stokes & Stokes, for appellants. Thomas B. Johnson and A. W. Stockell, for appellee.

WILKES, J. This cause comes before us upon the record and an agreed statement of facts, and involves the question of the liability of the estate of Mrs. Mary J. Furman to an inheritance tax, the amount for which liable, and the date when it should have been paid. The main feature, so far as appears from the record and agreed statement of facts, is that Mrs. Furman died April 11, 1900, leaving an estate estimated at \$150,000, consisting of both realty and personalty. She left no husband, father, mother, or direct lineal descendant, and the debts are merely nominal in amount. She executed a will by which she provided for the payment in the first instance of her debts; second, for the erection of a monument, to cost not less than \$26,000; and, thirdly, she willed all the remainder of her property, except her household and kitchen furniture, wearing apparel, and jewelry, to her executors named in the will, in trust for the Vanderbilt University, located in Nashville, to be expended in the manner directed in the will, and for the purposes therein specified. The

will was contested by her next of kin, and the contest is now pending, undecided, upon an issue of *devisavit vel non*, upon appeal in this court. It is conceded that, whether the will is sustained or set aside, the estate will be liable to a collateral inheritance tax of the same amount in either event, and the question is when that tax was payable, and would be delinquent. On the 25th of May, 1901, a bill was filed in the chancery court of Davidson county by the clerk of the county court to collect the tax, through Thos. B. Johnson, state revenue agent, as his attorney. On the 23d of September, 1901, it was agreed that the executors should pay \$4,000 of said taxes (being 5 per cent. upon \$80,000 of value), and that the remainder should await the result of the litigation or further orders, and this was done. A question then arose as to the liability of the estate for interest upon the tax, and for an attorney's fee of 15 per cent. upon it, and the agreed case was made up to test these questions in the courts. The chancellor held that the tax was past due and delinquent when the bill was filed; that it bore interest from one year after the death of testatrix; that, under the statute, the estate was liable to an attorney's fee of 15 per cent. on the amount already paid and yet to be paid. Defendants prayed an appeal to this court, and assign the several holdings mentioned as error.

The present law providing for an inheritance and succession tax is chapter 174, p. 347, Acts 1893 (Shannon's Compilation, §§ 724-756). Section 729 provides: "If the collateral inheritance tax shall be paid within three months after the death of the decedent, a discount of 5 per centum on the amount of the tax shall be made and allowed; and if said tax is not paid at the end of one year from the death of decedent, at which time it shall be due, interest shall then be charged at the rate of six per centum per annum on such tax." This provision is found in section 4 of the original act, and fixes the date when the tax becomes due and payable. By section 8 of the original act (section 728 of Shannon's Compilation) it is provided that the tax shall be a lien upon the real estate, and that the owner of any personal estate subject to the tax shall make full report and return of same to the clerk of the county court within one year from the death of the decedent, and enter into security for the payment of the tax to the satisfaction of such clerk, and, in case of failure so to do, the tax shall be immediately payable and collectible. It is left somewhat uncertain by the connection as given in the original act whether the provision for bond is intended, except in cases where there are life estates or periods of years intervening. We need not now decide this question, as in the present case there are no intervening estates, and the tax, in any event, was due and payable at the end of one year

from the death of the decedent, and a report was a necessary incident to the settlement fee and payment of the tax. The fact that proceedings are pending to test the validity of the will cannot postpone the maturity of the tax, when it appears that in either event—testacy or intestacy—the tax will be payable, and at the same rate as in the present case.

We are of opinion, however, that the estate is liable for the tax only to the extent of its clear value, and that "clear value" means net value after the payment of all debts and expenses of administration, or execution of the will, in case of testacy, and in cases where the will is contested, and expenses for attorney's fees, etc., are incurred by the executor in attempting to sustain the will, these fees and expenses must be treated as expenses of administration, and deducted from the amount of the estate, in order to reach its clear value. In such case it is the duty of the executor and clerk of the county court to make an estimate of such fees and expenses, and to tentatively allow for them, and thus approximate the amount of tax to be paid; and this amount should be paid subject to revision upon final statement and settlement of accounts. Under section 11 of the act, provision is made, which, we think, covers the case, where the executor may have paid too much tax, and allows its recovery back from the clerk, or out of the state treasury, when overpayment is made. In the present instance, \$4,000 has been paid upon an estimate of clear value of \$80,000, but this payment was not made for some four months after the tax was due and payable. We are of opinion that the tax bears interest from the date when payable, to wit, one year from the death of the decedent; and this notwithstanding the impediments in the way of paying over the whole of it,—such as the pendency of litigation, the scarcity of funds, and other causes.

The next question that arises is as to the liability of the estate for attorney's fees, and, if liable at all, for what amount. It is made the duty of the county court clerk to collect the tax, and for that purpose he is by the act authorized to employ an attorney, who shall have a reasonable fee for his services, to be paid, in addition to the tax, by the party liable for the tax. It appears that the clerk of the county court of Davidson county has entered into an agreement with Thomas B. Johnson, one of the three revenue agents of the state, whose office it is to collect back or delinquent taxes, to look after, bring suit for, and collect such inheritance taxes as may be overdue. Mr. Johnson claims that he has the right, by virtue of his office, and under the statute defining his duties, to look after and collect this tax, and bring suit therefor, as well as under the appointment of the county court clerk, and that, under the statute, his compensation for such service is fixed at 15 per cent. upon the amount

of tax realized. It is held in *Zickler v. Union Bank & Trust Co.*, 104 Tenn. 281, 57 S. W. 341, that the inheritance tax law, contained in chapter 174, Acts 1893, was designed to furnish a complete system of taxation upon the subject of collateral inheritance taxes; that is, a system, in and of itself, to be executed according to the provisions of that act. Under these provisions, it was the duty of the county court clerk of Davidson county to have collected this tax, and, when suit became necessary, it should have been brought in that court; and the clerk, under the act, had the authority to employ an attorney, to be paid a reasonable compensation for his services, in that court. This suit was not brought in that court, but in the chancery court. There was, however, no demurrer or plea to the jurisdiction, and we hold that it could be maintained, under such circumstances, in the chancery court. But it must be conducted and treated as though it had been brought in the county court, and in accordance with the provisions of the act, by an attorney employed by the county court clerk under that act. The suit must therefore be treated as if brought by Mr. Johnson under his employment by the county court clerk, and not by him in his official capacity of state revenue agent. This being so, he would, under the general inheritance act, be entitled to a reasonable fee in the court below; but the act provides only a fee for services in the county court to such attorney, and contemplates that on appeal to the circuit court it shall be looked after by the district attorney, and in the supreme court by the attorney general and reporter. The court is therefore of opinion that Mr. Johnson acted under his employment by the county court clerk, and is entitled only to a reasonable fee for his services in the chancery court below, which is fixed at 5 per cent. upon the amount of tax so far realized, and that may hereafter be realized. This fee, however, will go to him as the employed attorney of the county court clerk, to be paid by the parties liable for the tax, but will constitute no part of the salary provided in the act relating to state revenue agents. Nor will the \$4,000 taxes recovered in this suit, or the amount hereafter recovered, be treated as a fund out of which his salary of \$2,500 as revenue agent is to be paid by the comptroller. In other words, the inheritance tax collected and to be collected out of the decedent's estate will be treated as though collected under the general inheritance law, and the fees of Mr. Johnson, of 5 per cent., will be paid to him as though he did not fill the office of revenue agent for the state, and independent of his salary as such agent, just as they would be to any other attorney whom the county court clerk might see fit to employ.

The decree of the court below will be modified as herein indicated, and in all other respects affirmed, and the cause is remanded

to the court below for further proceedings. The costs of the cause will be paid by the estate of Mrs. Furman.

MEYERE v. NASHVILLE, C. & ST. L. RY.
(Supreme Court of Tennessee. Feb. 7, 1903.)

CARRIERS—INJURIES TO PASSENGERS—DANGEROUS POSITION—RIDING ON PLATFORM—DECLARATION—DEMURRER.

1. A declaration for injuries to a passenger, alleging that he took passage on the rear coach of defendant's train, and not being able to secure a seat in that coach, because of its crowded condition, stood on the rear platform thereof, and was thrown from the train while it was passing around a curve at a rapid speed, but failing to allege that plaintiff attempted to gain a seat in any other coach of the train, or requested any of the trainmen to procure a seat for him, or that there was no standing room inside the rear coach, was demurrable; it not appearing therefrom that plaintiff was not voluntarily and unnecessarily riding on such platform.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by Arthur Meyere against the Nashville, Chattanooga & St. Louis Railway. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Frank P. Bond and Lewis Leftwich, for appellant. Claude Waller and J. D. B. De Bow, for appellee.

McALISTER, J. Plaintiff brought this suit to recover damages for personal injuries sustained by him while a passenger on one of the defendant's trains. A demurrer to the declaration was sustained by the circuit judge, and the plaintiff appealed.

The cause of action is thus stated in the third count of plaintiff's declaration, namely: "Said plaintiff, according to the terms of his contract and his ticket, purchased of defendant at said station of Tullahoma, for the transportation of plaintiff from said station to Nashville, as aforesaid, entered the last car of said train, which was what is known as a 'day coach,' and which was attached behind the car known as a 'sleeper,' though usually a sleeper was run upon said train as the rear car, when, because of the careless and negligent conduct of defendant, its agents and employees, in failing to provide suitable, usual, and proper accommodations for plaintiff, according to its contract and agreement with plaintiff for his safe and convenient transportation over its road as aforesaid, and because of the careless and negligent conduct of said defendant, its agents or employees, in not furnishing plaintiff a seat on said train, and the crowded and overloaded condition thereof; the rear door of said car having been carelessly and negligently left ajar by the defendant, its agents and employees; plaintiff having

¶ 1. See *Carriers*, vol. 2, Cent. Dig. §§ 1376, 1377.

seen other persons (passengers) standing on said platform, without objection on the part of the defendant, its agents and employes,—when, by reason of the careless, negligent, and unskillful management and operation of said train by defendant, its agents and employes, when said train was being run at a careless, negligent, and reckless rate of speed around a sharp curve in said road, by a sudden lurch of said car, plaintiff lost his balance, and because of the carelessness, negligence, and unskillfulness of defendant, its agents or employes, in not having the said door of said car (it being the last car of said train) securely closed, and in not having said platform of said car safeguarded and protected by the usual, proper, and necessary railings, chains, and guards, was violently thrown from said platform to the ground, fracturing his skull, and otherwise wounding, bruising, and crippling plaintiff, permanently disabling him, and causing him great mental and bodily suffering, and on account of which he was, and still is, unable to attend to his ordinary business duties.” The demurrer to this count was, viz.: “(1) The said third count fails to aver that the plaintiff could not secure a seat on the rear coach, or some other coach on the train, and that he made any effort to do so, or that he notified any of the defendant’s agents in charge of the train that he could not secure a seat, but shows, on the contrary, that he took his position voluntarily and unnecessarily on the platform of the rear coach while the train was in rapid motion, which platform was not provided with railings or guards. Such conduct on the part of plaintiff was negligence, which would, in law, bar any right of recovery against this defendant for any accident to him in falling off of said platform. Said count is therefore insufficient in law. (2) The said third count fails to aver that any of the defendant’s agents in charge of the train knew that plaintiff had no seat inside of the coach, and that he had taken his station for passage on the rear platform of the rear coach of said train, and fails to aver any act of negligence of the defendant which was the proximate cause of the injury to him. The said third count is therefore insufficient in law. (3) The said third count shows that plaintiff was guilty of negligence in going upon the unguarded platform of the rear coach of the train, and that said negligence was the proximate cause of the accident. The said count is therefore insufficient in law.”

The determinative question of law presented by the pleadings is whether a passenger who voluntarily and unnecessarily assumes a position on the platform of a rapidly moving train can recover damages for injuries sustained in consequence of being thrown from the train, by the motion of the car while rounding a sharp curve. Mr. Wood, in his work on Railway Law, vol. 2, p. 1157, says: “A railroad company is bound to furnish its passengers reasonable and proper accommo-

datations for traveling, and if it has an insufficient number of cars, so that passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there; but for injuries received while unnecessarily riding there the company is not responsible, nor while passing from one car to another unnecessarily. The fact that the conductor permits a passenger to ride upon the platform when there is no necessity for his doing so does not render the company liable for injuries received by him. No person can charge another with the consequences of his own negligence simply because such other person permitted him to do the act.” Mr. Elliot, in his work on Railroads, vol. 4, sec. 1630, says: “It is also negligence, under ordinary circumstances, to stand upon the platform of a rapidly moving commercial railroad car. But there may be exceptional cases in which this is not true, and two or three of the courts have held that standing upon the platform is not contributory negligence, where the car is so crowded that the passenger is unable to get a seat therein, although there is room for him to stand inside the car. This seems to us, however, to be contrary both to principle and to the weight of authority. The failure to furnish him a seat may be of importance in determining the question of negligence or breach of duty on the part of the carrier, but we are unable to see its bearing upon the question of contributory negligence, especially where there is plenty of room to stand inside the car. In such case the failure to furnish a seat does not make it any safer or any less negligent to stand upon the platform, and is not the proximate cause of the injury.” Mr. Patterson, in his work on Railway Accident Law, sec. 272, says: “It is well settled that a passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the railway responsible for injuries of which his position is the efficient cause—as, for instance, * * * from his riding on the platform of a moving car before the train comes to a stop; but, as before stated, it has been held that the failure of the railway to perform its duty of providing the passenger with a seat will excuse his contributory negligence in riding on the platform; yet this doctrine cannot be regarded as reasonable, for, if the passenger cannot obtain a seat, he may stand within the car, or he may refuse to proceed on his journey, and may hold the railway responsible for the damages resulting from its breach of contract; but injuries resulting primarily from his voluntarily putting himself in a position of such obvious danger as that of riding on the platform of a car in motion cannot be said to have been proximately caused by the railway’s failure to provide him with a seat.” In volume 5, Am. & Eng. Ency. of Law (2d Ed.) p. 678, it is said: “If a passenger voluntarily and unnecessarily stands on the platform of a railroad car while

it is in motion, he cannot maintain an action against the railroad company for an injury due in part to the fact of his occupying this position." Again, it is said on page 679: "Thus, where the passenger at the time of receiving an injury is on the platform of a running car, when there is room for him inside the car, this is such contributory negligence as will prevent recovery for the injury." Again, on page 681, it is said: "It has been held that for a passenger to be upon the platform of a steam car in motion is, as a general proposition, *prima facie* negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there is shown by affirmative proof to have been excused by the occasion." Mr. Wharton, in his work on Negligence, sec. 363, says: "Passing from car to car when the train is moving, if followed by injury to the plaintiff in consequence of such exposure, bars his recovery." In discussing this subject, Mr. Beach, in his work on Contributory Negligence, sec. 149, says: "If there is even standing room in the car, it is negligence to occupy the platform. This is the rule in Pennsylvania and Illinois, and it is commended by Dr. Wharton." We believe the true rule to be that a passenger who voluntarily and unnecessarily undertakes to ride on the platform of a moving train cannot recover damages for injuries sustained in consequence of such perilous exposure. The terms "voluntarily" and "unnecessarily" impose the limitation upon the rule, for, if it appears that, owing to the overcrowded condition of the car, there is neither sitting nor standing room on the inside, it may not be negligence to occupy the platform. But so long as there is standing room inside the car the passenger cannot occupy the platform. It will be observed, from a careful reading of the declaration, that it is not alleged that plaintiff requested any of the trainmen to procure him a seat, nor that he attempted to find a seat in any other coach of the train; nor is there an allegation that in fact there were no vacant seats in the other cars. It is not alleged, moreover, that there was not standing room in the coach whose platform plaintiff occupied. The substance of the plaintiff's declaration is that he took passage upon the rear coach of defendant's train at Tullahoma, and not being able to secure a seat in that coach, because of the crowded and overloaded condition thereof, he stationed himself on the rear platform of that coach, and, while the train was passing a curve at a rapid and unusual rate of speed, plaintiff was precipitated from the train and injured. It is not alleged at what rate of speed the train was moving, so as to show that it was immoderate and excessive, even if this were a matter which the law regulated. We must conclude, from the facts set out in the declaration, that the injury was brought about by the negligence and imprudence of the plaintiff in assuming voluntarily and unnecessarily a position on the platform of the

car admittedly dangerous, and not designed for the use of passengers.

The judgment of the circuit court is affirmed.

TOMPKINS v. NASHVILLE, O. & ST. L. RY.

(Supreme Court of Tennessee. Jan. 17, 1903.)
ATTORNEY AND CLIENT—LIEN OF ATTORNEY—STATUTES—CONSTRUCTION—DISMISSAL OF SUIT—RIGHTS OF ATTORNEY.

1. Under Acts 1899, c. 243, § 1, providing that attorneys of record who begin a suit in a court of record shall have a lien on plaintiff's right of action from the date of filing the suit, attorneys for plaintiff in an action for personal injuries, entitled to a percentage of the recovery in lieu of fees, are not entitled to object to plaintiff's dismissal of the suit without their consent; nor can such attorneys be made parties, and prosecute the suit to termination thereafter.

Appeal from circuit court, Davidson county; J. W. Childress, Judge.

Action by Cora A. Tompkins against the Nashville, Chattanooga & St. Louis Railway. From an order denying a petition by H. C. Lassing and others, plaintiff's attorneys, to continue the suit, and to deny plaintiff's application for a dismissal, such attorneys' appeal. Affirmed.

H. C. Lassing and Allen & Rains, pro se. Whitaker & Lytle and A. B. Neal, for appellee Cora A. Tompkins.

McALISTER, J. The present suit involves the proper construction of section 1, c. 243, Acts 1899, viz.: "That attorneys of record who begin a suit in a court of record in this state shall have a lien upon the plaintiff's right of action from the date of filing the suit." The facts necessary to be stated to raise the question in litigation are that on September 2, 1902, Cora Tompkins, through her attorneys, H. C. Lassing and Messrs. Allen & Rains, instituted an action in the circuit court of Davidson county against the Nashville, Chattanooga & St. Louis Railway to recover damages for the alleged negligent killing of plaintiff's husband. A declaration was filed on the 24th of October, 1902, in which it was alleged that the deceased was killed while riding as express messenger on one of defendant's trains in the state of Georgia, and that said train was negligently brought in collision with another of defendant's trains, occupying the same track, but going in an opposite direction. It appears that the writ and declaration were signed by H. C. Lassing and Allen & Rains, as attorneys for the plaintiff. At a subsequent day of the term, the plaintiff, without notice to her counsel, caused the following motion to be entered on the motion docket of the court, viz.: "In this cause the plaintiff moves the court for an order dismissing her

¶ 1. See Attorney and Client, vol. 5, Cent. Dig. §§ 407, 414.

suit against the defendant railroad company, without prejudice in any way to her right of action against the said railroad company." Prior to the hearing of said motion, Messrs. Lassing and Allen & Rains, by leave of the court, appeared and filed a petition in said cause, alleging, among other things, that petitioners were plaintiff's attorneys of record, and, as such, instituted the suit, and had a lien on plaintiff's right of action for their compensation; that, under the contract and employment made by petitioners, they would be entitled, if case should be compromised, to one-fourth of the recovery, in lieu of fees for their services, and, if said case was prosecuted to final judgment, they would be entitled to more than one-fourth of the recovery, to be governed by the extent of services rendered, but not to exceed one-half of the recovery. It is alleged that petitioners are interested in any step or move which may be taken in said suit, and that petitioners are entitled to prosecute said suit to final judgment, because of their interest in said suit, and their lien on the plaintiff's right of action; that petitioners have not been paid for their services in said cause; and that plaintiff is insolvent, and unable to pay their fees unless she obtains a recovery in said cause. Petitioners resisted the right of plaintiff to dismiss her suit, and asked leave of the court to be allowed to prosecute said suit in plaintiff's name to final recovery, and to be made joint parties with plaintiff in said suit. This petition was signed and sworn to. On the 8th November, 1902, plaintiff, by her attorneys, Whitaker & Lytle and A. B. Neal, interposed a demurrer to the petition, which was sustained by the court, and the original suit dismissed on the motion of plaintiff. The substance of the demurrer was that counsel's lien on the right of action cannot be enforced so long as plaintiff fails or refuses to prosecute the suit, that plaintiff is alone entitled to prosecute said right of action, and that petitioners are not entitled to be made parties to said action. We are constrained to believe this contention sound. The object of the legislature in giving an attorney's lien on the right of action was to prevent the compromise and settlement of cases out of court, so as to defeat the collection of fees for professional services rendered. It was not contemplated by the act that suitors should thereby be precluded from managing their cases or dismissing them at pleasure. In *Railroad v. Wells*, 104 Tenn. 707, 59 S. W. 1043, in considering this statute, it is said: "The lien which the statute fixes on the plaintiff's right of action follows the transaction without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; if a compromise agreement is made, the lien attaches to that; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment

to his client without his consent. * * *

Since the passage of the act, as before, the plaintiff may prosecute or compromise or dismiss his suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated in the plaintiff's favor." It is insisted, however, that the question presented in that case was whether counsel of record were entitled to a lien on the amount paid to plaintiff by way of compromise, and that the question presented in this record was not involved in the *Wells Case*. Counsel insist the question now presented is whether the plaintiff can defeat and defraud her attorneys of their lien on her right of action by dismissing her suit, the plaintiff being insolvent and unable to pay their fees. As already stated, it is not shown or charged in the petition of counsel that plaintiff has settled or compromised her suit, or has acted fraudulently or collusively with the defendant company. The allegation merely is that she has directed the dismissal of her suit without prejudice, and petitioners object to such dismissal, and ask the court for leave to prosecute the suit to final judgment in the plaintiff's name. Counsel cite in support of this contention *Twiggs v. Chambers*, 56 Ga. 279; *Moses v. Bagley*, 55 Ga. 283; *Coleman v. Ryan*, 58 Ga. 132. The Georgia decisions hold that the plaintiff will not be allowed to dismiss or discontinue his suit, over the objection of his attorney, without paying his charges. Those cases, however, are based on a statute which not only gives an attorney's lien on the suit, but provides that the attorney may control the suit to enforce his lien for the amount due him for services. Code Ga. § 2814. By the act of 1826 (*Shannon's Code*, § 4940), suits may be dismissed, in writing, out of term time, as well as in term time, and further costs saved. So it was held in *Sharpe v. Allen*, 11 Lea, 521, that by virtue of this statute a dismissal of a suit in vacation puts an end to the suit, and terminates the control of the court over it. The jurisdiction of the court over it ceases, except to render judgment for costs. See, also, *Stanton v. Houston*, 12 Heisk. 266. So, in *Yoakley v. Hawley*, 5 Lea, 673, it was held that the attorney cannot prosecute or defend in the name of his client against the latter's consent. The fact that the attorney may be interested to continue the defense, in order to secure his fee, does not give the right to control the case. The court in that case continues: "She [the plaintiff] had the right, as we have repeatedly held, to dismiss or compromise her suit, independent of their wishes, and this right was beyond their control." *Stephens v. Railway Co.*, 10 Lea, 450; *Thompson v. Thompson*, 3 Head, 529. The question, then, is presented, whether these holdings are changed or modified by chapter 243, Acts 1890. In *Railroad Co. v. Wells*, 104 Tenn. 711, 59 S. W. 1043, it was held "that this act does not deprive the plaintiff of the right to con-

trol her own suit, nor make all defendants in suits brought in courts of record liable for the fees of plaintiff's attorneys. Since the passage of this act, as before, the plaintiff may prosecute or compromise or dismiss her suit at will, and the defendant is liable only for such sum as may be adjudged or stipulated by compromise in plaintiff's favor." We may observe that if the act of 1899 had, in terms, undertaken to deprive the plaintiff of the right to control his own suit, it would be open to grave constitutional objections; but, as held in the Wells Case, the act does not expressly or by necessary implication import such a meaning, but leaves the plaintiff to prosecute, compromise, or dismiss his suit at will. So we think that public policy and private right would be best subserved by adhering to the rule so long adopted in this state, both by statute and legal practice, of permitting a litigant to dismiss her suit without the intervention of her attorney. If, for instance, a complainant in a bill for divorce should conclude to withdraw her complaint and become reconciled to her husband, should the dismissal of her suit be prevented by her attorney, and he be permitted to become coplaintiff with her in the prosecution of her suit, because by attachment he has impounded property of the husband to secure her alimony? This very case was recently before this court, wherein it was seriously contended by counsel that he had a lien on complainant's cause of action, and the bill could not be dismissed without the settlement of his fees. It is needless to say that the question was resolved adversely to the contention of counsel. Again, it would seem that a litigant has a right to say when he will no longer incur the liability of a bill of costs for the prosecution of a suit. If he has no right to control this matter, his counsel can carry him through all the courts, and, at the end of a long litigation, leave him mulcted in a heavy bill of costs.

We are unable to agree with counsel in their construction of the statute, and the result is that the judgment of the circuit court must be affirmed.

HINTON v. SUN LIFE INS. CO.

(Supreme Court of Tennessee. Jan. 10, 1903.)

APPEAL—RECORD—BILL OF EXCEPTIONS—CORRECTION OF MISTAKE—FINDINGS OF FACT.

1. A certain time, reasonable in length, for filing bill of exceptions, having been allowed, the bill, not affirmatively appearing to have been filed in that time, cannot be considered.

2. Application to amend the record, though not made till after the court filed its opinion holding that the bill of exceptions was filed too late, will be allowed, the court having raised the point itself, and appellant not having known of the mistake made by the clerk as to a date till after the filing of the opinion.

3. The admission, in the answer to a petition to correct the record, that the mistake alleged existed, is sufficient to correct the record.

4. In a case where there has been a request for findings under Shannon's Code, § 4684, providing that on the trial of a question of fact by the court the decision, if requested, shall state the facts found, the bill of exceptions can be looked to not for supplying facts, but only to see whether there has been a finding of the necessary facts, or there is evidence to support the findings, or there is error in admission or rejection of evidence; and, there being error in any of these matters, the case will be reversed, and remanded for a new trial.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by Walter Hinton against the Sun Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

A. F. Whitman, for appellant. Tip Gamble, for appellee.

NEIL, J. This suit was begun on the 22d day of May, 1902, before a justice of the peace of Davidson county, on a policy of insurance for \$156. In that tribunal the cause was decided in favor of the defendant, and from this judgment the plaintiff presented an appeal to the circuit court of the county. In that court the cause was again tried, and judgment rendered in favor of the plaintiff on May 28, 1902, for \$157.67, being the original sum sued for, with interest, and for all of the costs of the cause. On July 19, 1902, a motion for a new trial was made and overruled, whereupon the defendant insurance company prayed and was granted an appeal to this court, and was allowed 10 days to file a bill of exceptions; but that bill of exceptions was not filed until August 5, 1902, which was 17 days after July 19th, and 7 days beyond the time allowed. The rule is that, when time is allowed to file a bill of exceptions, and it is not filed until after the time has elapsed, it cannot be looked to on the trial of the cause in this court (*Muse v. State*, 106 Tenn. 181, 61 S. W. 80; *Jones v. Moore*, 106 Tenn. 183, 61 S. W. 81), and in such a case no other result can follow in this court, so far as depends upon the matters which should be contained in the bill of exceptions, except an affirmance of the judgment of the court below. *Wright v. Redd Bros.*, 106 Tenn. 719, 63 S. W. 1120. It is true that the cases just cited were addressed to chapter 275, Acts 1899, which was enacted for the purpose of allowing time after the adjournment of court for the preparation of bills of exception, while in the case before us it does not appear whether the 10 days allowed would have carried or did carry the case beyond the adjournment of the term. But the principle is clear that, when time is allowed for the filing of a bill of exceptions, it must affirmatively appear that it was filed within that time; otherwise this court cannot look to it. Again, if we should concede that the bill of exceptions could be lawfully

¶ 1. See *Appeal and Error*, vol. 2, Cent. Dig. §§ 2330, 2331.

filed after the expiration of the 10 days, and within the term, it does not affirmatively appear that August 5th was within the term; and this fact we should be enabled to determine from the record, but this record we have before us is silent upon the subject. All that we have is that 10 days were allowed for the filing, and the filing did not take place until 17 days had elapsed. So, *prima facie*, in any event, the bill of exceptions was filed too late, and there is nothing in the record to rebut this presumption against it. While a bill of exceptions may be properly made up at any time during the term, if there be no rule or order to the contrary in the court in which the case was tried (*Patterson v. Patterson*, 89 Tenn. 151, 14 S. W. 485), yet a party is not entitled as a matter of right to the whole of the term in which to present it. *Mallon v. Tucker Mfg. Co.*, 7 Lea, 62, 66; *Sikes v. Ransom*, 6 Johns. 279. In *Mallon v. Tucker Mfg. Co.* it was held that a general rule was not unreasonable which fixed 15 days as the limit within which bills of exceptions were required to be presented after the verdict of the jury, or after the decision of the cause by the judge in nonjury cases. We see no reason why an order limiting the time for such preparation and filing may not be made in individual cases, and why, in the absence of a compliance with such order, the right to file may not be denied altogether. Without doubt the right to make such order would be of the greatest service to the parties in many cases where the terms of courts are long, and the facts in the cases supposed are numerous and complicated, and the questions arising are many; such cases, in short, as would in all probability soon slip from the memory of the circuit judge, and make the preparation of the bill of exceptions a work of an exceedingly uncertain and unsatisfactory nature. Indeed, the conceded right to make such an order, giving reasonable time, applicable to all cases, necessarily involves and includes the right to make it in each individual case, on the principle that that which is just as to the whole is just as to each of the parts composing that whole. Moreover, even in the absence of such general order, no question of unfair discrimination could arise between different cases in the same court, because, while a limiting order may not be made in one case, yet may be made in another, there is always to be determined by this court the question of the reasonableness of the length of time given, which must to a great extent be measured by the nature of the case itself. Applying the principle to the present case, the court can see that the facts are so few, and the record so small, the time allowed for the preparation of the bill of exceptions was not only reasonable, but most ample.

The bill of exceptions not having been filed in time, this court cannot look to it, and

hence, as the record now stands, there is nothing to show error in the judgment of the court below.

On Rehearing.

(Jan. 17, 1903.)

This case, under the style of "*W. A. Hinton vs. Sun Life Insurance Company*," was heard on a former day of the term, and an opinion was then rendered directing an affirmance of the judgment of the court below, on the ground that the bill of exceptions was filed after the expiration of the time granted by the circuit judge, and that there was, therefore, nothing upon which the plaintiff in error could assign error. The plaintiff in error has now presented a petition showing that there was a mistake in the transcript by reason of the failure of the clerk of the circuit court to make a true copy, and that with this error corrected it would appear that the bill of exceptions was to be filed within 10 days from July 26th, instead of from July 19th, as the record shows. The prayer of the petition is that the plaintiff in error be allowed to suggest a diminution of the record, and that, upon the correction as to dates being made, the cause be reheard. The attorney for the defendant in error has filed an answer to the petition admitting its allegations, but insisting that it was the duty of the opposing counsel to examine the record before the original hearing in this court, and to have the correction then made, and that it is now too late. To this counsel for plaintiff in error replies that it was a mistake only as to dates; that such a mistake easily escapes the attention; that no point was made upon the bill of exceptions by counsel for defendant in error on the previous trial, but that this court itself raised the question, and plaintiff in error was not aware of its existence until the opinion came in, and that the determination of the case upon this point has operated in the nature of a surprise upon plaintiff in error. Although the application comes late, we think that under the facts stated it should be allowed. It is not necessary, however, that the suggestion of diminution should be actually made, or a certiorari awarded. The admissions contained in the answer to the petition, when taken in connection with the petition, supply the place of both, and correct the record so as to show that the bill of exceptions was filed in time.

Before turning to the bill of exceptions it is necessary to call attention to section 4684 of Shannon's Code. This section, referring to the practice of the circuit court, says: "Upon the trial of a question of fact by the court, the decision, if requested by either party shall be given in writing, stating the facts found and the conclusions thereon which shall constitute a part of the record." It should also be noted that the case was

begun before a justice of the peace, and hence there was no pleading setting forth the cause of action except the warrant. This pleading was in the customary brief form, and was as follows: "State of Tennessee, Davidson County. To any Lawful Officer of said County: You are hereby commanded to summon Sun Life Insurance Company of America to personally appear before me, or some other acting justice of the peace for said county, to answer the complaint of W. A. Hinton in a plea of debt by insurance policy #156.00 under \$500. Given under my hand and seal this 22nd day of May, 1902. H. H. Clark, J. P."

His honor, the circuit judge, was properly requested, under the section of the Code just quoted, to make written findings of fact and law, and did so in the following language:

"(1) The defendant issued one of its ordinary policies upon the life of Ella M. Burnett, December 2, 1895. It is conceded that the policy was regularly issued, and the premium paid up till March 24, 1902. The next payment due was March 31st, which Burnett failed to pay, and three other pay days were passed likewise without payment.

"(2) The court finds as a matter of fact that the insured was four weeks in arrears in the payment of the weekly dues provided for in the contract.

"(3) On the 24th of April the assistant superintendent at Nashville, Rogers, mailed to the home office at Louisville a statement of those in arrears the four weeks, and among the names presented was that of the insured. The company, through the home office at Louisville, returned to the local office at Nashville a list of the policies lapsed by the company, and the insured's name was amongst that list, to take effect April 28th, and the defendant in this case insists that the insured was more than four weeks in arrears, and her policy had never been revived, in conformity with the rules of the company; that they had a right to lapse and had lapsed her policy to take effect April 28th, as stated.

"(4) The insured died, as is conceded, on the 11th of May thereafter. The proof shows that on the 26th of April the insured paid to the local office in Nashville \$1.00, and it is insisted that by virtue of that payment her back dues were fully covered, and her dues more than paid to the date of her death, and that by the acceptance of said \$1.00 on the 26th of April the company waived any rights they may have had to have lapsed the policy.

"(5) The receipt given for the \$1.00 says as follows: 'Received from Ella Burnett \$1.00, being the arrears on policy No. —, which the applicant desires the company to revive. Under no circumstances will the company be liable under said policy, in case of death, until the policy has been revived on the books of the company, and the money credited in the premium receipt book be-

longing to said policy. [Signed] Hogan, Agent.'

"(6) A stipulation in the face of the policy provides that when a party is in arrears for four weeks, and desires to be reinstated, upon the payment of all arrears the company will reinstate the party if the physical examination shall be satisfactory.

"(7) Across the face of said receipt is the following: 'If the company accept the revival application, the amount paid will be credited on the premium receipt book belonging with the policy; otherwise the money will be returned.'

"(8) The defendant insists that, while it received this money, it had no opportunity to make the personal examination of the insured, to see if she was in proper condition for them to have been willing to revive the policy; that her address was unknown to them, and she could not be found for the purpose.

"The company had a stipulation with the insured that her address should always be furnished to it.

"(9) Between the time the dollar was paid and her death was 17 days; and

"(10) The court is of opinion, and so holds, that it was their duty, under their contract and agreement with the insured, to have found her and made such examination as they desired. But, failing in this, the insured had a right to presume, as they did not return her money to her, that they had accepted her money and revived her policy, and that, therefore, they cannot now insist upon the nonpayment of the sum stipulated in the policy.

"(11) Therefore the court holds, and so finds, that, while the insured had been in arrears upon her policy more than the four weeks stipulated in the policy, yet, having tendered and paid to the company, or its duly authorized agent, a sum that more than paid all dues to the company, and they having held the same seventeen days without making an examination of her, or offering to do so, and failing to return her the money, they thereby waived any right they may have had in the premises; and it being conceded that the insured died, judgment will be rendered against the defendant company for \$—— and interest thereon from the time same should have been paid to this date."

On the foregoing findings, judgment was rendered against the company for \$156, the amount of the policy, and \$1.67 interest,—in all \$157.67,—and all of the costs of the cause, and an appeal was prayed and obtained by the company.

On comparing these findings with the bill of exceptions, it appears that certain important facts are omitted. Among those omissions is the policy itself. This being the contract sued on, it constitutes not only an important fact but a vital one. His honor

says that the company issued one of its ordinary policies, but does not state what the terms of such ordinary policies are. In reaching the conclusion stated in the several findings, his honor evidently had before him the policy, and in determining whether, under the facts stated in the first policy, the defendant in error was in arrears, construed the policy; but this court, not being able to look at the policy for the purpose of determining the merits, because not contained in his honor's findings, cannot review his construction, and thereby decide as to its correctness or the contrary.

The third finding cannot be properly understood without reference to certain facts appearing in the testimony, but not included in his honor's findings, in respect of the practice of the company in carrying out certain provisions of the policy covering forfeitures for the nonpayment of premiums; nor can it be understood without those provisions of the policy. Without these facts it is not possible to understand the significance of the act of the superintendent in mailing the list referred to to the home office, or the returning, by the home office, of its list to the superintendent at Nashville, and the significance of the statement that that list was to take effect on April 28th.

The bearing of the facts contained in the fourth finding cannot be fully ascertained without a reference to and a construction of certain clauses of the policy.

The provisions of the receipt referred to in the fifth finding cannot be understood without a reference to the method pursued by the company and its policy holders, under the practice of the company, in cases where policies are sought to be revived after lapse, which is fully shown in the testimony.

The seventh finding cannot be fully understood without this additional fact, and a further explanation of what is meant by the premium receipt book, and its office in the business of the company, in the matter of the reviving of policies; all of which is fully shown in the testimony.

The first paragraph of the eighth finding does not state facts, but only one of the defendant's contentions. The facts appear in the evidence showing whether this contention was a meritorious one or not, but they are not set out in his honor's findings. It is stated in the second paragraph of this eighth finding that the insured had agreed to furnish her address to the company, but his honor's findings do not show whether the address was in fact furnished. There was sufficient testimony upon the point to support a finding one way or the other.

The bearing of the tenth finding cannot be fully understood without having before us the terms of the contract,—that is, of the policy,—and likewise a statement of the practice of the company in the matter of reviving policies. Only in the light of these additional facts could the court properly de-

termine whether the assured had the right to rest upon the presumption contained in the said tenth finding.

The same is true of the eleventh finding. It is impossible to correctly determine whether the waiver there adjudged was correctly adjudged, without having before us the additional facts just referred to.

In the preceding review of his honor's findings we purposely passed over the sixth one. We now return to it. It is insisted in the defendant's brief that no such stipulation appears in the policy. The contention is correct. Nothing of this kind appears in the face of the policy, or anywhere in or on the policy. There is some evidence contained in the testimony of the witnesses as to the practice of the company in the matter of the reviving of policies bearing upon the point, but nothing in the policy itself.

Taking all of his honor's findings together, it is perceived from what we have already said that they are not sufficiently full to enable us to base any judgment upon them, owing to the omission of the important facts which we have referred to.

The question now to be determined is whether this court should disregard the findings of the court below, and ascertain the facts for itself, or whether the cause should be reversed, and remanded for a new trial. When the case is tried before the circuit judge without the intervention of a jury, and he merely renders judgment without making any special findings of fact, the practice is for this court, under the limitations below stated, to examine the record, and render such judgment on the facts at large as the circuit judge should have rendered. *Fogg v. Gibbs*, 8 Baxt. 409; *Wheeler v. State*, 9 Helsk. 393; *Dawson v. Holt*, 11 Lea, 580, 47 Am. Rep. 312; *Smith v. Hubbard*, 85 Tenn. 306, 2 S. W. 569; *Eller v. Richardson*, 89 Tenn. 576, 15 S. W. 650; *Glasgow v. Turner*, 91 Tenn. 165, 167, 18 S. W. 261; *Simmons v. Leonard*, 91 Tenn. 183, 194, 18 S. W. 280, 30 Am. St. Rep. 875; *Woodall v. Foster*, 91 Tenn. 195, 198, 199, 18 S. W. 241; *Montague v. Thomason*, 91 Tenn. 168, 176, 18 S. W. 264; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376, 384, 21 S. W. 663. But while this is the general rule, the court will depart from it, and remand for a new trial, when justice seems to require it in the special case. *Settle v. Marlow*, 12 Lea, 474. The same rules govern, even when a special finding of facts and law is filed by the circuit judge, no request under the statute for such special finding having been made of him. *Stephens v. Mason*, 99 Tenn. 512, 42 S. W. 143. Of course, it is to be understood that in this class of cases those tried by the judge without the intervention of a jury, and without a legal request for written findings, his judgment, and his voluntary findings if he file any, are to be treated like the verdict of a jury when attacked on the ground that there is no evidence to support such judgment or

the findings, as the case may be. In such a case the court will refer to the bill of exceptions to ascertain whether there is any evidence to sustain the judgment. Upon discovering such evidence, no other objection being made, or, if made, not being found tenable, the court will affirm. If upon such reference to the bill of exceptions no evidence is found to support the findings or judgment, or if they were based upon incompetent evidence duly objected to, or rendered after excluding competent evidence, or if they are found fatally erroneous upon other grounds, this court will then, upon a consideration of the testimony at large, render such judgment as the circuit judge should have rendered without a remand, except in the class of cases referred to in *Settle v. Marlow*, supra. But in the class of cases we now have before us the court can look to the bill of exceptions only for the purpose of ascertaining whether there is any evidence to support the findings, or any part of them, when attacked on the ground that there is no evidence to support them; or for the purpose of passing upon questions of evidence; or for the purpose of ascertaining whether such findings contain a substantial response to the contentions of the parties as they appear in the evidence considered in relation to the pleadings; or whether such findings, when considered in the relation just indicated, are intelligible, and constitute a substantial response to the request for findings in accordance with the statute. If such examination shall result favorably to the technical frame and substance of the findings, then the court, confining itself wholly to the facts contained in the findings, will determine the question of law arising upon those facts, and either affirm, modify, or reverse the judgment of the court below. But if, on objection made, it is discovered that there is no evidence to support the findings, or that some substantial part of them is open to this objection, or if a substantial error is made as to the admission or rejection of testimony, or if it be ascertained that the findings do not contain a substantial response to the request, or that they are unintelligible, or so framed that no judgment can be safely pronounced thereon one way or the other, the court will reverse and remand for a new trial. This is the practice in the special class of cases we have before us. *McHale v. Wellman*, 101 Tenn. 150, 153, 46 S. W. 448. And see *Stanley v. Donoho*, 16 Lea. 495.

In this case, counsel for each side have discussed the matters arising without much reference to the findings of the circuit judge, and have based their respective arguments upon facts found in the bill of exceptions, but not contained in his honor's findings. This is not the proper practice. This court cannot look to the bill of exceptions in this kind of case except for the purpose already indicated; nor can the counsel. It is the duty of counsel in the court below to call the

court's attention to any material facts omitted, and ask to have them incorporated. If this be not done, or if, for any reason, the case be allowed to come to this court with findings so framed as that judgment cannot be safely pronounced thereon in favor of either party, all we can do is to reverse, and remand for a new trial. Such must be the judgment in the present case. Therefore, the petition for rehearing having been granted, the judgment heretofore rendered in this court affirming the judgment of the court below will be set aside, and the judgment of that court will be reversed, and the cause remanded for a new trial.

DARLINGTON et al. v. MISSOURI PAC. RY. CO.*

(Court of Appeals at St. Louis, Mo. Dec. 9, 1902.)

RAILROADS—CARRIAGE OF FREIGHT—DEMURRAGE CHARGES—RIGHT TO MAKE LIEN—DELIVERY OF FREIGHT—WHAT CONSTITUTES CONVERSION—SWITCH TRACKS ON PRIVATE LAND—TITLE OF COMPANY—LICENSE.

1. Where a switch connecting with the side track of a railroad company was put in on private land for the convenience of the tenants of the owner, but also for the profit of the railroad company, and partly at its expense, the railroad company had a license, coupled with an interest in the switch, and as such licensee had the right to move its engines thereon to set in or take out cars consigned to the tenants.

2. Such license could not be arbitrarily or suddenly revoked.

3. A tenant, who leased part of the land with the switch on it, and with knowledge of the uses made of it by the railroad company, had no power to revoke the license, or to interfere with the company's use of the switch, so long as the license was not abused.

4. Action of a railroad company in switching cars containing lumber onto a switch on private land, of which the consignee was tenant, for the purpose of allowing them to be unloaded, did not operate to deprive it of dominion over the cars or over the lumber remaining therein, and did not preclude it from repossessing itself of the cars and lumber for the purpose of enforcing a lien on the lumber.

5. A railroad company has the right to make a rule requiring its consignees to unload their freight from its cars within a reasonable time, or pay a reasonable sum per day as a demurrage charge for detention of the cars beyond such time.

6. A railroad company may have a lien for demurrage charges, even without express stipulation therefor in the contract of shipment.

7. Where a bill of lading required the consignee to unload the shipment from the company's cars within 48 hours, or pay a demurrage charge, but the right of the company to remove the cars and warehouse the shipment was not complete until 72 hours had expired, and the company removed a car not fully unloaded after the 48 hours had expired, but within the 72-hour period, it was guilty of conversion.

8. A consignee of freight was not excused from noncompliance with his duty to unload it from the cars within the time stipulated in the bill of lading by reason of the extreme condition of the weather.

*Rehearing denied March 3, 1903.

¶ 6. See Carriers, vol. 9, Cent. Dig. §§ 431, 895.

Appeal from St. Louis circuit court; Warwick Hough, Judge.

Action for conversion by Evans R. Darlington and others against the Missouri Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The petition is as follows: "The plaintiffs, Evans R. Darlington, James G. Berryhill, and Samuel L. Berryhill, state that they are partners, and as such are engaged in the lumber business under the firm name and style of E. R. Darlington & Co.; that the defendant, the Missouri Pacific Railway Company, is a railroad company organized and incorporated and operating a railroad under the laws of the state of Missouri. Complaining of said defendant, the said plaintiffs, for first cause of action, aver that heretofore, on or about December 16, 1901, at the city of St. Louis, aforesaid, the said defendant, with force and arms, without leave, wrongfully seized, took, and carried away certain of the goods and chattels of plaintiffs, and then in the possession and control of plaintiffs, to wit, 1,600 feet of 16-foot white pine lumber of the value of \$40, 13,277 feet of white pine boards of the value of \$338.56, 561 feet clear fir flooring of the value of \$28.05, 28 feet clear fir flooring of the value of \$1.19, 4,888 feet clear fir flooring of the value of \$195.52,—being of a total value of \$603.32,—and converted the same to its own use, and other wrongs to the plaintiffs then and there did, against the peace of the state of Missouri, and to the actual damage of plaintiffs in the sum of \$700; that said taking was wrongful, by force, malicious, and oppressive. Wherefore plaintiffs demand judgment for seven hundred dollars, the actual damage as aforesaid, and also for three thousand dollars as punitive damages, together with costs." The answer was a general denial. The evidence is that the Merchants' & Manufacturers' Railroad Warehouse Company, a corporation, is the owner in fee of a strip of ground, about 500 feet north of Chouteau avenue, in the city of St. Louis, and abutting the Missouri Pacific Railway Company's right of way, and running parallel with it for a distance of about 2,000 feet. In the summer of 1891 an arrangement was agreed to between the Merchants' & Manufacturers' Railroad Warehouse Company and the Missouri Pacific Railway Company, whereby the railroad company built a switch track on and along the strip of land where it abuts the railroad right of way, and connected it at each end with its own side track. The railroad company bore the expense of constructing the switch and the Merchants' & Manufacturers' Railroad Warehouse Company paid for the rails and other material used in the construction of so much of it as is located on its land. In February, 1896, the Merchants' & Manufacturers' Railroad Warehouse Company leased to the plaintiffs for a term of six years 180 feet of the larger strip, with the right to use the entire switch on its premises with other tenants of the lessor.

Plaintiffs are wholesale and retail dealers in lumber. Their lumber is received in car-load lots, and they generally had their cars consigned and billed to the defendant, who, on their arrival in the city of St. Louis, would take charge of the cars so consigned, and place them on the switch in plaintiffs' yards. On December 12, 1901, defendant received from its connections two car loads of dressed lumber for delivery to plaintiffs,—one from Portland, Or.; the other from Chippewa Falls, Wis. On the same day, at about 11 o'clock a. m., the defendant placed these cars on the switch in the Darlington Company's yards to be unloaded by plaintiffs. Plaintiffs paid the freight charges, and unloaded a part of the lumber. About noon on December 16, 1901, defendant's demurrage clerk, finding the two cars partially unloaded, presented plaintiffs a bill for \$2 demurrage charges on the cars. Darlington, one of the plaintiffs, to whom the bill was presented, called up the chief clerk by telephone in the office of the railroad company, with whom he said the plaintiffs usually did business, and had a telephonic conversation with him about the demurrage charges. His evidence of this conversation is, in substance, as follows: "I told him that the lumber in the cars was our property; that we had paid for it; that we had paid their charges, and that we owed them nothing on it; and that I would not pay these car service charges, because they were unjust, as we had not time to unload them, owing to the bad weather. Well, we had some talk back and forth. He said that he would have to order the cars out unless I paid the charges. 'Well,' I said, as a compromise, 'I will do this: I will pay these charges if you will promise to refund them. You have a car-service rule which permits the refunding of car-service charges on account of bad weather;' and, I said: 'We certainly had bad weather. There is no question about that; and if you will just say that you will refund these charges, I will pay the young man the two dollars, and we will let it go and you can make a refund later on, and we will unload the cars.' He said: 'No, I won't promise that. You will have to pay the two dollars, or we will take the cars out.' Well, I told him that he had no right to take the cars out. It was my property; it was in my possession; it was on my property; and he had no right to come in there and take them out without my consent." Witness then testified that the next thing he knew relating to the transaction was that about noon one of the switch engines of the Missouri Pacific Railway Company, with a crew consisting of an engineer, fireman, and two switchmen, came onto plaintiffs' switch, backed down to the two cars, and hauled them off, they containing the lumber described in the petition belonging to plaintiffs, and hauled it away, and that he had not seen the lumber since. The engine came in over the Darlington switch and track, and into the Darlington yard. Witness went down and told the switch crew

that they must not take the cars; that they had no right to do so, and he did not want them taken; that he wanted to finish unloading them. At first the man in charge of the crew said he was coming in there to pull some cars down below. He would not tell witness whether or not he was going to take the cars with the Darlington lumber. Could hardly get any answer from him as to what he was going to do, although witness insisted on knowing. Witness stood on the track, protesting against the entry or removal of the cars, but the engine kept backing down on him, and it got so close to him that he had to jump, or be run over. He jumped. When he got off the track, the engine kept on down to where the cars were, coupled on to them, pushed them out and away. All this occurred inside of the Darlington lot, on the plaintiffs' switch, about noon, Monday, December 16, 1901.

It is conceded that defendant and their railroad associates have car-service rules, one of which is, when freight in car-load lots is to be unloaded by the owner or consignee, he is allowed 48 hours, excluding Sundays, in which to unload the car, after it is set in place for that purpose; that after the lapse of 48 hours from the time the car is placed for unloading the railroad company charges as demurrage \$1 per day per car for each day the car remains unloaded; and that plaintiffs were familiar with the rule. On the back of the bill of lading for the Chippewa Falls shipment was the following: "All car-load freight shall be subject to a minimum charge for trackage and rental of \$1.00 per car for each 24 hours detention, or fractional part thereof, after the expiration of 48 hours from its arrival at destination; and after the expiration of 72 hours this company shall be at liberty to unload and store the freight in a warehouse of its own, or unload and deliver to a warehouseman. And the consignor or consignee shall pay the C., M. & St. P. Ry. Company the expense of unloading and warehousing same, and for such expense this company shall have a lien upon the freight in addition to its own freight charges and back charges." This car was consigned to plaintiffs. On the Portland bill of lading is the following: "It is expressly understood and agreed that shipments of car load or less than car-load freight, requiring the entire use of a car, will be subject to demurrage, in accordance with the current rules and regulations of the company delivering the said goods at points of destination, in case such car is detained over 48 hours in loading or unloading." This car was consigned to defendant. Plaintiffs never saw either of these bills until offered in evidence by the defendant. Plaintiffs offered evidence tending to show that from the Friday morning the cars were placed until Saturday noon it was raining continuously, and was so extremely cold that their men could not work and unload the lumber, and

haul it to their sheds. There was countervailing evidence to the effect that it did not rain, and that plaintiffs' men were at work unloading other cars, which had come in before the two in question. At the close of the evidence the defendant offered an instruction in the nature of a demurrer to the evidence, which the court refused. Defendant then offered six other instructions in line with the following: "The court instructs the jury that if you believe from the evidence that prior to the arrival of the lumber in controversy at St. Louis defendant had adopted a rule that consignees of car-load freight would be allowed forty-eight hours' free time after setting of the car on the switch for unloading, and for every twenty-four hours thereafter that the car was detained for unloading a demurrage or storage charge of \$1.00 per car would be made, and that said rule was known to plaintiffs before the arrival of said lumber at St. Louis, and that defendant placed the cars containing the lumber in controversy on the switch track in plaintiffs' yard in the city of St. Louis for unloading, and that plaintiffs neglected or refused to unload said lumber before 7 a. m. of December 16, 1901, then the defendant had the right to charge plaintiffs \$1.00 per car for each and every 24 hours that said cars remained unloaded on the track in plaintiffs' yard after that time; and if you believe from the evidence that plaintiffs refused to pay defendant, on demand, any demurrage charges that may have accrued on said cars, as aforesaid, then defendant had the right to remove the cars containing said lumber from said switch track, and refuse to deliver said lumber to plaintiffs until they paid the demurrage charges accrued thereon, as aforesaid, and your verdict will be for defendant,"—all of which were refused. For the plaintiffs the court gave the following instructions: "(1) The court instructs the jury that the gist of this action is the unlawful, wrongful, and forcible taking and carrying away of the property of the plaintiffs, namely, the lumber described in the petition, from the possession of the plaintiffs by the defendant. If, therefore, the jury find that on or about December 16, 1901, the plaintiffs were the owners and in possession of the lumber described in the petition, and that the defendant railroad company, by its agents and employees, at the city of St. Louis, unlawfully and wrongfully interfered with said plaintiffs' possession by forcibly seizing, taking, and carrying away said lumber without lawful right, and against the will of plaintiffs, then the jury should find the issues for the plaintiffs. (2) If the jury find from the evidence that the defendant placed the two cars containing the lumber on that portion of the side track or switch which is on plaintiffs' yard or premises in this city, in position for and for the purpose of enabling the plaintiffs to unload said lumber from the cars, this constituted a delivery of the lumber in said

cars to plaintiffs; and if you further find that prior to or at the time of such delivery the plaintiffs had paid defendant the freight and all other charges due on said lumber up to the time of so placing said cars, then the court instructs you that defendant had no right or lawful authority, without the leave of plaintiffs and against their will, to take possession of the cars containing said lumber, and haul them away from the premises of plaintiffs, even if charges for 'car service' or 'demurrage,' as it is sometimes called, had accrued after said delivery by reason of the detention of the cars with the lumber longer than 48 hours after such delivery, or by reason of the failure of the plaintiffs to complete the unloading of all the lumber from said cars within 48 hours after such delivery, and to pay defendants for the 'car service' or 'demurrage' claimed for detention of said cars after said 48 hours had expired. (3) If the jury find the issues for the plaintiffs, the court instructs you that you may assess their damages at such sum, not exceeding \$700, as you may find from the evidence was the reasonable value of the lumber taken by defendant from plaintiffs at this city on the date it was so taken, and you may also include interest at 6 per cent. per annum from that to this date on the value of the lumber; but the amount, including interest, must not exceed \$700. (4) If you also find from the evidence that such lumber was taken maliciously (that is, wantonly, wrongfully, intentionally, and willfully), or if the act was done oppressively (that is, by the exercise of superior force), and for the purpose of compelling payment of the demands of defendant, and because plaintiffs refused to pay the car service charges, then you are at liberty to assess, in addition to the actual damage as aforesaid, if any, such an amount as, in your judgment, is a reasonable penalty or punishment for the wrong so done, not, however, exceeding \$3,000. But you are not authorized to give these punitive damages unless you find from the evidence not only that defendant took the lumber, but that in taking it it acted maliciously,—that is, wantonly, intentionally, wrongfully, and willfully; or that it acted oppressively, as above defined." No instructions were given for the defendant. The jury returned a verdict for plaintiffs, assessing their actual damage at \$700, and the punitive damages at \$1,000. A timely motion for rehearing was filed, pending which defendant entered a remittitur of \$500 of the punitive damages, whereupon the motion for new trial was overruled. Defendant appealed.

Clardy & Herbel, for appellant. Geo. D. Reynolds, for respondents.

BLAND, P. J. (after stating the facts). 1. Counsel for both parties have devoted a good deal of time to the discussion of the rights of the parties to the possession of the cars af-

ter they had been placed in the Darlington yards, and in respect to the right of the defendant to enter upon the switch with its engines to remove the cars without plaintiffs' consent. The contention of plaintiffs is that they were in the possession of both the switch and of the cars, and that the switch was their property, and that defendant had no right in or upon it except by the grace of plaintiffs. To the contrary, the defendant contends that it had an interest in the switch, or at least a license to move its engines upon it, and that it never parted with its possession and control of the cars. In the light of the circumstances surrounding the construction of the switch, it does not seem to us that there should be any serious contention about the rights of the parties in respect thereto. The switch was put in for the profit and convenience of the tenants of the Merchants' & Manufacturers' Railroad Warehouse Company on its land and mostly at its expense, and also for the profit of the defendant railroad company and partly at its expense, so that for the purpose of taking in and pulling out cars consigned to the tenant of the Merchants' & Manufacturers' Railroad Warehouse Company defendant had a license, coupled with an interest in all that part of the switch on the private land of the Merchants' & Manufacturers' Railroad Warehouse Company, and as such licensee had the unquestionable right to move its engines thereon to set in or take cars off the track consigned to the lessee of the Merchants' & Manufacturers' Railroad Warehouse Company. Such a privilege cannot be arbitrarily or suddenly revoked. *Baker v. Railroad Co.*, 57 Mo., loc. cit. 272; *Dickson v. Railroad Co.* (Mo. Sup.) 67 S. W. 642; *Chiles v. Wallace*, 83 Mo. 85; *Gibson v. Association* (St. L.) 33 Mo. App. 165; *McAllister v. Walker* (St. L.) 69 Mo. App. 496; *House v. Montgomery* (K. C.) 19 Mo. App. 170; *Cook v. Fridgen*, 45 Ga. 331, 12 Am. Rep. 582; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Rislen v. Brown*, 73 Tex. 135, 10 S. W. 661; *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. 482; *Railroad Co. v. Nye*, 113 Ind. 223, 15 N. E. 261; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10. The plaintiffs leased the land with the switch upon it, and with knowledge of the uses made of it by the defendant; and it was not within their power, as lessees of part of the land, to revoke the license, or to interfere with the use of the switch by the defendant company, so long as it did not abuse its license.

2. Plaintiffs claim, and the circuit court so held on the trial, that the plaintiffs were in the possession and had control of the lumber at the time the cars were moved off by defendant. We do not think this claim is exactly correct. The cars were switched on the track in the plaintiffs' yard for the purpose of being unloaded. To accomplish this purpose, the plaintiffs were, in a sense, in possession of both the cars and their con-

tents, but the defendant did not lose its dominion over the cars or the lumber so long as it remained in the cars. It retained the right to repossess itself of the cars after they were unloaded, and to repossess itself of both cars and the lumber remaining in them for the purpose of enforcing any carriers' lien it may have had on the lumber existing when the cars were placed, or any common-law lien acquired after they were placed in plaintiffs' yards. After the cars were placed, plaintiffs had a right to the use of them for a reasonable time for the purpose of unloading. Forty-eight hours, according to defendant's car-service rules, was allowed as a reasonable time in which to unload. The rule further provides that, in case the car should be retained by plaintiffs for the purpose of unloading beyond 48 hours, plaintiffs should pay as demurrage \$1 per day per car for the time they were detained over the 48 hours of free time. It is conceded that plaintiffs had knowledge of the existence and terms of this rule, and that they only objected to the payment of the demurrage charges on account of the weather, and it appears from the evidence of Darlington that the rule had theretofore been recognized and acted upon by the plaintiffs; so that, leaving out of consideration the stipulations in the bills of lading, there is abundant evidence that plaintiffs impliedly agreed to be bound by these car-service rules. But, independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute. *Hawgood v. 1,310 Tons of Coal* (D. C.) 21 Fed. 681; *Huntly v. Dows*, 55 Barb. 310; *Miller v. Mansfield*, 112 Mass. 260; *Miller v. Railroad Co.*, 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170; *Kentucky Wagon Mfg. Co. v. Ohio & M. Ry. Co.*, 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326; *Owen v. Railway Co.*, 83 Mo. 464; *McGee v. Railway Co.* (K. C.) 71 Mo. App. 314; *Railroad Co. v. Adams* (Va.) 18 S. E., loc. cit. 675, 22 L. R. A. 530, 44 Am. St. Rep. 916. In this state demurrage charges as to shipments of grain in car-load lots are allowed by statute. Section 1115, Rev. St. 1899. The right to make the charge, we think, is established by the modern authorities. The Chippewa Falls bill of lading expressly stipulated for a lien for demurrage charges; the Oregon one did not. The question, then, is, did defendant have a lien on the lumber remaining in the car from Oregon when it moved it? The English rule is that no lien exists for demurrage charges under the maritime law unless it is expressly provided by contract (*Birley v. Gladstone*, 8 Maule & S. 205), and some of the American courts have followed the English doctrine. *Gage v. Morse*, 12 Allen, 410, 90 Am. Dec. 155; *Railway Co. v. Jenkins*, 103 Ill., loc. cit. 598; *Railway Co. v. Holden*, 73 Ill. App.

582; *Burlington & M. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. 451; *Crommellin v. Railroad Co.*, 4 Keyes, 90. The authority of the case of *Gage v. Morse* is overturned by the later Massachusetts case of *Miller v. Mansfield*, supra. The Nebraska case followed the case of *Railroad Co. v. Jenkins*, 103 Ill. 598, without comment. Coming to the recent cases, we find the following decisions hold that the right of lien exists independent of contract: *McGee v. Railway Co.*, *Miller v. Railroad Co.*, *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.*, *Miller v. Mansfield*, supra, and 4 Elliott, R. R. § 156. The railroad commissions of some of the states have recognized the rule and the right to enforce demurrage charges,—the Kansas commission in the case of *Davis v. Missouri, K. & T. R. Co.*, Commissioners' Reports of Kansas (1891) p. 21; the Iowa commission, in *Rothschild v. Railroad*, Commissioners' Reports of Iowa (1887) p. 783; the Missouri commission, in the case of *E. R. Darlington & Co. v. Central Car Ass'n of St. Louis*, May 16, 1901. The following is quoted from the opinion of Judge Toney, as chancellor, before whom the *Kentucky Wagon Mfg. Co.* Case was first heard, as presenting a sound and logical demonstration of the necessity and reasonableness of the rule: "Without the right of making and enforcing reasonable rules and regulations as to the delivery of freight and the detention of their cars by consignees, railroads would be at the mercy of individual shippers. In order to fulfill the chief end of their creation, viz., the service of the public as common carriers, they should be left free to establish general and reasonable rules and regulations governing the delivery of freight and charges for the unnecessary or unreasonable detention of their cars by consignees. It is a matter of the highest public interest that they should be accorded this right and power. Individual convenience should be subordinate to the public good, which demands expedition, regularity, uniformity, safety, and facility in the movement of the freight of the country, which must, of necessity, be materially obstructed if individual consignees are allowed, without let or hindrance, to convert freight cars on their arrival with cargoes of freight upon their side tracks into warehouses for the storage of freight at the suggestion of their convenience or interest. As we have seen, railroads are a public necessity, the general welfare of the country being dependent upon their untrammelled interconnection, and untrammelled liberty to accomplish the legitimate public purposes of their organization. Promptness, regularity, and safety in the transportation of passengers and freight are essential requisites to the successful administration of the railroad common carrier's system of the country. These characteristics or qualities are demanded by the public interest. Regularity and system in the movement of their cars, in the handling

of freight, both in receiving, transporting, and delivering it, so that the public can know what to expect and what it can depend upon, are demanded of railroads by law and by public policy. But how can this be expected of railroads if their rolling stock may be tied up and waterlogged upon the private side tracks and switches of private consignees to serve as storerooms and warehouses for their freight, without any power on the part of the railroad companies to enforce reasonable rules against such consignees, requiring diligence in the unloading and redelivery of their cars? These public carriers rely upon the rolling stock to meet the demands of the volume of business which they have to carry. How can they insure to consignees and shippers in general and to the public that facility of commercial interchange which they are required to afford both by charters and by public law? How can they furnish cars and transportation to shippers in general, and discharge the volume of traffic business of their respective systems, if their rolling stock can be locked up in the private yards of special consignees? How can such carriers know with any reasonable degree of certainty whether their rolling stock at any given time is or will be fully up to the demands of the business along their lines? Promptness, uniformity, and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike, with reference to the reception, transportation, and delivery of freight. These qualities in railroad administration it requires no philosopher to see are indispensable to the proper accommodation and service of the interests of the public; and it should be the leading principle of action with all railroad managers to adopt and impartially enforce such rules and regulations as will most effectually secure these desired ends for the public." 50 Am. & Eng. Ry. Cas. 90. It is conceded by the parties that 48 hours is a reasonable time in which to unload a car, and that \$1 per car per day is a reasonable demurrage charge for their detention after 48 hours.

We think the right to make the rule and to enforce it is rightly thoroughly established by the modern American cases, and that the defendant had a lien upon the lumber which had not been unloaded from the Oregon car. *Barker v. Brown*, 138 Mass. 340; *Steinman v. Wilkins*, 42 Am. Dec. 254; *Schmidt v. Blood*, 24 Am. Dec. 143. The bill of lading for the Oregon car expressly provided that 48 hours only should be allowed for unloading. For the Chippewa Falls car the time stipulated for unloading was 48 hours, but the right to remove the car and warehouse the lumber was restricted to 72 hours. The bills of lading were contracts, not only for the shipment of the lumber, but they pre-

scribed the duties of the plaintiffs after they reached their destination. *Gashweiler v. Railroad Co.*, 83 Mo. 112, 53 Am. Rep. 558. Under the contract the time given plaintiff to unload the Chippewa Falls car had not expired when defendant took the lumber away from plaintiffs' yard. The taking of this lumber, therefore, was unjustifiable. In respect to the other car, the time for unloading had expired, and the defendant, under the evidence, had a right to take the lumber into its possession, and hold it at the expense of the plaintiffs for the payment of its demurrage charge, unless plaintiffs were excused for noncompliance with its contract to unload in 48 hours on account of an extreme condition of the weather. That this excuse is unavailing, we think is well settled by the authorities. *Hutchison* states the rule as follows: "If the carrier has agreed to carry the goods to their destination, and there deliver them within the prescribed time, he will be held to a strict performance of his contract, and no temporary obstruction, or even absolute impossibility, will be a defense for failure to comply with the agreement." *Hutchison*, Cont. § 317. In *Harrison v. Railroad Co.*, 74 Mo., loc. cit. 371, 41 Am. Rep. 318, the supreme court, speaking through Norton, J., said: "Where a party, by contract, agrees to do a prescribed thing in a prescribed time, he is liable for nonperformance of the contract, notwithstanding the fact that his nonfulfillment of the contract was occasioned by inevitable and unavoidable accident." To the same effect is *Gelvin v. Railroad Co.* (K. C.) 21 Mo. App. 273; *Miller v. Railroad Co.* (K. C.) 62 Mo. App. 252; *Waters v. Railroad Co.* (N. C.) 14 S. E. 802, 16 L. R. A. 834; *Atkinson v. Ritchie*, 10 East, 530; *Bank v. Burt*, 87 Mass. 113; *Nelson v. Odiorne*, 45 N. Y. 489; *Cutliff v. McAnally*, 88 Ala. 507, 7 South. 331; *Cassady v. Clarke*, 7 Ark. 123; *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. 256. There are numerous other cases in support of this doctrine. The cases which seemingly announce a contrary doctrine will be found to be cases involving obligations where the thing to be done is one of duty, and not of private contract; as in *Ballentine v. Railroad Co.*, 40 Mo. 491, 93 Am. Dec. 815, where it was held a carrier was excused for failing to deliver goods in a reasonable time on account of delays occasioned by an extraordinary snowstorm. See, also, *Davis v. Railroad Co.*, 89 Mo. 340, 1 S. W. 327; *Cunningham v. Railroad Co.* (K. C.) 79 Mo. App. 524; *Whittemore v. Sills* (K. C.) 76 Mo. App. 248. Also in cases where the contract is on the basis of the continued existence of a given person or thing. In the latter class the condition is implied that, if the performance becomes impossible on account of the sickness, or of the perishing of the person or thing, the performance will be excused; as in *Walker v. Tucker*, 70 Ill. 527, where the exhaustion of a coal mine was held to excuse further per-

formance of a contract of lease; as in *Hall v. School Dist.* (K. C.) 24 Mo. App. 213, where the burning of the schoolhouse was held to relieve the school district from its contract of employing the teacher; as in *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388, where sickness of the person employed was held to relieve him from a performance of his contract of employment; as in *Lord v. Wheeler*, 67 Mass. 282, where the contract was to repair a house, and the house was destroyed by fire; as in *Butterfield v. Byron* (Mass.) 27 N. E. 667, 12 L. R. A. 572, 25 Am. St. Rep. 654, where a contract to furnish part only of the labor and material for the erection of a building was held as discharged on the destruction of the building by fire before it was completed; and as in *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415, where it was held that the destruction of personal property before title had passed, after the contract for the sale of the property, relieved the vendor from liability for failure to deliver. Our conclusion is that under the pleadings and the evidence the defendant was not guilty of trespass, that it had a right to take possession of the car shipped from Oregon and to store the lumber remaining in the car until its demurrage charges were paid, but that it had no right to take the car and lumber therein shipped from Chippewa Falls, the time agreed upon in which it might be removed not having expired, and that its taking and retention of the lumber was a conversion thereof to its own use, and that plaintiffs, having paid the freight, are entitled to recover the market value of that lumber at St. Louis on the day it was taken by the defendant.

The judgment is reversed and the cause remanded.

GOODE, J., concurs. BARCLAY, J., concurs in result.

OPP v. KOHLER.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

APPEAL—ABSTRACT—FILING OF MOTION FOR NEW TRIAL—AFFIRMANCE.

1. Where appellant's abstract fails to show the filing of a motion for a new trial, it is defective, and the judgment will be affirmed.

Appeal from circuit court, Cass county; W. L. Jarrott, Judge.

Action by John Opp against John Kohler. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George Bird and J. R. Nicholson, for appellant. J. S. Brierly, for respondent.

PER CURIAM. This is an action which was brought before a justice of the peace to recover damages for the wrongful conversion by defendant of two helpers, the property of the plaintiff. In the circuit court

the plaintiff had judgment, and the defendant appealed.

The plaintiff in his brief and by a motion has called in question the sufficiency of the defendant's abstract of the record. The defendant has filed an amended abstract of the record proper, showing that the bill of exceptions was filed, but there are other fatal defects in the abstract which we cannot overlook. The condition of the defendant's abstract after the filing of the amendment is precisely like that in *Kirk v. Kane* (Mo. App.) 71 S. W. 463, and on the strength of the rulings made in that case we must affirm the judgment in this.

GREEN v. MEYERS et al.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

JUDGMENT—RECORD—NOTICE—IDEM SONANS—SUFFICIENCY OF ENTRY.

1. A purchaser of property from Eleanor G. Sibert is charged with notice of a judgment entered against his vendor, which appears in the judgment abstract as entered against E. G. Seibert, the names being idem sonans and practically identical.

2. Although indices of a judgment abstract are kept on the vowel system, and names beginning with "SI" are found several pages distant from those beginning with "Se," a purchaser of property from one whose name is Sibert is charged with notice that the name may be spelled Seibert, and must search the record under both indices.

3. The rule of idem sonans applies to records.

4. A judgment, abstracted by the initials of the Christian name, "E. G.," is sufficient to charge a purchaser of property from "Eleanor G." with notice of its existence.

5. Rev. St. 1899, § 3759, requires an abstract of judgment to state "fourth, the amount of the debt, damages and costs." Held, an omission to name the costs, or amount thereof, does not nullify a judgment otherwise properly entered.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Robert L. Green against Harry J. Meyers and another. From a judgment for plaintiff, defendants appeal. Reversed.

W. C. Hock, for appellants. L. C. Boyle and Sidney B. Wood, for respondent.

ELLISON, J. This is a petition for injunction to restrain the sale of plaintiff's real estate under an execution. Plaintiff had judgment in the trial court.

On April 23, 1901, the plaintiff purchased from Eleanor G. Sibert the property in question. Theretofore, on January 18, 1901, defendants recovered judgment against E. G. Seibert for \$108 and costs, and on that day took a transcript of the judgment to be filed with the clerk of the circuit court, where it was abstracted in the abstract of judgments as a judgment against E. G. Seibert. Personal service was had in the suit upon which the judgment was rendered. And E. G. Sei-

*Rehearing denied.

bert and Eleanor G. Sibert are one and the same person. Plaintiff had no actual notice of the judgment when he purchased the property, and the question is, does the record charge him with notice?

1. The names Seibert and Sibert are not only idem sonans—they not only sound the same in utterance—but they are, practically, the same name. Therefore, no matter which way it may be spelled by the party himself, or by the recording officer, it is notice. It is common knowledge that proper names are spelled in a variety of ways, and everybody is presumed to have such knowledge. Thus, "Reed," "Reid," and "Read," are different ways of spelling one name. Manifestly, the record of a judgment against "Reed" is notice to a subsequent purchaser from the same man signing the deed as "Reid." "Persons searching the judgment docket for liens ought to know the different forms in which the same name may be spelled, and to make their searches accordingly, unless, indeed, the spelling is so entirely unusual that a person cannot be expected to think of it." *Myers v. Fegaly*, 39 Pa. 434, 80 Am. Dec. 534.

2. The fact that the indices are kept on the vowel system, as in this case, and that names beginning with the letters "Si" are found several pages further on than those beginning with "Se," can make no difference, for, as before stated, one must be charged with notice that the name he seeks may be found spelled either way.

3. But it has been decided in Pennsylvania that, in so far as the initial capital letter is concerned, this must be understood to apply to the English language, for our records are kept in that language. So that the same name may be spelled in such different way in some other language as not to appear to be the same to the English mind, the difference producing a tendency to mislead. Thus, the letters Y and J are pronounced alike in the German language; yet a judgment entered against George P. Joest is not notice of a judgment against George P. Yoest. *Hell's Appeal*, 40 Pa. 453, 80 Am. Dec. 590. There is nothing to suggest to the ordinary English mind in looking through the letter Y, in the indices, that the name might be found under some other capital. If, however, in the spelling of a name, letters following the capital have the same sound in a foreign language that a different letter has in our language, and this sound is customarily given it in the community, then they will be held idem sonans, as Bupp for Bopp in *Myers v. Fegaly*, supra. As to these suggestions, it is not necessary that we make any decision, and we do not.

4. Some confusion has arisen in the authorities as to whether the rule as to idem sonans applies to records. It is said that the law of notice by record is addressed to the eye and not the ear, and that therefore the rule cannot apply to records. It is true

that record notice is principally a matter of sight and not sound. Yet it is, above all, a matter for the consideration of the mind, and if the record of a name spelled in one way should directly suggest to the ordinary mind that it is also commonly spelled another way, the searcher should be charged with whatever the record showed in some other spelling under the same capital letter. It is not necessary to decide here whether this would be carried out to the extent of holding that the searcher for information in the record should look under some other capital for another mode of finding the same name, as, for instance, "Kane" and "Cain," "Phelps" and "Felps," etc. But that the rule of idem sonans has been applied to records has been too often accepted by the supreme court of this state for us to question it. See *Simonsen v. Dolan*, 114 Mo. 179, 21 S. W. 510; *Whelen v. Weaver*, 93 Mo. 432, 6 S. W. 220; *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44; *Geer v. Lumber Co.*, 134 Mo. 93, 34 S. W. 1099, 56 Am. St. Rep. 489.

5. The further question to consider is whether the judgment, being abstracted by the initials of the Christian name, "E. G.," is sufficient notice to a purchaser from "Eleanor G." We think that it is. The record is for notice. And a person is chargeable with notice if he has knowledge of that which would put a reasonable man on further inquiry, and such inquiry, followed, would lead to knowledge of the thing sought for. One who is interested in examining a record index for the name of "Eleanor G." as the Christian name of a certain surname and finds prefixed to such surname the initials "E. G.," will certainly have his attention arrested, and it would surely beget in him enough concern, if he be acting in good faith, to inquire further. So we say that the initials "E. G." in the abstract of judgment in this case were sufficient notice of the full name "Eleanor G." See case *Jones' Estate*, 27 Pa. 336; *Fisher v. Bush*, 133 Ind. 321, 32 N. E. 924; *Pinney v. Russell*, 52 Minn. 447, 54 N. W. 484; *Bank v. Kuhnle*, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129. In so concluding we are not unaware of those cases wherein the supreme courts of this state and the United States and this court have decided that in the absence of matter of estoppel, an order of publication, or notice of sale by publication, against a person by the initial of his Christian name, was not sufficient. *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874; *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 234; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; *Mosely v. Rely*, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721; *Burge v. Burge* (not yet officially reported) 67 S. W. 703. But they are to be distinguished from cases of the kind now being considered. An order of publication is a mode of service as a requisite to jurisdiction. A person may

know that an action is pending against him, and he may know that notice by an order of publication was intended for him, yet such knowledge will not supply the place of a proper order published with substantial correctness. In other words, knowledge, in such cases, will not supply notice. But in the matter of record of judgments and deeds, the reverse is true—knowledge will supply notice. If there be knowledge there need not be notice. So that, if one has knowledge of a deed, it is not necessary that he have the notice which the law attaches to its being recorded.

6. The abstract of judgment as entered, while correctly stating the amount of the judgment, failed to state the amount of the costs, and this is given by plaintiff as a reason why there was no lien created. The statute (section 3759, Rev. St. 1899) requires that: " * * * An abstract of said judgment shall be entered in a book to be kept by the clerk of the circuit court having jurisdiction of civil cases within such city, and shall state in ruled columns: First, the names of the parties; second, the date; third, the nature of the judgment or decree; fourth, the amount of the debt, damages and costs." The abstract of judgment in question was the following: "Against whom: Selbert, E. G. In whose favor: Harry G. Meyers et al. Date of judgment: January 18th, 1901. Nature of judgment: general. No. of case: Trans. Amount of judgment: \$108.00. Where entered: M. 406-407." We are of the opinion that the omission to name the costs, or amount thereof, was not sufficient to nullify the judgment otherwise properly entered. And, defendant offering to remit the amount of the costs, the judgment will be reversed. All concur.

PARRY v. GORDON COFFEE & SPICE CO.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

APPEAL—RECORD—ABSTRACT—BILL OF EXCEPTIONS.

1. Where the abstract does not show any record of the filing of a motion for new trial or in arrest of judgment, the defect is not remedied by a recital of such filing in the bill of exceptions, and where no error appears on the record proper the judgment will be affirmed.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by W. R. Parry against the Gordon Coffee & Spice Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Ellis, Cook & Ellis, for appellant. Geo. F. Ballingal and C. S. Leonard, for respondent.

BROADDUS, J. Plaintiff having called attention to the defective abstract herein, the defendant filed a motion for leave to supply such

defect, accompanied with an amended abstract. The original failed to show that there had been any judgment in the case, or that any bill of exceptions, motion for new trial, or motion in arrest of judgment had been filed. The amended or supplemental abstract shows that a judgment had been rendered, and that a bill of exceptions had been filed, but it does not show any record of the filing of a motion for new trial or in arrest of judgment. The bill of exceptions recites such filing, but that is not sufficient, as such showing must be made from a record entry in the case. *Hill v. Combs*, 92 Mo. App. 242, and *Turney v. Ewins* (not yet officially reported) 71 S. W. 543; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Western Storage Co. v. Glasner*, 150 Mo. 426, 52 S. W. 237.

Finding no error in the record proper, the cause is affirmed. All concur.

KRAUS v. KRAUS.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

DIVORCE—SUPPORT OF INFANT CHILD—ISSUE AS TO PATERNITY—EVIDENCE.

1. Evidence in a proceeding to modify a decree requiring a divorced father to make monthly payments for the support of an infant child, consisting in part of the father's allegations in the cross-bill that the child was his, considered, and held to support a finding of the father's paternity, rather than to show the child a foundling, fraudulently imposed on him as his own.

Appeal from circuit court, Jackson county; James Gibson, Judge.

Suit for divorce by Lulu E. Kraus against Samuel Kraus. On petition to modify a decree requiring monthly payments from defendant for the support of an infant child. From a judgment refusing modification, defendant appeals. Affirmed.

Beardsley, Gregory & Kirshner, for appellant. S. S. Gunlack, for respondent.

BROADDUS, J. This suit is on a petition to modify a decree rendered by the circuit court on the 13th day of January, 1899, wherein the same adjudged the care and custody of an infant male child, then 22 months old, to the mother, Lulu E. Kraus, said child having been born during the marriage relations between plaintiff and defendant, and awarding that defendant pay to plaintiff on the 1st day of each month the sum of \$15, to be used for the care and keeping of said child, said payments to continue until it reaches the age of 6 years, if it should live so long and remain in the care and custody of plaintiff, at which time the court might make such further order affecting the maintenance of said child as shall then be deemed right. The grounds of the petition are that said child is neither the progeny of the plaintiff nor that of the de-

fendant, and that plaintiff fraudulently, at the time of its supposed birth, imposed said child upon defendant as that of her own, when in fact it was a foundling of unknown parentage. The defendant complied with the order of court, and made the monthly payments for the care and custody of the child until the month of March, 1901, at which time he claims he learned that it was not born of the wedlock between himself and the plaintiff, when he discontinued such payments. One of the principal witnesses was one Amelie Bethman, who stated that about the 2d day of March, 1897, she went to defendant's residence in Kansas City, Mo., at which time she saw the plaintiff and a Miss Ritter, a hired girl. Plaintiff then told her that she (plaintiff) must have a baby, as her husband thought she was pregnant; that she had padded herself with cotton to lead him to so believe; and that, as her husband did not treat her well, she thought, if she could get a child, he would treat her better. Said witness further testified that she looked about a week without finding a child to suit her; that, after having had a talk with Miss Ritter, the servant girl, she went to a certain house on East Twelfth street, to see about a baby there, and from thence she went to plaintiff, and told her how the baby looked, whereupon plaintiff gave her a cape and a shawl; that she then went and got the baby from the Twelfth street house, placed it under the cape, and carried it to the plaintiff, and put it in a bed; that plaintiff then went to bed; that the woman from whom she got the baby was a midwife; that at about 4 o'clock p. m. defendant came home, and saw the child; that she came regularly in the morning for nine days to look after the baby, during which time plaintiff was up and around the house; that the child appeared to be four or five days old when she first saw it; and that she, as a midwife, reported the birth of the child as that of plaintiff and defendant. One Emma Hayden, also a midwife, testified that she was the person who furnished a young baby to the said Bethman in 1897 from her house in Kansas City, at which place she was living. Mary Ritter, the house girl named, testified that she went at plaintiff's request to Mrs. Bethman for the purpose of obtaining an infant, and made an appointment for a meeting between them; that she was not present at such meeting, but that Mrs. Kraus told her that the Bethman woman had promised to bring her a baby soon; that at this time plaintiff began to make preparations to deceive her husband, and make him believe she was with child; that in about two weeks thereafter Mrs. Bethman brought the child in question; that after the child appeared, and at about 3 o'clock p. m. of the same day, at plaintiff's request, she went to a grocery store, and telephoned defendant to come home; that he came shortly thereafter, and asked witness how she got Mrs.

Bethman so quick, whereupon plaintiff had spoken up, and said, "I had Val stop a carriage which was passing along the street at the time, and I sent the carriage for her;" and that defendant spoke and acted in such a way that she was convinced that he firmly believed the child to be his own, and insisted on having the family physician come to see his wife that night, or the next morning. She further testified that Mrs. Kraus was up and around, assisting in the housework, with her night dress on, and when any one came she went to bed; that in the meantime she kept the doors locked and the blinds drawn. Dr. Rodgers, the family physician, was called, and testified that he visited plaintiff professionally on the 20th of January and in December preceding the date of the supposed birth of the child, but he had no recollection of such visits having any reference to plaintiff's pregnancy. Defendant testified that he was never at any time satisfied that the child was his progeny, and that prior to its supposed birth he had not noticed that his wife was pregnant; that he and plaintiff were divorced in 1899, and that in February, 1901, he married another woman, at about which time he began a search for evidence to confirm the suspicions he entertained that the child was a foundling, resulting in his locating the hired girl, Miss Ritter, and the two midwives. On the other hand, the plaintiff testified that she was the mother of the child, and the defendant its father, her testimony being confirmed by that of her mother and other women friends, as follows: Mrs. Margaret Frame, who had known plaintiff for many years, testified that in the fall of 1896 plaintiff was sick, throwing up her victuals, as women sometimes do in cases of pregnancy, and that she called her attention to her symptoms, and that plaintiff then admitted she was pregnant; that she constantly visited her, and that she was getting heavy and fleshy. Mariah Ellis testified that she had known Mrs. Kraus for 10 years or more; that in the fall of 1896 she noticed that plaintiff was sick at the stomach, at which time she accused her of being in a state of pregnancy; that she saw her off and on during the winter, and that her condition indicated pregnancy; that she saw her in January, 1897, and she was very large; that in seven or eight days thereafter she saw her again, when she was employed in making baby clothes. Mary Gowdy, plaintiff's mother, who was living at Cameron, Mo., testified that she saw plaintiff in September of 1896; that she stayed all night with her, and that they slept in the same bed; that plaintiff was sick at the time, and pregnant; that in October following she was at plaintiff's home again; and that she saw her again in January, while she was in a bathtub, and that she could see that she was pregnant. The pleadings in the original divorce suit were in evidence, and the answer and cross-bill of defendant al-

leged, amongst other things, that the child in controversy was born of the marriage relationship, and that plaintiff was not a suitable person to have it in care and custody, and defendant asked that it be turned over to him. We have given only a general outline of the testimony in the case, but, we think, sufficient for the purposes thereof. The court overruled defendant's application, and he has appealed to this court, insisting that the evidence clearly showed that the child was not the offspring of the plaintiff and defendant.

It is obvious that more or less perjury was committed at the trial, because the evidence of witnesses on both sides could not be true, and that of one or the other must, therefore, be false. The duty of passing upon the credibility of the witnesses was a matter for the trial court, especially of those for the plaintiff, who were present and testified in person. The positive testimony of the witnesses for the respective sides did not greatly preponderate either one way or the other, but the circumstances taken into consideration amply sustain the finding of the court. One of the most remarkable of these circumstances was that the defendant, living in the same house with his wife, could have been so easily imposed upon as he claims he was as to the paternity of the child. We can readily see that, where the husband is away from home for months previous to the supposed birth of a child to his wife, he might be deceived, and that a spurious infant, under such circumstances, might be imposed upon him as that of his own and of his wife. But it is incredible that where, as in this case, the husband is living in the same house with the wife, though not cohabiting with her, but seeing her daily for months prior and up to the very date when a child is presented to him as just then born, that he would not know it was an imposition. Common sense and experience are altogether at variance with such a conclusion. It is not to be believed for a moment that defendant, not having any previous knowledge of the condition of the wife, would not, as was shown here, have said or done something to indicate his surprise at the happening of such an unlooked-for event. Instead he seemed pleased at the result, and expressed no suspicion because of the unlooked-for arrival of the infant. And if the evidence of the women friends of the plaintiff, whose reputations seem to have been good, is to receive credence, the evidence of the hired girl, Ritter, cannot be true that plaintiff only began her preparations to deceive her husband a few days prior to the supposed birth of the child, for they state she was making baby clothes as early as August and September previous, at which times she appeared to be and showed the usual symptoms of pregnancy. But, aside from all this, there is one fact that must be controlling: The defendant, in his said cross-

bill and answer to the divorce suit, used the following language: "Defendant further says that there was born, during the time of the existence of the marriage relationship between plaintiff and defendant, to the plaintiff, a child, a boy now about twenty months old," of which he asks the care and custody. If he entertained the suspicions he now says he did, he should have made them known; but having failed to do so, he ought not to be heard at this late date to stultify himself by denying what he most solemnly asseverated in his said cross-bill. To stigmatize the mother, and to deprive the child of its birthright, are matters of the gravest importance, and should not be done, except upon clear and unequivocal testimony, and of such force as to leave no reasonable doubt.

For the reasons given, we affirm the finding and judgment of the trial court. All concur.

ARBUTHNOT v. BROOKFIELD LOAN & BUILDING ASS'N.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

BUILDING AND LOAN ASSOCIATION—LOAN—USURY—BY-LAW FIXING MINIMUM PREMIUM—EFFECT—ATTORNEY FOR ASSOCIATION—ADMISSIBILITY OF TESTIMONY—FINES FOR DELINQUENT PAYMENTS—WAIVER—RATE OF INTEREST ALLOWED.

1. Rev. St. 1889, § 2812, requires that loans made by building associations shall be at competitive bidding for premium for preference of loan in open meeting. *Held*, that a by-law fixing a minimum premium of 16 per cent.—the secretary announcing that no bid would be received for a less amount—vitiated a loan, and made it subject to the defense of usury, though the premium actually received as a consequence of competitive bidding over the minimum fixed was 25 per cent.

2. In a suit against a building association, by its attorney, to cancel a note and deed of trust executed by him to the association to secure a loan, the attorney is a competent witness as to matters relating to the loan.

3. Where fines for delinquent payments due to a building and loan association by its attorney on a loan made to him had never been charged against him, nor ever collected, on account of his relation to the association, they are properly disallowed in an action by the attorney against the association to cancel his note and deed of trust.

4. Rev. St. 1889, § 3709, provides that on proof of usury the same, in excess of "the legal rate of interest," shall be credited on the principal debt, and that costs shall be taxed against the guilty party, who shall in no case recover more than the amount due on the principal debt, "with legal interest," after deducting usurious payments, etc. *Held*, that the legal rate of interest contemplated was the statutory rate of 6 per cent. allowed in the absence of a contractual stipulation, and not the limit of 8 per cent., for which a valid stipulation might be made by the parties.

Appeal from circuit court, Linn county; Jno. P. Butler, Judge.

Suit by James A. Arbuthnot against the Brookfield Loan & Building Association.

*Rehearing denied.

From a judgment finding an insufficient amount due it, defendant appeals. Affirmed.

Chas. K. Hart, for appellant. Johnson & Bresnehen and Harry K. West, for respondent.

ELLISON, J. 1. This is an action in equity, whereby it is sought to cancel a note, and deed of trust to secure it, given by plaintiff to defendant for borrowed money. The plaintiff asked an accounting, and offered to pay to defendant whatever sum was found to be legally due. The trial court found that there was yet due defendant the sum of \$777.28, and entered a decree that upon the payment of that sum to defendant the note and deed of trust should be canceled. The defendant, claiming more than that sum, has appealed.

It appears that defendant is a building and loan association, and that in October, 1891, plaintiff executed his note to it for \$2,200; that, of this sum, defendant retained \$583 as a bonus or premium bid for the loan; that he agreed to pay 8 per cent. per annum in monthly installments, and also monthly dues of \$11 each month on his certificate of stock as a member of the defendant association. The loan in this case was made prior to 1895, when the building and loan statute was amended, and is therefore governed by the original statute of 1890. If the loan was made in accordance with the provisions of the latter statute, the defendant has been injured by the decree of the trial court. If, as charged by plaintiff, that statute was disregarded, then the exactions by defendant in the way of premium, interest, etc., were not authorized by law, and being, in the aggregate, much more than lawful interest, became usurious, and the decree of the trial court allowing credits for usurious payments should be affirmed. For we have ruled in a series of cases, beginning with *Brown v. Archer*, 62 Mo. App. 277, that, if a loan was made in the manner provided by statute, it was a valid loan, though the premium, interest, etc., aggregated more than a lawful rate of interest. But that if the statute was disregarded, it would not protect the loan from the charge of usury. The defendant had an established, fixed, minimum premium of 16 per cent. for preference of loans. The statute referred to (section 2812) required that the loan should be made at competitive bidding of premium for preference of loan in open meeting, and we have held that, where the association had a fixed minimum premium at which they made loans, that was an act in disregard of the statute, and avoided its protection. *Brown v. Archer*, supra; *Moore v. Building & L. Ass'n*, 74 Mo. App. 468; *Barnes v. Building & L. Ass'n*, 83 Mo. App. 466; *Clark v. Mo. Guar. Ass'n*, 85 Mo. App. 388; *Fry v. Savings Ass'n*, 88 Mo. App. 239; *Cover v. Building & L. Ass'n*, 98 Mo. App. 302.

2. That statement of the law is not questioned by defendant. But it seeks to distinguish this case from those just cited by the fact that, while there was a minimum premium of 16 per cent. for preference of loan fixed by one of its by-laws, yet in point of fact there was competitive bidding, in open meeting, at which the loan in controversy was bid off at 25½ per cent., and that, since the loan was bid off by competitive bids for a per cent. greater than the premium fixed by the by-law, the fact that there was a fixed premium worked no harm, and ought not to be allowed to affect the validity of the loan. The facts, as disclosed by the record, were these: Defendant had a by-law declaring that the premium to be received for preference of loans should not be less than 16 per cent.; that when this loan was let to plaintiff the secretary of the association, who cried the bids, opened the auction by announcing that no bid would be received under 16 per cent.; that thereupon bids were made over that rate until the loan was sold to plaintiff at 25½ per cent. In our view, that manner of letting the loan gave effect to the objectionable by-law, and was in the face of the statute directing free and open competition. The by-law was enforced by the opening declaration of the secretary. The bidders were compelled to bid more than 16 per cent., and, while there was competition above that rate, there could be none under that rate. It is manifest that there can be no fair and free letting of a loan, when a certain rate is determined upon beforehand, under which no loan would be made. The by-law arbitrarily fixed upon 16 per cent. as the rate, unless the association could get more. The by-law itself fixed a usurious rate, and, being fixed, it was not protected by the statute. When the association adopted the by-law, and enforced it through the act of its secretary, it was demanding usury in a manner unauthorized, and therefore it placed itself outside the protection of the statute; and the fact that it got more usury than it demanded in the by-law does not relieve the transaction of its illegality. We are cited to *Endlich on Building & Loan Associations*, sec. 411, but the citation does not support defendant. That author says that if the premium exacted was the result of fair competition, without reference to the illegal by-law, "no bid being refused because below the established minimum, nor raised for the sole purpose of covering it," the borrower has no cause of complaint. But in this case, while no bid was refused for the reason that it was below the rate named in the by-law, yet the bidders were advised at the outset that they would not be permitted to bid below that rate.

3. It seems that plaintiff was the attorney for defendant when the loan was made to him. For that reason defendant objected to his testifying in the case. The objection was not well taken. The plaintiff could not

be cut off from the right to testify to matters relating to the transactions concerning this loan. As to this loan, defendant and plaintiff were acting in antagonism. They were parties in opposing interests, and did not occupy the position of attorney and client.

4. Defendant claims that there were fines for delinquent payments owing by plaintiff which should have been charged against him by the court. The evidence disclosed that these had not been charged against him; that through a series of years no mention was made of fines, and none were ever collected, because of plaintiff being the attorney of the association. The mention of fines was a mere afterthought, and the court properly refused to consider them.

5. Defendant also claims that it has been improperly charged for interest on dues. A calculation shows this was not done, in point of fact.

6. The note in question drew, upon its face, 8 per cent. interest. The trial court, having found the transaction tainted with usury for the reasons herein set out, refused to allow defendant the 8 per cent.; but, instead, allowed 6 per cent. In this state 6 per cent. is the legal rate, but the rate may be made 8 per cent. by contract. And so the former is generally termed the "legal rate," and the latter the "contract rate." The statute (section 3709, Rev. St. 1899) is that "usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness." Defendant claimed at the argument that, as 8 per cent. may be legally contracted for, the statute, when using the expression "with legal interest," meant the interest stipulated in the contract, provided it was within the rate which could be legally contracted for. We think not. The statute, in using the expressions "legal rate of interest" and "with legal interest," meant the statutory rate which obtains in the absence of contract. Usury avoids the contract as to interest, and the statute disposes of it by giving the creditor the statutory rate, and applying the overplus towards the payment of the principal debt.

By inadvertence of court and counsel, in directing the calculation of what should be allowed the creditor in *Brown v. Archer*, 62 Mo. App. 277, the contract rate was used instead of the legal rate. The matter passed

unmentioned and unobserved, and the trial court did right in ignoring that calculation here.

The judgment will be affirmed. All concur.

THUDIUM v. BROOKFIELD LOAN & BUILDING CO.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

BUILDING AND LOAN ASSOCIATION—LOAN—USURY—BY-LAW FIXING MINIMUM PREMIUM—CONFORMITY TO STATUTE—NOTICE OF PAYMENT BEFORE DUE—NECESSITY.

1. Rev. St. 1899, § 2812, required the loans of building associations to be made by competitive bids in open meeting. Rev. St. 1899, § 1362, omits the requirement that bids shall be in open meeting, but still makes it necessary that loans be let to him who shall bid the highest premium. It also provides that any association may by its by-laws dispense with the offering of its money for bids, and, in lieu thereof, loan at such rate of interest and premium as may be provided by the by-laws; "said premium to be paid in gross installments." *Held*, that a by-law passed prior to Rev. St. 1899, § 1362, which provided a fixed minimum premium to be "paid in advance out of the money borrowed," was not in conformity to the statute and vitiated a loan made thereunder by its limitation on competitive bidding, so as to render it subject to the defense of usury.

2. Rev. St. 1899, § 1368, provides that a shareholder in a building association may repay a loan at any time by giving 30 days' written notice, upon such terms as may be prescribed in the by-laws, and, if there be no such by-laws, then, on settlement of his account, such borrower shall be charged with the full amount of the loan, together with dues, interest, premium, and fines, etc. *Held* that, where a loan was tainted with usury, notice under the statute was unnecessary before suing to cancel the note and deed of trust, though a balance was found due the association.

Appeal from circuit court, Linn county: John P. Butler, Judge.

Suit by John C. Thudium against the Brookfield Loan & Building Company. From a judgment awarding it less than it claimed, defendant appeals. Affirmed.

Chas. K. Hart, for appellant. T. M. Bresnahan and Harry K. West, for respondent.

ELLISON, J. This proceeding is by a bill in equity to cancel a note and deed of trust given by plaintiff to defendant for borrowed money. The trial court found there was yet due defendant on said loan the sum of \$336.78, and decreed that upon the payment of that sum the note and deed of trust should be canceled. The defendant, claiming that it was entitled to more than that sum, duly appealed.

Defendant is a building and loan association. Plaintiff executed his note and deed of trust to such association on November 2, 1896, for \$1,200, with 8 per cent. interest from date, payable in monthly installments. The loan, as shown by its date, was made

*Rehearing denied.

since the amendment of the building and loan statute enacted in 1895, and carried forward into the revision of 1899. The association had a by-law, adopted in 1886 and amended in 1889, wherein it was provided that at a competitive letting of loans no bid would be entertained of less than 16 per cent.; and, in answer to a question propounded by the court, the defendant's secretary stated that, if a bid was offered at less than 16 per cent., it was not considered. That rate of premium for preference of loan was an arbitrary basis to start from in the letting. The present loan was let at auction to defendant at a premium of 22½ per cent.

As before stated, this loan is governed by the building and loan statute, now known as article 10 of chapter 12 of the Statutes of 1899. By the provisions of section 2812 of the old statute of 1889, loans were to be made by competitive bids in open meeting called by the directors. The section governing the manner of making loans in the present statute is 1362, which omits the requirement that the bids shall be in open meeting called by the directors, but still makes it necessary that loans shall be let to him "who shall bid the highest premium," unless the association shall dispense with that mode by a by-law naming a fixed premium; thus authorizing two plans upon which loans can be made. If the loan in controversy is to be considered as having been made alone on the competitive bid plan, then, since defendant had a fixed minimum premium below which it would not permit bids, we must hold the loan to be usurious and unprotected by the statute, as decided by us at this sitting in *Arbuthnot* against this defendant, 72 S. W. 132.

But defendant insists that the loan is protected by that portion of section 1362 of the present statute which permits loans at a fixed premium. It is difficult to state our disposition of the case in a satisfactory way from the fact that the loan may be said to have been consummated under both divisions of the statute; that is to say, under that authorizing a letting to the highest bidder, and under that authorizing a fixed premium. It was, as we have said, let to the highest bidder, and there was a by-law naming a fixed premium, and the bidding was not allowed to begin at less than that rate. Whether the present statute can be construed so that these associations can have both plans in force at the same time, and make loans under either as they may elect, we need not decide. Neither need we decide whether, if it can have the two plans at the same time, it can, as was done in this instance, let the one loan under both plans; that is to say, fix a premium for preference, and then get as much more as borrowers will bid. It is not necessary to decide these questions, from the fact that, in our view, defendant had not taken the action required

by the present statute (section 1362) in order to exact a fixed premium before making the loan in controversy. The part of the section referred to reads, "that any association may, by its by-laws, dispense with the offering of its money for bids, and in lieu thereof loan or advance its money to members at such rate of interest or interests and premium as may be provided by the by-laws, such premium to be paid in gross installments." The by-law introduced in evidence was adopted by defendant several years prior to the enactment of that statute, and could not have been by its authority. But conceding (without deciding) that, if a prior by-law happens to be such as is required by a subsequent statute, it would become effective and binding when recognized and acted under by both parties in interest, yet the by-law in question will still not aid defendant's case, from the fact that it is not such by-law as is contemplated by the statute. The statute requires that the premium thus fixed shall be paid in gross installments, whereas the by-law requires that it "shall be paid in advance out of the money borrowed." This substantial difference between the by-law and the statute is sufficient to render it powerless to aid defendant's case without going into other parts which might be found to be out of harmony with the statute.

Defendant suggests that the decree should be reversed from the fact that plaintiff did not give 30 days' notice in writing of his intention to pay the loan before it was due by its terms, as required by section 1368, Rev. St. 1899. That section does not contemplate that notice shall be given in instances, as here, where the loan was usurious, as not being made as directed by the statute. The section referred to requires that on payments being made after notice the borrower shall be charged "with all interest, premium and fines." It is clear that this could not be applied to usurious loans, for in such case the premium is credited to the borrower, instead of charged, and so is the interest above the legal rate. Some other questions presented were disposed of in the case of *Arbuthnot* against this defendant, to which we have above referred.

The decree was proper and will be affirmed. All concur.

HAYES v. CONTINENTAL CASUALTY CO.
(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

ACCIDENT INSURANCE—EVIDENCE—PLEADING—
VARIANCE—WAIVER—NOTICE—PROOF OF
LOSS—DAMAGES—TRIAL—CONDUCT OF COUNSEL—INSTRUCTIONS.

1. Plaintiff, carrying accident insurance, testified that while he was on a train at night the engine gave out, and, hearing another coming, he feared a collision, and jumped off into a ditch about eight feet deep, and injured his breast and ankle, and afterward did not know

what happened; that he was taken by some unknown person to a farmhouse, where he stayed six or seven weeks; that he did not know anything, or where he was; that after he halfway came to his senses he thought of his wife, and went home and to bed, but when he woke he did not know his wife or whereabouts, and did not recover his mind for a week or so, and a day or two thereafter gave the company notice of the accident, which the policy required should be given immediately, and stated as his reason for not giving it before: "Well, I didn't have any papers with me. I was unconscious. I didn't know that I was insured, really." Several physicians testified for defendant that, while plaintiff's injuries may have caused unconsciousness, it would not have lasted the length of time claimed by him. *Held*, that it was a question for the jury whether they would believe the physicians or plaintiff.

2. Plaintiff's testimony was not overturned by evidence of the railroad officials that no wreck occurred at the time, since he did not testify that there was a wreck, but that he feared one.

3. Objection not having been made, in a suit on an accident policy, to the variance between the proof that there was no wreck, and the allegation of the petition that plaintiff was injured in a railroad wreck, objection on that ground was waived, under Rev. St. 1890, § 655, providing that no variance shall be deemed material unless the adverse party has been misled to his prejudice.

4. Condition of accident policy that immediate notice of the accident shall be given does not apply where insured is prevented from giving notice by unconsciousness resulting from the accident.

5. Where an accident policy provides that no indemnity shall be paid for disability, except for such time as insured is under the care of a physician, the allowance in a verdict of indemnity for time during which the insured was disabled preceding the employment of a physician was error.

6. Where, on attention being called to the fact that plaintiff's counsel was reading from a law report to the jury, the court caused him to desist, and instructed the jury to disregard what he had read, such reading, though improper, was not ground for reversal.

7. Refusal to instruct that the term "strict care," as used in an accident policy, meant "immediate care," on the ground that such definition would not enlighten the jury, was not error.

8. Where an accident insurance company, on being notified of an accident to a policy holder, denied its liability, it thereby waived the proof of loss of time, which the policy, in terms, required.

Error to circuit court, Jackson county; James Gibson, Judge.

Action by Franklin S. Hayes against the Continental Casualty Company. From a judgment for plaintiff, defendant brings error. Reversed.

W. F. Allen and J. E. Trogon, for plaintiff in error. J. W. Gillespie, for defendant in error.

BROADDUS, J. This is an action on a policy of insurance against accident and sickness made by the Northwestern Benevolent Society to the plaintiff on the 16th day of June, 1900. The defendant is the successor of said Northwestern Benevolent Society. By said policy the plaintiff was insured against loss by accidents or sickness,

and in case of immediate or total disability by reason of injury suffered by him, so as to cause total loss of time, and wholly prevent him from attending to or engaging in any business or occupation, a benefit of \$40 per month, or at that rate for any part of a month, should be paid to him for such total disability, and also a partial indemnity at one-fourth of said monthly rate for loss of time by reason of a material, but not a total, disability, not resulting immediately after an accident, provided that the total of time for which indemnity shall be paid for any one disabling injury shall not exceed one year, and only while the insured is under the strict care of a legally qualified surgeon. As the suit was instituted in a justice's court, defendant filed no answer, but, judging from what appears in the record, it denies all liability. The only evidence of the manner of plaintiff's injury, which he claims occurred on the 15th day of October, 1900, in the state of Texas, was his own. His statement was that he got on a freight train at Dallas for the purpose of going to Hearne, Tex.; that, when the train got somewhere between 40 and 75 miles from Dallas, the engine gave out, at night, on a curve, at which time he heard a passenger train coming, and, apprehending danger of a collision, he jumped off into a ditch about eight feet deep; that in alighting he was injured in his breast and ankle, and that afterwards he did not know what happened; that he was taken out of the ditch by some one unknown to him, and taken to a farmhouse, where he stayed about six or seven weeks. He says that then he still did not know anything—did not know where he was. He states that after he halfway came to his senses he thought of his wife, and then he wanted to come home. He then came home, and went to bed, after which he went to sleep, but awakened, and said he did not know where he was; that he talked to his wife, and did not know that he was talking to her, and did not know his whereabouts; and that he got home on the last day of November, but he was not positive. This examination showed that he was uncertain as to the date of events, if he was not simulating forgetfulness. It was shown that on the 1st day of December the defendant's agent went to plaintiff's home, and received from plaintiff's wife payment of existing dues, at which time said agent was aware of plaintiff's condition. Up to this time, plaintiff had given to defendant no notice of his injury and loss, and he states his reason for not so doing in the following language, viz.: "Well, I didn't have any papers with me. I was unconscious. I didn't know that I was insured, really." The defendant asked to have the statement of plaintiff stricken out, for the reason that he had not provided against such a contingency in his contract as an excuse for not giving notice as required by the policy. The court refused defendant's request. Plaintiff further

testified that he was at home a week or so before he recovered his mind; that in a day or two thereafter he gave defendant notice of his injury by the accident; that he made out his proof of loss upon a blank furnished to him by a Mr. Beedle, defendant's agent in Kansas City; and that he had no physician at any time until after he arrived home from Texas. Plaintiff's report of his injury was sent to the company by defendant's said agent, Beedle, on December 12th. On the 24th day of December, 1900, the defendant company notified the plaintiff, in writing, that it would not allow his claim, for the reason that he had not filed in its office within 10 days after the happening of the accident a report thereof.

The defendant introduced several physicians at the trial, whose testimony was to the effect that, while plaintiff's injuries may have caused unconsciousness, it would not have lasted for the length of time claimed by him. It also introduced the evidence of railroad officials, the purport of which was that there had been no wreck on the road named by the plaintiff at the time he designated. In regard to this evidence of the physicians, we need only say that it was a question for the jury to determine whether it would believe them or the plaintiff. The evidence of the railroad officials may have been, and doubtless was, true, in every respect, yet it is not to be taken as overturning that of plaintiff, for he did not say that he was in a wreck, but that he jumped under the impression that a wreck was impending.

Defendant contends mainly that the plaintiff was not entitled to recover for the following reasons, viz.: First, because he did not give defendant written notice within 10 days after the happening of the accident, and make his proof of loss, as required by the terms of the policy; second, because he did not have a surgeon in strict attendance upon himself during the time of his injury; third, because the allegations of the petition are that he was injured in a railroad wreck, whereas the proof shows that there was no such wreck at the time.

The latter objection only amounts to a variance between the proof and the allegations of the petition, to which defendant should have called the attention of the court at the time, as provided by section 655, Rev. St. 1890; and, having failed to do so, it has waived all error in that respect.

In *Whittemore v. Sills*, 76 Mo. App. 248, this court held that, "while the law never imposes upon any one a duty to perform what is impossible, it allows people to enter into contracts as they please, and the interference of third persons will not excuse performance," and that "when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him. But when a party by his own contract creates a charge or duty upon himself, he is bound to

make it good, if he may, notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract." The court citing *Davis v. Smith*, 15 Mo. 467; *Harrison v. Ry. Co.*, 74 Mo. 364, 41 Am. Rep. 318. It was one of the conditions precedent to plaintiff's right of recovery that he should give the requisite notice of the accident within 10 days after the happening thereof. This was not done in this case because plaintiff's evidence tended to show that he was rendered incapable of complying with that condition of his policy, by reason of his mental incapacity caused by the accident itself. The plaintiff contends, and we think justly, that the foregoing rule does not apply to a case of this kind, for it certainly was not in the contemplation of the parties that, if the accident for which the indemnity was provided should render the insured incapable of giving such notice, thereby defendant would escape liability. It is a rule of law in this state that "forfeitures in insurance policies are not favored, and conditions which effect such forfeitures should be strongly construed against the party making them." And it was held that where "an accident policy provided that, in case of an injury totally disabling insured from carrying on his work, notice of the accident should immediately be given the company, and, in case such injuries caused the death of the insured, notice should be given in like manner; that it was not necessary, where the injuries caused death, but did not totally disable the insured at the time from working, to give notice of the time it occurred, as the policy omitted to provide for any such notice." *McFarland v. Ins. Co.*, 124 Mo. 204, 27 S. W. 436. The case under consideration is similar on principle, as the policy fails to provide for such a condition as that which resulted to the plaintiff from the accident itself.

It was one of the conditions imposed by the by-laws of the defendant, and which the plaintiff accepted as a part of his contract of insurance, that no indemnity would be paid the insured, on account of any sickness or disability, except for such time as he might be under the professional care of a physician or surgeon, which, in case of injury, should date from the first employment for professional purposes to the last call made by such surgeon. There was evidence that there was a physician or surgeon in attendance upon plaintiff for only a part of the time for which he recovered indemnity. Whereas that fact would not preclude plaintiff from recovery under his proof, he should not be entitled to recover for the loss of time in which he had no surgeon, as he was permitted to do. It is true that the court, at the instance of defendant, gave instruction No. 4, which limited his right to recover for only such time as he was under the strict care of a qualified surgeon; but the court also gave instruction No. 4 on behalf of

plaintiff, allowing him to recover for the entire time he was wholly prevented by his injuries from engaging in business. This is claimed as prejudicial error, and, no doubt, was, as the action was commenced in January, 1901, less than two months from the time that the plaintiff first had the care of a surgeon, whereas plaintiff recovered for the sum of \$120, which amounted to an indemnity under the policy for a period of three months. The jury evidently disregarded defendant's instruction, which was the law, and followed that of plaintiff, which, as we have seen, was not the law of the case.

During the argument to the jury the counsel for plaintiff was reading from a law report an extract from a decision, when defendant's counsel objected to his action in so doing, whereupon the court, after ascertaining that the book in question was a law report, caused the said counsel to desist from further reading from said report, and instructed the jury to disregard what it had already heard. The court did all that could be done under the circumstances, and it is more than probable that the jury was not influenced by such conduct upon the part of plaintiff's counsel; yet such a course of practice is not to be encouraged, as it might impose upon the court the duty, in some instances, of reversing a cause.

The defendant asked the court to define the term "strict care," as used in the policy, as "immediate care," which the court refused, because the definition would not enlighten the jury in that respect. The term "strict care" has no technical significance, but is to be interpreted as the language is usually understood.

The defendant contends that plaintiff should have been required to prove that he made proper proof of loss of time, as a condition precedent to his right of recovery. As it was shown that defendant, upon receiving notice of the accident in question, denied all liability under the policy, it waived such proof. The law does not require the doing of an unnecessary act. *Hoffman v. Acc. Ins. Co.*, 56 Mo. App. 301.

The further point is made that it was not proved that the defendant had assumed the liabilities of the Northwestern Benevolent Society. As this proof can be supplied on a trial anew, it has no significance at present.

For the reasons given, the cause is reversed and remanded. All concur.

GREENWOOD v. PARLIN & ORENDORFF CO.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

APPEAL—RECORD—SUFFICIENCY.

1. The motion for new trial must be shown by the record proper, and cannot be evidenced by any recital in the bill of exceptions.

2. The taking of an appeal must appear from the record proper.

3. Where it appears that the bill of exceptions has been filed after the term has elapsed, an abstract of the record is insufficient which fails to show an order extending the time for filing.

4. The affidavit that the appeal is not prosecuted for vexation or delay must be shown in the abstract of the record.

Appeal from circuit court, Jackson county; Wm. B. Teasdale, Judge.

Action by L. H. Greenwood, trustee, against the Parlin & Orendorff Company. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

Ellis, Cook & Ellis and Gilmore & Brown, for appellant. Beardsley, Gregory & Kirshner and Hutchings & Kellinger, for respondent.

SMITH, P. J. This is an action under section 60b of the bankruptcy law of 1898 [U. S. Comp. St. 1901, p. 3445] to set aside an alleged unlawful preference and to recover the value thereof. As none of the questions which were discussed and submitted to us for decision at the oral argument and in the briefs of counsel properly arise on the record, they cannot be considered. Turning to the abstract of the record proper, and we find nothing but the pleadings and judgment, supplemented with a recital that on a certain day and year a bill of exceptions was filed in the case. Such an abstract is insufficient for the following reasons: (1) Because it nowhere recites that a motion for a new trial was filed. It is true there is a recital in the bill of exceptions that such motion was filed, but this will not suffice, for it is now well settled that the filing of such a motion is a matter that must be shown by the record proper, and cannot be evidenced by any recital in the bill of exceptions. It has no place in the bill of exceptions. *Hill v. Combs*, 92 Mo. App. 242; *Bram v. Miller* (not yet officially reported) 67 S. W. 714; *Turney v. Ewins* (not yet officially reported) 71 S. W. 543; *Kirk v. Kane* (not yet officially reported) 71 S. W. 463; *Crossland v. Admire*, 140 Mo., loc. cit. 656, 51 S. W. 463; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Storage Co. v. Glasner*, 150 Mo. 426, 52 S. W. 237. (2) Because such abstract does not recite any order granting an appeal. This defect is fatal to the appeal. *Harper v. Oil Co.*, 74 Mo. App. 645; *Meyers v. Meyers*, 19 Mo. App. 140; *Swank v. Swank*, 85 Mo. 198; *Ray v. Ray*, 49 Mo. 301; *State v. Ry.*, 84 Mo. 129. The recital in the bill of exceptions of the fact that an appeal was taken does not evidence the fact. It must appear from the abstract of the record proper. (3) Because it appears the bill of exceptions was not filed during the term it was taken, but after that term had elapsed, and it nowhere appears in the abstract of the record proper that there was any order entered of record (section 728, Rev. St.) extending the time for filing such bill.

Such an extension cannot be shown by the recitals in the bill of exceptions, but must appear from the abstract of the record proper. And (5) because the affidavit required for an appeal by section 808, Rev. St., is nowhere to be found in the abstract. The recital of the bill of exceptions that there was an affidavit is insufficient. The affidavit, or its substance, should be shown in the abstract of the record. Without a statutory affidavit, we are without jurisdiction. See *Sebested v. Kansas City* (not yet officially reported) 68 S. W. 1068, and cases there cited.

It results that the appeal must be dismissed. All concur.

ORMSBY v. LACLEDE FARMERS' MUT. FIRE & LIGHTNING INS. CO.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

INSURANCE—AUTHORITY OF AGENT—WAIVER OF TERMS OF POLICY—ESTOPPEL—ACTION—SUBMISSION OF ISSUES—INSTRUCTIONS.

1. The rule that an agent of an insurance company has authority to waive conditions of the policy applies to a mutual company organized under Rev. St. 1890, c. 119, art. 10.

2. Where an agent of an insurance company, knowing that the property on which insurance is sought is incumbered, writes in the questions and answers in an application, whereby it appears that there is no incumbrance, the insurance company waives any right to forfeit the policy because of the untruthful statement in the application.

3. Where an insured informs the agent of the insurance company that he has made a contract to sell the property, and the agent tells him that will make no difference with the policy, the company is estopped to forfeit the policy because of such contract.

4. Where, in a suit on a fire policy, the defense was several grounds for forfeiture, an instruction that, if the jury find certain facts with respect to one of the grounds of forfeiture, they are to find for plaintiff, is erroneous, as ignoring other defenses.

Appeal from circuit court, Linn county; John P. Butler, Judge.

Action by R. J. Ormsby against the Laclede Farmers' Mutual Fire & Lightning Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Harry K. West, for appellant. C. C. Bigger, for respondent.

BROADDUS, J. This is a suit on a fire insurance policy. The property insured was a dwelling house situated on the plaintiff's farm. The defendant is a farmers' mutual insurance company, incorporated under article 10, c. 119, Rev. St. 1890. The petition is in the usual form. The answer, after admitting defendant's corporate existence, and interposing a general denial, except as to matters not therein afterwards admitted to be true, sets up the following specific defenses: That by the terms of the policy itself a written application of plaintiff for in-

surance was made a part thereof, as well as the by-laws of the defendant's organization; that the plaintiff in his said application falsely and fraudulently warranted that said property insured was free and clear of incumbrance, when in fact it was incumbered by a valid deed of trust for \$1,000; that the plaintiff, in his said application, also fraudulently and falsely warranted and represented that he had never suffered loss by fire, when in fact he had suffered such loss to the amount of \$500; and that after he had entered into said contract he had made a valid contract for the sale of said property to one J. I. Hamilton. It further pleads as a defense that plaintiff, by his proof of loss furnished to the defendant, falsely and fraudulently represented to the defendant that he was the sole and unconditional owner in fee of the insured property, and that the same was free from incumbrances. By all of which defendant claims the policy became void. The plaintiff, in reply, admits making the application, but pleads that it was prepared by one H. E. Maybee, defendant's secretary, who wrote all the questions and answers therein, and that he (plaintiff) signed it without reading or knowing its contents. He admits that the land was incumbered by a deed of trust for \$1,000, but claims that said Maybee was informed of that fact when the application was made. He also admits that after obtaining the policy of insurance he entered into a contract to sell the insured property to one Hamilton, but alleges that immediately after making said contract of sale he informed said Maybee of the fact, that said Maybee thereupon told him the sale would make no difference, and that the policy would remain in force until he delivered his deed for the property to said Hamilton. The reply then sets up that after his loss one Cady, who was also insured by defendant, sustained a loss by fire, for which plaintiff was assessed \$1.25 to pay his proportionate share of said Cady's loss, which he paid, and that at the time of said assessment and payment the defendant was aware of all the said breaches of the policy set up in its answer. The defendant moved to strike from plaintiff's reply the allegations therein, except that part which admitted the facts as set out in defendant's answer, for the following reasons, viz.: First, because the matters pleaded do not constitute a reply; second, because the facts pleaded do not show a waiver of the conditions of the policy; third, because that part of the statement of the secretary, Maybee, "that the contract of sale made by plaintiff would make no difference, and that the policy would remain in force until the delivery of his deed to the purchaser," did not amount to a representation of a fact, but only an expression of an opinion as to the law, or a conclusion of law. The court overruled the motion. The finding and judgment were for the plaintiff.

¶ 2 See Insurance, vol. 22, Cent. Dig. § 1007.

On the trial of the case the plaintiff introduced evidence tending to sustain all the allegations in his reply, and the defendant introduced evidence tending to disprove all such allegations. The law in dispute, therefore, arose both on the motion to strike out the reply and on the evidence. The law governing the question whether the matters set out in plaintiff's reply constitute a waiver upon the part of the defendant has been elaborately reviewed at this term of the court in an opinion by Judge Smith in the case of *Ross-Langford v. Mercantile Mut. Ins. Co.*, 71 S. W. 720. The law is also stated in *Springfield Laundry Co. v. Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521. The first is the latest expression on the subject by the Court of Appeals, and the latter by the Supreme Court, and the rule seems now to be well settled that the acts and declarations of the soliciting agent for an insurance company while writing the application for insurance are the acts and declarations of the company itself. And in *Laundry Co. v. Ins. Co.*, supra, it was held that "the local agent had the same authority to waive a condition of the policy that the company had." Applying the law as thus stated to the matters set up in plaintiff's reply, and to which he directed his evidence on the trial, we do not think there was any error committed by the court in overruling defendant's motion to strike said matters from said reply; and because the defendant is a farmers' mutual insurance company, under article 10, c. 119, Rev. St. 1899, does not prevent the principle from applying, for the very apparent reason that the decisions are not predicated upon the fact that statements and representations were not material to the risk, but because, as such, they had been waived by the act of the agent, which was the act of the company itself.

In reference to the statement made by the agent to the plaintiff, after he had notified said agent that he had sold the premises to Hamilton, that it would make no difference, as the policy would remain in force until he made a deed to Hamilton, we hold that the defendant was bound as much thereby as if a resolution had been passed by defendant's board of directors to that effect, for whatever the defendant might do its agent could do, under the decisions referred to. Especially is this true if the insured had acted upon such representation of the agent, as it was shown the plaintiff did in this case. The defendant was estopped by the act of its agent.

The defendant objected to instruction No. 2 given on behalf of the plaintiff, for the reason that it wholly ignores the other defenses in issue, and because it tells the jury, if they find a certain fact with respect to the incumbrance, then they are to find for the plaintiff. This instruction was erroneous in that regard, for the plaintiff would not be entitled to a verdict alone upon a finding that

defendant had waived the incumbrance on plaintiff's property, for he must also show that all the other representations were waived, as the policy would stand forfeited if it was shown that any one of them had not been waived by defendant. And the same objection stands good as to instructions numbered 3 and 4 given for the plaintiff. Under these instructions the jury was authorized to find for the plaintiff upon waiver of one cause of forfeiture alone, notwithstanding there may have been no such waiver upon other grounds of forfeiture which were in issue on the pleading and evidence.

For the error contained in said instructions, the cause is reversed and remanded. All concur.

WYNN v. FOLLOWILL.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

CONTRACT FOR SUPPORT—TERMINATION BY DEATH—STATUTE OF FRAUDS—WAIVER OF EXCEPTION.

1. Defendant agreed to furnish "hired help" to plaintiff for the purpose of assisting her in keeping, supporting, and caring for his infant child for a period of two years and eight months. *Held*, that the contract was not within the statute of frauds, since it was based on the life of the child, which might end within a year.

2. Plaintiff sued for defendant's failure to furnish her with help to care for his child. On cross-examination plaintiff was asked if she would have brought the action if defendant had permitted her to keep the child, but received a nonresponsive answer. The question having been repeated, the court sustained an objection thereto. Then another subject was begun, when the court interrupted, saying he did not understand just what counsel was endeavoring to show, and that counsel might ask plaintiff any question to show the animus that prompted her, but the matter was not pressed further. *Held* to furnish no ground for complaint.

Appeal from circuit court, Maries county; James E. Hazell, Judge.

Action by Bettie C. Wynn against Robert M. Followill. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas M. & Cyrus H. Jones, for appellant. Crites & Garrison, O. D. Corum, and J. W. Terrill, for respondent.

ELLISON, J. This action is for damages resulting by defendant's failing to furnish plaintiff with a domestic servant to assist plaintiff in caring for defendant's infant child. The judgment in the trial court was for plaintiff.

It appears that plaintiff is the child's grandmother, and that defendant's wife died, leaving the infant then only a few days old. The evidence in behalf of plaintiff tended to prove that she took the child to her own home to care for it, on the understanding and agreement that defendant would furnish to her a girl who would assist her. The evidence for plaintiff further tended to show

*Rehearing denied February 23, 1904.

that defendant failed to wholly perform his agreement. The original petition was based on an alleged agreement to pay plaintiff for her labor and expense in taking care of and maintaining the child. There was, however, afterwards filed an amended petition, which declared on a contract to furnish the domestic aforesaid. No objection was made to the amendment by defendant, and he filed his answer thereto. The defendant then took the position at the trial that the petition showed an agreement void under the statute of frauds, and the plaintiff got leave to make two amendments by interlineation, the intention being to so change the statement of the case as to remove the objection based on the ground of the statute of frauds. Defendant objected to these last amendments. But as, in our opinion, the amended petition, with or without the interlineations, did not state a contract which could be affected by that statute, we need not notice the objections to them.

The amended petition, according to defendant's claim, stated a contract for the furnishing of "hired help" to plaintiff for the purpose of keeping, supporting, and caring for the infant for a period of two years and eight months. Defendant contends that the contract was therefore one not to be performed within one year, and void. It is agreed on all sides that the contract was based upon the care and support of the child. If the child should cease to live, the contract of course terminated. So, notwithstanding the contract, in point of time, was for a period of more than one year's duration, yet it was necessarily based on the life of the child, and, as that might end within a year, the statute of frauds does not apply. *Foster v. McO'Brien*, 18 Mo. 90. In *Harrington v. Cable Ry. Co.*, 60 Mo. App. 223, we held that a verbal contract to employ one for as long a period as he should properly do his work was not within the statute, since, if he died within a year, the contract would end. The same rule, as applicable to a variety of cases, is stated by *Lawson's Contracts*, sec. 74. And so it is made plain, as applicable to the present controversy, by the various illustrations in the following cases: Where the verbal contract was that a railway company would issue annually to plaintiff and his family a pass for a period of ten years (*Weatherford Ry. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526); where the verbal contract was to sell certain stock at the end of three years, with an option to the purchaser to call it at any time (*Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 320, 3 L. R. A. 337); and where the verbal agreement was that a railway company would maintain cattle guards on the plaintiff's premises so long as it should operate its road through them (*Railway Co. v. Whitley*, 54 Ark. 190, 15 S. W. 465, 11 L. R. A. 621).

The foregoing virtually disposes of the case, for defendant's attack on the judgment is

based almost entirely on the statute. We regard the evidence in plaintiff's behalf as ample to sustain the verdict. And after going over the instructions, we conclude that there is no substantial objection to them. They completely cover every issue in the case, which is all that should be asked.

Criticism is made of the court's ruling on a question asked plaintiff on her cross-examination, which we think is not justified by the record. Defendant claims that the court refused to allow him to ask plaintiff if she would have brought this action if defendant had permitted her to keep the child. The record shows that question to have been asked and answered: "If Robert [defendant] had done what he promised me to do I never would have brought it." Then after repeating the question one or more times, without getting an answer, counsel again asked it, and an objection thereto was sustained. Counsel then began on another subject, when the court interrupted with the statement that the court had not exactly understood just what counsel was endeavoring to show, and said, "You may ask her any question you like to show the animus that prompted her." But the matter was not further pressed. It is apparent that this branch of the record affords defendant no just ground of complaint.

We are satisfied that there is nothing in the record which in any way improperly affected the substantial merits of the case, and the judgment will be affirmed. All concur.

CAUVEREN v. ANCIENT ORDER OF PYRAMIDS.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

LIFE INSURANCE—REINSTATEMENT—HEALTH CERTIFICATE—WAIVER—PLEADINGS—STATUS OF COMPANY.

1. By the rules of an insurance company, a policy holder in default could be reinstated on payment of the arrears and production of a health certificate. Deceased, being in default, made the payment to an agent, who stated he would send the "health slip" to deceased, which could be signed and returned. There was evidence that the agent had so acted as to others, and that no objection was made by the company. Deceased died before the agent sent the slip. *Held*, that the question of waiver of the certificate was for the jury.

2. Where the petition declares that defendant is, and was at the time of making the contract, a corporation engaged in the life insurance business in the state, and the answer was that "defendant admits being a corporation and doing business in the state, and admits the issuance of a beneficiary certificate to" the deceased, and does not set up what kind of a corporation it is, the status of the defendant is thereby fixed, for the purposes of the case, as an ordinary life insurance company.

Appeal from circuit court, Jackson county; James Gibson, Judge.

Action by Annie Cauveren against the Ancient Order of Pyramids. From a judgment in favor of plaintiff, the defendant appeals. Affirmed.

John Sullivan, for appellant. Leon Block, for respondent.

ELLISON, J. The plaintiff sued defendant on what she terms a life insurance policy containing a contract of insurance as old line or regular life insurance. The defendant claims the insurance was a beneficiary certificate issued by a fraternal benevolent society. The judgment in the trial court was for plaintiff.

The defendant claims that, being a benevolent association, and not liable to the law applicable to regular life insurance companies, the plaintiff cannot recover, for the reason that the deceased died while suspended for nonpayment of dues, and that there were no proofs of death. The plaintiff claims that the contract of insurance is a regular life insurance contract, and that, while deceased had not paid certain dues at the time agreed, he did in fact pay them prior to his death. It seems (as near as we can gather from the record) that when one becomes delinquent for dues in defendant company he may regain good standing by making payment, accompanied by a health certificate showing him to be still in good health. The deceased made the payment to defendant's agent Louis, the "local scribe," but did not get a health certificate from him. Louis stated that he would send to deceased (who lived near by) the "health slip," which could be signed and returned to him. There was evidence of this having been done with others in the same way, by the same agent, Louis, and no objection made by the company. In this instance deceased died before Louis gave him the certificate as promised. The evidence as a whole, on this branch of the case, tended to show a waiver by defendant of the strictness of its by-laws. The evidence fully justified the court in considering Louis as defendant's agent, and in submitting to the jury defendant's waiver, under the decision of the Supreme Court in *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384.

But, aside from the foregoing, we are of the opinion that the pleadings fix defendant, for the purposes of this case, as an ordinary life insurance company. The petition declares against it as such, and the answer, in effect, admits it; at least it contains no denial. The petition is that defendant is, and was at the time of making the contract, "a corporation engaged in the life insurance business in the state of Missouri." The answer was that "said defendant admits being a corporation and doing business in the state of Missouri, and said defendant admits the issuance of a beneficiary certificate to [the deceased] Morris H. Cauverren." The answer nowhere sets up the kind of corporation it is, other than the admission quoted. It refers to a benefit fund, and alleges that neither plaintiff nor deceased were entitled to participate therein on account of not having paid their assessments. The whole answer

seems to be drawn on an assumption that the court and everybody concerned knew what sort of company defendant was, and that it was unnecessary to state it. If it was defendant's purpose to avoid liability as stated in the petition, it should have set out what sort of organization it was, and followed this by allegations of deceased's shortcomings, and thus given itself some definite individuality. It is practically admitted that, if defendant is to be considered as a regular life insurance company, the acts of the "local scribe," Louis, were the acts of the company. The consequence must follow that his promise, after accepting back dues, to get the health certificate, was binding upon the company, and his failure to do so cannot now be claimed.

What we have said on this head is really of no practical importance so far as the result is concerned, for the reason that, in our opinion (as above set out), defendant was liable, under the authority cited, even considered as a benevolent or fraternal association.

As to the claim that no sufficient proofs of death were furnished, it is sufficient to say that, defendant having denied liability in toto, no proofs were necessary.

What we have said necessarily disposes of most of defendant's case. Other suggestions made are not considered meritorious.

The judgment being manifestly for the right party, it is our duty to affirm it, which is accordingly done. All concur.

READY v. MISSOURI PAC. RY. CO.*

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

SURFACE WATER—DISCHARGE ON ANOTHER'S PREMISES—MEASURE OF DAMAGES—EXCESSIVE DAMAGES.

1. Where a railroad company cut a ditch, and put in a culvert under its track, thereby causing surface water, flowing onto the railroad from higher ground beyond, and which, the evidence tended to show, had before such interference found its way along ditches on the sides of the track until it spread out over the surface generally, to rush through such culvert and onto plaintiff's premises, covering her ground, filling her cellar and cistern, and destroying her grass, it was liable for the damage.

2. Where one allows surface water to collect on his premises, and wrongfully discharges it onto the premises of another, the latter is entitled to recover the actual damage sustained by him up to the beginning of the action, and the difference between the value of the estate just before and just after the injury does not furnish the measure of damages.

3. In estimating the damages, the jury could consider any and all injuries resulting from the different overflows caused to the house and basement and outhouses, as well as any injury to the lot itself, by the deposit of mud and clay thereon.

4. Defendant wrongfully discharged surface water onto plaintiff's premises, covering her ground, filling her cellar and cistern, and de-

*Rehearing denied February 23, 1903.

stroying her grass. *Held*, that a verdict of \$400 was not excessive.

Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Action by Margaret Ready against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Elijah Robinson, for appellant. Charles R. Pence, for respondent.

ELLISON, J. This is an action for damages caused by defendant discharging surface water onto plaintiff's real property and improvements thereon. The judgment was for the plaintiff in the sum of \$400.

In order to determine the legal question applicable to this case, it is only necessary to state in a very general way the cause of the complaint as made out by evidence in plaintiff's behalf. Plaintiff's property is situated across an alley from defendant's line of railroad. Water flows from higher ground beyond onto the railroad, and is received by ditches alongside of the track. There was evidence tending to show that this water, prior to defendant's interference, found its way on along the sides of the track until it spread out over the surface generally. The evidence also tended to show that defendant could have led the water off in the direction of certain catch-basins maintained by the city. However that may be, it was shown that defendant cut a ditch and put in a culvert under its track at the "head of the alley," which caused the water to rush through such culvert, and thence across the alley onto plaintiff's premises; covering her ground, filling her cellar and cistern, and destroying her grass. The law in such state of case is plain and well understood. Defendant, as it contends, had a right to protect itself from injury by surface water. But it had no right to allow that water to collect on its premises, and then discharge it at one point, in a body, onto defendant's premises. In *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254, the court said that it was "an actionable injury and nuisance for one to collect surface waters and cast them in a body upon a neighboring proprietor; and the same rule holds in this regard both to individuals and to municipal corporations. The latter, though not obliged to construct sewers or drains to protect adjoining owners against the flow of surface water from public ways, yet, if they do construct drains, and thus carry water and cast water upon the adjacent lands, they are as much responsible as though they had invaded such lands by sending their servants thereon." In *Rychlicki v. St. Louis*, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651, the same court said that "according to the rules of the civil law, as adopted by many, if not most, of the states of this Union, the owner of the higher adjoining land has

a servitude upon the lower land for the discharge of surface water naturally flowing upon the lower land from the dominant estate. But it is well settled by the decisions of the courts which follow the civil law that this servitude extends only to surface water arising from natural causes, such as rain and snow, and that the owner of the higher land cannot collect the surface water in drains, trenches, or otherwise, and precipitate it in a body upon the lower land, to the damage of the owner thereof."

Complaint is made of plaintiff's instructions. It is said that the true rule for the measure of damages is to allow plaintiff the difference between the value just before and just after the injury. In this class of nuisances, where the cause of the injury may at any time cease, by act of the party or the intervention of a court, the rule of damage is not the whole difference in the value of the estate just prior and just after. Such rule would be unjust, sometimes to one party and sometimes to the other party. If the damage is estimated just after the nuisance is established, and while it is still in existence, perhaps practically destroying the estate, the entire value of the property might be assessed, though the nuisance could be removed. That would be unjust to the party creating or maintaining the nuisance. On the other hand, there are instances where the damage, under the rule mentioned, would be very slight, and yet, if the nuisance is continued, separate damage would follow each successive injurious act flowing from or attributable to the nuisance. So, therefore, the rule contended for by defendant was repudiated in *Foncannon v. Kirksville*, 88 Mo. App. 279. The true measure of damage is to allow actual damage occasioned by the nuisance up to the beginning of the action, without reference to total depreciation of the value of the inheritance. *Pinney v. Berry*, 61 Mo. 359; *Smith v. Ry. Co.*, 98 Mo. 20, 11 S. W. 259. In this case the instruction was that the jury should take into consideration any and all injuries resulting from the different overflows caused to the house and basement and outhouses, as well as any injury to the lot itself by the deposit of mud and clay thereon. We think it was not objectionable.

It is next insisted that the damages are excessive. Considering the nature of the damage, it is clear that its extent would be hard to estimate with mathematical certainty or precision. Necessarily, much must be left to the sound judgment of the jury, based on the statements of facts made to them concerning the character of injury to the walls of the house, the cistern, and outhouses, as well as to the yard. We are not of the opinion that an allowance of \$400 justifies our interference with the conclusion of the jury.

The judgment is affirmed. All concur.

ROBERTS v. INSURANCE COMPANY OF AMERICA.

(Court of Appeals at St. Louis, Mo. April 15, 1902.)

INSURANCE—LOSS—VALUE OF PROPERTY—EXTENT OF LIABILITY—PROOFS OF LOSS—WAIVER—REVIVAL OF REQUIREMENT—ACTIONS—INSTRUCTIONS.

1. Where a policy provided that in case of loss the company should be liable only for three-fourths of the actual cash value of the property insured at the time of the loss, an instruction that, if the jury found the value of the different classes of the property to amount to the insurance thereon, they should find for plaintiff for the full amount of the insurance, was error.

2. Where, in an action on a policy, defendant claimed freedom from liability by reason of plaintiff's failure to furnish proofs of loss, and plaintiff claimed a waiver of such requirement, an instruction purporting to cover the whole case, and authorizing the recovery by plaintiff if the jury should find for plaintiff the facts hypothetically stated, which omitted the issue as to the proofs of loss, and whether or not proofs had been waived, was error.

3. Where proofs of loss were waived, the requirement of the policy that they should be furnished could not be revived by a subsequent demand of the company that they should be furnished.

Appeal from circuit court, Laclede county; L. B. Woodside, Judge.

Action by M. G. Roberts against the Insurance Company of America. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The petition is on a policy insuring the plaintiff against loss by fire of certain personal property described in the petition and in the policy. It is alleged that on the day of January, 1900, while the policy was in force, all of the property insured was destroyed by fire, and was a total loss to plaintiff; that plaintiff complied with all the conditions of the policy, and had repeatedly demanded a settlement and payment of the loss, which had been refused by the defendant. The answer admitted the issuance of the policy. As a special defense, it is alleged in the answer that the policy provided that within 60 days after the fire, unless the time was extended in writing by the defendant, the plaintiff should furnish proofs of loss; that the defendant, in accordance with the law, had provided and furnished plaintiff with blank proofs of loss, but that the plaintiff had wholly failed and refused to furnish any proofs of loss as required by the policy. The answer denied all other allegations of the petition. The reply was—First, a general denial; second, a plea of waiver by defendant of the conditions and requirements set out in the answer in respect to proofs of loss.

For the plaintiff, the court gave the following instructions: "No. 1. The court instructs the jury that if they believe and find from the evidence that the defendant issued to the plaintiff the insurance policy sued on, by which the said insurance compa-

ny insured the property destroyed by fire for a period of one year, and that while said policy was in full force and effect, and without any fault on the part of the plaintiff, the property was burned up and destroyed, they will find the issue for the plaintiff. And in arriving at the amount of plaintiff's damages the jury will ascertain the value of the property named as the first item of insurance, and, if the property so destroyed was at the time of the fire of the value of \$120, they will find for the plaintiff the sum of \$120 on the first item. And they will ascertain the value of the property so insured as the second item of insurance, and, if the property destroyed was of the value of \$30 at the time of the fire, the jury will find for the plaintiff the sum of \$30 on the second item. And they will ascertain the value of the property so insured under the third item of insurance, and, if the property so destroyed was at the time of the fire of the value of \$150, they will find for the plaintiff the sum of \$150 on the third item of insurance." "No. 3. The court instructs the jury that if they believe and find from the evidence that R. S. Phillips, the agent of the defendant company, about the 1st day of February informed the plaintiff that he need not furnish proofs of loss, for the reason that the adjuster of defendant stated to him that his coming to adjust the loss waived the said proofs, then the requirement of said policy for such proofs was waived by the said company." And refused No. 5 asked by defendant, which is as follows: "No. 5. The court instructs the jury that the valuations placed upon the property insured in his application by the insured is conclusive upon plaintiff, and he is bound thereby, so that, if you find for plaintiff in this cause, you will take the value of the property as fixed by him in his application, and add thereto the value of such goods as he may have added to the property insured in his office, and deduct from the aggregate of said amounts the value of the property saved from the fire, and three-fourths of the remainder will give the plaintiff the amount which he is entitled to recover if you find for him." The jury returned the following verdict: "We, the jury, find the issue for plaintiff as follows: On first item, \$120; on second item, \$30; on third item, \$150. We further find, for vexatious refusal to settle loss, a penalty of ten per cent., of \$30, to wit, and attorney's fee of \$——."

Fyke, Yates, Fyke & Snider, for appellant.
J. W. Farria, for respondent.

BLAND, P. J. (after stating the facts).
1. The court instructed and the jury found for plaintiff for the full amount of the insurance as fixed by the policy. Defendant's contention is that the recovery should not have exceeded three-fourths of the actual cash

value of the property insured, and that its refusal instruction No. 5 should have been given. The policy contains a clause limiting the right of recovery to three-fourths of the cash value of the property insured, not to exceed the amount of the insurance, and defendant's refusal instruction should have been given, as it correctly defined the measure of damages.

2. Instruction No. 1 given for plaintiff purports to cover the whole case, and authorized a recovery by plaintiff if the jury should find the facts for plaintiff as hypothetically stated in the instruction. The instruction left out of view the question as to the proofs of loss, or whether or not the proofs of loss were waived. Under the terms of the policy, it was incumbent on the plaintiff to show affirmatively that he had furnished proofs of loss as required by the policy, or that the furnishing of these proofs had been waived by the defendant. The proofs of loss furnished did not comply with the terms of the policy, and it therefore became essential to plaintiff's right of recovery that he should establish that proofs of loss were waived. This issue was raised by the pleadings, and should have been submitted to the jury, as it was a question of fact whether or not the proofs of loss had been waived. *Loeb v. Ins. Co.*, 99 Mo. 50, 12 S. W. 374.

No instructions were given for the defendant. Instruction No. 3 given for plaintiff authorized the jury to find that proofs of loss had been waived if they found certain facts to exist, but the instruction does not predicate the right to plaintiff to recover upon the fact that proofs of loss had been waived. The two instructions (Nos. 1 and 3) cannot, therefore, be considered together, as presenting the whole case, and plaintiff was permitted to recover irrespective of a waiver of proofs of loss. The instruction is also erroneous as to the measure of damages. Three-fourths of the value of the property destroyed is the damage fixed by the policy, and the jury should have been so instructed.

The adjuster of a fire insurance company, as to the settlement of losses, is the representative of the company; and his acts, within the scope of his authority, are the acts of the company. *McCollum v. Ins. Co.*, 67 Mo. App., loc. cit. 69-75. When once waived, the requirement that proofs of loss should be furnished is eliminated from the policy, and could not be revived by a subsequent demand of the company on plaintiff to furnish proofs. *Porter v. Ins. Co.*, 62 Mo. App. 520. If, therefore, it should be found that proofs of loss had been waived, then the furnishing of defective proofs in an attempt to comply with the demand can cut no figure in the case.

For the errors above noted the judgment is reversed, and the cause remanded.

BARCLAY and GOODE, JJ., concur.
72 S.W.—10

LEICHER v. KEENEY.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

FRAUD—VENDOR AND PURCHASER—MISREPRESENTATIONS AS TO QUANTITY OF LAND—PURCHASER'S REMEDY—EVIDENCE—DEFENSE—PRACTICE—OFFERS OF EVIDENCE—HEARING ON APPEAL.

1. A petition alleging that a vendor fraudulently represented that a tract of land had been surveyed, and found to contain 160 acres, for the purpose of inducing the vendee to purchase the same in gross, and injuring him, and that plaintiff relied on the representations, and seeking to recover damages therefor, states a cause of action.

2. Where the court on appeal passes on the propriety of the ruling of the trial court in rejecting a party's offers of evidence to prove every fact alleged in his pleading, it must take the offers as and for the proof itself.

3. In a case where objection is made to a party's offers of evidence to prove the allegations in his pleading, it is the better practice for the court to let the jury retire, and then hear the proposed evidence and the objections thereto.

4. A vendee relying on the vendor's fraudulent representations as to some specific fact affecting the value of the land may, on the discovery of the fraud, stand by the purchase, and sue for the fraud.

5. Where a vendor's fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre.

6. The doctrine that a written contract is conclusively presumed to merge all prior negotiations, so as to exclude parol evidence of the previous negotiations, does not apply in an action based on defendant's fraud in procuring the contract.

7. The representations of a vendor that a tract of land contained 160 acres, while it contained over 18 acres less, is a material representation.

8. A vendor sued by a vendee for fraudulent representations inducing the vendee to purchase a tract of land cannot defend by showing negligence on the vendee's part, when the negligence was caused by the vendor's own conduct.

Appeal from circuit court, Pettis county; Geo. F. Longan, Judge.

Action by William Leicher against Frank L. Keeney. From a judgment of nonsuit, plaintiff appeals. Reversed.

Louis Hoffman and Sangree & Lamm, for appellant. Barnett & Barnett, for respondent.

SMITH, P. J. This is an action for deceit. The petition alleges: That the defendant sold him a farm by the following description, to wit: The northeast quarter of section number 18, except that part lying north of the middle of the main channel of Muddy creek; also excepting the following: Beginning at the southeast corner of said northeast quarter of section number 18; thence running west 136° poles; thence north 43 poles and 15 links; thence east to the east line of said section number 18; thence south 43 poles and 15 links to the place of beginning; also excepting from the remainder

¶ 6. See Evidence, vol. 20, Cent. Dig. § 312.

20 acres off of the east side thereof; the east half of the northwest quarter and 20 acres off of the south side of the west half of the northwest quarter of said section number 18—all in township number 46 north of range number 21 west of the fifth principal meridian; also all of the southeast quarter of the northeast quarter of section number 13 in township number 46 and range 22, lying east of Muddy creek. That he knew nothing whatever of the number of acres included in said description, and that the defendant was aware thereof. That he (plaintiff) relied solely on the information derived from defendant, of which fact he (defendant) was aware. That defendant represented to him that the number of acres included in the said description was 160, and that defendant knew such to be the fact. That such representation was false and untrue, and was either known by the defendant to be false, or else was recklessly made by the defendant as true for the purpose of having plaintiff accept the same as true, and act thereon, when the defendant did not know the facts to be true. That during these negotiations this plaintiff proposed to the defendant that the land should be surveyed and measured, in order to determine the number of acres the land contained, and to fix the aggregate amount of the consideration plaintiff was to pay for the land, and the defendant thereupon, falsely and fraudulently, and for the purpose of injuring and defrauding this plaintiff, represented and stated to the plaintiff that he (the defendant) had surveyed said land, or caused it to be surveyed and measured, and that the land, by such survey and measurement, contained, in fact, 160 acres, and that there was no use of any further survey and measurement. That plaintiff, relying on these false and fraudulent statements and representations relating to the number of acres of land in such description and such survey, so made by the defendant, and believing them to be true, was induced thereby to sign a contract, and accept a deed from the defendant for said land, and to pay defendant the sum of \$3,500, whereas, in truth and in fact, the defendant did not have said land surveyed, and, in truth and in fact, said description contained only 141.82 acres of land. Plaintiff states that by reason of the false and fraudulent statements and representations made by the defendant to the plaintiff, as above stated, plaintiff was deceived and induced to sign said contract, accept said deed, and pay the defendant \$399.96 more money than was due the defendant, and plaintiff was wrongfully defrauded into accepting a deed conveying said land, less by 18.18 acres than he believed, and was wrongfully led by the defendant to believe, he was getting. That plaintiff has often demanded from defendant said sum of money out of which he was tricked and defrauded by the defendant, and defendant has refused to make restitution. Wherefore, etc.

The defendant's contention that the petition does not state a cause of action is not, at least to the second count, well taken. *Thomas v. Beebe*, 25 N. Y. 244.

At the trial the plaintiff, to maintain the issue in his behalf, introduced as a witness Charles Walch, who testified that he was present during the negotiations leading up to the purchase of the defendant's farm by plaintiff. The witness was asked: "Do you recollect the price asked at that time? By Mr. Barnett, for Defendant: At this point we object to that question, and, in order to get the whole matter before the court, we object to the introduction of any oral testimony as to what the contract was between these parties, because the petition itself says it was in writing. It might be that a writing might be introduced that was so obscure that oral testimony might be introduced to explain, but first the writing must be seen, to show whether it is complete within itself, and expresses the contract. I now tender the written contract to the gentlemen, that they may introduce it, if they desire, and I object to any oral testimony until that is first introduced. By Mr. Hoffman, for Plaintiff: We allege fraud in the procuring of that written instrument, and we are entitled to go into that. The rule that the gentleman states does not apply under the pleadings in this case. We charge that that was procured through fraudulent representations. By Mr. Barnett: It will show upon its face that it could not be procured by fraudulent representations. By the Court: I think you had better introduce it first. (To which action and ruling of the court the plaintiff then and there duly excepted at the time, and still excepts.) By Mr. Hoffman: My theory is that we commence and take it up by steps, and, when we come to the contract, introduce it. By the Court: No, sir: that is not proper. It is a written contract that you plead, and you do not ask to set it aside, and now you undertake to show that that written contract was procured by fraud. Now introduce your contract, and show that it was procured by fraud. By Mr. Barnett: While it is true our objection now only goes to that extent, yet later on we are going to object to any testimony, for the reasons these negotiations were had before the contract was signed, and the court can see upon the face of the contract that there could be no deceit in procuring that contract. By Mr. Hoffman: If the court cuts us off from introducing oral testimony, what is the use of going on at all? By Mr. Barnett: None at all. By Mr. Hoffman: I say there is. Mr. Barnett has seen fit not to demur to our petition, but objects to the introduction of any evidence. By the Court: Do you claim that there can be a written contract, and you can throw it aside and go ahead? By Mr. Hoffman: No, sir; we say we have a right to go in and claim under that contract for whatever we got, and the damage for the dif-

ference. We stand on that contract, and sue for damages for the fraud. Now we are commencing with the first history of the contract, and we propose at the proper time to introduce that contract and the warranty deed. By the Court: The court will sustain the objection. (To which action of the court in sustaining said objection the plaintiff then and there duly excepted.) Q. by Mr. Hoffman: Was there a contract entered into for the purchase of the Keeney farm in the spring of 1898 between Mr. Leicher and Mr. Frank Keeney? A. There was an instrument, or something of that kind, to make the deal good until Mr. Leicher returned from Chamols. By Mr. Barnett: We object to that. The contract speaks for itself. Q. by Mr. Hoffman: You may examine that paper. (Handing witness contract marked 'Exhibit A.')

A. Yes, sir; I believe that is the instrument. By Mr. Hoffman: We offer it in evidence. By Mr. Barnett: Well, read it." Thereupon this contract was read in evidence. It recited that the defendant, in consideration of the payment of \$100, and the several payments afterwards to be made, as therein specified, sold the plaintiff what was known as the "Fowler Farm," the main part of which was "situate in the north half" of a certain section, township, and range therein named. Plaintiff also introduced a warranty deed from the defendant to plaintiff for the land described in the petition, but further recited that the tract contained "160 acres, more or less." Plaintiff then repeated to the witness Walch the question asked him at the outset, and to which he answered, "Yes." "By Mr. Barnett: I object to any further evidence under this petition since the introduction of this written contract. Of course, the deed is merely a carrying out of it. We object to the preliminary negotiations for the reason that their contract was reduced to writing. By the Court: Objection sustained. (To which action of the court in sustaining said objection the plaintiff then and there duly excepted at the time, and still excepts.) By Mr. Hoffman: Plaintiff excepts to the ruling of the court, and I suppose there is no use asking any further questions, excepting I want to put it in the record. By the Court: Yes, sir. By Mr. Hoffman: Plaintiff proposes and offers to prove by this witness on the stand, and also by the plaintiff William Leicher, all the facts, allegations, and statements stated in the petition; and also to show by Thomas C. Stanley, who was in 1898, and for many years prior thereto, the county surveyor of Pettis county, and who is an experienced and competent surveyor, that the land described in the petition and in said deed of conveyance mentioned in the petition was actually surveyed and measured by him, and that upon actual survey and measurement he found it to contain 141.82 acres." To all of which offering of evidence the defendant objected, and the objection was by the court sustain-

ed, to which action of the court in sustaining said objection the plaintiff then and there duly excepted, whereupon the plaintiff took a nonsuit, with leave to move to set the same aside, etc.

The plaintiff's offers of proof of every fact alleged in his petition must, for the purpose of passing upon the propriety of the action of the court in rejecting such offers, be taken by us as and for the proof itself. It is rather difficult to satisfactorily review the action of a trial court where a case was disposed of by it as this one was. It is rare that a party, when it comes to the test, can make such an omnibus offer good. When one is heard to say, "I can call spirits from the vasty deep," the inquiry generally suggesting itself is, "Will they come?" Cases made in this way often turn out to be but little more than mere "moot cases," whose determination settles nothing of any practical importance in the case. Much valuable time and labor is frequently needlessly expended in determining such fictitious causes. In cases like the present it would be far better for the court to let the jury retire, and then hear the proposed evidence, and the objections thereto, and in that way both it and the reviewing courts may acquire a more intelligent idea of it, and the questions of law raised by it. Suppose we declare the ruling of the court to be erroneous, and direct the nonsuit to be set aside, and a new trial had, and at such trial the plaintiff fails to make good his offers, but adduces evidence making a different case? The result will be that the parties will find themselves just where they started, and the decision of the reviewing court had as well not been made, as respects the case. Such practice ought not to be tolerated; but the power to accomplish the needed reform does not reside with us. The plaintiff stands in the attitude of having introduced evidence tending to prove that during the preliminary negotiations which took place between him and defendant respecting the purchase and sale of the land the defendant represented to him that the tract contained 160 acres, when in fact, as he found out after the completion of the purchase and the execution of the deed, it only contained 141.18 acres—or 18.82 acres less than the represented quantity; that, when plaintiff proposed a survey of the land to ascertain its quantity, defendant thereupon represented to him that he had himself caused it to be surveyed, and that it was found by actual measurement to contain 160 acres, and that it was, therefore, unnecessary to make the survey; that the land did not contain the quantity represented, and that defendant had not caused a survey thereof, and had not found by actual measurement that it contained that quantity, and that the falsity of these representations were known to defendant when made; that the plaintiff, in ignorance of the falsity of these representations, and relying on

them, was induced to enter into the contract of purchase and accept the deed. In case of fraudulent misrepresentation as to some specific material fact affecting the value of the land, the vendee, trusting to the representations of the vendor, upon the discovery of the fraud may stand by his purchase, and sue for the damages. *Shinnebarger v. Shelton*, 41 Mo. App. 147, and cases there cited; *Owens v. Rector*, 44 Mo. 389, loc. cit. 392, 393. It is seen from the contract and the deed that the sale was not at so much per acre, but was a sale in gross. It has been ruled that the liability of a vendor for a fraudulent representation is as clear where a farm is in gross as where by the acre; and that, if the fraudulent representations relate to the quantity of the land sold, it is immaterial whether the sale was in gross or by the acre. The representations may have induced plaintiff to enter into the contract for the purchase in gross, instead of by the acre, and there would be great injustice in depriving him of his remedy for the fraud on that account. *Thomas v. Beebe*, 25 N. Y. 244; *Tyler v. Anderson*, 106 Ind. 191, 6 N. E. 600. It is quite true, as the defendant contends, that it is a well-settled rule of law that where, without fraud practiced upon him, a person signs a contract, he is conclusively presumed to know its contents, and to accept the terms thereof. *Johnson v. Ins. Co.*, 93 Mo. App. 590; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521; *Kellerman v. Ry. Co.*, 136 Mo. 188, 34 S. W. 41, 37 S. W. 828; *Och v. Railway*, 130 Mo. 44, 31 S. W. 962, 36 L. R. A. 442; *Mateer v. Railway*, 105 Mo. 320, 16 S. W. 839; *Morgan v. Porter*, 103 Mo. 135, 15 S. W. 289; *O'Bryan v. Kinney*, 74 Mo. 125; *St. Louis, etc., Ry. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13. As was said in *Crim v. Crim*, supra: "The written contract is conclusively presumed to merge all prior negotiations, and expresses the final agreement of the parties." But the doctrine of merger of all previous negotiations and representations in a written contract and the merger of the written contract in the deed can have no application in a case like this, where the action is based on the fraud of the defendant, and not upon any warranty on contract on his part in regard to the quantity of the land. Fraud cannot be merged. *Gooch v. Conner*, 8 Mo. 391; *Johnson v. Miln*, 14 Wend. 195; *Thomas v. Beebe*, ante. The difference between the quantity represented and that which was in fact contained in the tract as described was so large as to be material and substantial. The representation as to quantity was prior to and outside of the contract, and not at variance with the deed. But it is said that this case is analogous to that of *Mires v. Summerville*, 85 Mo. App. 183, and should be decided in the same way; but this case is, perhaps, to be distinguished from that, for here it seems the plaintiff vendee resided in a county dif-

ferent from that in which the land was located. The plaintiff and defendant did not stand on an equal footing. It does not appear that the plaintiff was at all familiar with the land, but presumably, since he resided in another county, he was not. But not only this, when he proposed to defendant to have a survey made to ascertain the quantity with certainty, he was met by the representation of the latter that he himself had had a survey made of it, and found out by actual measurement that it contained 160 acres. After the plaintiff had trusted in the defendant's representations, and was thereby influenced and induced to enter into the contract, we do not think that, when sued for his fraud, defendant can be excused from answering for the consequences on the ground of the plaintiff's negligence, where it appears that such negligence was caused by the conduct of the defendant himself. *McGhee v. Bell*, 70 S. W., loc. cit. 496, 497; *Starkweather v. Benjamin*, 32 Mich. 305. It seems to us that on the facts which the evidence tends to prove there is no escape from the conclusion that plaintiff, in regard to the very essence and marrow of the subject of the negotiation, was deceived by the representations of defendant, to the former's great detriment.

The several colloquies carried on between the court and counsel during the examination of the witness Walch show that the learned court misconceived, or rather misapplied, the rule quoted from *Crim v. Crim*. It seems to have failed to notice that the action was based on fraud, and was, for that reason, not within the rule. Even if the plaintiff can make the proof embraced in his comprehensive offer, we are not entirely clear as to whether or not he ought to recover. Nor are we quite satisfied with the way in which the case was disposed of in the court below, and accordingly we shall reverse the judgment, and remand the cause for further trial. All concur.

HELM v. MISSOURI PAC. R. CO.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

JUSTICE OF THE PEACE—ACTION—ADMISSIBILITY OF WRITTEN CONTRACT—SUPERSEDING ORAL CONTRACT—ADMISSIONS OF AGENT—SCOPE OF AUTHORITY—RES GESTÆ—VERDICT—AMOUNT—SUFFICIENCY OF DATA.

1. Rev. St. § 3852, provides that no formal pleadings shall be required in justice's court, but that plaintiff shall file the instrument sued on, or a statement of the account or of the facts constituting the cause of action, and that defendant shall file the instrument, account, or statement of his set-off or counterclaim. *Held*, in an action against a carrier for delaying the shipment of live stock, that the written contract of shipment was admissible on behalf of the carrier without having been pleaded.

2. A shipper contracted with a carrier orally for a car for his cattle on a certain day. The parties then reduced the contract to writing, in which it was provided that the shipment was

not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market, and also that the shipper released any cause of action for damages which might accrue to him by any previous contract. *Held*, that the written contract superseded the oral one.

3. In an action against a carrier for delay in a shipment of live stock, a witness for plaintiff testified to an admission of the carrier's agent that there was no occasion for delay in furnishing a car, and that he believed the agent was agent for the carrier at Kansas City, "or something"; that for all the cattle witness ever shipped he had paid this agent the freight therefor, and did not know what he was; that he was agent there; and that he (witness) always made checks for freight payable to him. *Held*, that the showing of the agent's authority was insufficient to warrant the introduction of his admission.

4. An agent's admission made a day after the transaction to which it related had been completed was inadmissible as part of the res gestæ.

5. In an action against a carrier for delay in a shipment of live stock, the court instructed that the measure of damages was the difference between the market price when the cattle arrived at their destination and that when they should have arrived, and the difference between the shrinkage of weight actually sustained, and that which would have taken place had there been no delay. The weight of the cattle was not shown. All that appeared was the amount of shrinkage, which, at the price the cattle brought, would have made the amount of that item of damages \$28. *Held*, that a verdict of \$100 was conjectural and excessive.

Appeal from circuit court, Jackson county; Wm. B. Teasdale, Judge.

Action by William T. Helm against the Missouri Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Elijah Robinson and Harris Robinson, for appellant. Llewellyn Jones, for respondent.

SMITH, F. J. This is an action which was commenced before a justice of the peace. It is alleged in the statement that plaintiff was the owner of 23 head of fat cattle, which he desired to ship to the Kansas City market from Adams' Station (an unimportant station, at which defendant kept no agent), and that accordingly, on January 14, 1901, the defendant, through its agent at Independence, promised to furnish at Adams' Station a car on that day for the shipment of plaintiff's cattle, for which he (plaintiff) promised to pay the usual freight charges; that, relying on said promise, plaintiff drove his cattle to Adams' Station, and there placed them in the defendant's stock pens, and had them ready for shipment, but that defendant failed to furnish the car so promised until the next day (the 15th), by reason of all which plaintiff's cattle were detained at said station, and did not reach Kansas City until 3 o'clock in the afternoon of that day, and 17 hours later than they would have arrived, had defendant kept its promise; and that by reason of defendant's neglect plaintiff was

damaged \$100, etc. The plaintiff testified that defendant's agent agreed to furnish him a car at Adams' Station in ample time to be loaded and picked up by the freight train going west, that would, if on time, pass that point at 8 o'clock that evening, and reach Kansas City by 10 o'clock next morning. He further testified to the other facts alleged in his statement, and that when he engaged the car he also signed a written contract for the shipment.

The defendant introduced the contract referred to by plaintiff in his testimony. It contained, amongst others, this provision: "First. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market." It does not appear from the abstracts that any exceptions were taken or preserved to the action of the court in overruling plaintiff's objections to the introduction of said contract, but the court later on, by an instruction given sua sponte, withdrew the same from the consideration of the jury. The reasons influencing the action of the court in withdrawing the contract are nowhere stated. It is conceded by the plaintiff that he signed and delivered it in duplicate to the defendant, and since it does not appear that any fraud or imposition was practiced, or that any mistake intervened, it must be taken as the sole evidence of the final agreement between the parties. *Wyrick v. Railway*, 74 Mo. App., loc. cit. 416. It was not required of defendant, under the statute (section 3852, Rev. St.), to set it up by answer or other pleading, in order to entitle him to introduce it in evidence. In actions before justices of the peace, no formal pleadings are required. There the general issue is presumed to be pleaded, and under it the defendant may show any matter which tends to defeat the plaintiff's action. On a trial anew in the circuit court the rule is the same. *Sherman v. Rockwood*, 26 Mo. App. 403; *Hornsby v. Stevens*, 65 Mo. App., loc. cit. 189; *Reed v. Snodgrass*, 55 Mo. 180. If the defendant relied upon the provisions of the contract already quoted as a defense in bar of the plaintiff's action, he had the right to introduce it in evidence without formally pleading its provisions. We cannot but think that the action of the court in withdrawing the contract from the consideration of the jury was erroneous.

The defendant, it further seems to us, was entitled to the third instruction requested by him, to the effect that if plaintiff entered into a written contract with defendant for the transportation of his cattle, and that by the terms thereof it was agreed that it—defendant—would not transport said cattle within any specified time, or in time for any particular market, then defendant was only liable for unreasonable delay, etc. Now, if the parties entered into a verbal contract for the furnishing of cars, as alleged in the

¶ 4. See Evidence, vol. 20, Cent. Dig. § 354.

statement, yet if, after entering into such verbal contract, the parties further entered into the written contract containing the provision previously quoted, then the latter is the sole evidence of the final agreement between them, and it cannot be varied by prior parol negotiations. *Wyrick v. Railway*, supra; *Railway v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; *McFadden v. Railway*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; *O'Bryan v. Kinney*, 74 Mo. 125. The written contract was entered into before there had been any breach of the parol contract, and in this respect this case materially differs from that of *Harrison v. Railway*, 74 Mo. 304, 41 Am. Rep. 318; *Miller v. Railway*, 62 Mo. App. 252; *Gann v. Railway*, 72 Mo. App. 34. When a written contract is so entered into, it will supersede and do away with the prior verbal one between the parties; and especially so when such written contract contains the provision previously quoted, and also a further provision, as here, that the shipper "hereby releases and waives any and all cause for action for damages that may have accrued to him by any written or verbal contract prior to the execution hereof." *Miller v. Railway*, 62 Mo. App., loc. cit. 259; *Gann v. Railway*, 72 Mo. App., loc. cit. 38; *Harrison v. Railway*, 74 Mo., loc. cit. 373, 41 Am. Rep. 318; *Leonard v. Railway*, 54 Mo. App. 294. It is clear that when the parties here entered into the written contract that its provisions took the place of and superseded those of the previous verbal contract, and so became the final and only contract between them relating to the furnishing of the car or the shipment of the cattle. The latter contract thereby became merged in the former. Nor will it do to say that there was no sufficient consideration for the substituted or superseding written contract. *Leonard v. Railway*, supra; *O'Bryan v. Kinney*, supra. The verbal agreement being out of the way, no good reason can be assigned why the defendant was not entitled to a submission of the case upon the theory of his refused instruction.

The plaintiff's first instruction, telling the jury that if it found that defendant had promised to furnish him a car on the day therein named, and failed to keep its promise, then to find for plaintiff, would have been well enough, if it had gone further, and submitted the points raised by the evidence of the defendant. *Clark v. Hammerle*, 27 Mo., loc. cit. 70; *Shewalter v. Railway*, 84 Mo. App., loc. cit. 601, and cases there cited.

The plaintiff was permitted, over the objections of the defendant, to prove the admissions of one Tutt, which were, in substance, that he (Tutt) had told a witness for plaintiff that there was no occasion for the delay in furnishing the car, and that the men down there were too neglectful. Plaintiff's said witness further testified that he believed Tutt was agent for defendant at Kansas City, "or something"; that, in all the cattle he had ever shipped up, he had al-

ways paid Tutt the freight there, but that he did not know what he was; that he was agent there; and that he had always made checks payable to him (Tutt) for freight in shipping cattle out to his (witness') station. The law is that there must be a prima facie showing of an agent's authority by other evidence, before his admissions can be admitted. *Mechem on Agency*, sec. 716. And in section 714 of the work just referred to, it is stated that it is not every statement or admission which an agent may chose to make that is binding upon the principal. In order to have that effect, they must have been made in respect to a matter within the scope of his authority. If, therefore, the statements or admissions offered in evidence were made by one who either had no authority at all, or had no authority to represent the principal in the matters concerning which they were made, they are not admissible against the principal. So they must have been with reference to the subject-matter of his agency. And the adjudicated cases, with one accord, all declare that the rule which admits the admissions of an agent as against the principal is limited to two cases: First, where the scope of the agency is such that the agent is an agent for the purpose of making the particular admission; and, second, where the admission is in the form of a declaration made by the agent while acting within the scope of his agency, and about the business of his principal, concerning such business. *Lumber Co. v. Kreeger*, 52 Mo. App., loc. cit. 422, and cases there cited. And so it was said in *Bergeman v. Railway*, 104 Mo., loc. cit. 86, 15 S. W. 992, that the admissions of an agent in reference to the business of the principal, with which he has been intrusted, if made while engaged in its execution, or so soon thereafter as to constitute a part of the transaction, are admissible in evidence. The evidence nowhere discloses the exact scope of Mr. Tutt's agency. Whether he was one of defendant's stock agents, or an agent connected with the defendant's freight office at Kansas City, does not clearly appear. Nor does it appear that he was connected with its train service, or engaged in the management or operation of its trains. It would be strange that a freight collecting station agent could by any admission of his bind the defendant, his principal, by an admission of the kind he appears to have made. As far as appears from the record, his admissions fall far short of meeting the requirement of the rules to which we have adverted. And besides this, they were made a day after the transaction had been completed, to which they related. They were, therefore, too remote to be a part of the res gestae, if otherwise admissible.

The defendant, by its motion for a new trial, complained that the verdict was excessive. The plaintiff sued for an even hundred dollars, and had judgment for a like amount. The evidence showed that there

was a probable shrinkage in the cattle of from 25 to 40 pounds a head, and that there was a decline of 10 cents on the hundred. The jury was told by an instruction for plaintiff that the measure of damages was the difference between the market price when the cattle arrived in Kansas City and that when they should have arrived, and the difference between the shrinkage in weight actually sustained, and that which would have taken place had there been no delay. Under this instruction, it is difficult to see how the jury could have reached the conclusion it did. The weight of the cattle was not shown. How, then, could the jury tell what the difference in the market price would amount to, unless it had been informed of the weight of the cattle? There was nothing upon which to base the computation. If the cattle declined 10 cents per hundred pounds, they could not ascertain how much to allow plaintiff on that account until the weight of the shipment was shown. All the jury had was the amount of the shrinkage, which was 690 pounds. At \$4.20 per hundred—the price the cattle brought—the amount of that item of damage was \$28.98. The verdict for an amount in excess of that, under the evidence and instructions, was unauthorized. It was based upon conjecture, and for that reason, if for no other, it cannot be upheld.

The judgment will be reversed, and cause remanded. All concur.

PEYCKE et al. v. AHRENS.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1908.)

STATUTE OF FRAUDS—TELEGRAMS AND LETTERS EVIDENCING CONTRACT.

1. Telegrams and letters between defendant and plaintiff showed that defendant had telegraphed an order for a car load of cabbage at a named price. Later, a second and a third car were requested at a named figure by telegraph, and the receipt of the first car acknowledged, several telegrams passing between the parties. Defendant also wrote, "We take it that we have two cars of Texas cabbage en route," and, later, that the second and third cars had been received, that the cabbage was not satisfactory, and they must reject it. Another letter by plaintiffs and one by defendant followed. *Held* that, considered in their entirety, the telegrams and letters constituted a contract of sale valid under the statute of frauds.

Appeal from circuit court, Jackson county; Dan'l B. Holmes, Special Judge.

Action by Julius Peycke and others against Albert Ahrens. Judgment for plaintiffs, and defendant appeals. Affirmed.

Beardsley, Gregory & Kirshner, for appellant. Meservey, Pierce & German, for respondents.

SMITH P. J. The plaintiffs and the defendant were each dealers in cabbage, the place of business of the former being Kansas City, and that of the latter Chicago. As appears from the record, the plaintiffs' claim

is that they entered into a contract with the defendant by which they sold him two car loads of medium-sized hard green Texas cabbage at \$3.50 per crate, payable on delivery. This contract was put in issue by defendant's answer. At the trial, the plaintiffs to maintain the affirmative introduced in evidence a series of telegrams and letters which had passed between them and the defendant, and which they deemed pertinent. In the trial court the defendant requested an instruction—in effect a demurrer—by which he raised the objection that their written correspondence was not sufficient to satisfy the requirements of the statute of frauds; but that court denied his request, and later on gave judgment for plaintiffs. It is conceded that the only question the defendant's appeal has brought before us for decision is as to the propriety of the ruling of the trial court touching the defendant's demurrer.

Our statute (section 3419) is that: "No contract for the sale of goods * * * shall be allowed to be good, unless * * * some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract." It is almost a literal transcript of the seventeenth section of the English statute of frauds (29 Car. II., c. 1). Benjamin on Sales, 9. It is an old practice to put in evidence several papers, as letters, etc., relating to the same contract, and by their references to, or connections with, each other, to establish all the requisites of a proper memorandum under the statute. *Browne, St. Frauds*, 346b et seq.; *Heldeman v. Wolfstein*, 12 Mo. App. 366; *Greeley-Burnham Grocer Co. v. Capen*, 23 Mo. App. 301; *Cunningham v. Williams*, 43 Mo. App. 629; *Armsby Co. v. Eckerly*, 42 Mo. App. 229; *Moore v. Mountcastle*, 61 Mo. 424. In *Swallow v. Strong* (Minn.) 85 N. W. 942, it was said that "the memorandum of a contract for the sale of land, to satisfy the statute of frauds, may consist wholly of letters, if they are connected by reference, express or implied, so as to show on their face that they all relate to the same subject-matter. This relation cannot be shown by parol, but it must appear from the nature of the contents of the letters, or by express reference therein to each other. Such memorandum, whether it consists of a single writing or several, must express the substantial terms of the contract and its subject-matter with reasonable certainty. It is not, however, essential that the land be described with precision, if the writing on its face is an adequate guide to find it." And in *Thayer v. Luce*, 22 Ohio St. 62, it was, in substance, said that several writings may be construed together for the purpose of ascertaining the terms of a contract required by the statute of frauds to be in writing; and, if some only of the writings be signed, reference must specifically be made therein to those which are not so signed. But, if each of the writings be so signed, such reference to the other need not be made, if by inspection and comparison

it appears that they severally relate to and form a part of the same transaction. And similar statements of the rule are to be found in other cases. *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496; *Peabody v. Speyers*, 56 N. Y. 230; *Work v. Cowhick*, 81 Ill. 317.

A sale is defined in the elementary books to be a contract or agreement for the transfer of the absolute property in personalty from one person to another for a money price. *Tiedeman on Sales*, sec. 1; 2 *Kent's Com.* 468; *Benjamin on Sales*, sec. 1; *Story on Sales*, sec. 1. According to the Roman law, a sale was not the immediate transmutation of the property, but a contract of mutual and personal engagements for the transfer of the thing on the one hand, and the payment of the price on the other, without regard to the time of the performance on either part. *Cunningham v. Ashbrook*, 20 Mo. 554. At the common law, consent alone was sufficient to constitute a valid sale. *The W. W. Kendall Boot & Shoe Co. v. Bain*, 46 Mo. App. loc. cit. 594, 595, and cases there cited. In making a contract involving the statute of frauds there are three essential and inevitably necessary ingredients: (1) the parties; (2) the subject-matter; and (3), the price. Where any one of these essentials is wanting, there is no contract. *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Martin v. Mill Co.*, 49 Mo. App. 29.

The dominating question here is whether or not, if we take the several writings and construe them together as an entirety, they disclose a contract of sale sufficient to satisfy the requirements of the statute of frauds. A reference to them will show that on the 23d of April the defendant telegraphed plaintiffs he wanted "a carload or two of California cabbage, quick, wire what they could do"; and to which plaintiffs on the same day answered that they had "one car of Texas cabbage" which would be due on the next day, and which "they could sell at \$3.60 per crate." To plaintiffs' said answer, defendant on the 25th replied, "if car is medium sized, hard green, well iced, ship." On the next day, the 26th, the defendant telegraphed plaintiffs: "Can you offer Calif. rolling, wire number routing Texas car." Plaintiffs on the same day answered: "Have no Calif. unsold for quick delivery, but can give you another Texas due here Sunday." On the 27th, plaintiffs telegraphed defendant: "Can divert another car Texas cabbage same quality and price." To this the defendant answered: "Car just arrived. May ship another well iced if at \$3.50." On the next day, the 28th, the plaintiffs telegraphed defendant: "Will divert car Monday morning \$3.50 delivered. If not satisfactory wire quick." On the next day, the 29th, the defendant telegraphed plaintiffs: "Do not spare ice on to-day's shipment." And afterwards, on the same day, the defendant telegraphed plaintiffs: "Will take another car nice medium cabbage, same price. Answer." To this the plaintiffs telegraphed defendant:

"Do we understand you want another car divert Fruit Grower's 18927 just in?" In reply to which, defendant telegraphed back to plaintiffs: "You understand correct. Let 18927 also come, well iced." Later on the same day, plaintiffs wired defendant that: "Fruit Grower's 17546 containing 208 crates quality condition fine, passed here to-day Burlington." And on the same day defendant wrote plaintiffs, saying: "After exchange of telegrams to-day, we take it that we have two cars of Texas cabbage en route: FGE 17546 and FGE 18927. Weather is extremely warm to-day, and, as we wired you, trust you will see that cars are not spared any ice, as there is too much money invested in this cabbage." On the same day the plaintiffs wrote defendant that they inclosed him invoices for the two cars of cabbage, etc. On May 1st, the defendant wrote plaintiffs acknowledging the receipt of the invoices, and that we "wired you second, third arrived this morning * * * stock too small. Some soft. Sorry must reject; worth probably \$2.50 per crate." And also further wrote: "We are very sorry that we ordered the last two cars, as rejecting anything is not in our line, but as the shipment was not what we ordered * * * we concluded we had better wire you as we did." On August 7th, plaintiffs wrote defendant, saying, amongst other things, "We sold you altogether three car loads of Texas cabbage last spring and delivered them to you." To this letter the defendant responded that: "The cabbage market was certainly as good at the time your second and third cars were sold as when we received your first. We have yet to decline to accept a car of goods that we bought because there was a loss staring us in the face merely on account of the decline in the market value." The foregoing telegrams and letters are connected by reference, express or implied, so as to show they all relate to the same subject-matter, and no good reason is seen why they do not constitute a sufficient memorandum of a contract of sale to satisfy the statute. They clearly disclose the names of the contracting parties, the subject-matter, and the price, so that none of the essential terms required to constitute a sale are absent. This correspondence, unaided by parol evidence, plainly shows that the plaintiffs sold and the defendant purchased three car loads of cabbage at \$3.50 per crate to be delivered at Chicago. But this is not all. In the two last letters of the defendant, as has been seen, are references and statements to the effect that plaintiffs had not only sold and he had purchased the three car loads of cabbage, but that the same had been delivered to him in Chicago. The only complaint he made was that as to quality. This issue was found against him, and is conceded to be conclusive if the correspondence establishes a contract which is sufficient to satisfy the

statute. Taking the admissions of these letters in connection with the preceding telegrams, and when considered in their entirety, and it will be found that they disclose every element required to constitute a contract of sale good under the statute. Nothing is wanting. And it is no objection to say that these letters were not written until after the contract was made, or until after its breach, if they contain, as we think they do, the required statement of the contract. *Moore v. Mountcastle*, 61 Mo. 424; *Cash v. Clark*, 61 Mo. App., loc. cit. 640, 641; *Cunningham v. Williams*, 48 Mo. App. 629.

The object of the section was simply to dispense with parol testimony in certain cases, and to require evidence in writing, over the signature of the party to be charged, of the obligation to be enforced; and in the present case we cannot doubt that the correspondence fully meets that requirement. Accordingly, the judgment will be affirmed. All concur.

MAUGH v. HORNBECK et al.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1903.)

SALES — WARRANTIES — PLEADING — SUFFICIENCY AFTER VERDICT—OFFER OF PROOF—SCOPE—APPEAL.

1. Where an answer is not demurred to as not stating facts sufficient to constitute a defense, but the objection is taken to evidence attempted to be introduced thereafter, the objection will be overruled, if the answer is sufficient after verdict.

2. In an action on nonnegotiable notes given for a drilling outfit, an answer that the machinery was sold to be used in prospecting for mineral, on a warranty that it would do satisfactory work, and would drill 15 feet per day in solid limestone, and that defendants found it unsuitable for drilling in stone, and that it would not work in the locality for which it was intended and warranted, and that defendants had offered to return the same, sufficiently stated a defense for breach of warranty to authorize the introduction of evidence thereof.

3. Where evidence of a warranty was erroneously excluded on the ground that the answer did not sufficiently present the issue, defendant was not required, in order to obtain a reversal on appeal, to have further offered to prove a breach of the warranty, and damages arising therefrom.

Appeal from circuit court, Jasper county; J. D. Perkins, Judge.

Action by George J. Maugh against O. H. Hornbeck and others. From an order granting a new trial after a verdict for plaintiff, he appeals. Affirmed.

Shannon & Shannon, for appellant. Potter & Emerson and S. C. Westcott, for respondents.

ELLISON, J. This action is based on five nonnegotiable promissory notes. The verdict of the jury in the trial court was for plaintiff, whereupon defendants filed a motion for new trial, which was sustained, and thereupon plaintiff appealed. The notes were given

to the SeEVERS Manufacturing Company in part payment of a "steam drilling outfit," and they were assigned to plaintiff. The answer, as claimed by defendant, set up a warranty of the machinery, and a failure of warranty. Plaintiff's view, as expressed in his brief, is that the answer did "not contain a negation of the warranties therein alleged." At the trial, after the close of plaintiff's case, defendant undertook to show certain warranties as to the efficiency and capacity of the drill. This was objected to by plaintiff for two reasons—one, that no breach of warranty was alleged in the answer; and, second, that plaintiff was an assignee for value, and the alleged warranty was "a matter collateral to the notes sued on." The objection was sustained generally. The plaintiff only relies here on the point as to the sufficiency of the answer as pleading a warranty, and breach thereof. It will be noted that the objection to the sufficiency of the answer came through an objection to evidence. So if we should consider the answer insufficient if objected to by way of demurrer before the trial, it would not follow that it was so defective as to justify the refusal of all evidence thereunder. The rule is that, when an objection to a petition or answer as not stating a cause of action or defense is made by way of an objection to evidence thereunder, the objection will be overruled if the pleading is sufficient after verdict. *Marshall v. Furgeson*, 78 Mo. App. 645; *Donaldson v. Butler County*, 98 Mo. 163, 11 S. W. 572; *Hurst v. Ash Grove*, 96 Mo. 168, 9 S. W. 631; *Young v. Shickle*, 103 Mo. 324, 15 S. W. 771; *Hatten v. Randall*, 48 Mo. App. 203. Those cases involved the sufficiency of a petition, but the same rule would apply to an answer. Tested by this rule, we have no doubt of the sufficiency of the answer, and will consequently approve the trial court's action in concluding to grant a new trial. The answer contained the following allegations: "The defendants further, in answer to plaintiff's petition, state that the contracts herein sued on were given, as stated, as part purchase price for one steam drilling outfit to the SeEVERS Manufacturing Company; that said drilling outfit was sold to defendants to be used in drilling and prospecting for mineral in the zinc and lead district of Missouri and Kansas; that said drilling machine was sold to defendants on a warranty made by the duly authorized agent of the SeEVERS Manufacturing Company to said defendants that said machine would do satisfactory and speedy work, and do as good work as any drilling machines which are commonly used in the Missouri-Kansas zinc and lead district, and would also drill at least fifteen feet per day in solid limestone; that said defendants took said drill, tested and operated the same; that said machine was unfitted and unsuitable for drilling in rock or stone, and was wholly unsatisfactory and of no use to defendants, and would not work in the locality for which it was intended and warranted. The defendants

further state that, a long time prior to the alleged assignment of the within contracts to plaintiff, the said defendants offered to return said machine to the Seevers Manufacturing Company," etc. We are satisfied that while it could have been more specific, it yet could not be said that it wholly failed to state a defense based on a breach of warranty. There was a statement of express warranty, and its failure.

Plaintiff makes some suggestions to the effect that defendants, in addition to offering to show a warranty, should have gone further, and offered to prove a breach and damages. If defendants were cut off from the right to show a warranty, it would certainly have been quite useless to offer to show a breach, or damages thereunder. The authorities cited by plaintiff in support of his suggestions are not in point.

The order granting a new trial is affirmed. All concur.

SHAEFER v. MISSOURI PAC. RY. CO.

(Court of Appeals at Kansas City, Mo. Feb. 16, 1908.)

CARRIER-PASSENGER-ASSAULT BY CONDUCTOR-EVIDENCE-RES GESTÆ-FAILURE TO OBJECT-CONCLUSION OF WITNESS-CREDIBILITY-INSTRUCTIONS-SUFFICIENCY OF EVIDENCE-FORM OF VERDICT.

1. In an action by a passenger for an assault by a conductor and porter, plaintiff testified that after the porter had choked him he said to him, "That's a nice way to treat a passenger here," and the porter replied, "That is my bread and butter, and I would do it again." Plaintiff had alleged that for 30 or 40 minutes after the assault the conductor and porter continued to insult and abuse him. *Held*, that the evidence of the porter's reply was admissible as bearing on the issues.

2. It was also admissible as part of the *res gestæ*.

3. Evidence of a witness that, on going to plaintiff's rescue, the porter stepped back, and another passenger said something to the porter about abusing plaintiff, and the porter then threatened that passenger that "he would get treated similar if he did not keep his mouth shut," was admissible as part of the *res gestæ*.

4. Plaintiff's witness was asked whether the conductor or porter used any boisterous or insulting language to plaintiff, and answered that he heard some words mumbled, but could not tell what they were. *Held* that, though the inquiry was improper as calling for a conclusion, yet, in view of the witness' answer, there was no reversible error.

5. Another of plaintiff's witnesses, on being asked whether he heard any cursing or abusive language used, and, if so, by whom, answered that he did. Defendant failed to cross-examine him. *Held* that, in view of this failure, defendant could not complain on appeal that the evidence was merely the witness' conclusion.

6. Where the evidence of a witness is objectionable as his conclusion, but is merely cumulative, and no prejudice appears, it will not constitute reversible error.

7. A defendant's failure to except to plaintiff's testimony will preclude the review on appeal of the admission of such evidence.

8. In an action by a passenger for an assault by a carrier's servants, plaintiff's witness, after having testified to the disarrangement of plaintiff's neckwear, stated that he thought

that was probably the only injury plaintiff sustained in the scramble. *Held*, that this statement of the witness was properly excluded as merely his conclusion.

9. Although inquiry as to a witness' veracity may extend to his general moral character or reputation, evidence that he was in the saloon or "joint" business is inadmissible to discredit him.

10. In an action by a passenger for an assault by the carrier's servants, plaintiff on cross-examination stated that at the time of the difficulty he did not use profane language; that he was a Christian, as good as the average man. *Held*, that evidence that plaintiff was excitable, impulsive, and was accustomed, on the slightest provocation, to use profane language, was not competent to discredit plaintiff's testimony.

11. In an action by a passenger for an assault by the carrier's servants, it appeared that the occasion of the trouble was the detachment by the carrier's conductor of more mileage from the passenger's ticket than the latter thought was proper. Near the close of the cross-examination of the carrier's conductor, the carrier objected that the mileage "pulled" by the conductor was immaterial, but evidence relating to it had previously been elicited without objection. *Held*, that the refusal of an instruction excluding the matter of the mileage from the jury was proper.

12. In an action by a passenger for an assault by the carrier's servants, evidence that the occasion of the trouble was the detachment by the conductor from the passenger's mileage ticket of more mileage than the latter thought proper is admissible as part of the *res gestæ*.

13. In an action by a passenger for an assault by the carrier's servants, the jury returned a verdict for plaintiff "at the sum of \$750, seven hundred dollars." *Held*, that the amount expressed in the written words was controlling, and that expressed in the numerals would be disregarded.

Appeal from circuit court, Jackson county; E. P. Gates, Judge.

Action by J. F. Shaefer against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action by plaintiff against defendant to recover damages for an assault committed by a conductor and negro porter of the latter on the former while a passenger on a train of such latter. The facts which the plaintiff's evidence tends to prove are stated with sufficient accuracy in the defendant's statement of the case, and are: That plaintiff was a passenger on the defendant's train on the evening of January 23, 1899, and when between St. Joseph, Mo., and Atchison, Kan., a difficulty occurred between him and the conductor. The testimony on both sides tended to show that plaintiff told the conductor he was going to Atchison, and offered mileage tickets in payment of his fare; that the conductor informed him that he could not accept mileage to Atchison; that plaintiff then asked the amount of cash fare, and, being told it was 85 cents, handed the conductor \$1, and the conductor gave him 15 cents in change, and, while punching his receipt for the cash fare, remarked to plaintiff that he could take cash fare beyond Atchison, either in the direction of Kansas City or in the direction of Omaha;

that thereupon plaintiff said he was going to Hiawatha, Kan., and told the conductor to take the mileage to Hiawatha; that the conductor then handed plaintiff back his \$1 and received from plaintiff his 15 cents change, the plaintiff at the same time handing to the conductor his mileage book; that the conductor took from the book the fare to Hiawatha, being tickets representing 70 miles, that being the mileage fare from St. Joe to Hiawatha, and canceled the same and returned the book to plaintiff; that thereupon plaintiff asked the conductor how much mileage he had taken, and the conductor replied 70 miles. Up to this point there was no conflict in the evidence. Then there was testimony on the part of the plaintiff tending to prove that, upon being told by the conductor that he had taken 70 miles, the plaintiff said he did not want to go to Hiawatha, and demanded the return of his mileage in a rather resolute and determined way, at the same time rising to his feet, and that thereupon the conductor said, "G—d d—n you, why didn't you say so?" and knocked or pushed the plaintiff down in the seat, and that he and the porter choked him. There was a trial to a jury which resulted in judgment for plaintiff, and defendant appealed.

Eljah Robinson and J. L. Lorie, for appellant. J. C. Rosenberger and Haff & Michaels, for respondent.

SMITH, P. J. (after stating the facts).

1. The plaintiff testified that after the porter had choked him he said to the latter, "That's a nice way to treat a passenger here," and the latter replied, "That is my bread and butter, and I would do it again." The defendant contends that, since this utterance of the porter was after the choking took place, it should have been excluded on its objection. One of the issues made by the pleadings was whether or not "for thirty or forty minutes after the assault the conductor and porter continued to insult, abuse, and vilify plaintiff with coarse, obscene, profane, and insulting language." This testimony tended to prove an issuable fact in the case, and, besides, it was so clearly connected with the assault itself as to be a part of the *res gestæ*, and it was therefore properly admissible. The general rule is that the declarations, to form a part of the *res gestæ*, should be made contemporaneously, or nearly so, with the main event; yet, where, there are any connecting circumstances between such event and the declarations, the latter, though made some time afterwards, may form a part of the *res gestæ*. And it is sufficient if there is such connection between the declaration and the event that, although the declaration is made some time after the event, it may be regarded, not as an historical narrative, but as a verbal act, forming a part of one transaction. *Harri-*
man v. Stowe, 57 Mo. 93; *Stoeckman v. Rail-*

way Co., 15 Mo. App. 503. According to this rule, we think the testimony was properly admitted.

2. The witness Condon testified that "when the negro porter grabbed Shaefer (plaintiff) by the throat with both hands, everybody in the car was running to Shaefer's rescue. When I got up there the negro let go Shaefer and stepped back, and another big traveling man there said something to him about abusing Shaefer, and the 'nigger' threatened him that he would get treated similar if he didn't keep his mouth shut." This, we think, was so closely connected with the assault as to be a part of the *res gestæ*.

3. During the examination of the witness Krieger the plaintiff's counsel inquired of him whether or not the conductor or porter used any bolsterous, unseemly, or insulting language to plaintiff. The witness answered that he heard some words mumbled, but that he could not tell what they were. It is sufficient to say that, while the inquiry was improper as calling for the expression of a conclusion of the witness, yet, as the witness answered in the negative, the inquiry did not prejudice the defendant. The plaintiff was permitted to inquire of the witness Condon whether or not he heard any cursing or abusive language used, and, if so, to state by whom. The witness answered that he did. The defendant could have protected itself if it had cared to do so by exercising its privilege of cross-examination. It could have asked the witness to state the language used, but this was not done. And if the opinion of the witness was erroneous, it was in the power of defendant, by cross-examination, to explode it by calling on him to state the language used by the conductor and porter. If the defendant failed to take this precaution, he ought not to be heard to complain of the action of the court. Besides, the evidence of the witness was somewhat cumulative, and, while the question by which it was brought out was not, perhaps, proper, we do not feel at liberty to reverse the judgment on that account, unless we could discover that prejudice resulted from the action of the court in permitting it to be answered.

4. The defendant objects that the court erred in permitting the plaintiff to testify that one Bendure told him about being influenced to testify in favor of the defendant. Upon examining the record we do not find that any exception was preserved to the ruling of the court in permitting the plaintiff to testify as to the declarations of Bendure, and for that reason the alleged error cannot be reviewed here.

5. On cross-examination, plaintiff's witness Krighbaum testified that after the encounter he noticed Shaefer's collar and necktie were disarranged, and that, "*I think that was probably the only injury plaintiff sustained in the scramble.*" That part of the witness' testimony which we have quoted and italicised was, on motion of plaintiff, excluded. The

witness had already stated what he had seen, and the quoted part of his testimony is no more than an expression of a conclusion deduced by him. This was a usurpation of the province of the jury, and was properly stricken out.

6. The defendant inquired of several of the witnesses if they knew the reputation of the plaintiff's witness William Condon for truth and veracity. After they had answered this question, they were further asked if they knew what business he was engaged in, to which they answered, "In the saloon or 'joint' business." The plaintiff objected to the question by which this answer was called out, and which objection was by the court sustained. Under the rulings in this state a witness may be impeached, not only by a general reputation as to veracity, but the inquiry may extend to the general moral character or reputation of the witness. *State v. Shields*, 13 Mo. 236, 53 Am. Dec. 147; *State v. Hamilton*, 55 Mo. 520; *State v. Breeden*, 58 Mo. 507; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *State v. Miller*, 71 Mo. 590; *State v. Patrick*, 107 Mo. 147, 17 S. W. 666; *State v. Grant*, 79 Mo. loc. cit. 133, 49 Am. Rep. 218. But evidence as to specific acts is held inadmissible. 1 Greenleaf, Ev. § 461. Evidence of general moral character of the witness being admissible, it must follow that anything showing determination of that general moral character or reputation is also admissible. *State v. Grant*, supra. The inquiry in the present case did not extend to the general moral character or reputation of the witness. The veracity of a witness cannot be impeached by inquiry as to specific acts of past delinquencies. *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101. And so evidence of specific and independent immoral acts is not admissible for the purpose of impeaching the credibility of a witness. *Seymour v. Farrell*, 51 Mo. 95; *State v. Rogers*, 108 Mo. 202, 18 S. W. 976; *State v. Grant*, supra; *State v. Beaty*, 25 Mo. App. 214. Evidence tending to show that the witness had been in the saloon business or liquor traffic is, under the rule to which we have referred, inadmissible for the purpose of impeaching his credibility. A saloon keeper or liquor dealer may or may not be a credible person, but evidence of the fact that he is or has been such cannot be received to impeach his credibility; so we do not think the ruling of the court was erroneous.

7. The court rejected the defendant's offers of evidence to prove the disposition and characteristics of plaintiff; that is to say, that he was excitable, impulsive, and was accustomed, on the slightest provocation, to use profane language. The plaintiff, in answer to questions asked him by defendant on cross-examination, stated that at the time of the difficulty he did not use profane language, and that he was a Christian, but not better than any other man, but as good as the average man. We do not think the prof-

fered evidence was competent to discredit that given by plaintiff. It was clearly irrelevant.

8. The plaintiff's first instruction correctly expressed the law applicable to the case. *Malecek v. Railway Co.*, 57 Mo. 18; *Farber v. Railway Co.*, 116 Mo. loc. cit. 91, 22 S. W. 631, 20 L. R. A. 350. And defendant's second and third were rightfully refused. It is manifest from the unobjected-to testimony of the plaintiff that the *casus belli* was the detachment by the defendant's conductor of more mileage than the former thought the latter had a right to. This was a fact for the jury to consider, along with the other facts in evidence. It is true that the defendant near the close of the cross-examination of its conductor objected that it was immaterial as to the mileage "pulled" by the conductor, but the evidence relating to it had previously been elicited without objection, and the objection then made did not reach it. Such evidence was therefore before the jury, and the defendant's instruction excluding it was rightly refused. *Ring v. Canada Southern Line*, 14 Mo. App. 579; *Drehman v. Stifel*, 41 Mo. loc. cit. 184, 97 Am. Dec. 268. Such evidence was a part of the *res gestæ*, and should have been admitted on that ground.

9. The defendant insists that the verdict is so clearly against the evidence that it is apparent that the jurors must have been prejudicially influenced against it by the admission of the evidence of which it has complained. It must be conceded that the evidence is so conflicting as to render it utterly impossible to reconcile it. If credence is given to plaintiff's evidence, then the conclusion is irresistible that the assault was not only committed upon plaintiff by the defendant's conductor and negro porter, but that it was of the most flagrant and aggravated character, fully justifying the verdict; and, on the other hand, that adduced by defendant is such as to create a doubt as to the justice and propriety of the verdict. But there have already been three jury trials of the cause with a like result in each. In view of this, we would not feel justified in overthrowing the verdict on the ground that it was the result of prejudice engendered in the minds of the jury by the admission of the objected-to evidence. We cannot but think that if all the evidence to which defendant made objection were out of the case, the result would have been the same.

10. In the verdict the amount was expressed in numerals and words thus: "At the sum of \$750, seven hundred dollars." The plaintiff remitted \$50, and judgment was thereupon given for \$700. No reason is seen why the rule to the effect that, where there is a variation between amounts expressed in numerals and words in a written instrument, the written words must prevail over the numerals, should not apply to a verdict in a case like this. *Bank v. Pipkin*, 66 Mo. App.

597. By the application of this rule the numerals become eliminated from the verdict, leaving it unexceptionable in expression.

The judgment is accordingly affirmed. All concur.

BATES et al. v. BRATTON.

(Supreme Court of Texas. Feb. 26, 1903.)

SCHOOL LANDS—ABANDONMENT—DECLARATION OF FORFEITURE—CONSTRUCTION OF STATUTES.

1. Rev. St. 1895, art 4218I, after declaring that, on the failure of a purchaser of school land to pay interest, the commissioner shall indorse on his obligation, "Land Forfeited," also provides that, if any purchaser shall fail to reside on and improve his land he shall forfeit it the same as for nonpayment of interest, and it shall again be for sale as if never sold and forfeited. *Held*, that the land of a purchaser who has failed to reside thereon cannot again be sold until the commissioner has declared a forfeiture.

2. Act April 19, 1901, § 3, provides that, if a purchaser of school lands fails to reside thereon as required by law, he shall forfeit the land, and it shall be on the market again without any action on the part of the commissioner of the general land office. Section 9 repeals all laws in conflict with the provisions of the act. *Held*, that this act was not retrospective as to past land sales, and that, therefore, abandoned land, purchased under the law of 1895, was not on the market until a forfeiture was declared by the commissioner, as required by that law.

3. Act May 27, 1890, expressly validated sales of school lands made prior to January 1st of that year, when the applicant had not settled on the land at the time of his application, but had made settlement within six months thereafter, and had complied with the law in all other respects.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by W. R. Bratton against E. J. Bates and another. Judgment in the Court of Civil Appeals (71 S. W. 38) affirming a judgment for plaintiff, and defendants bring error. Reversed.

Stapleton & Meek and Newton & Ward, for plaintiffs in error. Rudolph Runge, for defendant in error.

GAINES, C. J. The defendant in error, Bratton, brought this suit against plaintiffs in error, Wheeler and Bates, to recover two sections of school land in Mason county, which we will designate simply as section 304 and section 116. There was a trial by a jury, and it resulted in a verdict and judgment for the plaintiff. This judgment was affirmed by the Court of Civil Appeals. On the 22d day of September, 1898, Wheeler applied to the Commissioner of the General Land Office to purchase section 304 as a "home section," and section 116 as additional lands. He made the affidavits, filed the obligations, and made the first payment of purchase money, as required by law, and the lands were awarded to him. On the 17th day of October, 1899, he sold the two sections to Bates. The installments of inter-

est due under the purchase were regularly paid up to the bringing of the suit and to the time of the trial. On the 20th day of January, 1902, the plaintiff, Bratton, made application to purchase the same lands, section 304 as a "home section," and section 116 as additional, and in his application complied with all the requirements of the statute. His application to purchase was rejected, because the lands had been sold to Wheeler. From the evidence adduced upon the trial and the charge of the court the plaintiff's claim appears to have been that at the time he made his application to purchase the lands were upon the market, and subject to sale, for two reasons: First, because Wheeler was not an actual settler upon section 304 at the time he applied to purchase; and, second, that, if Wheeler was an actual settler at such time, both he and his vendee, Bates, had lost any right acquired by him by ceasing to reside upon the home section, as required by law.

The court charged the jury, in effect, that if they found that the plaintiff was an actual settler upon section 304 at the time he applied to purchase the lands, and either that Wheeler was not an actual settler on that section at the time of his application, or that he did not continue to be such until he sold to Bates, or that Bates, after his purchase, did not continue an actual settler on such section, to return a verdict for the plaintiff. The defendants requested the following special instruction: "If you find from the evidence in this case that at the time Wheeler made his application to purchase it he was an actual settler thereon, and had a right so to purchase it, but you further find that after said purchase said Wheeler, or his vendee, E. J. Bates, has failed to reside upon said land as the law requires, then I charge you, as the law in this case, the lands would not be again on the market, and subject to sale, until the Commissioner of the General Land Office had declared the lands forfeited for nonoccupancy, and so notified the clerk of the county court of Mason county, Texas." The request was refused, and we think its refusal was error. When Wheeler made his purchase, the law of 1895, regulating the sale of the public free school and asylum lands, as amended by the act of May, 1897, was in force. Section 11 of the former act, which appears as article 4218I in the Revised Statutes of 1895, after declaring that upon a failure to pay interest the Commissioner should indorse upon the purchaser's obligation, "Land Forfeited," also provided, among other things, that "if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred." It is clear, as we think, that under this pro-

vision lands which had become subject to forfeiture by reason of the failure of the purchaser to continue his residence upon the same as required by the act were not subject to be sold again until the Commissioner had declared the forfeiture. But it is argued that this provision was repealed by the act of April 19, 1901, and that under the requirements of the latter law, whenever the purchaser ceased to make his home upon the land, his rights were ipso facto forfeited, and the lands were immediately subject to sale. We need not pause to inquire whether under our Constitution it was within the power of the Legislature to make such a provision as to lands which had been sold under the act of 1895; for we are of the opinion that it was not the intention of the Legislature in enacting the law of April 19, 1901, to effect, in any manner, the rights of those who had purchased under the previous law, and whose account was in good standing in the General Land Office. It did apply to lands which had been previously sold, but which had been forfeited, or might thereafter be forfeited, in accordance with the provisions of the laws under which they had been bought. The act is entitled "An act relating to the sale and lease of public free school and asylum lands, and to repeal all laws and parts of law in conflict therewith." Gen. Laws 1901, p. 292. The first section requires the Commissioner to cause lists to be made of the "unsold lands" in the respective counties, and to forward the same to the clerks of the counties, respectively. The second section provides the manner in which the lands are to be sold. The third section, after prescribing that no person shall purchase more than four sections, provides as follows: "Every purchaser shall be required within three years after his purchase to erect permanent and valuable improvements on the land purchased by him, which improvements shall be of the reasonable market value of three hundred dollars. If any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, he shall forfeit said land and all payments made thereon to the state, to the same extent as for the nonpayment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office." Sections 4, 5, and 6, inclusive, apply to leases, and sections 7 and 8 to detached and timbered lands, respectively. Section 9 repeals all laws in conflict with the provisions of the act, and section 10 contains the emergency clause. The claim is that under the latter provision of section 3, if either Wheeler or Bates failed to reside upon the land as required by law, the land became forfeited without the action of the Commissioner, and was again

upon the market for sale. This presents the question, did that provision apply to past sales?

The rule in the construction of statutes is that they are to be construed as acting prospectively, unless it appears, either by express language or by clear implication, that they were intended to have a retrospective operation. With a single exception, to be hereinafter noted, we find nothing in the entire act which indicates that it was to apply to any past transactions. The word "shall" appears throughout the act, and in almost every section. We presume the argument in support of the contention is that the words "if any purchaser shall fail" and "all forfeitures for non-occupancy" are broad enough to embrace those who had theretofore purchased as well as future purchasers. That is true, and the language should probably receive that construction, provided there was anything in the entire act to indicate that the Legislature in using it had in mind past sales. Looking to the entire act, we find nothing to indicate that at any time they contemplated changing the law as to those who had purchased lands under the previous laws. On the contrary, we find in section 4 a provision which clearly indicates that the general purpose was to legislate only to future transactions. That provision is found in the following extract from that section: "All lands which may be leased shall be subject to sale at any time, except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made as well as to those hereafter to be made." This evinces to our minds that the Legislature, in passing the act, contemplated only future sales and leases. If not, after providing that leased lands shall be subject to sale, why say that the provision shall apply to past as well as to future leases? If they understood the act as applying to past sales and leases, why make the special provision so as to include past leases? But again, the words "any purchaser," as found in the latter provision quoted from section 3, are no more comprehensive than the words "every purchaser" in the provision which immediately precedes it. So if we should hold that by "any purchaser" the Legislature meant past as well as future purchasers, we should be bound to hold the words "every purchaser" are equally comprehensive. The result would be that we would have to hold that the Legislature intended to impose upon those who had purchased under former laws the burden of making improvements of the value of \$300, an exaction not demanded by the laws under which they bought. This the Legislature could not do, because it is prohibited by the Constitution. It is never presumed that the Legislature intended to exceed its powers as limited by the Constitution, and where it employs language which reasonably admits of two constructions, one of which is constitutional and the other of which is not,

the former construction must prevail. Again, it is a rule in the construction of writings, that ordinarily the same word is presumed to be used in the same sense throughout the instrument; so that when we reach the conclusion that the word "purchaser" in the first provision under consideration means purchasers under that act, and does not include purchasers under former laws, we should also conclude that the word is used in the same sense in the next succeeding provision. So, also, the words "all forfeitures for non-occupancy" evidently refer to the nonoccupancy of purchasers under that act.

For the error of the court in refusing the requested instructions, the judgment must be reversed; and, since the cause is to be remanded, we deem it proper to consider briefly a matter which was assigned as error in the Court of Civil Appeals, although it has not been assigned in the application for the writ of error to this court. The trial judge, in connection with the other charges, instructed the jury, in effect, that, if Wheeler was not an actual settler upon section 304 at the time he made his application to purchase, to find for the plaintiff. The act of May 27, 1899, validated all sales made prior to the 1st day of January of that year, when the applicant had not settled upon the land at the time of his application, but had made settlement upon the same within six months after that time, and when the law had in all other respects been complied with. Wheeler having made his application on September 22, 1898, it seems to us the jury should have been instructed, in effect, that, if he actually settled upon section 304 within six months after that date, the defendant was entitled to a verdict, unless there had been a subsequent abandonment, either by him or by Bates, and a forfeiture by the Commissioner of the General Land Office.

The judgment is reversed, and the cause remanded.

NEELY et al. v. FT. WORTH & R. G. RY. CO.

(Supreme Court of Texas. Feb. 26, 1903.)

RAILROADS—FRIGHTENING HORSES—DEATH—PROXIMATE CAUSE.

1. Decedent's horse was frightened by defendant's engine, ran away, and decedent was killed by being thrown from the buggy, on the horse running into a mudhole in the street, caused by an overflow from defendant's water tank. There was evidence that before the horse ran into the mudhole, decedent pulled him into a wire fence, where he stopped, but that decedent slapped him with the lines, and the horse started again, when he broke into the hole, and decedent was thrown out by the buggy wheels, striking a hard substance in the mud. *Held*, that the presence of the mudhole, and defendant's negligence in causing the same, was not the proximate cause of decedent's injury.

Certified questions from Court of Civil Appeals of Second Supreme Judicial District.

Action by Mrs. Linnie Neely and others against the Ft. Worth & Rio Grande Railway Company for the wrongful killing of said plaintiff's husband. From a judgment in favor of defendant, plaintiffs appeal. On certified questions from the Court of Civil Appeals.

John H. Hiner, Daniel & Keith and Parks & Hudson, for appellants. West, Chapman & Smith, for appellee.

BROWN, J. Certified questions from the Court of Civil Appeals for the Second Supreme Judicial District, as follows:

"We deem it advisable to certify to your honors for decision the question or questions stated below:

"This appeal is from a judgment denying the widow and children of Charles Neely the recovery sought by them of damages resulting from his death, which occurred December 11, 1896, from mortal injuries received the day before at one of appellee's railway crossings in Granbury, Tex., and under the following circumstances, as detailed by Dr. Magnus, appellants' first witness: 'At the place where Neely received his injuries he was trying to hold his horse, when he was thrown from his back. He was traveling in his one-horse hack. The horse was badly frightened, and ran. Neely tried to hold him. Neely drove across defendant's track at crossing east of defendant's water tank. There was standing on defendant's switch track, north of main line and west of crossing, a string of box cars. There was between said depot and crossing a train on defendant's main line, moving east towards said crossing. Neely nor the horse could see said moving train until they got on defendant's main line from behind said box cars standing on switch track. When Neely drove onto main line, the horse became frightened at the train moving towards the horse, and ran southwest into a wire fence south of track. Neely was trying to hold horse, and pulled or jerked him out of the wire fence. The horse then ran down the wire fence west, ran the front wheel of the wagon against the fence post, threw Neely from seat of vehicle onto his knees between the seat and the dashboard. The horse continued to run west to a mudhole, where two wheels on left side of wagon ran into the mudhole, careened Neely to the left, and, just as he was about to regain his equilibrium, the left front wheel of the wagon struck some hard substance in the edge of the mudhole, and at the same time the wheel struck said hard substance, the horse dashed suddenly to the left around the mudhole from the train, when Neely fell out and received the injury which caused his death.' In a deposition offered by appellee, this witness stated that when Neely pulled his horse into the wire fence the horse stopped, and he thought 'horse would have been all right, but

Mr. Neely slapped him with the lines, and the horse started again.' Witness Elliott, offered by appellee, gave the same version at this point, and added: 'And just as he started him he ran over an old wood frame that was lying there next to the fence, and that pitched him, started him out of the seat; then as he ran down in that little ditch there was there by the tank, that pitched him further out; then he went out of my sight.' The version given by McClelland, witness for appellants, may be found in our opinion on former appeal, which appeal was taken by the railway company from a judgment in favor of those now appealing. 60 S. W. 282. That judgment was reversed because we were of opinion that the charge of the court there quoted was erroneous in submitting as a distinct ground of recovery the alleged negligence of the railway company in producing said mudhole, because in no view of the evidence, from which we have quoted above what seems most pertinent, could the accident, under the decisions there cited, have been ascribed to the mudhole as a proximate cause. When the case went back, the railway company demurred to this feature of the case as alleged, upon the ground that, taken altogether, the petition itself showed that the mudhole could not have been the proximate cause of the injury, and the court sustained the demurrer, and also excluded evidence offered by appellants to show the character of the mudhole in the street, and that it was due to the negligence of the railway company. To these rulings, which really raise the same question, the principal errors are assigned, and we find no merit in any others. We consequently find that, upon the issues made by the pleadings and evidence submitted to the jury, the verdict establishes either that it was no fault of the appellee that Neely's horse took fright and ran away, or else that it was the fault of Neely himself.

"The petition charged that the railway company had negligently and knowingly permitted the pond or mudhole in question to be created in a public street by overflow and leakage from its water tank, alleging it to have been 'about two feet deep and about twelve feet wide, and partially filled with water and mud.' It further charged that it was dangerous to the traveling public, and known to the railway company to be so, and that, knowing that it was 'extremely dangerous to the traveling public,' the railway company 'negligently, knowingly, and willfully permitted the said excavation, pond, and hole to remain near, in, and upon said public road, street, and thoroughfare in said city.' The petition then details the accident, alleging that the railway company, by the several acts of negligence therein specified and submitted in the charge as grounds of recovery, caused Neely's horse to become frightened and run away.

"Questions certified:

"First: In view of the evidence above quoted and referred to, showing unmistakably how the accident occurred, and in view of the finding of the jury, which the verdict when construed most favorably for appellants imports, that appellee was not to blame for the fright of the horse, which ran away with deceased, throwing him from his vehicle into the mudhole just after he had lost his balance by the collision of his vehicle with the fence post or other object, was there material error in sustaining the demurrer to the petition and in excluding evidence as to the character of the mudhole and appellee's responsibility for its existence?

"Second: If this question should be answered in the affirmative, should the court upon another trial submit that issue to the jury, if the evidence bearing upon it should tend to show that the mudhole in the street was due to appellee's negligence merely, and that it was dangerous to ordinary travel merely? That is, what rule should be announced for the guidance of the trial court on another trial of this case, in view of the ruling made by this court on the former appeal as to proximate cause?"

We answer the first question in the negative.

The petition alleged as the cause of the death of Charles Neely that the railroad company permitted water to escape from its water tank situated near a public street and to flow upon said street, whereby the "pond or mudhole" which caused Neely to be thrown from his vehicle was created. No human foresight would have discovered that the escaping of water from a tank into the public street would result in such injury as that which produced the death of Charles Neely. It is not charged that the railroad company was under any duty to repair the street; in fact, it had no right to do so; that duty rested upon the authorities of the town. The injuries which caused the death of Mr. Neely were not a probable result of the negligent act charged against the railroad company, therefore its negligence was not the proximate cause of the injuries from which Neely died. *T. & P. Ry. Co. v. Bingham*, 90 Tex. 223, 38 S. W. 162.

MURRAY et al. v. GILLESPIE, District Judge.

(Supreme Court of Texas. Feb. 28, 1903.)
WITNESSES—FEES—DISALLOWANCE BY JUDGE
—MANDAMUS.

1. Code Cr. Proc. art. 1093, allows fees for witnesses who reside out of the county in which the trial is had, and makes it the duty of the judge to allow the account if correct, provided that fees shall not be allowed to more than two witnesses to the same fact, unless the judge shall certify such witnesses were necessary. *Held*, that the action of the judge in disallowing the account of a witness was

conclusive, and was not subject to review by mandamus.

Motion by Nancy Murray and others for permission to file a petition for mandamus against J. K. P. Gillespie, district judge, to compel the latter to allow petitioners fees as witnesses in a criminal prosecution tried before him. Motion denied.

J. B. Brockman, for relators.

GAINES, O. J. This is a motion to file a petition for a writ of mandamus against the respondent, as judge of the criminal district court for Harris and Galveston counties. The petition shows, in substance, that the relators were summoned as witnesses in behalf of the defendant in a certain cause, which had been pending in the criminal district court of Harris county, entitled "The State of Texas versus T. F. Boyd"; that they were residents of another county, and had attended upon the trial in obedience to the process of the court, and had made out their accounts for mileage and attendance, duly certified to by the clerk, and had presented the same to respondent, as judge of the court, for allowance, and that he had refused to allow the same. The prayer is for the writ of mandamus to compel him to make the allowance. The certificates are made exhibits to the petition, and upon each of them is an official indorsement by respondent, which shows that he refused to allow the account for the reason that he had already made an allowance for the attendance of two witnesses, who were in like manner brought before the court from another county to testify to the same fact to which the relators were called to give evidence. Previous to the act of April 20, 1883 (which is now incorporated in our Code of Criminal Procedure as article 1093), the state paid no fees for witnesses attending in criminal cases. Code Cr. Proc. 1879, art. 1107. Article 1093 of the present Code allowed fees for witnesses who resided out of the county in which the trial was had, when such witnesses had been recognized, or had been attached, and given bond for their attendance; and made it the duty of the judge to examine and to allow the account if found correct. However, it also contained this proviso: "Provided further, that fees shall not be allowed to more than two witnesses to the same fact, unless the judge of the court before whom the cause is tried shall, after such case shall have been disposed of, certify that such witnesses claiming fees as herein provided were necessary in the cause." We are of opinion that it was the purpose of the Legislature to make the action of the judge in allowing or disallowing the account of a witness conclusive, and it is not subject to review or control by mandamus or otherwise. If it be urged that, if the judge refuse to allow a just and legal account, the witness has no

remedy, the same may be said of the judgment of the justice of the peace which does not exceed \$20. Const. art. 5, § 16. Since the attendance of witnesses in state cases could be compelled without the payment of any fees whatever, as was done under previous laws, we think that the Legislature, when they came to allow such fees, had the right to make such regulations for determining the allowance as they saw proper, and that they intended to confide all questions growing out of the matter to the decision of the judge alone.

Being clearly of the opinion that the district judge cannot be compelled by the writ of mandamus to approve the accounts in question, the motion to file the petition is overruled.

DENISON & S. RY. CO. v. ST. LOUIS S. W. RY. CO. OF TEXAS.

(Supreme Court of Texas. Feb. 16, 1903.)

RAILROADS—RIGHT OF WAY—USE OF CITY STREETS—FORECLOSURE SALE—RIGHTS OF PURCHASER—ABANDONMENT OF RIGHTS—STATUTORY PROVISION.

1. Where a city ordinance granted a railroad the right to occupy a street for right of way purposes, and the company built on a portion of the street, and its successor in title assumed possession of the track, and extended the same, though not so far as the ordinance authorized, the city's grant of the whole street was accepted, including the portion on which no road was constructed.

2. Where a railroad had obtained from a municipal corporation its unconditional consent to the construction of a railroad on one of its streets, a purchaser at foreclosure sale of all the properties, privileges, and franchises of the railroad acquired its rights to the use of the whole street, including a part over which no road had been actually constructed.

3. The fact that the charter of the purchasing company conferred on it power to occupy the streets in the city in question for right of way purposes, subject to the condition precedent that it obtain the city's consent, did not require it to surrender the right of way which it had acquired by its purchase, and reacquire the same by exercise of its charter powers.

4. Where a railroad for many years delayed to use a portion of the right of way granted it on the streets of a city, and the city thereupon granted the right to another company, a decision in favor of the former company in injunction proceedings brought by the latter involves the conclusion that there had been no abandonment of the first granted right of way.

5. Where a railroad was granted a right, unconditioned as to time, to build on a certain street, and for 14 years such right of way, for a distance of a block and a half, was entirely unused, such delay did not necessarily, and as a matter of law, constitute an abandonment.

6. Rev. St. art. 4558, providing that any railroad corporation which shall fail to equip at least 20 miles of its right of way every year after the second of its incorporation, until the whole is completed, shall forfeit its corporate existence, and that its powers shall cease so far as relates to the portion of the road then unfinished, does not apply to a failure to occupy a short portion of a right of way granted in a street to connect with another line; the road having been built into the city, along such street, in due time after the grant.

Certificate of dissent from Court of Civil Appeals of Fifth Supreme Judicial District.

For opinion in the Court of Civil Appeals, see 72 S. W. 201.

The following are the statement and questions from the Court of Civil Appeals:

On March 9, 1901, plaintiff brought suit for injunction and for other relief against defendant; alleging, among other things, that plaintiff had the right to lay its tracks and operate its cars from the center of East street between Pecan and Mulberry streets; that the right was exclusive in so far as it affected the construction of other lines of railway in the center of East street; that plaintiff had appropriated the said right of way by planting its poles along the edge of the sidewalk, and had strung its span wires between the poles, and had strung its trolley wire on its span wires along the center of East street, preparatory to building its track along the center of same, when the defendant, at night and by force and arms, began the construction of a line of steam railway along the center of East street between Pecan and Mulberry streets, and was so constructing the same, with a great number of hands, at the time of the filing of the petition. A temporary injunction was granted, and defendant thereafter filed an answer in which it prayed that the plaintiff be also enjoined from interfering with the part of the road that defendant had put down at this place, and a temporary injunction was granted to the defendant. Upon the trial of the case judgment was rendered in favor of the defendant, and plaintiff was perpetually enjoined from building its track on the center of East street between Pecan and Mulberry streets, or from in any wise interfering with the occupation of the center of East street by the defendant. Plaintiff duly excepted, and perfected an appeal by writ of error to this court. The case was tried in the lower court without the intervention of a jury. There is no statement of facts in the record. The court filed its conclusions of fact, which we adopt, as follows:

"(1) In 1887 the St. Louis, Arkansas & Texas Railway Company was a corporation, duly and legally incorporated under the laws of the state of Texas relating to the incorporation of railways, for the purpose of owning, operating, and maintaining a railway, and with such powers, privileges, rights, and franchises as may be granted under said laws. By the terms of the charter, said railway was authorized to extend, among other places, through Grayson county, and into the city of Sherman, in Grayson county, Texas.

"(2) In the year 1887, and for several years prior and subsequent thereto, and until the year 1895, the city of Sherman was a corporation, duly and legally incorporated under the general laws of the state of Texas, for the incorporation of cities of more than one thousand and less than ten thousand inhabitants. About the year 1895 it was incor-

porated by special act of the legislature, but the powers are not materially different from such as it had while incorporated under the general laws.

"(3) East street prior to and during 1887 was, and since then continuously has been, a street established in the city of Sherman, running from the north boundary line thereof to or near the south boundary line thereof. The Texas & Pacific Railway, running east and west, crossed East street at a point a trifle over half a mile from the north boundary line. The first street running east and south of the Texas & Pacific Railway is Mulberry street, the next is Pecan street, the next is Houston street, and the next is Lamar street, and the next is Cherry street.

"(4) On the 21st day of February, 1887, the city council of the city of Sherman passed the following ordinance:

"'An ordinance granting right of way to the St. Louis, Arkansas Railway Co. over East street.

"'Section 1. Be it ordained by the city council of the city of Sherman that the permission of said city be and the same is hereby given to the St. L. A. & Texas Railway Company to construct, operate and maintain its railway upon, across and over East street in the city of Sherman from the point where the T. & P. crosses said street to the southern terminus thereof.

"'Sec. 2. That the permission of the city of Sherman is hereby granted to the St. L., Ark. & Texas Ry. Company to build across and upon the streets that intersect East street from the crossing of the T. & P. Ry. Company south to their terminus of East street, to the extent that may be necessary in operating their railroads.

"'Sec. 3. The rights and privileges hereby granted is and shall hereby be construed to be a condition that the said railway company shall construct and keep in repair all necessary street crossings and shall at all times conform the grade of said road to the grade of said street as the same now exists or as the same may hereafter be established by the city council of the city of Sherman.

"'Sec. 4. That this ordinance take effect and be in force from and after its passage.'

"(5) The St. Louis, Arkansas & Texas Railway Company acted on said ordinance, and subsequent to the passage of such ordinance, and about June or July, 1887, the St. Louis, Arkansas & Texas Railway Company, which was then constructing its railway, built into the city of Sherman. It established its depot north of Cherry street, and just south of and adjoining Lamar street, and continued its track northward along East street, and in the center thereof, to a point just south of and near Houston street, where said track remained without extension about until the year 1891.

"(6) The St. Louis, Arkansas & Texas Railway Company executed certain mortgages on its railway properties, privileges, and

franchisees to secure certain bonds executed by it, and on the 8th day of June, 1889, suit was filed in the United States Circuit Court for the Eastern District of Texas to foreclose these mortgages. On the 24th day of July, 1890, this suit resulted in a decree of foreclosure on all the rights, privileges, and franchises and properties, of every kind and character, of the St. Louis, Arkansas & Texas Railway Company, and the same were duly ordered by the court foreclosing the mortgage to be sold in satisfaction of the amount found to be due on the bonds. Under this decree, sale was duly and regularly made in October, 1890. Sale was confirmed on the 9th day of December, 1890, and deed was ordered made to the purchaser of said property, the St. Louis Southwestern Railway Company of Texas, of all rights, properties, privileges, and franchises of the St. Louis, Arkansas & Texas Railway Company; and under and by virtue of the orders and directions of the United States Circuit Court for the Eastern District of Texas, having control and jurisdiction of the same, in November, 1891, all the properties, privileges, rights, and franchises of the St. Louis, Arkansas & Texas Railway Company passed to and vested in the St. Louis Southwestern Railway Company of Texas, as purchaser under the foreclosure sale.

"(7) The St. Louis Southwestern Railway Company of Texas is a corporation, duly and legally incorporated under the laws of the state of Texas in such cases made and provided, for the owning, maintaining, and operating of a railway, with all the rights, powers, and privileges granted by such laws. Such acts of incorporation took place about the year 1890, and said railway succeeded to the rights, powers, privileges, and franchises of the St. Louis, Arkansas & Texas Railway Company; and said railway has continuously since May, 1891, at which time said properties were delivered to it, operated the former lines of the said St. Louis, Arkansas & Texas Railway Company, including that portion of the line running through Grayson county, and to and into the city of Sherman, and up East street, as aforesaid.

"(8) About the year 1892 the St. Louis Southwestern Railway Company of Texas extended the part of said railway to East street northward about two hundred feet, across Houston street, and to a point about 100 yards south of Pecan street.

"(9) The Denison & Sherman Railway Company is duly and legally incorporated as a local and suburban railway under section 2, art. 4352, c. 1, tit. 94, Sayles' Tex. Civ. St., with authority to construct and maintain a local suburban railway from the southern boundary of the city of Denison to the northern and eastern boundary of the city of Sherman, a distance of less than ten miles, and, in addition thereto, a distance of five miles in each of said cities of Denison and Sherman, and on the streets thereof, and that its track-

age in the city of Sherman does not amount to five miles.

"(10) On the 16th day of May, 1900, the city council of the city of Sherman passed an ordinance, which was duly approved, granting to John Crerar, his heirs and assigns, the right to build, construct, and operate a line of electric railway over certain streets in the city of Sherman, which was duly approved, a copy of which is hereby attached, and marked 'Exhibit A,' and made a part thereof. Soon thereafter said franchise created by said ordinances was duly assigned to the Denison & Sherman Railway Company. Thereafter, on the 28th day of September, 1900, the city council of the city of Sherman duly passed, which was subject to approval, ordinance hereto attached, and made a part thereof, and marked 'Exhibit B.' Each of the said ordinances was duly accepted by the said John Crerar, and said franchise created by said ordinances were, subsequent to their passage, for value, assigned by John Crerar to the Denison & Sherman Railway Company. The city council of the city of Sherman had notice of the assignment of said ordinances by John Crerar to the Denison & Sherman Railway Company. Thereafter, on the 27th day of February, A. D. 1901, the city council of the city of Sherman passed an ordinance, which was duly approved by the Mayor, granting directly to the Denison & Sherman Railway, its successors and assigns, for the full term of fifty years, the right to construct, etc., a line of railway on Maxey street, from Lamar street northward, using the following language: 'Section 1. The right is hereby given and granted to the Denison & Sherman Railway Company, its successors and assigns, to construct,' etc., 'a railway,' etc., 'over the center of Maxey street, from Lamar street northward, crossing its line on Brackett street. * * * Also, from Maxey street over and along the center of Pecan street as far as will connect with its line of railway on East street, and to erect poles,' etc. And plaintiff claims said ordinance to be recognition of the city council of the city of Sherman of the validity of the assignment aforesaid, and of the ownership of the Denison & Sherman Railway of the franchise over East street.

"(11) On the — day of — the Denison & Sherman Railway Company erected poles on either side of East street, between Mulberry and Pecan streets; the poles being placed on the outer edge of the sidewalk on each side of East street, and having a space between them of thirty-nine feet and six inches. Said poles were placed opposite to each other, and connected with wires called 'span wires,' and in the center of said wires there was attached a trolley wire running practically over the center of East street from north to south, between Mulberry and Pecan streets, and was at the south end of this block turned westward on Pecan street, and was on the north end of this block turned eastward on Mulberry street, being a connection of the

proposed line from the Union Depot of the Houston & Texas Central Railway Company and the Texas & Pacific Railway Company at the foot of Mulberry street along and by the Missouri, Kansas & Texas Railway Company's depot on Pecan street, up and by the principal hotel on Travis street, southward on Travis street onto Lamar street, and eastward on Lamar street to the Union Depot of the St. Louis Southwestern Railway Company and of the Santa Fé Railway Company. While the poles and wires of the Denison & Sherman Railway Company were in the condition aforesaid, on the night of the — day of March, 1901, the St. Louis Southwestern Railway Company of Texas, without notice to or consent of the plaintiff company, partly laid its track on East street, between Pecan and Mulberry streets, and was working on said track when the injunction in this case was served. Said line of railway, iron, and ties were placed along the center of East street under the trolley wires of plaintiff company, which had previously been erected. The Denison & Sherman Railway Company had erected these poles and wires in the daytime and publicly.

"(12) That it is impracticable for the plaintiff and defendant railway companies each to build and operate a line of railway on East street, and that the construction by plaintiff of its line in the center of East street will have the effect of excluding defendant from the use of the street between Pecan and Mulberry streets."

"At a former day of the present term of this court the judgment of the trial court was affirmed by the majority of the court. Associate Justice Bookhout at the time dissented, and notice of his dissent was incorporated in the judgment. His dissenting opinion having been filed, we have concluded to certify the points of dissent to the Supreme Court, for their opinion thereon, as follows:

"Question 1. Did the St. Louis, Arkansas & Texas Railway Company, under the facts stated, accept the privilege or license granted it by the city of Sherman over the entire portion of East street, stipulated in the ordinance, or to that part only over which it constructed its road? If yea, then, under the facts, did said company abandon the license or privilege to that part of East street over which it failed to construct its road?

"Question 2. Under the facts found, did the said company, under the provisions of article 4558, Rev. St., forfeit its charter and its corporate existence and authority, and the privilege to construct its road over that part of East street over which the city had granted it the right to construct its road, but which it had not used? If this question is answered in the negative, and question No. 4 is answered in the affirmative, then was there such forfeiture by defendant in error?

"Question 3. Was the license or right granted by the city of Sherman to the St. Louis, Arkansas & Texas Railway Company personal to that company, and, in so far as said

company had failed to construct its road and make use of the same, incapable of being mortgaged and conveyed by a sale under foreclosure proceedings of such mortgage? (See condition in section 3 of ordinance.)

"Question 4. Under the facts stated, did the license or right granted to the St. Louis, Arkansas & Texas Railway Company to build a railroad over East street, but which the said company had not used, and over which it had failed to construct its road, pass to the defendant in error by the mortgage, foreclosure proceedings, sale, and conveyance thereunder?

"Question 5. Is the defendant in error, under the facts, authorized to construct and extend its railroad over and along East street, and in the center thereof, under the authority granted to the St. Louis, Arkansas & Texas Railway Company in 1887, without defendant in error procuring the consent of the city of Sherman to do so? If yea, is such right superior to that of plaintiff in error?"

Moseley & Smith, for plaintiff in error. B. B. Perkins and Head & Dillard, for defendant in error.

WILLIAMS, J. (after stating the facts). After a careful consideration of the case, we are of the opinion that the majority of the court reached correct conclusions upon those of the questions certified which were treated in the majority opinion; and we deem it unnecessary to consume time in the discussion of those points, merely to state the same conclusion in different language. This disposes of all of the questions stated in the certificate, except the last part of the first, relating to abandonment, and the second and fourth, as to the application of article 4558, Rev. St.

Neither the district judge, nor the Court of Civil Appeals, has made any express finding on the subject of abandonment. The judgment rendered involves the conclusion that there had been none. This court is asked to decide, upon certain facts stated in the findings, whether or not an abandonment had taken place. We could only hold the affirmative of this question in case the evidence conclusively established the fact. This would be an inference which does not necessarily result from the facts recited. Many circumstances besides those stated might affect the question. As there is no statement of facts, and the question has not been expressly passed upon by the courts below as a question of fact, we cannot hold, as a matter of law, that there was an abandonment. The delay in extending the tracks of defendant in error is, at most, only evidence of the fact, to be weighed by the trial court and the Court of Civil Appeals.

We are of the opinion that article 4558 has no application to the case. The completion of the road to Sherman was a compliance with that statute as to this part of the road, and we do not think that the right

which had been acquired to make connections and arrange terminals in that city would be forfeited by noncompliance with the provisions referred to in the construction of some other parts of the line.

GULF, C. & S. F. RY. CO. v. SHELTON.

(Supreme Court of Texas. March 2, 1903.)

MASTER AND SERVANT—EXISTENCE OF RELATION—APPEAL—ASSIGNMENTS OF ERROR.

1. On appeal to the Court of Civil Appeals the assignments of error were that the trial court erred in charging that defendant had the burden of proving plaintiff's contributory negligence, and in refusing to charge that, if it appeared from plaintiff's own testimony that he did not exercise reasonable care, the jury should find for defendant. The assignment in the Supreme Court was that the instruction as to the burden of proving contributory negligence was calculated to lead the jury to consider only the evidence offered by defendant. *Held*, that the assignments presented to the Court of Civil Appeals were different from the assignment presented to the Supreme Court, and that the action of the former court could not be reviewed.

2. Where a switching crew, employed to do yardwork for one railroad, and paid by it, performed similar services at a connecting point for defendant, who paid the other company one-half the cost, and there was no evidence of the terms of the contract between the two companies concerning their joint business at that point, the crew were equally the servants of both companies, and defendant was liable for their acts to the same extent as if it had employed them.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by J. W. Shelton against the Gulf, Colorado & Santa Fé Railway Company. Judgment in the Court of Civil Appeals (69 S. W. 653, 70 S. W. 359) affirming a judgment for plaintiff, and defendant brings error. *Affirmed*.

Alexander & Thompson and J. W. Terry, for plaintiff in error. Finley & Knight and Etheridge & Baker, for defendant in error.

BROWN, J. On the 30th of March, 1900, Shelton purchased from the agent of the railroad company at Gainesville, Tex., a ticket to Los Angeles, Cal., over that road to Purcell, Ind. T., thence over the Atchison, Topeka & Santa Fé Railroad by way of Newton, Kan. At Purcell two of the cars belonging to the plaintiff in error were set out of the train, in one of which Shelton was seated. Upon arriving at Purcell, the station was properly announced, and the passengers left this car, except Shelton and another man. The switching crew employed by the Atchison, Topeka & Santa Fé Railway Company took charge of the train upon its arrival, and started to take it into the yards for the purpose of dropping out the two cars. Upon discovering Shelton and the other man in the car, one of the crew who had charge of the train told them to get off the train, or they would be left. The night was dark,

and the platform was poorly lighted, and when Shelton stepped off the train he fell, and received his injuries. The switching crew that took charge of the train were employed by the Atchison, Topeka & Santa Fé Railway Company to do the work for both companies in the yards at the place of connection, and did perform that work for both companies, being paid by the latter company. The defendant railroad pleaded contributory negligence on the part of Shelton, and the court, among other things, charged the jury as follows: "The burden of proving that plaintiff was guilty of contributory negligence devolves upon the defendant." The railroad company asked the court to give the following charge: "You are instructed, at the request of the defendant, that, while the burden is on the defendant to prove its defense of contributory negligence, that if it appears from the plaintiff's own evidence that in going back to sleep after being awakened and notified that Purcell was the next station, or that in jumping from the moving train in the dark, when he could not see where he was jumping, he did not exercise the care and prudence that a person of ordinary and reasonable care would exercise under like circumstances, you will return a verdict for the defendant." Judgment was entered against the railroad company, from which it appealed, and presented the following assignments of error:

"(10) The court erred in charging the jury as follows: 'The burden of proving that plaintiff was guilty of contributory negligence devolves upon the defendant.'"

"(16) The court erred in refusing to give to the jury defendant's ninth special instruction, which properly instructed the jury with respect to the burden of proof on the question of contributory negligence."

"Proposition: Plaintiff's own evidence disclosed his contributory negligence, and the burden of proof should properly have been fixed by the trial court upon the plaintiff."

The application for writ of error presented the question in the following form: "The honorable Court of Civil Appeals erred in overruling the tenth and sixteenth assignments of error, which complained of the charge of the trial court, 'burden of proving contributory negligence devolves upon the defendant,' and of the refusal to give defendant's special charge No. 9, because appellee's own testimony tended strongly to show—if it did not completely establish—his contributory negligence as being the proximate cause of the injury; and on this state of the evidence the burden of proof was improperly placed upon the defendant by the trial court, as such charge was calculated to cause the jury to believe that in considering this issue they were not entitled to consider the evidence offered by plaintiff, and herein the Court of Civil Appeals erred in holding that appellant's charge 9 was properly refused."

We have stated only such facts as are necessary to understand the questions decided by this court.

A writ of error was granted, because this court was of opinion under the facts that the trial court erred in charging the jury that the burden of proving contributory negligence on the part of the plaintiff rested upon the railroad company. In this court the proposition is presented that the charge was calculated to lead the jury to consider only the evidence offered by the defendant on the subject of contributory negligence, while in the Court of Civil Appeals (69 S. W. 653) the proposition was that the error consisted in misdirecting the jury as to the burden of proof. The defendant in error objects to the consideration of the assignment as here presented, because it was not assigned and presented to the Court of Civil Appeals.

We are of opinion there is a marked difference in the question presented to the Court of Civil Appeals and that presented to this court. The object in requiring assignments to be made accompanied by propositions of law is to direct the mind of the appellate court to the very point upon which it is claimed the trial court committed the error; and when a party has thus presented his case, and specified his objections to the ruling of the trial court, he thereby waives any other objection which might have been presented under that assignment of error. *H. & T. C. Ry. Co. v. Rutherford*, 94 Tex. 518, 62 S. W. 1056. In the case cited this court said: "As specific objections were made to the instruction in the brief, those not so specified were waived, and this court can only review the action of the Court of Civil Appeals upon the point properly presented to it." The Court of Civil Appeals could not have understood that the plaintiff in error was, by the proposition contained in its brief, attempting to raise the same question that is presented in the application. We therefore conclude that we cannot review the action of the Court of Civil Appeals under the assignments presented in the application.

It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, were employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning their joint business at that station. Under this state of facts the men of the switching crew

were equally the servants of both companies, and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it. *G., C. & S. F. Ry. Co. v. Dorsey*, 66 Tex. 148, 18 S. W. 444.

We have examined all of the assignments of error presented in the application, and find no error which requires a reversal of the judgment. It is therefore ordered that the judgment of the district court and of the Court of Civil Appeals be in all things affirmed.

GALVESTON, H. & S. A. RY. CO. v. GINTHER et al.

(Supreme Court of Texas. March 2, 1903.)

ATTORNEY AND CLIENT—PERSONAL INJURY CLAIM—ASSIGNMENT OF PORTION OF RECOVERY—PRIORITY TO SUIT—FAILURE TO DOCKET—PUBLIC POLICY—AGREEMENT FOR CONDITIONAL FEE—DISTINCTION.

1. *Sayles' Ann. Civ. St. art. 3353a*, provides that causes of action for personal injuries, whether to the health or reputation, not resulting in death, shall survive to the injured person's heirs. *Held*, that a cause of action against a railroad company for injuries to the person would survive, and a portion thereof was therefore assignable before suit to the attorneys prosecuting the claim.

2. *Sayles' Ann. Civ. St. art. 4647*, requires that the sale of a judgment or cause of action sued on, or part thereof, shall be acknowledged, filed, and noted by the clerk on the judgment or trial docket; and provides that these provisions shall apply to all "judgments, suits, claims and causes of action, whether assignable in law and equity or not," and that such recording shall operate as constructive notice to all persons dealing with reference to the judgment or cause of action. *Held*, that an assignment of a part of a cause of action to plaintiff's attorney, before suit thereon, was valid, and it was not necessary that the assignment should be filed and noted as required by the statute, the defendant having actual notice of the attorney's claim.

3. A contract whereby a client assigns to his attorney "one-third of whatever may be recovered in said suit [about to be instituted on the client's claim] or by way of compromise," does not contravene public policy by preventing the compromise of disputed claims, such not being its effect.

4. A contract signed by a client, which recites that he has employed the other parties as his attorneys to sue on a claim for personal injuries, and proceeds, "I agree to give and hereby assign to them one-third of whatever may be recovered in said suit, or by way of compromise," is a present assignment of one-third of the cause of action, and not a mere agreement for a conditional fee; and hence will charge the defendant who has notice thereof with liability for a proportionate amount of the sum paid directly to the client by way of compromise, in derogation of the attorneys' rights.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Paul Ginther against the Galveston, Harrisburg & San Antonio Railway Company, in which Patterson & Buckler, plaintiff's attorneys, intervene. From a judgment for interveners, affirmed by the Court of Civil Appeals (70 S. W. 96), defendant brings error. Affirmed.

Baker, Botts, Baker & Lovett and Beall & Kemp, for plaintiff in error. Patterson & Buckler, for defendants in error.

WILLIAMS, J. Ginther, intending to sue plaintiff in error for damages for personal injuries, employed Patterson & Buckler as his attorneys, and executed to them the following instrument: "El Paso, Texas, March 26th, 1900. I have employed Patterson & Buckler to sue the Galveston, Harrisburg & San Antonio Railway Company for \$20,000.00, as damages for injuries sustained by me in consequence of its negligence on February 22nd, 1900, in the yards at El Paso, Texas, on repair track No. 3. I agree to give, and hereby assign to them one-third of whatever may be recovered in said suit, or by way of compromise. [Signed] Paul Ginther." The attorneys filed the suit April 6, 1900, and were prosecuting it, when Ginther compromised with plaintiff in error, who, with notice of the rights of the attorneys under the above instrument, paid him \$2,500 in full settlement. Patterson & Buckler intervened in the suit, alleging Ginther's insolvency, and the other facts, and sought and obtained judgment against plaintiff in error for one-third of the amount paid to Ginther. This judgment having been affirmed by the Court of Civil Appeals (70 S. W. 96), this writ of error was sued out. The propositions upon which a reversal is asked are: (1) That the alleged assignment was not good, because (a) suit not having been filed when it was made, the cause of action was not one which would have survived the death of the assignor, under the act of 1895 (Sayles' Ann. Civ. St. art. 3353a), and which was not, therefore, assignable under that statute; and (b) such assignment was not in accordance with the act of 1889 (Sayles' Ann. Civ. St. art. 4'17), in that it was made before the suit was begun, and was not filed and noted on the docket as required by that act. (2) That the contract was contrary to public policy, and void, in that it attempted to take away the right of the person injured to compromise his claim. (3) That the instrument was not an assignment, but a mere agreement for payment of a contingent fee.

In the case of Gulf, Colorado & Santa Fe Railway Company v. Moore (Tex. Civ. App.) 68 S. W. 559, the action was brought by the heirs of the person injured, who had died without having sued. The point was made by the defendant, and overruled by the Court of Civil Appeals, that the cause of action abated upon the death of the plaintiff's ancestor. This ruling was assigned in an application to this court for writ of error, which was refused. In Railway Company v. Andrews, 67 S. W. 923, the question as to the validity of an assignment made before in-

stitution of suit was considered, and decided in favor of its validity by the Court of Civil Appeals, and upon application for a writ of error to this court the same conclusion, after much consideration, was arrived at. These decisions are against the first proposition of plaintiff in error.

As to the second, it may be said that there is very high authority for the doctrine that contracts between attorneys and clients, which undertake to deprive the latter of power to end the litigation by settlements or compromises, are contrary to public policy, and therefore invalid. But the contract in this case contains no stipulations which make it obnoxious to this objection. It simply entitles the attorneys to a part of any sum realized by judgment or compromise, and this is the only right asserted by them. The instrument cannot, therefore, be held void on this ground.

The third contention is the one on which the writ of error was granted. The instrument does not, in terms, attempt to assign a present interest in the cause of action, but agrees to give and assign one-third of "whatever may be recovered" in the suit or by way of compromise. Mature consideration and examination of authorities has convinced us that the instrument operated as an assignment of an interest in the fund when recovered. This was held by the Court of Civil Appeals in Texas & Pacific Railway Company v. Vaughan, 40 S. W. 1065, upon an instrument in which the language was, in effect, the same as that before us. The application for writ of error which was refused by this court specifically raised the point. The conclusion is supported by abundant authority. Williams v. Ingersoll, 89 N. Y. 508; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490; Patten v. Wilson, 34 Pa. 299. The instrument plainly expressed the intention to assign an interest in a cause of action of which a judgment or compromise was to be the measure, and the expression of this intention in any language was all that was required to make an assignment, as contradistinguished from a mere agreement to pay so much as a contingent fee. Christmas v. Russell, 14 Wall. 84, 20 L. Ed. 762. While the contract may have left the plaintiff free to compromise, it gave the assignees an interest in the claim which they had the right to have paid in the settlement. This right, when the defendant knew of its existence, could not be defeated by payment to the plaintiff. The position of defendant was that of any other person paying a debt to the original creditor, instead of an assignee, whose rights were known. Williams v. Ingersoll, supra; Railway v. Vaughan, supra.

Affirmed.

ÆTNA LIFE INS. CO. v. J. B. PARKER & CO.*

(Supreme Court of Texas. Feb. 26, 1908.)

ACCIDENT INSURANCE—NEGLIGENT INJURY—SUBROGATION OF INSURER—PAYMENT OF LOSS—TIME—STATUTORY PENALTY.

1. Batts' Ann. Civ. St. art. 3071, authorizing the recovery of 12 per cent. of the loss and an attorney's fee from an insurance company for its failure to pay within the time specified in the policy, does not apply to accident insurance.

2. An insurer against accidents is not entitled to subrogation to the rights of assured, who has been injured through the negligence of a third person, to recover from the latter for the injuries so sustained.

Certified questions from Court of Civil Appeals of First Supreme Judicial District.

Action by J. B. Parker & Co. against the Ætna Life Insurance Company, in which William Shelvy intervened. From a judgment in favor of plaintiff and intervener, defendant appealed, and questions certified from the Court of Civil Appeals.

H. P. Lawther, for appellant. A. Morgan Duke and N. W. Brooks, for appellees.

GAINES, C. J. The Court of Civil Appeals for the First Supreme Judicial District have certified for our determination the following questions:

"This action was brought by J. B. Parker & Co. against the Ætna Life Insurance Company of Hartford, Connecticut, to recover of the defendant a stipulated indemnity for injuries received by the insured during the life of a certain policy of accident insurance issued by the company to William Shelvy, and which had been assigned by the said Shelvy to the plaintiffs; and as a penalty the further sum of 12 per cent. of the amount of the indemnity due under said policy, and a reasonable attorney fee, which was alleged to be \$50; the total amount for which judgment was prayed aggregating \$371 and costs. William Shelvy intervened in the suit as plaintiff, and alleged that the amount due under the policy had been assigned to the plaintiffs, J. B. Parker & Co., to secure an indebtedness to them of \$225. He adopted the pleadings of plaintiffs, and joined in the prayer for judgment against the defendant, and asked that the balance, after deducting the amount due by him to the plaintiffs, be directed to be paid to him. The defendant pleaded as a defense to a recovery upon the policy the right of subrogation to the claim of Shelvy against the railway company for damages on account of the injuries for which indemnity was claimed, and its deprivation of the right by the settlement of Shelvy with the railway company, and the release of it from all liability for said injury. A demurrer by plaintiffs to so much of the answer as set up this defense was sustained, and it was stricken out. Shelvy was injured as alleged while in the service of the St. Louis Southwestern Railway Company of Texas by

getting caught in a turntable of said company while cleaning the tank of an engine, and was disabled for 28 weeks and 5 days, for which time the company was liable to pay him indemnity at the rate of \$10 a week, amounting to \$287.14. Judgment was rendered in favor of all the plaintiffs as prayed for.

"(1) Does article 3071, Batts' Ann. Civ. St., authorizing the recovery of 12 per cent. of the loss and an attorney fee as a penalty for failure of the insurance company to pay within the time specified in the policy, apply to accident insurance?

"(2) Did the court err in sustaining the plaintiffs' demurrer to the answer setting up defendant's right of subrogation to the claim of Shelvy against the railway company, and its discharge by reason of the fact that it had been deprived of this right by Shelvy's act in settling with and releasing the railway company from further liability to him?"

The court have accompanied the certificate with a copy of an opinion in the case delivered by the Chief Justice, from which it is to be inferred that, after certifying the questions, they had affirmed the judgment of the trial court in part and reversed it in part, and a motion for rehearing had been filed. We are of the opinion that both questions should be answered in the negative. As to the first, the opinion of the Court of Civil Appeals satisfactorily states the grounds upon which our ruling is based. We also adopt the opinion of that court upon the second question. But, in addition to what is there said, we think it is to be observed that, so far as the right of subrogation is concerned, accident insurance is more analogous to life insurance than it is to either marine or fire insurance, and it has been held that it does not apply in case of life insurance. *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Connecticut, etc., Ins. Co. v. Railway Co.*, 25 Conn. 205, 65 Am. Dec. 571. We think also that the case of *Bradburn v. Railway Company*, L. R. 10 Exch. 1, has some bearing upon the question. The point there decided is that "in an action for injuries caused by defendant's negligence a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages."

We have not succeeded in finding any case directly in point.

BARNES v. STATE

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

ASSAULT—ALARMING ANOTHER—USE OF ANIMATE OR INANIMATE OBJECT—EVIDENCE—SUFFICIENCY.

1. Pen. Code, art. 592, subd. 3, providing that the use of any dangerous weapon or the semblance thereof in a threatening manner, with intent to alarm another, is an assault, did not warrant an instruction that the use

*For corrected opinion, see 72 S. W. 530.

of any animate or inanimate object in a threatening manner, with intent to alarm another and under circumstances calculated to do so, constituted an assault.

2. Where one riding a horse turned the same about toward prosecutor, who stood at a distance of several feet, and prosecutor, thinking that the rider intended to run over him, ran and fell over a keg and injured himself, the rider was not guilty of an assault, in the absence of any showing that he chased the prosecutor.

Appeal from Hill county court; L. C. Hill, Judge.

Henry Barnes was convicted of an aggravated assault, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was fined \$25 on conviction of aggravated assault.

The evidence, put in its strongest light for the state, shows appellant was on the streets of Hillsboro, sitting on his horse in front of a barber shop talking to a friend. He was about the middle of the street. The alleged injured party, John McGee, was "sitting on the opposite side of the street on a beer keg," from which he arose and approached within 8 or 10 feet of defendant, and asked him "If that was his colt." Receiving no reply, he repeated the question. Appellant said something not understood by the witness, and jerked his horse around in the direction of witness. Witness ran, did not look back, and fell over a beer keg. Witness was rather to the rear of the horse when he asked the question. Appellant, when spoken to by witness, jerked his horse around with his head toward witness, and made a remark not understood by witness. At the same time some boys who were near by hallooed, "Look out; he is going to run over you;" and it was then witness ran and fell over the beer keg and hurt his leg. Witness says he ran, as he thought, to keep from being run over and to get out of the way of the horse. Other witnesses testify, some of whom place the distance between the alleged injured party, McGee, and defendant at 25 or 30 feet. But none of them testify that appellant chased McGee, or that he claimed to be in any way hurt, until after he had been made the subject of sport by the bystanders.

After giving the definition of assault and assault and battery, and the limitations upon these as made by the statute, the court proceeds in this language: "Or who is at so great a distance from the person assailed as that he cannot reach his person by the use of the means with which he makes the attempt is not guilty of an assault, but the use of any animate or inanimate object, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault." We suppose the court intended to give in charge that portion of the third sub-

division of article 592, Pen. Code, which reads as follows: "But the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under such circumstances calculated to effect that object, comes within the meaning of an assault." But in doing so he substituted in place of the expression, "the use of any dangerous weapon," the phrase, "the use of any animate or inanimate object, or the semblance thereof." This charge is clearly erroneous. There are circumstances under which the use of animate or inanimate objects might constitute an assault; as, for instance, driving a buggy against a party and other facts concurring to that end might constitute an assault. Other illustrations of that sort might be given. But simply the use of any animate or inanimate object for the purpose of alarming another does not, under our statute, constitute an assault. It must be a dangerous weapon or the semblance thereof, and used in an angry or threatening manner, with intent to alarm, and this would only constitute a simple assault. The court only submitted the issue of aggravated assault. But under the facts stated we do not believe the evidence shows an assault. The fact that John McGee ran, believing appellant was going to chase him, would not constitute an assault. It is the act and intent of an accused party which constitutes him guilty, and not the belief of the party assaulted. If the defendant had caused McGee to run over the beer keg, or put him in such condition that, to escape being ridden down, he had been forced to run over the beer keg and injure himself, perhaps this might have constituted an assault. But appellant did not chase McGee.

For the errors indicated, the judgment is reversed and the cause remanded.

GRAY v. STATE

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

INTOXICATING LIQUORS—SALE TO MINOR—KNOWLEDGE—EVIDENCE.

1. On the issue whether one selling liquor to a minor knew he was under age, testimony that two others, both of them minors, drank with him at the same time, was relevant.

2. The testimony was part of the *res gestæ*.

3. To warrant conviction for selling liquor to a minor, the seller must know the buyer is a minor.

Appeal from Dallas county court; Ed S. Lauderdale, Judge.

Tom Gray was convicted of crime, and appeals. Reversed.

J. C. Muse and A. I. Hudson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

¶ 3. See *Intoxicating Liquors*, vol. 22, Cent. Dig. § 172.

DAVIDSON, P. J. Appellant was convicted of selling intoxicating liquor to a minor. The main issue in the case was appellant's belief that the purchaser, Henry Dewberry, was under the age of 21 years at the time of the sale. Over his objection the court permitted the state to prove that Walter Florence and W. T. Dewberry drank beer with him at said time and place, and that they drank two or three glasses each; that they were also minors, one being 16 and the other 20 years of age. The objection was that the minority of Walter Florence and W. T. Dewberry was irrelevant, and that it was not proper to be introduced, but was calculated to prejudice the jury against him, etc. This testimony was admissible. Appellant's contention was that he believed from all the circumstances, the appearance of the purchaser, his size, etc., that he was over 21 years of age, and that he was acting in good faith in selling the beer to him. It was also the fact, proved upon the trial, that he had known the purchasing witness for 5 or 6 years, and the younger Dewberry, who was then 16 years of age. These matters bore upon the good faith of defendant in selling beer, and tended to impeach his theory that he believed the purchasing party was over 21 years of age. In addition this was part of the transaction—*res gestæ*.

The court charged the jury, among other things: "The law imposes upon the state the burden of proving that defendant knowingly sold spirituous, vinous, or intoxicating liquors to Henry Dewberry, knowing him to be under the age of twenty-one years, and the law requires the defendant to exercise such discretion in making sales of spirituous, vinous, or intoxicating liquors to any other person as a person of ordinary diligence and discretion would have exercised under the same or under similar circumstances." A charge of similar import was held erroneous in *Reynolds v. State*, 32 Tex. Cr. R. 36, 22 S. W. 18. In order to justify a conviction under this peculiar statute, the seller must sell knowingly, and this means that he must sell the liquor knowing the person to be a minor. It is not necessary here to discuss what may or may not constitute knowledge.

Appellant requested a charge which was perhaps in rather strong language, but presented his only defense, to wit, that is, his good faith in selling the liquor to the minor believing him to be 21 years of age. Whatever the court may have thought about the facts, the evidence was before the jury setting up this defensive matter, and the court not only failed to give such a charge, but refused the special charge, and in addition gave the charge above criticised. Before defendant could be convicted, he must have sold the liquor to the boy knowing him to be under the age of 21 years. If he believed he was 21 years of age or over, under such facts as come under his observation or of which he was aware, then he would be entitled to an

acquittal; for in that case he would not be guilty of knowingly selling to a minor.

Because of the errors discussed, the judgment is reversed and the cause remanded.

BERRY v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 21, 1903.)

ASSAULT WITH INTENT TO RAPE—CONTINUANCE—ABSENT WITNESS—DILIGENCE—STATEMENTS BY PROSECUTRIX—*RES GESTÆ*—INTENT—SUFFICIENCY OF EVIDENCE.

1. A continuance of a criminal case is properly denied for want of diligence to secure the attendance of a witness resident in another county, where it is shown that subpoena was issued to such other county November 21st, but that from November 16th to 24th the witness was present at the county of trial, and stayed part of the time with defendant, verdict being returned November 26th.

2. In a prosecution for assault with intent to rape, evidence of statements made by prosecutrix immediately on reaching home in a prostrated condition, after having run three-quarters of a mile to escape her assailant, in answer to questions propounded by her mother, that the person assaulting her was accused, and that he was dressed in certain fashion and rode a horse of a certain color, is admissible, the statements being part of the *res gestæ*.

3. Evidence in a prosecution for assault with intent to rape considered, and held to sustain a finding of intent in making the assault to commit that crime.

Appeal from district court, Edwards county; I. L. Martin, Judge.

James Berry was convicted of assault with intent to rape, and appeals. Affirmed.

W. C. Linden and H. C. Fisher, Jr., for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to commit rape, and his punishment assessed at confinement in the penitentiary for a term of three years.

Appellant presented an application for continuance for the want of the testimony of Elmo Hobbs, alleged to reside in Bandera county. It is alleged that on November 21, 1902, he caused subpoena to issue to said county for witness Hobbs to appear instant, which subpoena was deposited by the clerk on said date in the post office at Rock Springs, with proper postage affixed, and has not been returned to court. The application insists that the testimony was material, in this: That the prosecutrix, Gladys Jarvis, has sworn, and it is presumed she will again swear, that defendant assaulted her just about sunset, and that defendant will be able to prove by witness John Hobbs that about two hours before sunset, on the day upon which the assault is alleged to have been committed, he and the said John Hobbs were together at Leakey, and were together about an hour, and left together, or about the same time; and that John Hobbs walked across

*Rehearing denied February 26, 1903.

his field to his hay camp, having engaged defendant to assist in baling hay, and defendant went around on horseback, in company with the two Payne boys, until he reached the gate entering the field in which said hay camp was situated; and that said John Hobbs could see, and did at frequent intervals see, defendant from the time defendant started around to said gate until he entered the same; and that during said time defendant did not commit the assault herein charged against him; that defendant and said John Hobbs reached the hay camp about the same time, and it was then about one-half hour before sundown; and that soon after reaching said camp John Hobbs sent defendant and his son, Elmo Hobbs, to water some horses, and they returned about dark. By Elmo Hobbs defendant will be able to prove that from the time he and defendant left said hay camp, some minutes before sundown, until after dark, he was with defendant continuously, and during said time defendant made no assault upon prosecutrix, Gladys Jarvis, and did not meet or see prosecutrix; that said testimony will be a complete denial of any assault of any character upon prosecutrix. The record shows that witness John Hobbs was not introduced, although present. The district attorney filed a controverting affidavit, setting up the fact that the application does not show diligence to obtain the presence of Elmo Hobbs; that witness Elmo Hobbs came to Rock Springs on November 16, 1902, and remained there continuously until November 24, 1902, and was frequently about and in the courthouse during said time, and that during said time said Elmo Hobbs camped with defendant, James Berry, and with his father, John Hobbs, Lon Welch, and others; that he did not leave the town of Rock Springs until the morning of November 24, 1902. The verdict of the jury was rendered on November 26th. We think the state is correct in its position that no diligence was shown. In the light of this record, the testimony is not probably true.

The second bill of exceptions complains of the following: "Mrs. Jarvis, mother of prosecutrix, Gladys Jarvis, testified that when Gladys reached home on the evening of the alleged assault, a distance of three-fourths mile from where the alleged assault took place, she fell down on her knees at the gate of her home; she was crying, and was very much excited and exhausted, and when she (her mother) reached her she could scarcely speak; that witness asked Gladys what was the matter, and she said a man had run her on horseback, and had got off of his horse, and had caught her by the arm and put his hand over her mouth, and that she had gotten loose from him and run all the way home." The state's counsel contended that all that Gladys said at the time to her mother was only a part of the *res gestæ*, and offered to prove by Mrs. Jarvis, in addition to the above, who Gladys said the party was

that assaulted her, and the details of the assault, as well as description of the party and the color of the horse he was riding. To this last offered testimony defendant objected, for the stated reasons that, in prosecution for rape and assault to rape, the law permits the state to go no further in giving evidence of the complaint of prosecutrix than to prove that she made complaint, the time she made complaint, and the person to whom she made complaint, and that the law does not permit the state to prove the details of her statement, nor the person whom she charges with the offense, and because said proffered testimony is hearsay, and prejudicial to defendant, and was too remote to be admissible as a part of the *res gestæ*; and furthermore urged as an objection that the ability of prosecutrix to give a detailed description of the party alleged to have assaulted her, and the horse he rode and the clothing he wore, was evidence of the fact that it was not spontaneous statement growing out of the transaction itself, but showed evidence of consideration. The court overruled the objection, holding the testimony *res gestæ*, and the witness was permitted to state that at said time and place said Gladys said, in addition to her other statement, that the man who assaulted her was James Berry, and that her mother asked her if she was sure it was James Berry, and she answered she was sure of it, and that she had run all the way home; that witness asked her, "What on earth did you run all the way for?" and she said that she was afraid he would run after her and catch her again; that her mother did then and there ask her how the party was dressed, and Gladys stated how he was dressed; and also she asked her the kind of horse he was riding, and in answer stated the kind of horse he was riding. To this last offered testimony defendant objected for the reasons stated. We think this testimony was admissible as a part of the *res gestæ*. It appears that Gladys had run three-fourths of a mile, was excited, crying, and lying prostrate on the ground, when her mother reached her. This statement was continuous replies to questions asked by her mother. It precludes any premeditation, and shows that spontaneity which is one of the requisites of *res gestæ* evidence. The court did not err in admitting this testimony. *Freeman v. State*, 40 Tex. Cr. App. 545, 46 S. W. 641, 51 S. W. 230; *Castillo v. State*, 31 Tex. Cr. App. 145, 19 S. W. 802, 37 Am. St. Rep. 794.

Appellant insists "that the evidence is not sufficient to warrant the finding that the assault, if made, was made with the specific intent to rape or to have carnal intercourse with the prosecutrix; the only evidence upon that issue being that of prosecutrix, substantially as follows: That she was on her way home from Leakey, and met defendant, Jim Berry, in the road. After he passed her on the way to Leakey, she looked back, and saw him on the outside of Fisher's gate, about 80

yards from the gate, standing by his horse, making a cigarette, and saw him tightening his saddle girth, and that later he overtook her in the road, and came near running over her on horseback, and she became frightened, and ran out of the road to escape the horse. Defendant got off his horse, and when she had run two or three steps farther he caught her by the left arm, and asked her whose little girl she was, and he told her she was Gladys Jarvis. That while he was running her on the horse she said to him, 'Jim, what do you mean; I will tell my papa on you;' and he said, 'My name is not Jim, my name is Slover; and you don't know where I live;' and she told him she did know him, that his name was Jim Berry, and that she screamed when he caught hold of her, and that he put his hand over her mouth, and she jerked loose from him and fell on the ground, and he caught hold of her and raised her up, and she screamed and pulled loose again and fell on the ground, and that she did not remember anything more until she had gotten some distance on her road home, and heard a cow bawling, and that was the first thing she knew, and did not know how long she lay on the ground. That this was all that was said by either herself or defendant. Her mother testifies that when she returned home her drawers were badly torn, but the record does not show when they were torn." Appellant's contention would lead to the conclusion that before there could be an assault to rape there must be evidence going to show a specific intent to rape or contemplated rape. The court properly charged the jury, and these circumstances were amply sufficient for the jury to conclude that appellant had such specific intent. We think their verdict was warranted by the evidence.

The judgment is affirmed.

McFADIN v. STATE

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

CRIMINAL PROSECUTION—RIGHT TO CONTINUANCE.

1. Code Cr. Proc. art. 567, which provides that "in all cases the defendant shall be allowed two entire days, exclusive of all fractions of a day, after his arrest and during the term of the court, to file written pleadings," is mandatory; and where the original prosecution against defendant was dismissed, and a new complaint and information filed, defendant was entitled to the two days, especially where there were additional counts in the information; and this notwithstanding that the new counts related to the same transaction, and merely charged different methods of committing it.

Appeal from Somervell county court; J. G. Adams, Judge.

James McFadin was convicted of crime, and appeals. Reversed.

Martin & George, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of aggravated assault and battery, and fined \$50, and given one month in the county jail.

The only question we deem necessary to be considered is the first bill of exceptions, which is to the effect: "The complaint and information were filed, and defendant arrested, and the trial commenced, on the 8th day of August, 1902, and that thereafterwards, on the same day, and within one hour of the time of the filing of the same, the case was called by the court for announcements; and the state, by her counsel, announced 'Ready,' whereupon the court demanded that the defendant announce. Defendant asked and demanded of the court that he be allowed two full days in which to file written pleadings before being called upon to announce, which request and demand the court in all things refused and denied, and required defendant to announce then, to all of which action of the court defendant excepted." The court appends the following explanation to the bill: "On the 15th day of June, 1902, complaint was made against defendant, charging him with aggravated assault upon S. N. Parham on June 14, 1902, and said complaint was filed and the cause docketed on the county court docket of Somervell county as No. 591. The defendant was arrested under said complaint on the 16th day of June, 1902, and gave bond for his appearance before this court, which convened August 4, 1902. By agreement with defendant's attorneys and the county attorney, said cause was set for trial on August 8th. On said day the county attorney filed a new complaint and information, covering the same transaction as the old one, but the information contained two additional counts, but all relating to the same transaction, but simply charging different methods of committing the same assault. The state announced 'Ready' under the new complaint and information. Under the foregoing facts, I did not think that the defendant had any right to two days' notice of the new papers filed, when that was the only grounds of postponement urged." Article 567, Code Cr. Proc., provides, "In all cases the defendant shall be allowed two entire days, exclusive of all fractions of a day, after his arrest and during the term of the court to file written pleadings." This statute is mandatory, and applies in all cases; and it is not necessary for the appellant to make known to the court what character of written pleadings he may desire to present, or that he desires to present any written pleadings. The statute is intended to afford him the opportunity to prepare for trial, to examine the legal questions involved in the case, and to determine whether any pleadings are necessary, and decide upon his course as to the trial. *Evans v. State*, 36 Tex. Cr. R. 32, 35 S. W. 169; *Whitesides v. State* (decided at the present term) 71 S. W. 960. When the prosecution was dismissed, and new com-

plaint and information filed, it becomes a new case in court. This is especially true in view of the statement in the bill of exceptions that there were additional counts in the information than those contained in the previous information. However, we do not think this would make any difference, but appellant would be entitled to the two days under the statute, under any conditions. Therefore it follows that the trial court erred in not extending this statutory rule to appellant when requested.

For the error discussed, the judgment is reversed and the cause remanded.

WHITE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 11, 1902.)

MURDER — SECOND DEGREE — CONVICTION — FIRST DEGREE — INSTRUCTION — PROPRIETY — MANSLAUGHTER — SUFFICIENCY OF EVIDENCE — TIME FOR TAKING OBJECTION.

1. In a prosecution for murder in the second degree, it is not error to charge on murder in the first degree in giving a complete exposition of the elements of murder in the second degree.

2. In a prosecution for murder, the evidence showed an altercation and encounter between accused and a third person, wherein accused was knocked down. The parties left the house, and accused, who was nearsighted and had lost his eyeglasses, returned and fired through the door, killing an innocent person. The court instructed on murder in the second degree and manslaughter; making accused's guilt to depend on the condition of his mind at the time he shot, as he supposed, at his recent opponent. *Held*, that it was not reversible error to also instruct on murder in the first degree; the jury having returned a verdict of guilty in the second degree.

3. An instruction that if accused killed the person shot intentionally, but at the time of doing so was laboring under such passion as to deprive him of a deliberate mind, he was guilty of murder in the second degree, was proper, as, if he shot the person, not mistaking her for his recent opponent, the crime could not be reduced to manslaughter.

4. In a prosecution for homicide, the court instructed that if the jury believed accused was struck and knocked down by K., and that such blows produced pain or bloodshed, and that accused lost his eyeglasses, without which his sight was impaired, and that, when he arose, blood was running from the wounds produced, and he started to leave the house, and got to the front door, and then turned and fired "with the intent and believing that he was shooting" K., who was in the house, and that, at the time he shot, accused was in such passion as to render him incapable of cool reflection, he would be guilty of manslaughter, though he killed an innocent person. *Held*, that the charge was not objectionable as making a conjunction or combination of circumstances essential to the reduction of the homicide to manslaughter.

5. Evidence in a prosecution for homicide considered, and *held* to support a verdict of murder in the second degree.

On Motion for Rehearing.

6. Code Cr. Proc. art. 723, provides that, where it appears on defendant's appeal that any of the requirements of the eight preceding

articles (relative to the charge of the court) have been disregarded, the judgment shall be reversed, provided the error is excepted to at the time of the trial. *Held*, in a prosecution for homicide, that it was too late, on a motion for rehearing of the appeal, to urge for the first time that the evidence did not show decedent's death to have resulted from the injury inflicted by accused, rather than from improper medical treatment.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

Enoch White was convicted of murder in the second degree, and appeals. Affirmed, and motion for rehearing overruled.

Thomas, Spellman & Richardson and Robt. B. Seay, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and given 10 years in the penitentiary.

The charge of the court is criticised in the motion for new trial because the issue of murder in the first degree was submitted. This was not error. It is usually necessary to charge on murder in the first degree, to a complete exposition of the elements of murder in the second degree. *Simmons v. State*, 23 Tex. App. 653, 5 S. W. 208. It may also be stated, in reply to this proposition, that an acquittal was had as to murder in the first degree. Where this is the result, unless the submission of a charge in regard to the higher phase of the homicide leads to injurious results in regard to the phase of the case upon which the conviction is obtained, it is not reversible error. This is not the case here. The evidence discloses that the homicide occurred, practically, under the following state of case: Appellant and Knight, in the house where the homicide occurred, engaged in an angry altercation of words, leading to a blow from Knight, which knocked appellant to the floor, causing pain and bloodshed. The parties immediately separated; appellant going out of the front door, and Knight the rear. The witnesses disagree as to the time intervening between this difficulty in the house and the firing of the fatal shots, but, as we understand the record, no witness places Knight in the house at the time of the homicide. Appellant testified that he had lost his glasses, without which he was unable to distinctly identify one person from another at the distance from which the firing occurred. Appellant, after passing out of the house (at what time, as before stated, is uncertain, but some time after leaving the house), fired into the house through the door from which he had emerged. The first shot took effect in the left rear portion of Willie Casey's head, killing her instantly. Deceased, Walker (another woman), was sitting in a chair diagonally across and in front of Willie Casey. Upon the first report of the pistol she jumped up, and appellant immediately fired upon her, and shot her through the stomach. No witness places Knight in the house

¶ 1. See *Homicide*, vol. 26, Cent. Dig. §§ 845, 846.

at the time, and the testimony all shows that he was not there. He testified himself that he had reached another street, some distance away, at the time of the shooting. The court charged the jury with reference to murder in the second degree and manslaughter. In reference to murder in the second degree, the charge made appellant's guilt depend upon the condition of his mind at the time he shot, as he supposed, at Knight, as it did, also, in the charge on manslaughter on the theory of mistaking the woman for Knight. No exception was taken to this, and the charges in these respects, as given, are correct.

Under the state's case above given, the court further charged the jury: "If you believe from the evidence, beyond a reasonable doubt, that defendant did shoot and kill said Sallie Walker, not by mistake, but intentionally, but that at the time of doing so he was laboring under such a passion as deprived him of the power, at the time he formed that intent to kill her, to do so with a considerate and deliberate mind, then he would be guilty of murder in the second degree." This charge is correct. If the jury should ascertain from the facts that appellant shot Sallie Walker, not intending to shoot Knight, or the individual he supposed to be Knight, then the question of manslaughter was eliminated. In other words, in order for him to have been guilty of manslaughter, his mind should have been laboring under the impression that he was shooting at Knight, and not at the woman he killed, for, if he shot and killed her, however much excited his mind may have been by adequate cause brought about by Knight, it would be murder in the second degree. She had not produced adequate cause, and had not been the occasion of its production, or sudden passion which would have rendered his mind incapable of cool reflection. The statute settles this question. Therefore the court was correct in giving the charge of which complaint is made.

The court gave a further charge upon manslaughter—in substance, that if the jury believed that appellant was struck and knocked down by Knight, and that such blow or blows produced pain or bloodshed, and that at the time he was using eyeglasses, and that said glasses were removed from his eyes, and that without such glasses his sight was impaired, and that, when he arose to his feet, blood was running from the wounds produced, and he started to, and did, leave the house, and go to the front door, and that when he reached that point, or thereabouts, he turned and fired his pistol, with the intent and believing that he was shooting at Knight, and that, when he left the room in which he was knocked down, the said Knight was in said house, and, at the time defendant shot, he was in such passion, of either anger, rage, or sudden resentment or terror, that rendered his mind incapable of cool reflection, and that he believed said Knight was still in the

house when he shot, and that it was his intent to kill Knight, and not Sallie Walker, then he would be guilty of manslaughter. The criticism is that it makes the conjunction or the combination of circumstances essential to the reduction of the homicide to manslaughter. We do not so understand this charge. These are the facts relied upon to reduce the homicide to the grade of manslaughter. If these facts existed, as stated, the jury should have convicted of manslaughter. In other words, we believe this was a pertinent application of the law to the facts. If he, in leaving the house, left Knight at the place of the difficulty, upon reaching the door began firing, believed Knight was still at the point where he (appellant) was knocked down, and shot on account of the blow, and, his mind being enraged to the point of being incapable of cool reflection, he thought he was shooting at Knight, but shot the woman Sallie Walker and killed her, the killing would be manslaughter; but if he shot the woman, recognizing that she was a woman, and not Knight, he was guilty of murder in the second degree. We believe these questions have been pertinently and fairly submitted by the court's charge.

Appellant insists that self-defense should have been submitted. There is no testimony indicating the question of self-defense. Appellant contends that, if he believed at the time he turned and began firing that Knight was following him up and continuing the assault, it would be self-defense. It is not necessary to discuss this question, as there are no facts in the record which indicate that appellant believed Knight was following him. All the testimony shows that he went in the opposite direction.

It is also suggested that the evidence is not sufficient to support the conviction. We have stated enough of the testimony to indicate there is no merit in this proposition.

The judgment is affirmed.

On Rehearing.

(Feb. 25, 1903.)

The judgment was affirmed at the Tyler term, 1902, and comes before us now on rehearing. The first two grounds of the motion are sufficiently disposed of in the original opinion, and we see no reason to change our views.

The third ground of the motion, which is raised for the first time in this motion for rehearing, is that the evidence raises the question that appellant's shot did not necessarily bring about the death of deceased, but it may have been, and probably was, brought about by the negligence of the physician. It is contended that the witness put on the stand by the state testified that this wound was not inevitably or necessarily fatal, and that the death, perhaps, was brought about by the failure of the deceased to permit an operation. The deceased woman was shot

by appellant through the bowels, and at the time he shot the woman he thought he was shooting another person, by the name of Knight, with whom he had shortly before had a difficulty. We do not believe the testimony justifies the raising by appellant of the proposition stated. But under the construction placed on article 723, Code Cr. Proc., it is too late, anyway, to suggest such matters to this court for the first time after appeal. It was not even raised or suggested until this motion for rehearing. The writer has not agreed to this construction placed on said article, but it is now the law; and, even if there was merit in appellant's contention, it is too late to urge it at this late day.

The motion for rehearing is overruled.

EARL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

SELLING LIQUOR TO MINORS—EVIDENCE—AGE OF PROSECUTOR—OPINIONS.

1. In a prosecution for selling liquor to a minor, it was not error to allow witnesses for the state to give their opinions to the effect that, judging from his appearance, size, etc., they would take him to be from 18 to 20 years of age.

Appeal from Hood county court; Phil Jackson, Judge.

Hal Earl was convicted of selling liquor to a minor, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of selling liquor to a minor, and fined \$45.

Appellant complains that the state was permitted to prove by certain witnesses their opinions as to the age of prosecutor, from his appearance, size, etc., and that from his personal appearance they would take him to be from 18 to 20 years of age. This character of evidence has been held to be admissible. *Garner v. State*, 28 Tex. App. 561, 13 S. W. 1004; *Jones v. State*, 32 Tex. Cr. R. 108, 22 S. W. 149; *Earl v. State*, 66 S. W. 839, 4 Tex. Ct. Rep. 337. The court gave a sufficient charge on the statute as to the requirement on the part of the state to prove knowledge by appellant at the time of the sale of the minority of the prosecutor, and it was not necessary to give the requested charge on this subject. *Slaughter v. State* (Tex. Cr. App.) 21 S. W. 247. The evidence is amply sufficient to support the finding of the jury. *Schirmacher v. State* (Tex. Cr. App.) 45 S. W. 802; *Wuertemburg v. State* (Tex. Cr. App.) 51 S. W. 944; *Earl v. State*, 66 S. W. 839, 4 Tex. Ct. Rep. 337.

The judgment is affirmed.

HENNINGBERG v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

RECEIVING STOLEN GOODS—SUFFICIENCY OF EVIDENCE.

1. In a prosecution for receiving and concealing stolen goods, the evidence examined and held insufficient to sustain a conviction for failing to show that the goods were received from the person named in the indictment.

2. Where the indictment charges the receiving and concealing of stolen goods from a certain person, the evidence must correspond therewith.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Sam Henningberg was convicted of crime, and appeals. Reversed.

J. B. Bisland, S. P. Skinner, J. A. Beall, and J. C. Muse, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of receiving and concealing 10 pounds of brass, of the value of 10 cents per pound, the same being the property of J. J. Doran, and his punishment assessed at a fine of \$100, and 30 days' confinement in the county jail.

Griffin testified that he sold appellant, on April 1, 1902, some old brass; that he got the brass from the railroad shops at Ennis; that appellant was in the junk business, buying old scrap iron, bottles, brass, etc.; that he heard appellant would buy brass. Appellant told witness if he would go to the roundhouse and railroad shops he could get brass, and also told witness to break the brass up, as he (appellant) was afraid he would be caught with it; that Cox and Hunter were present when defendant told him to break it up, and to chisel the letters off the brass, if any were on it, before they brought it to him. Witness went to the railroad yard and got some brass. There was a ditch between the repair track and the dump pile; that the ditch seemed to be filled up with trash from the shops and roundhouse, and this is where witness got the brass. In that dump pile were old pieces of old rubber hose, waste, cinders, and the cleanings from the shop, and in it were little brass rings, and little chunks of brass about an inch and a half long and three-fourths of an inch in diameter, and pieces of broken car boxes, and other scraps of broken brass. This is where witness got most of the brass he sold appellant, except some old car boxes picked up along the track between the passenger depot and the roundhouse. That witness is about 17 years of age, and took the brass in the daytime while everybody was working around the shops, and did not try to dodge or conceal himself; that he took it because he thought the railroad had no use for it, and had thrown it away; that the brass was all worn, and witness thought it had been discarded. Witness did not take any new brass. Appellant offered to furnish a wagon

¶1. See Criminal Law, vol. 14, Cent. Dig. § 1043; Intoxicating Liquors, vol. 29, Cent. Dig. § 292.

to haul the brass off if we would get the horse. Appellant came to witness' house with his wagon to get some brass piled up in the yard. Hunter and Cox were both there at the time; and when he got the brass in the wagon he told us to cover it up with sacks, so no one could see it, as he did not want any one to know that he had it. We went to Hunter's house, and got some brass there. Witness has never been indicted or arrested for stealing this brass. The brass witness sold at that time to defendant was gotten about noon; the railroad men were working around there, and saw him pick it up, and no one told him not to take it. That he sold defendant brass several times; some of the brass was branded "H. & T. C. R. R." Frank Cox testified to having sold brass under the same circumstances that Griffin testified to. At the time defendant told Griffin to cover the brass in the wagon, Cox states he supposed he did this because he was ashamed for people to see him hauling it. Hunter testified that he helped the two witnesses Griffin and Cox get brass in and around the railroad track, and out of the waste pile near the roundhouse. Witness stated that they broke the brass as directed by defendant, and the pieces they broke were among the pieces appellant got at Griffin's house. Roy Johnson, a newsboy on the Houston & Texas Central Railroad, testified that defendant offered him 50 cents at first, and finally \$2, if he would swear that it was not railroad brass that the boys brought home. This was after defendant was indicted. Witness refused to swear what appellant desired him. Doran testified that he was master mechanic for the Houston & Texas Central, and in charge, control, and management of the roundhouse, yards, shops, and all cars and engines for said road at Ennis; that on June 1st he saw Bruce Keach take a piece of brass out of the box by the roundhouse. Witness followed him, and he went to the house of defendant. He had the brass in a sack. Witness watched the premises of defendant, and on Monday following saw the brass in a barrel in his stable. After that went to the stable and examined the brass, and recognized a lot of railroad brass in the barrels. Defendant had six or eight barrels of brass in his stables. Some of them were headed up, and two were opened after defendant was arrested. Witness picked out and identified something like 2,000 pounds of brass that was railroad brass, and identified it as the property of the Houston & Texas Central Railroad Company. Some of it was whole brass, and some of it broken to pieces; cannot say that any of the brass was the brass Griffin, Hunter, and Cox sold to defendant. This is substantially the state's case. The indictment charged that appellant received from Taylor Griffin 10 pounds of brass, of the value of 10 cents per pound, the property of J. J. Doran, the special owner. However, Doran swears

that he cannot identify any of the brass found in the barrels or in the possession of appellant as the brass that Griffin delivered to appellant, nor is there any corroboration of testimony of Griffin, Cox, and Hunter, who are accomplices. In the absence of this proof, the evidence is insufficient. Where the indictment charges the receiving and concealing of stolen property from a certain person, the evidence must correspond with the allegations.

Because the evidence is insufficient to support the verdict, the judgment is reversed and the cause remanded.

HENNINGBERG v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

RECEIVING STOLEN GOODS—SUFFICIENCY OF EVIDENCE.

1. In a prosecution for receiving and concealing stolen property, where the evidence showed that defendant's wife, and not defendant, received the goods and did not show that he had authorized her to do so, defendant's conviction of the offense was not sustained.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Sam Henningberg was convicted of crime, and appeals. Reversed.

J. B. Bisland, S. P. Skinner, J. A. Beall, and J. C. Muse, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was obtained under an indictment charging appellant with receiving and concealing 28 pounds of brass, the same being the property of Doran, knowing it to have been stolen. The punishment assessed was a fine of \$100, and 30 days' confinement in county jail.

Witness Bruce Keach, when first upon the stand, testified that he committed the theft of the brass by agreement and under the instructions of appellant, and subsequently sold the same to him as per previous agreement between them. Another witness, who rendered Keach assistance in carrying the property to appellant's place of business, testified that appellant did not receive the property, did not pay for it, and was not at home when the property was sold; but that the property was bought by the wife of appellant. In fact, all the testimony shows that appellant was not at home that day, and could not have had the conversation detailed by the witness Keach as occurring between himself and appellant, and appellant did not buy the property from Keach. After witness Ross Cook, who assisted Keach, had testified that Mrs. Henningberg bought it and appellant had nothing to do with it, Keach asked to be recalled, and in obedience to that request was recalled by the county attorney, and again placed on the stand, and admitted that his testimony in regard to these matters was absolutely false, and

that he did not take the property at the instigation of appellant, and did not see appellant during the entire day. And all the evidence on the question shows appellant was not at home, but was at the little village of Bristol, some 12 miles away, and had no connection by word or deed either with the theft or receiving the property. And it is clearly shown that Mrs. Henningberg was the purchaser and appellant knew nothing of the transaction. Appellant was carrying on what is termed a "junk business"; that is, purchasing old iron, brass, bottles, and things of that sort, and selling them again; and that when he was absent his wife would make the purchases of such things of this sort as were brought to his store for sale.

There are several errors assigned which would require a reversal of the judgment, but we do not deem it necessary to discuss them, as the testimony does not support the conviction. The conviction seems to have been predicated upon the theory set forth in the court's charge, that, if Mrs. Henningberg bought the property, as the agent of her husband, and during his absence, it would be a purchase by the husband, and appellant therefore would be guilty. It is not necessary to enter into a discussion of the question as to how far the act of Mrs. Henningberg would be the act of her husband, because there is nothing in the testimony to indicate that Henningberg had instructed his wife to buy or receive and conceal stolen property. The facts exclude this theory. Therefore, the charge of the court was not germane to any question raised by the testimony.

Because the evidence is not sufficient to support the conviction, the judgment is reversed and the cause remanded.

BARNES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

PURSUING OCCUPATION WITHOUT LICENSE—EVIDENCE—SUFFICIENCY—PROOF OF LICENSE TAX.

1. In a prosecution for pursuing the occupation of selling intoxicating liquors and medicated bitters without license, a witness testified to the purchase from defendant of medicine prescribed by a doctor, and also medicine not so prescribed, but he did not know what the medicine was. Another testified that defendant had given him whisky several times during the past year, but for which no charge was made. Another testified to the purchase of bitters. Another testified to purchases of various kinds of bitters; that he did not know that the bitters were intoxicating; that he bought six or eight bottles in one day to sober up on. *Held* insufficient to prove that defendant pursued the occupation charged.

2. In a prosecution for pursuing an occupation without license, the state should not merely show the orders of the commissioners' court levying the tax, but also, from the minutes of the court, the amount of such levy.

Appeal from Archer county court; F. Lewis, Judge.

M. J. Barnes was convicted of pursuing the occupation of selling intoxicating liquors without a license, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of pursuing an occupation without license, and his punishment assessed at confinement in the county jail for 10 days.

The only question we deem necessary to consider is the sufficiency of the evidence to support the conviction. The evidence adduced upon the trial is substantially as follows: Joe Rinard testified: That defendant runs a drug store at Dundee. That "I have bought medicine from him that Dr. Matthews prescribed. I have bought medicine from him that Dr. Matthews did not prescribe. I have bought medicine in bottles. I do not know what it was. I drank the medicine I got in bottles." M. A. Smith testified: That he had known defendant three or four years, and knew where his place of business is, in Dundee, Archer county. "I have traded with him ever since I have been in the county. I have never bought whisky from defendant. I have gone into his place of business and asked him to sell me a dram, and told him I was feeling badly. He said, 'I cannot sell you a dram, but I will give you one.' I have gotten drams from him several times during the past year. I run an account with defendant. I paid him up what I owed him last year. I do not know whether he charged me with the whisky I got or not. (Here state's attorney exhibited to witness what purported to be his testimony before the grand jury, and read portions of it to witness in presence of the jury, for purpose of refreshing the memory of witness, to which defendant objected.) I testified before the grand jury. I signed that paper in the grand jury room. I do not think defendant charged me with the whisky I drank. If I said so in the grand jury room, I was mistaken. I am illiterate. Cannot read writing. Can only write my name. I am satisfied I did not pay for the whisky I got from defendant. I am friendly to defendant. I have brought him a number of watermelons and roasting ears." Sam Dillard testified: "I know defendant. Have been in his place of business a number of times. I have bought bitters from him. I never bought whisky from him." John Manton testified: "I know the defendant. I never bought whisky from defendant. I have bought bitters from him. I have bought Hostettters, Indian Herb, and Attwood's Bitters from defendant. I do not know that these bitters are intoxicating. I bought six or eight bottles in one day during the summer of 1901. I bought them to sober up on. I got my whisky at Wichita Falls." The state put in evidence the following or-

ders of the commissioners: "(1) Order of commissioners' court, February term, 1900, levying occupation tax for the county of Archer; (2) order of commissioners' court, February term, 1901, levying occupation tax for county of Archer; (3) order of commissioners' court, February term, 1902, levying occupation tax for county of Archer."

The indictment charged that defendant did unlawfully engage in, pursue, and follow the occupation of selling spirituous, vinous, and malt liquors and medicated bitters in quantities of one gallon, and less than one gallon, which said occupation was then and there made taxable, etc. In our opinion, this evidence is not sufficient. In the first place, it is not shown that appellant pursued the occupation alleged in the indictment, nor does it show what was the tax levied by the commissioners' court, but merely shows that the order levying the taxes was made. If the commissioners' court levied a tax, the amount of such levy should be shown from the minutes of the court. If appellant pursued the occupation, evidence should be introduced showing that he pursued such occupation.

The evidence adduced does not make out a case of the character charged, and for this reason the judgment is reversed, and the cause remanded.

THOMAS v. STATE.*

(Court of Criminal Appeals of Texas. Dec. 11, 1902.)

ASSAULT WITH INTENT TO MURDER—EVIDENCE—RES GESTÆ—CHARACTER OF WEAPON—INSTRUCTION.

1. Defendant, prosecuted for assault with intent to murder, had used threatening language to a third party and his companion, and even drawn a knife, because he was refused a bicycle. Prosecutor was not present at the time, and knew nothing of this altercation. A few minutes afterwards, and at a place some distance therefrom, prosecutor joined the third party, and shortly thereafter they overtook defendant, who attacked the third party with rocks; and, in attempting to prevent this attack, prosecutor was stabbed. *Held*, that evidence of the original altercation was admissible as part of the *res gestæ*.

2. Evidence showing that an assault was committed with a knife, and that the wounds, which were described, were severe, and aimed at vital parts, causing prosecutor to be confined for three weeks, justified an instruction on assault with intent to murder, without further proof as to the kind and character of knife.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

Ed Thomas was convicted of assault with intent to murder, and appeals. Affirmed.

Thomas, Spellman & Richardson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and given three years in the penitentiary.

There is but one bill of exceptions. The court permitted the state to prove by two witnesses (Lee and Helena): That on the day of the alleged assault, and a short time prior thereto, they passed defendant on the road in West Dallas. That defendant asked Lee to let him ride his bicycle. That Lee asked defendant if he did not have a good deal of gall, to ask a white man to let him ride his bicycle. Defendant answered "yes"; that his father used to drive a gall wagon. That Lee then went on, passing Helena, and that defendant, who was accompanied by his brother, came up with Helena, when the latter remarked, "Lee got the best of you," at which defendant began to curse and abuse Helena, threatening to kill him, whereupon Helena told Lee to stop, which he did. That when the parties came up, defendant drew a knife, or something witness took to be a knife. That Lee said to defendant, "You negroes move on, now, or I will hurt you, and hurt you bad." That about this time one Britton drove up in his wagon, prosecutor Jack Beer riding with him. Lee invited Beer to get out and go with him. That Beer got out of the wagon, and went with Lee. This last occurred several hundred yards from the place of the original difficulty between Lee and defendant with reference to the bicycle; and Beer, the prosecutor, was not present at that time, and did not know what then occurred. Appellant objected to the introduction of this testimony on the ground that it was extraneous matter, and could shed no light on the transaction under investigation, but was another and different offense, and was highly prejudicial to the rights of defendant. The court explains the admission of this testimony, and refusal to strike it out, as follows: "That there was only a few minutes' time between the conversations testified about and the difficulty in which Beer was hurt; that it was all part of the same transaction, and was admitted to show the condition of the defendant's mind, and determination to engage in trouble with anybody, and as evidence of malice towards Beer and every other person with him"—and refers to the evidence in full as to the explanation. Now, referring to the evidence, it will be seen that the difficulty all occurred about what transpired between appellant and Lee when he asked him to let him ride his bicycle, and that the events which culminated in the difficulty followed in rapid succession. It is true, Beer joined Lee after the first altercation. However, it was but a very short time after Beer joined Lee before they overtook or came up with defendant, who, as they approached, was armed with two rocks. He threw one at Lee, striking his bicycle, and was in the act of throwing the other, when Beer (prosecutor) rushed upon him with his umbrella, and

*Rehearing denied February 25, 1903.

struck him to prevent him from throwing the other rock. Then it was that appellant cut Beer. It occurs to us that all of this testimony was admissible as a part of the res gestæ, although Beer knew nothing of it, but simply interfered to protect his friend from an assault, when he himself was set upon by appellant, and severely cut and wounded. The state had a right to this evidence, as showing the origin of the difficulty—the cause of the assault by appellant on Lee. It showed appellant in the wrong from the start, and while the original transaction was unknown to the prosecutor, Beer, what he did know and see when appellant assaulted the witness Lee authorized him to interfere. What had transpired before showed the animus which actuated appellant, not only with reference to Lee, but with reference to any one else who might interfere to prevent him from assaulting Lee. This was a continuous difficulty, and it was competent for the state to show how it began.

Appellant complains in the motion for new trial that the court erred in submitting the assault with intent to murder, on the ground that there was no evidence of the kind or character of the knife with which the assault was made, showing it was a deadly weapon. There is no question that appellant had a knife. In his evidence he denies drawing his knife in the first altercation, when witness Lee testified as to his drawing a knife. Though he testified himself, he does not deny cutting prosecutor, Beer, with a knife. The wounds indicate unmistakably knife cuts. One wound was inflicted in the right temple, extending an inch and a quarter in the direction of the right eye. The other was in the left jaw, extending from the ear to the mouth. From the circumstances in which this onslaught was made after appellant threw the rock, he must have had his knife ready, because, before he could throw the second rock, Beer had interfered and struck him with the umbrella. He then immediately began cutting Beer with what was evidently a knife, though Beer did not see the knife. From the effect of these wounds, prosecutor was confined about three weeks. The wounds, as appears from the testimony, were severe. They were aimed at a vital part of prosecutor, and, although the evidence does not inform us of the size of the knife, we can judge of the deadly character of the instrument from other circumstances in the case. In *Walters v. State* (Tex. Cr. App.) 35 S. W. 652, there was no proof of the character of the knife, further than that it was a pocket knife; but, looking to the grievous character of the wounds, and where they were inflicted, it was held that the proof was sufficient to show the weapon was a deadly one. And for other authorities, see *Scott v. State* (Tex. Cr. App.) 62 S. W. 419; *Ashton v. State*, 31 Tex. Cr. R. 479, 21 S. W. 48. Judging from the manner of this assault, and from the character of the

wounds, where they were inflicted, and their effect upon prosecutor, the court was unquestionably authorized to give a charge on assault with intent to murder. The court also gave a charge on aggravated assault, which was proper. The jury, however, found appellant guilty of assault with intent to murder and we believe they were authorized to do so. The judgment is accordingly affirmed.

HODGES v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 23, 1903.)

GAMING—PERMITTING GAMING IN A HOTEL—INDICTMENT—SUFFICIENCY—EVIDENCE—OBJECTIONS.

1. Under White's Ann. Pen. Code, art. 379, as amended, punishing any person playing any game of cards "at any house for retailing liquors, storehouse, tavern, inn, * * * or at any place except a private residence occupied by a family," and article 389, punishing one who permits any game prohibited by the chapter to be played in a public house under his control, the phrase "a private residence occupied by a family," not entering into the definition of any of the places mentioned by name in the statute, an indictment charging defendant with permitting a game of cards to be played in a hotel under his control is not defective for failing to allege that the hotel was not "a private residence occupied by a family."

2. The indictment is not defective for failing to describe the room in which the game was played as a public room of the hotel, the fact of the game having been played in a private room being a matter of defense.

3. Objection on appeal in a prosecution under White's Ann. Pen. Code, art. 389, punishing the permitting of gaming in a hotel, that the evidence showed that defendant was guilty, if at all, of renting to another a room in the hotel for gaming purposes, was untenable, where defendant requested no instructions to that effect.

4. In a prosecution under White's Ann. Pen. Code, art. 389, for permitting gaming in a hotel, the evidence showed that the room where the game was played was rented by the month, but was, like other rooms in the hotel, under the control of defendant; he having ingress and egress to it for the purpose of supervising it and keeping it in order. A bed was found in the room, but there was no evidence that the renter or any one slept there. It also contained a gambling outfit. Held sufficient to support a conviction.

Appeal from Dallas county court; Ed S. Lauderdale, Judge.

Charlie Hodges was convicted of permitting gaming on premises under his control, and appeals. Affirmed.

Ellison & Cohron, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of permitting gaming on premises under his control, and fined \$50, and prosecutes this appeal.

The charging part of the count in the indictment under which he was convicted reads as follows: "Did unlawfully permit a game with cards to be played in a room and house

*Rehearing denied February 25, 1903.

¶ 1. See Gaming, vol. 24, Cent. Dig. § 237.

under his control; the said house then and there being a public place, to wit, a hotel inn." Appellant made a motion to quash the indictment on several grounds—among others, that under the law as amended, and under which this indictment was brought, the indictment should contain the negative averment, to wit, that said hotel inn was not a private residence occupied by a family. This brings in review a construction of the amendment to articles 379, 381, White's Ann. Pen. Code, on the subject of gaming, so far as they relate to this question. It will be noted that article 379, as amended, follows the original article, and includes every public house or public place mentioned by name which was contained in the original article, and then, in addition, makes it an offense for a person to play a game with cards at any place, except a private residence occupied by a family; that is, the portion of said article relating to this offense, as amended, reads as follows: "If any person shall play at any game of cards at any house for retailing spirituous liquors, storehouse, tavern, inn, or other public house, or in any street, highway or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family, he shall be fined," etc. Now, the question presented is, does the phrase and sentence, "except at a private residence occupied by a family," qualify or enter into the definition of any of the places mentioned by name in the amended statute, or is it confined to any other place, except those places mentioned? We understand the rule deduced from the authorities is to the effect that if the negative averments are contained in the enacting clause, and are essentially descriptive of the offense, then such negative averments must be set out in the indictment. On the contrary, although such negative averments may be in the enacting clause, still, if it is not essentially descriptive of the offense, it need not be set out in the indictment. See *State v. Duke*, 42 Tex. 455, and authorities there cited. Here if it be conceded that the exception of a private residence is contained in the enacting clause, yet it is not essentially descriptive of the offense alleged. Indeed, the places named, by their very terms and our understanding of the language, contravene the idea that they are a private residence. In ordinary parlance, a store or hotel or saloon is not a private residence, and the allegation of one of these in the indictment of itself contravenes and negatives the idea that it is a private residence. The repetition that such a house named is not a private residence would only be putting the allegation in another form. This construction is re-enforced when we look at the article before its amendment and since. Indeed, the amendment, as shown above, was merely the addition of another clause, enumerating other places where playing cards was inhibited be-

sides those previously mentioned; and in connection with the clause added, naming other places, we find the exception of a private residence. This is the addition of another clause to the statute, and the qualification or limitation is found in and refers to that clause alone. The views above expressed are further re-enforced when we recur to the fact that article 380 is left unrepealed by the amendment, and this article enters into, qualifies, and explains the public houses mentioned in article 379; and, in our view, article 379, as to the public houses and places named, is left by the amendment as it previously existed.

The indictment here set out, alleging that the permitted game was played at a hotel under the control of appellant, etc., under the former decisions of this court, was a proper indictment charging the offense. *O'Brien v. State*, 10 Tex. App. 544. In *Weiss v. State*, 16 Tex. App. 432, it was held that "room" and "house" are not synonymous terms, and, if the indictment here merely charged a room attached to said hotel, it should have been further described. For other authorities on this proposition, see *White's Ann. Pen. Code*, § 621. However, we understand the indictment does not designate any particular room, but alleges, in general terms, that the playing was at a hotel. In *Comer v. State*, 26 Tex. App. 509, 10 S. W. 106, it was held that ordinary rooms of a hotel, not used or occupied by guests, are public rooms, and do not become private when rented temporarily and used for the purpose of playing cards. We understand our decisions on this subject to hold that, where it is alleged that a game of cards was played at a hotel, it is sufficient. If it was a private room of the hotel, this is a defensive matter, which may be shown by the defendant. If a room of a hotel is taken by a guest for a night or a day, or as a residence for a time, this, under the law as it formerly stood, might become a private room, and so not within the terms of the inhibition of the statute.

However, appellant contends that the proof here showed, if any offense, not the offense of permitting a game of cards to be played in a hotel under his control, which is inhibited under article 380, but the indictment, according to the evidence, should have been brought against appellant under article 390, for renting a room of a hotel for the purpose of gaming. On this subject we are referred to *Borchers v. State*, 31 Tex. Cr. R. 517, 21 S. W. 192. We would observe that no charge was asked by appellant on this subject, and, it being a misdemeanor, if appellant believed the evidence authorized such a charge, he should have requested it. With us it is simply a question as to whether or not there is sufficient evidence to sustain the allegation that the game was permitted in a hotel, or a room of a hotel, under appellant's control. While the record discloses that the

room or rooms of the hotel where the playing occurred were rented by the month to Carroll, yet the evidence further discloses that these rooms were, like other rooms of the hotel, under the control of appellant, and there is no evidence showing that they were of a private character. True, a bed was found in the room, but no testimony that Carroll or any one else ever slept in that bed. In the same room was a gambling outfit, a table, and the paraphernalia required to play the game of poker. Appellant superintended this room, as he did the other rooms of the hotel, and had ingress and egress to it for the purpose of supervising and keeping it in order. His rental of the room was not inconsistent with his character of landlord. Therefore we hold that the evidence was ample to sustain the conviction on that branch of the case.

No error appearing in the record, the judgment is affirmed.

TAYLOR v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 28, 1903.)

LIQUORS—SALE OF INTOXICANT—EVIDENCE—SUFFICIENCY—COMPLAINT—SIGNATURE—AFFIDAVIT—FAILURE TO FILE—OBJECTION.

1. Code Civ. Proc. art. 277, subd. 4, requires that a complaint for a violation of the local option law shall be signed by the affiant, if he is able to write his name, and otherwise by his mark. What purported to be the signature to a complaint consisted of the affiant's name, there being between his given name and the other a space, above which was the word "his," and below which was the word "mark," but there was no mark in the space. *Held* that, in the absence of any showing that affiant was unable to write his name, it would be presumed that it was signed by affiant.

2. On a prosecution for violation of the local option law, an objection that the clerk of the county court had not placed his file mark on the affidavit or information, made on motion to arrest the judgment and on a motion for a new trial, is too late.

3. Where, on a prosecution for violation of the local option law, the state's evidence shows that the purchaser of the alleged intoxicant from accused became intoxicated from drinking it, but accused testifies that the liquid was cider made from nonintoxicants, the evidence is sufficient to sustain a finding that the liquid was an intoxicant.

Appeal from Collin county court; J. H. Faulkner, Judge.

Will Taylor was convicted of violating the local option law, and he appeals. *Affirmed.*

Jones & Eastham, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

Among other things, the motion for new trial attacks the complaint and information (1) because the complaint was not sworn to

as required by the statute; and (2) that neither the complaint nor information were ever filed in the county court. Article 277, Code Civ. Proc., sets out the requisites of a complaint, the fourth subdivision of which is that "it must be in writing and signed by the affiant, if he is able to write his name; otherwise he must place his mark at the foot of the complaint." The record shows the complaint was sworn to and subscribed before the county attorney on the 5th of May, 1902, and on that day filed by W. S. Terrell, justice of the peace of precinct No. 1, Collin county. We find the signature, or what purports to be the signature, to the complaint,

his
in this language: "John Steele." It does
mark

not show that affiant made his mark, and we are asked to presume, because the expression "his mark" is found in connection with his name, that therefore he was unable to write his name, and that there was an omission in not signing it by his mark. If, as a matter of fact, he did not write his name, this should have been shown. Where a party relies upon matters of fact to quash a complaint, information, or indictment, the verity of the fact, if it exists, must be shown by the attacking party. The presumption of regularity obtains, unless the contrary is shown, in matters of this sort, when attacked in motion for new trial, or in arrest of judgment, or on appeal.

As the record is presented to us, the affidavit and information were not filed by the clerk of the county court; that is, his file-mark was not placed on either instrument. The point was made in motion to arrest the judgment, as well as in motion for new trial, that this was fatal to the conviction. This matter comes too late after conviction. It should have been urged in limine. The same rule applies in regard to filing affidavit and information as in case of indictment. The court, therefore, did not err in overruling this contention. *Jessel v. State* (Tex. Cr. App.) 57 S. W. 828.

It is also contended that the evidence is not sufficient to support the conviction. The state's evidence shows that the purchaser of the intoxicant from appellant became very much intoxicated from drinking it—so much so that he was arrested and confined, and subsequently punished. Appellant contends that the liquid he sold was cider manufactured in the town of McKinney out of non-intoxicants, and that no amount of it could produce intoxication. If the state's testimony is true—and the jury believed it—the liquid sold was intoxicating, for there is no question that the purchaser drank it and became very much intoxicated, and he swears that this is the liquid that produced the intoxication. Under this state of case, this court is not authorized to reverse the judgment.

There being no error in the record, the judgment is affirmed.

*R-hearing denied February 25, 1903.

WINFIELD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

CRIMINAL LAW — REASONABLE DOUBT — INSTRUCTION—ACCOMPLICE—DEFINITION OF ACCOMPLICE—ALIBI—INSTRUCTION.

1. The court instructed: "The defendant is presumed to be innocent until his guilt is established to the satisfaction of the jury beyond a reasonable doubt, and unless you are so satisfied, find him not guilty." *Held*, that the charge practically embodied the law of reasonable doubt, and was not subject to objection that it failed to charge that if the jury had a reasonable doubt they must acquit.

2. An instruction on alibi which charged, "If you have a reasonable doubt of the presence when and where the offense was committed, if any was committed, of the defendant, then find him not guilty," while awkwardly worded, was sufficient.

3. One who keeps watch while another burglarizes a house is an accomplice.

4. Where the evidence shows that a witness was an accomplice, and the court tells the jury that he was such, it is not necessary to give a charge defining the law of accomplice.

5. An instruction that a certain witness is an accomplice is not prejudicial to the accused.

6. Where the evidence conclusively shows that a certain witness is an accomplice, an instruction that such witness is an accomplice is not erroneous as on the weight of the evidence.

On Rehearing.

7. An instruction that accused is "presumed to be innocent until his guilt is established by the satisfaction of the jury beyond a reasonable doubt, and unless you are so satisfied, find him not guilty," is not such error as to authorize a reversal.

Appeal from district court, Harris county; J. K. P. Gillaspie, Judge.

Ed Winfield was convicted of burglary, and he appeals. Affirmed.

E. T. Branch, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, the punishment assessed being five years in the penitentiary.

The first ground of appellant's motion is that the court erred in failing to charge the jury, if they had a reasonable doubt of defendant's guilt, they must acquit. The court charged as follows: "The defendant is presumed to be innocent until his guilt is established to the satisfaction of the jury beyond a reasonable doubt, and unless you are so satisfied, find him not guilty." While we commend the usual form of charging on reasonable doubt, as it eliminates such objections as the one now urged, yet we believe the court's charge practically embodies the law on this subject.

Appellant insists that the court erred in his charge on the law of alibi, which charge is in the following language: "If you have a reasonable doubt of the presence when and where the alleged offense was committed, if any was committed, of the defendant, then find him not guilty." While this charge

is awkwardly worded, we think it is sufficient.

Appellant also insists that the court erred in not defining an accomplice. The court charged the jury as follows: "You are charged that the witness John Sims is an accomplice, and you cannot convict defendant on his testimony, unless corroborated by other evidence tending to connect defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense." Witness Johns Sims testified that he assisted appellant in burglarizing the house, and kept watch while appellant went into the house. There was no testimony disputing what he said in reference to this matter, and his testimony in law makes him an accomplice. In view of the fact that the court told the jury that he was an accomplice, it renders unnecessary any charge defining the law of accomplice. Nor do we think that the charge telling the jury that a certain witness is an accomplice is injurious to appellant; nor is it upon the weight of the evidence. We have repeatedly commended trial courts instructing the jury that a witness is an accomplice, where the testimony clearly shows that fact. If the testimony raises the issue merely of an accomplice, then it is proper for the court to submit this to the jury by charge; but where the evidence is undisputed going to show that witness is an accomplice, it is not on the weight of the evidence, nor erroneous, for the court to so instruct the jury. *Hatcher v. State*, 65 S. W. 97, 3 Tex. Ct. Rep. 234.

No error appearing in the record, the judgment is affirmed.

On Rehearing.

(Feb. 25, 1903.)

Appellant files a motion for rehearing, and asks for a certiorari, insisting that in the original opinion we misquoted the charge complained of. Appellant insists that the original charge read as follows: "The defendant is presumed to be innocent until his guilt is established by the satisfaction of the jury beyond a reasonable doubt, and unless you are so satisfied, find him not guilty." We do not think it necessary to grant the writ of certiorari on a technical matter of this character. It would not be such error as would authorize a reversal of this case, concede the charge to be as stated. The motion for certiorari is denied, and the motion for rehearing overruled.

LATHAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE—APPEAL—EXCEPTION.

1. The matter of surprise at testimony cannot be complained of on appeal, in the absence of an exception.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 28.

2. The jury may find that defendant made a sale of liquor, S. testifying that he laid a half dollar on defendant's table, for which defendant, a half hour later, turned over to him a pint of whisky, though defendant claimed that he induced a third person to bring the whisky to the designated point for S.'s benefit.

Appeal from Montague county court; W. W. Cook, Judge.

Burt Latham appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law. The only two grounds of complaint are set out in the motion for new trial, to wit: (1) Want of sufficient evidence to show a sale of intoxicating liquors; and (2) surprise at the testimony of the witnesses Newmnan and Smith, contradictory of appellant's testimony, or answers to questions propounded by the county attorney at what is termed "the court of inquiry." In regard to the second, it is sufficient answer to state that no exception was reserved. In regard to the first, if the jury believe the testimony of the state witness Slaton, they were authorized to conclude from the facts that it was a sale of the liquor by appellant. Slaton testified that he laid a half dollar on appellant's table, for which appellant, half an hour later, turned him over a pint of whisky. However, appellant claimed that he induced a party by the name of Trammell to bring the whisky to the designated point for the benefit of Slaton. Trammell was not introduced. This was peculiarly a fact case. If the jury believed Slaton, they were justified in the conviction of appellant; they could have believed appellant and acquitted him. We are of opinion that the testimony is sufficient, and the judgment is affirmed.

Ex parte MILLER.*

(Court of Criminal Appeals of Texas. Jan. 28, 1903.)

CONVICT BOND—RELEASE—RECONFINEMENT—CONTRACT BETWEEN HIRER AND JUDGE.

1. Where a convict bond is given, and a prisoner released from custody by virtue thereof, he may nevertheless be returned to custody, by agreement between the hirer and the judge.

Appeal from Colorado county court; J. J. Mansfield, Judge.

Writ of habeas corpus by Pat Miller, a prisoner on the poor farm. Denial of discharge, and relator appeals. Judgment affirmed.

Whit Boyd, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Relator had been convicted of a misdemeanor, the fine and costs

amounting to over \$200. He was placed upon the county poor farm, where he remained 5 days, when he was taken out under a convict bond, which was executed on the 20th of April, 1901. He remained out on the convict bond until about October 17, 1901, when he was returned by the hirer to, and accepted by, the county judge. Relator was again placed on the poor farm, and remained 12 days, when, at the instigation of the original hirer and relator's attorney, Burford, the county judge agreed and permitted relator to leave the county farm, for the purpose of making money to discharge the balance of his fine and costs. Not having done so, he was arrested during the month of November, 1902, under capias pro fine, and on the 8th day of December resorted to the writ of habeas corpus for his discharge. The contention, as we understand the record, is that the convict bond having been given, and the relator released from custody under and by virtue of it, the subsequent return by the hirer and the acceptance of relator by the county judge was void, and that the execution of the convict bond, under the facts stated, was of that character which could not be abrogated by the act of the hirer and the consent of the county judge. We believe this contention to be incorrect. There is no provision in our statute which prohibits the county judge from receiving back a convict after he has been hired out, or his acceptance of a convict under the circumstances detailed. This is a matter of contract, and, in a general way, may be said to be subject to the general rules and principles of contracts, and, as a method of policy, may frequently be of benefit to the convict. Where the convict has been hired out and escapes, the statute holds the hirer responsible for the full amount of the bond, unless the convict is rearrested and placed in the custody of the sheriff of the county in which he was convicted before such bond becomes due; but, where this has been done, the hirer is only liable for the time the convict remains with him. But this statute relates only to convicts who escape. The statute authorizing the hiring of convicts seems to be full and ample, and leaves a large discretion with the county judge in making these contracts. It does not undertake to limit to one character of contract, or require an indivisible contract; that is, it does not undertake to require the county judge to hire out convicts, stretching over a sufficient time to cover the entire amount of fine and costs; and, if it did, this would frequently be found to be onerous, and even impossible. Persons are willing at times to hire convicts for a month, or for a limited period, when they would be unwilling to hire them for a longer time. Therefore, we believe the county judge did not err in receiving the convict back; and there was no error on his part in refusing to discharge him under the writ of habeas corpus, inasmuch

*Rehearing denied February 25, 1903.

as a sufficient length of time had not been served to pay off the fine and costs.

The judgment is affirmed.

FULLER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

ASSAULT—EVIDENCE.

1. Where a man standing several feet from a woman makes a "kissing sign" to her, consisting of puckering his lips and smacking them, he is not guilty of an assault.

Appeal from Parker county court; D. M. Alexander, Judge.

Henry Fuller was convicted of an aggravated assault, and he appeals. Reversed.

Kuteman & McKinsey, for appellant. R. B. Hood, for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25; hence this appeal.

The only question involved in this case is whether or not the facts show an assault. The prosecutrix, a girl about 14 years of age, was the only eyewitness to the transaction. Appellant, who was a married man, lived a near neighbor, and some intimacy existed between the families, and prosecutrix was in the habit of visiting his house. On the particular occasion appellant called at the house where prosecutrix lived, to return a saw which he had borrowed. Prosecutrix was engaged in sweeping the room. Appellant had some conversation with her, and while she was near a table, sweeping, he walked up to the table, and, as she states, made a "kissing sign at her"—that is, "he puckered his lips and smacked them." That he did this twice, but did not touch her, and made no effort to kiss her or use any violence. She says that she stepped back and said: "Now look what you have caused me to do. I nearly broke ma's specks. If that is the best you can do, you had better go home." The specks were lying on the floor. After this he left, but she states that he came back where she was, and told her to say nothing about it; that it might make trouble. Witness further states that appellant made no improper act or remark to her, and had never said anything improper to her. At the time this occurred he was standing at the side of the table, and she was standing at the end of it. This put them some three or four feet apart. An assault is defined to be "any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with the ability, to commit a battery." If appellant by his acts had manifested any intention at the time to lay hands on prosecutrix and to kiss her without her consent,

his acts and conduct would unquestionably have made an assault; but we fail to gather from the statement of what occurred, as contained in the record, that he did anything at the time showing that he intended to take a kiss without the consent of the prosecutrix. What he did could not be construed into any more than asking prosecutrix to give him a kiss; and even if he had done this, without manifesting some ulterior purpose to use violence to force her to comply with his request, it would not amount to an assault, for there would be lacking the essential element, "showing by his acts and conduct an immediate intention to commit a battery." It may have been, and doubtless was, improper for him to make the "kissing sign" to prosecutrix, as she terms it, or suggests that he would like to kiss her; but this, under the circumstances, did not render him guilty of an assault. *Flournoy v. State*, 25 Tex. App. 244, 7 S. W. 865; *Lee v. State*, 34 Tex. Cr. R. 519, 31 S. W. 667.

The judgment is reversed, and the cause remanded.

BRANNAN v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 28, 1903.)

ESCAPE—PERSON IN CUSTODY—CONVICT.

1. Under Pen. Code, art. 229, providing that if any person shall willfully aid a prisoner to escape from the custody of an officer by whom he is legally detained on an accusation for a misdemeanor he shall be punished by fine, etc., a person who has been convicted of a misdemeanor, and is serving a sentence as a county convict, is not in custody on an accusation, within the statute, and hence assisting such a person to escape is not a violation of the statute.

Appeal from Hill county court; L. C. Hill, Judge.

W. C. Brannan was convicted of aiding a prisoner to escape, and appeals. Reversed.

J. E. Clarke, for appellant. Robt. A. John, Asst. Atty. Gen., C. F. Greenwood, Co. Atty., and B. Y. Cummings, Asst. Co. Atty., for the State.

DAVIDSON, P. J. Appellant was convicted of aiding a prisoner to escape, in violation of article 229, Pen. Code, and fined \$50.

Article 229, Pen. Code, reads as follows: "If any person shall willfully aid a prisoner to escape from the custody of an officer, by whom he is legally detained in custody on an accusation for a misdemeanor, by doing an act calculated to effect that object, he shall be punished by fine," etc. Appellant's contention is that this article has no application to the facts adduced in evidence, and that under the testimony he is not guilty of violating it. The uncontroverted evidence is that appellant's principal had been convicted in three cases of misdemeanor, and

*Rehearing denied February 25, 1903.

placed in charge of the proper officer, and was being worked upon the road as a county convict under these convictions at the time of his escape. The state's contention is that the terms of article 229 apply as well to defendants after conviction as pending prosecution, and it cites in support of this article 240, Pen. Code, which provides: "The word 'accusation,' as used here, and in every part of this Code, means a charge made in a lawful manner against any person, that he has been guilty of some offense, which subjects him to prosecution in the name of the state. A person is said to be 'accused' of an offense from the time that any 'criminal action' shall have been commenced against him. A legal arrest without warrant; a complaint to a magistrate; a warrant legally issued; and indictment, or an information, are all examples of 'accusation,' and a person proceeded against by either of these is said to be 'accused.'" As we understand an "accusation" under our statute, it applies to a pending prosecution, and when that prosecution has been terminated in a conviction it ceases to be an accusation. After a conviction or the judgment of guilty, a party is termed a "convict" when he has accepted the sentence or judgment of conviction as a finality, which has been adjudged against him by the court of last resort which has jurisdiction of his case to which he may have thought proper to appeal. Article 27, Pen. Code; *Arcta v. State*, 26 Tex. App. 193, 9 S. W. 685; *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108; *Jones v. State*, 32 Tex. Cr. App. 135, 22 S. W. 404. Appellant's principal had accepted the punishment awarded him, and was serving out that punishment at the time of his escape. It was no longer an accusation, but was a conviction, and the terms of article 229, Pen. Code, do not apply.

The judgment is reversed, and the cause remanded.

FREEMAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. An instruction on self-defense, that the question to determine is, "Was defendant in present danger of death or serious bodily injury, or were the circumstances such as to afford him reasonable grounds to believe himself in such danger? (2) Was the killing done in good faith, to protect himself from such danger or threatened danger? If both these questions can be answered in the affirmative, then the killing would be in self-defense and justifiable"—is not erroneous for using the word "both"; that word referring to the necessary concurrence of danger and good faith, and not to the necessity of apparent as well as real danger.

Appeal from district court, Cherokee county; Tom C. Davis, Judge.

Jim Freeman was convicted of manslaughter, and appeals. Affirmed.

C. B. Emanuel, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at four years' confinement in the penitentiary.

Appellant complains of the following portion of the charge of the court, to wit: "Self-defense is founded upon the law of nature, and cannot be superseded by any law of society; but self-defense is a defensive, not an offensive act, and it must not in any case exceed the bounds of defense and prevention. There must at least be an apparent necessity to ward off by force some unlawful and violent attack. The important question for the jury to determine is: (1) Was the defendant in present danger of death or serious bodily injury, or were the circumstances such as to afford him reasonable grounds to believe himself to be in such danger. (2) Was the killing done in good faith, to protect himself from such danger or threatened danger? If both these questions can be answered in the affirmative, then the killing would be in self-defense and justifiable." Appellant contends that the court in this charge instructed the jury that there must be apparent as well as real danger, both, before appellant would have the right to act in his self-defense. This contention is not correct, as an examination of the charge will show that the court tells the jury that if the danger was present or there was evidence of serious bodily injury to the defendant, and he in good faith believed the same, then he would have the right of self-defense. The charge is not subject to the criticism urged by appellant. *Isom Francis v. State* (Tyler Term, 1902) 70 S. W. 751. There was no error in this charge.

It is not necessary to discuss the other errors assigned. No error appearing in the record, the judgment is affirmed.

WHITE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

THEFT—MISDEMEANOR.

1. Defendant, at whose house were found articles taken from his employer's store, no one of which was worth \$50, is entitled to a charge on misdemeanor, on the theory that the articles may have been taken at different times, he admitting the theft, but there being no testimony that all were taken at one time, and he having had opportunities to take them at various times.

Appeal from district court, Harris county; J. K. P. Gillaspie, Judge.

Sam White appeals from a conviction. Reversed.

C. E. & A. E. Heldingsfelder, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of property over the value of \$50, and his punishment assessed at con-

finement in the penitentiary for a term of seven years; hence this appeal.

There is but one assignment which need be noticed, that is, the refusal of the court to submit a charge on misdemeanor, based on the proposition that the property may have been taken at different times. The facts as shown by the record bearing on this issue are as follows: Appellant was the employé of prosecutor, who owned a store, where drygoods and articles of wearing apparel were sold. Appellant was found in possession of the articles described in the indictment, which consisted of various articles of clothing—overcoat, suit of clothes, neckwear, cuff buttons, collar buttons, underwear, etc. None of these articles amounted in value to as much as \$50, some of them being of as much as \$10 in value—still the majority of them were of small value. Appellant, when found in possession of them, admitted the theft, but there was no testimony showing that they were all taken at one time. Appellant had an opportunity to have taken them at different times during his service with prosecutor, and the nature of the articles and the character of the theft would suggest that they must have been taken at different times. On this point prosecutor testified as follows: "I cannot tell whether they were taken all at one time, or a dozen different times. All I know is that I found them at Sam White's house, and he admitted stealing them. No, I cannot say that goods to the amount of \$50 or over were taken at any one particular time." On this state of facts, the court should have submitted a charge of misdemeanor, as complained of in appellant's motion for new trial. For this error, the judgment is reversed, and the cause remanded.

LEE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—RECEIVALS—SENTENCE.

1. Under White's Ann. Code Cr. Proc. art. 887, providing that in appeals in cases of misdemeanor the form of recognizance given therein shall be sufficient, a recognizance in such appeal which fails to state or show the punishment, if any, that was assessed against the appellant, is insufficient, and the appeal will be dismissed.

Appeal from Jack county court; R. S. Blair, Judge.

C. A. Lee was convicted of a misdemeanor, and appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed a motion to dismiss this appeal, on the ground that the recognizance is defective, in this: that it fails to state or show the punishment, if any, that was assessed against appellant in the justice court.

The motion is sustained. Article 887, White's Ann. Code Cr. Proc.; and see *Horton v. State*, 68 S. W. 172, 4 Tex. Ct. Rep. 896, where proper form is laid down.

The appeal is dismissed.

MEADOR v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

RESISTING OFFICER—WRIT OF SEQUESTRATION—EVIDENCE—AFFIDAVIT.

1. In a trial for resisting an officer who was attempting to serve a writ of sequestration, fair on its face and issuing from a proper court, it was not necessary, before introducing the writ, to prove a valid affidavit for the same.

2. A writ of sequestration which recites that the person making the affidavit fears that the one in possession will remove the property out of the county, or will dispose of the same during the pendency of the suit, is not an invalid process for stating the reasons on which it was based in the alternative.

Appeal from Johnson county court; W. D. McKoy, Judge.

Andrew Meador was convicted of resisting an officer, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted upon an information and complaint for resisting an officer, and his punishment assessed at a fine of \$1.

The first bill of exceptions complains that the state offered in evidence a writ of sequestration, which is as follows, to wit: "The State of Texas. Justice Precinct No. 5. To the Sheriff or Any Constable of Johnson County, Greeting: Whereas, S. S. Ramsey has made affidavit that Andrew Meador unlawfully detains from him one red and white cow with horns value \$10.00. One red and white cow without horns, value \$10.00. One black yearling value \$5.00. Total value \$25.00 of the value of twenty-five & no/100 dollars, to the possession of which he has a good and lawful right, and for the recovery of which he has brought suit; that he fears that defendant Andrew Meador will remove the same out of the county or will dispose of the same during the pendency of this suit. These are to command you that you take into possession the above described property if to be found in your county, and keep the same subject to further orders in said suit, unless replevied according to law. Herein fail not, and due return make of this writ, and certify how you have executed the same. This 31st day of March A. D. 1902. T. S. Wade, Justice of the Peace, Johnson County, Texas." To the introduction of which appellant objected, for the reason that to prove a valid writ of sequestration the state must first prove a valid affidavit for the same, and no affidavit has been offered in evidence; and for the further reason that the writ showed on its face that the grounds upon which the

writ was issued and the reasons for issuing the same, if the writ recited the facts, were in the alternative and violated the writ, and the writ in a civil proceeding would be invalid and held for naught; and was therefore not a valid writ or process. The court overruled all of these objections. All of the questions raised by this bill of exceptions were passed upon and discussed in *Witherspoon v. State*, 61 S. W. 396, 2 Tex. Ct. Rep. 21. In that case we held that a writ of sequestration being simply voidable on its face, there was no error in excluding the bond and affidavit which were the basis of the writ. Process issued from a court of competent jurisdiction will protect an officer, where the same is fair on its face. By this is not meant that it shall appear to be perfectly regular in all respects and in accord with proper practice and after the most approved forms, but what is intended is that it shall appear to be process lawfully issued and such as the official might lawfully serve. That process may be said to be fair on its face which proceeds from a court, magistrate, or body having the authority of law to issue process of that nature, and which is in legal form, and on its face contains nothing to notify or apprise the official that it is issued without authority. When such appears to be the process, the officer is protected in making the service, and he is not concerned with any illegalities that may exist back of it. It follows, therefore, that the court did not err in admitting the writ of sequestration in this case.

Appellant also contends that the court erred in holding that the writ of sequestration offered in evidence was a valid process. We do not think there was any error in this ruling. The evidence amply supports the verdict, and the judgment is affirmed.

TURNER v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 28, 1908.)

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS.

1. Where the state's testimony showed a clear case of assault with intent to murder, and the defense raised a case of self-defense, there was no ground for a charge on aggravated assault.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Turner was convicted of assault with intent to murder, and he appeals. Affirmed.

Thomas & Spellman, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

There is but one bill of exceptions in the record, and that calls in question the action of the court failing to instruct the jury on

aggravated assault. Appellant insists that this phase of the case is presented by the evidence, and refers us to a number of authorities in support of that contention. The authorities are to the effect that whenever the facts of a case raise an issue that issue should be submitted to the jury, but we have carefully examined the record before us, and fail to find that the issue of aggravated or simple assault is raised from the evidence. The state's theory, which is supported by the testimony of witnesses, shows a clear case of assault with intent to murder. Appellant's theory, supported alone by his own testimony, raises a clear case of self-defense. Nowhere in the record is the issue of aggravated or simple assault raised, as we view it. We accordingly hold that the court did not err in failing to give a charge on aggravated or simple assault.

The judgment is affirmed.

GUILLES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

VENUE IN CRIMINAL CASE—PROOF.

1. Evidence in a criminal case held insufficient to prove the venue.

Appeal from Hood county court; Phil Jackson, Judge.

Joe Guiles appeals from a conviction. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of carrying knucks, and fined \$25. The sixth bill of exceptions is as follows: "Be it remembered that upon the trial of the above-entitled cause the state introduced the following testimony, and none other, on the question of venue, to wit: Willie Briley testified that when he saw the defendant with the knucks he was about fifty yards northeast of a church house known as the White Church; that he thought this church house was in Hood county, but was not certain; that he did not know where the Hood and Parker county line was; never saw it run or surveyed, and did not know whether it was within four hundred (400) yards or within one-half mile of this church house. George Guiles testified for the state as follows: 'I know where the White Church is. It is near or in the same neighborhood in which I live. I suppose it is in Hood county, but I do not know for certain. I never saw the county line run or surveyed, nor never heard any one say where it is. There is a rock situated about a quarter of a mile west from said White Church, and I have been told that this rock is on the Hood and Parker county line. I do not know how said county lines run from said rock; that is, the direction in which they

*Rehearing denied February 25, 1908.

run. I do not know of any other points on said county line by which I could determine the direction or the way and manner in which said county line run.' Counsel for the defendant contended that the evidence in this case was not sufficient to prove venue, and requested the court to instruct the jury to return a verdict of not guilty for that reason. The court overruled said contention, and refused to submit to the jury the requested instruction aforesaid, to which defendant excepted."

We think it affirmatively appears from the evidence contained in the bill of exceptions that the venue was not proved, and for this reason the judgment is reversed and the cause remanded.

ELLISON v. STATE*

(Court of Criminal Appeals of Texas. Jan. 21, 1903.)

THEFT—TAKING—IDENTITY OF GUILTY PERSON—POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS.

1. In a prosecution for theft, a requested instruction that, to convict, defendant must be shown to have taken the property intending to deprive the owner thereof and to appropriate it to his own use, and that no other connection with the transaction will supply the proof of actual taking, is sufficiently covered by an instruction that if accused fraudulently took the property from the owner without his consent, with intent to deprive the owner thereof and appropriate it to his own use, he is guilty.

2. In a prosecution for theft, an instruction that, if the jury have a reasonable doubt as to whether defendant is the identical person who sold the stolen animals to a witness, they should acquit, is not objectionable as permitting the jury to arrive at a belief that defendant was such identical person from sources other than the evidence.

3. In a prosecution for theft, a witness testified that he bought the stolen animals from accused, and gave him a check therefor. The accused made no explanation of his possession of the property. *Held*, that it was not error to fail to charge that in order to warrant an inference of guilt from the possession of the stolen goods such possession must be shown to have been exclusive, personal, and recent, and to involve an assertion of property.

Appeal from district court, Bexar county; John H. Clark, Judge.

Will Ellison was convicted of theft, and appeals. Affirmed.

W. C. Linden and G. O. Brown, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of the theft of horses and mules, and given five years in the penitentiary.

Appellant insists that the court erred in refusing the following charge requested by him, to wit: "In order to warrant a conviction for theft, the proof must show beyond a reasonable doubt that the defendant in Mason county, Texas, at about the time alleged in the indictment, took the animals

described in the indictment, or any one of them, from the possession of J. M. Sudbury, without the consent of the said J. M. Sudbury, and with the intent to deprive him of its value, and to appropriate it to the use and benefit of himself, and that he afterwards brought such animal or animals into Bexar county, Texas; and you are further instructed that no other connection with the transaction, whether innocent or fraudulent, would supply the proof of actual taking; and in case you have a reasonable doubt as to whether the evidence in this case establishes the guilt of the defendant of the actual taking in Mason county, Texas, you should acquit him." In his main charge the court instructed the jury as follows: "If in this case you believe from the evidence beyond a reasonable doubt that the defendant did, in the county of Mason and state of Texas, at any time within five years next before the 19th day of April, 1901 (which is the date of the filing of the indictment in this case), fraudulently take from the possession of J. M. Sudbury the horses and mules, or any of them, as alleged in the indictment, without the consent of the said J. M. Sudbury, and with the intent to deprive the said J. M. Sudbury of the value of the same, and to appropriate it to the use of him, the said defendant, and that the said J. M. Sudbury was at the time the owner (or had the actual control, care, and management) of said horses and mules, and that afterwards the said Will Ellison carried said horses and mules, or any of them that were so stolen, into Bexar county, Texas, then you will find defendant guilty as charged." The charge of the court covered all of the phases presented by the evidence, and there is no error in the refusal of the special charge requested by appellant.

The first ground of appellant's motion for new trial is that the court erred in overruling his application for continuance. No bill of exceptions was reserved presenting this matter, and hence we cannot review this objection.

The fifth ground of the motion is "that the court erred in his charge wherein he tells the jury that, if they do not believe defendant was the identical person who sold the animals to Capps, they should acquit, instead of instructing them the state must establish the identity of defendant beyond a reasonable doubt; that said charge would permit the jury to arrive at their belief that defendant was the identical person who sold said animals from some other source than the evidence, as, for example, the reluctance of Capps in testifying the relationship of Capps to defendant, etc., or from defendant's failure to show that he was not present," etc. We do not think the charge is subject to this character of criticism. The charge presents the reasonable doubt on the theft of the animals in Mason county, and the bringing of the same to Bexar county; and then the

*Rehearing denied February 25, 1903.

court charged the jury: "If you have a reasonable doubt as to whether or not defendant is the identical person who sold and delivered the alleged stolen animals to the witness Capps (if sold and delivered to him), then you will give defendant the benefit of the doubt, and acquit him." This charge was certainly favorable to appellant, and he cannot complain of it. The court charged on the law of circumstantial evidence, and presented every possible phase of the testimony by a charge covering the same.

The sixth ground of the motion is that the court "failed to instruct the jury as to the effect of possession of stolen property, in this: The state relies solely upon the evidence of possession of the property alleged to have been stolen as the same is testified to by the witness Capps. Mere possession of stolen property, although unexplained, is not sufficient to warrant an inference or presumption of guilt of theft of such property, but in order to warrant said inference or presumption, and to warrant a conviction of theft upon such evidence, the possession must be proven to be exclusive, must be personal, must be recent, and must invoke a distinct and conscious assertion of property by defendant, and, in all cases depending for conviction upon possession by defendant, this law should be submitted to the jury by instructions, and in this case the court wholly failed to refer to it in any manner." As we understand appellant's objections, they are that the court failed to charge upon recent possession of stolen property. This is not necessary when appellant makes no explanation of his recent possession. The testimony of the witness Capps shows very clearly that he bought the animals in question, and, as insisted by appellant, he equivocated somewhat as to the identity of appellant, evidently trying to shield him; but his evidence, coupled with the other circumstances, clearly identified defendant as the man who had the actual control, custody, and exclusive management of the horses and mules. Capps gave him a check for the value thereof, and everything indicates complete possession on his part.

Appellant insists that the verdict of the jury is contrary to the law and the evidence, in that it fails to establish the identity of defendant, and fails to establish the fact of the original taking of the property. We cannot agree with either of these contentions, but believe the evidence establishes both of these propositions beyond a reasonable doubt. While it is true the taking of the animals was proven, not by positive evidence, but by circumstantial evidence, it is clearly made to appear that defendant and no one else took the animals in Mason county, without the consent of the owners thereof, and that he brought them to the city of San Antonio, or near thereto, and sold them to witness Capps.

There is no error in this record, and the judgment is affirmed.

MCCOMAS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

HOMICIDE—MANSLAUGHTER—PROVOCATION —EVIDENCE—INSTRUCTIONS.

1. In a prosecution for murder, where defendant claimed that deceased had insulted his daughter, and that he killed deceased after having learned this fact, evidence of slanderous remarks alleged to have been made by deceased concerning various other young women was not admissible.

2. Evidence of the general reputation of deceased for lewdness was admissible.

3. In a prosecution for murder, questions on the cross-examination of accused as to whether he did not know that his wife had a bad reputation when he married her were not prejudicial to accused; the answers being in the negative.

4. An exception to evidence not reserved by bill cannot be reviewed.

5. In a prosecution for murder, defendant introduced evidence to show that he killed deceased at their first meeting after learning that deceased had insulted defendant's daughter. The testimony of the state tended to show that the killing was for insulting and slanderous remarks made by deceased concerning defendant's wife, and there was no showing by defendant that the killing occurred on the first meeting after being informed of these remarks, or that he killed deceased for this cause. *Held*, that a charge on manslaughter, which limited the adequate cause for the killing to the conduct of deceased toward defendant's daughter, and excluded any consideration of the slanderous remarks concerning defendant's wife, was not error.

Appeal from district court, Lamar county; Ben H. Denton, Judge.

A. W. McComas was convicted of murder, and appeals. Affirmed.

Fagan & Hathaway, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of seven years.

The testimony of appellant is to the effect that deceased, who was a practicing physician in the town of Paris, made an indecent proposal to his daughter, and that he killed deceased upon their first meeting after being informed of it; and his testimony also tends to show that deceased made some demonstration at the time of the killing, evidencing an intent to shoot appellant. The court charged the jury upon the different phases of murder, and also presented the law of manslaughter applicable to the case. The state, in order to contradict and disprove appellant's statement that he killed deceased on account of insults to his daughter, proved by witnesses that defendant had told them deceased had imputed a want of chastity to his wife, with whom he was not living at the time of the alleged slander.

In the first bill of exceptions, appellant complains that the court refused to permit

¶ 2. See *Homicide*, vol. 26, Cent. Dig. § 333.

J. D. Richardson to testify for appellant to slanderous remarks, which we do not deem necessary or proper to detail here, concerning young ladies in Paris, and which deceased had made to witness some time prior to the alleged insult to appellant's daughter. The second bill complains of the refusal of the court to permit similar testimony by witness Woodal. This testimony was not admissible. Isolated acts of lewdness are not admissible in a trial of this character, nor do we think isolated statements of slanders would be admissible. In *Jones v. State*, 38 Tex. Cr. R. 364, 43 S. W. 78, 70 Am. St. Rep. 751, this court held that specific acts of lewdness were inadmissible, because the introduction of such acts would involve too many issues, and the courts cannot turn aside to try a vast number of collateral issues. But the general reputation of deceased for lewdness, if such testimony had been offered, would have been admissible. The court did not err in refusing to admit this testimony.

The fourth bill complains that, while appellant was on the stand on cross-examination, the state asked him if he was not warned by a friend before he married his present wife that she was a woman of bad reputation, to which defendant answered "No," and also asked appellant if he was not warned by Will Smith that she was a woman of bad reputation, to which defendant answered "No." The state then asked defendant if he did not know before he married his present wife that she had a bad reputation for virtue, to which he answered "No." The state also asked defendant if he did not know that his wife had lived in Boardtown before he married her (meaning by "Boardtown" a disreputable portion of the city of Paris, where many prostitutes reside), to which he replied that she never had lived in Boardtown. And the state also asked defendant if, after he and his present wife had separated, he did not offer again to live with her, to which he replied "Yes." The answer of appellant to the first questions being in the negative, we cannot see how he has been injured. The last question, and the answer thereto, in the light of this record, were harmless.

In motion for new trial, appellant complains that the court permitted Boyett, Wilson, McHam, Springs, and Mrs. McCulston to testify after the state had closed its case; referring to the third bill of exceptions. This bill is not contained in the record, and the exception, not being reserved by bill, cannot be reviewed. However, we are of opinion there was no error in this respect.

In motion for new trial, appellant insists "the court erred in the charge on manslaughter, in telling the jury what would be adequate cause, so as to reduce the killing to manslaughter, in limiting the adequate cause of the killing to insulting words and conduct of deceased towards the daughter of defendant, when the state showed by its evidence

that defendant was enraged toward deceased on account of slanderous words used by deceased towards the wife of defendant, and because the court failed to instruct the jury, in substance, if they found the killing was for insulting or slanderous remarks made by deceased to or concerning the wife of defendant, and the killing took place at the first meeting of defendant and deceased, such cause would be an adequate cause for the killing, and would reduce the offense from murder to manslaughter." There was no error in the action of the court. Appellant's testimony shows the killing occurred on account of insulting conduct or language of deceased towards his daughter. It is true, the state's testimony indicates a state of facts as above detailed, but appellant did not show the killing occurred upon first meeting after being informed of such slander upon his wife, and that he killed deceased for this cause.

It is also insisted that the verdict of the jury is not supported by the evidence. The evidence amply supports their finding.

The judgment is affirmed.

RUSSELL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

CARD PLAYING — INFORMATION — SPECIFICATION OF PLACE — SUFFICIENCY OF ALLEGATION — JURORS — TRIAL OF COMPANION CASE — FAILURE TO EXAMINE ON VOIR DIRE — EFFECT.

1. In a prosecution for playing cards, under White's Ann. Pen. Code, art. 379, as amended, punishing any one playing at cards elsewhere than at a private residence occupied by a family, it is sufficient to allege that the game was not played at such a private residence, without specifying the place where it was played.

2. Jurors testified on their voir dire that they had neither formed nor expressed an opinion as to accused's guilt or innocence; that they had convicted another for having played cards in the same game; that they did not know what game of cards accused was to be tried for playing, but they did know they could give him a fair trial. They testified, on motion in arrest, that they were guided solely by the evidence, and not by the evidence in the companion case. *Held*, that accused's failure to further examine them on their voir dire touching the companion case, precluded his urging their prejudice on motion in arrest.

Appeal from Somervell county court; J. G. Adams, Judge.

Tom Russell was convicted of card playing, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with playing at a game with cards, which said game of cards was not played at a private residence occupied by a family. The first two grounds of the motion to quash are in the nature of general demurrers, alleging that the complaint and information are vague and indefinite, and insufficient to set forth

the offense. It is contended that neither the complaint nor information affirmatively allege that defendant played at a game of cards at any place in Somervell county where card playing is prohibited. If it was intended by this criticism to say that venue was not properly alleged, it is sufficient answer to state it is specifically alleged that the playing occurred in Somervell county. If it is intended to attack these pleadings because the pleader does not designate a particular point or place, we hold that this was not necessary. We suppose the contention is that in charging, under article 379, White's Ann. Pen. Code, as amended, the pleader did not state that it was at a definite and certain place, setting it out. In cases of this character, as we understand the decisions, this has never been necessary. Where the information undertakes to charge at a public place—one named in the statute—it is sufficient to allege the playing occurred at that particular place, or in that particular house or character of house, without describing it as a public place, because the statute makes it so; as, for instance, where the game is charged to have occurred in a saloon, or hotel, or public inn, or public place of that character, specifically mentioned. If it is intended to charge a playing at a public place not specifically mentioned in the statute, then the facts should be stated which makes it a public place. But that does not apply here. Under the latter clause of the article referred to, any playing anywhere, not mentioned in the preceding portions of the statute, is a violation of the law, unless at a private residence, occupied by a family. The facts show the playing occurred in a pasture in a cedar brake. We are of opinion that the criticism of the complaint and information are not well taken. We have an instance in a "crap game," which is an offense played anywhere except at a private house. It has always been held that simply to charge the playing of a game of craps at a place other than at a private residence was sufficient to charge this offense.

Bill of exceptions was reserved to the evidence of Sid McCoy and Sid Mitchell, who testified to appellant playing in the game of cards in the pasture in the cedar brake, about a mile and a half northwest of the town of Glen Rose. The grounds of objection are that the information did not allege that the game was played at a public place, or at any particular place. This constitutes no objection, for the reasons indicated in discussing the motion in arrest.

It is also urged in the motion that the jurors trying the case were disqualified and incompetent. These six jurors were taken on the trial without exception. It is contended in the motion that these jurors were incompetent, because each of them had a fixed opinion as to the guilt of defendant, and had expressed said opinion, which was unknown

to defendant. There is no bill of exceptions reserved to any of these matters; and appellant relied upon attacking the jurors after conviction. Their evidence was taken in connection with the motion. They stated on their voir dire, in substance, that they had neither formed nor expressed an opinion as to the guilt or innocence of defendant; that they had convicted Pete Williams for having played in the same game. They further stated on their voir dire that they did not know what game of cards defendant was to be tried for playing, but they did know they could give him a fair and impartial trial under the law and the evidence; and further testified that in rendering their verdict they were guided solely by the law and the evidence submitted to them, and not by any evidence or circumstances detailed in evidence in the Pete Williams Case, 72 S. W. 192, or any other evidence or circumstance outside the record in this particular case. As this matter is presented to us, there is no error shown. The jurors were not asked with reference to the Pete Williams Case on their voir dire. If defendant knew of their having sat in the Pete Williams Case, which was a companion case to this, and he had desired to exclude them on that account, he should have directed his examination to that point while the jurors were upon their voir dire. It is too late, after conviction, to attempt to take advantage of this matter.

No error appearing in the record, the judgment is affirmed.

HANKINS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1908.)

GAMING—INDICTMENT—PLACE—SUFFICIENCY OF ALLEGATION.

1. Under Pen. Code, art. 379, as amended by Acts 27th Leg. p. 26, prohibiting the playing at a game of cards at any place except a private residence occupied by a family, it is not necessary that an indictment for gaming, which alleges that the game was not played at a private residence occupied by a family, should show the character of the place where the game was played.

Appeal from Somervell county court; J. G. Adams, Judge.

John Hankins was convicted of gaming, and he appeals. Affirmed.

Jno J. Hiner, J. E. Pearce, and E. P. Lea, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of gaming, and his punishment assessed at a fine of \$10.

Appellant made a motion to quash the information on the ground that the same does not designate or describe any particular place. The information in this respect is as

follows: That "John Hankins did then and there unlawfully play at a game with cards, the said game of cards then and there not being played by the said John Hankins at a private residence occupied by a family." Under the former decisions of this court, as the statute stood prior to the amendment of article 379, Pen. Code (see Acts 27th Leg. p. 26), it was necessary, where the playing was at a house other than those set out in said article, or at a place other than those named, to designate the house or place, and describe it so as to constitute the same a public house or a public place. It will be noticed that article 379, before its amendment, made the playing of cards at certain named public houses, or in any other public house than those named, or in certain named public places, or any other public place than those named, an offense. So it will be seen that the house or place where the game was inhibited had to be a public house or a public place. Consequently it had to be set out and described to make it such. See White's Ann. Pen. Code, §§ 620, 630; *Crutcher v. State*, 39 Tex. Cr. R. 233, 45 S. W. 594. In that case the playing was in a pasture, as in the case at bar; but in that case it was held, under the statute as it then existed, that the place must be set out and described in order to show that it was a public place, which was the requirement of the statute at that time. In *Green v. State* (Tex. Cr. App.) 61 S. W. 481, the playing was at an old mill, and at night. It was there said that a flouring mill is not one of the houses specially denominated by the statute as a public house or place; that it may be private at times and public at other times; but under the testimony, which there showed that the playing was at night, and the mill was not in use, that it was not a public place. But, as stated, in 1901 the 27th Legislature amended article 379, and, after enumerating the houses and places theretofore named as public, the statute, as amended, proceeds to inhibit the playing at a game of cards at any place except a private residence occupied by a family. It is no longer required that the place must be public, and the game of cards cannot now be lawfully played at any place except a private residence occupied by a family. And we hold, if a game of cards is played at any house or place other than those set out in article 379, as amended, it is only necessary to allege, as was done, that the playing was at a place other than a private residence occupied by a family. The proof here showed that the playing was not at one of the houses or places enumerated in the statute, but at another place, to wit, a pasture. The evidence was responsive to the allegations in the indictment, which we hold was sufficient, and the conviction was proper.

There being no error in the record, the judgment is affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

GAMING—PLACE OTHER THAN PRIVATE RESIDENCE—INSTRUCTION.

1. In a prosecution for playing cards, one witness testified that the game was played on the ground in a certain pasture, and another witness testified that he saw accused and the first witness and others sitting in a circle on the ground on the day named in the pasture. The court charged that, if accused played cards at any place except a private residence occupied by a family, etc., they should find him guilty. *Held*, that a requested instruction that the law required the state to prove that the game of cards was played at a place not a private residence then occupied by a family, and if the jury did not find that the place was not a private residence they should acquit, was properly refused.

Appeal from Somervell county court; J. G. Adams, Judge.

Pete Williams was convicted of gaming, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of gaming, fined \$10, and prosecutes this appeal.

Appellant insists that the complaint and information are defective, and filed a motion to quash the same. The charging part of the information is as follows: Pete Williams "did then and there unlawfully play at a game of cards, the said game of cards then and there not being played at by the said Pete Williams at a private residence occupied by a family," etc. This information is good. For a discussion of this matter, see *Russell v. State* (just decided) 72 S. W. 190; *Hankins v. State*, *Id.* 191.

The second bill of exceptions complains that the state proved by Sid McCoy that he, in company with John Hankins and three other parties, unknown to witness, on the 29th of March, 1902, played at a game of cards in Shields' pasture, in Somervell county, about a mile and half or two miles northwest from Glen Rose. Appellant objected to this testimony, because the information did not allege that defendant played poker at any place in Somervell county, and because same did not allege that defendant played cards in the pasture of Wm. Shields, in said county. Appellant's objections are not well taken, as it is a violation of law to play cards anywhere not at a private residence, under the recent statute.

The third bill of exceptions raises practically the same question.

In the fourth bill of exceptions complaint is made that Sid McCoy testified that the game he played on March 29th was played on the ground in the cedar brake in Wm. Shields' pasture; and the witness Sid Mitchell testified that he saw defendant and Sid McCoy and others sitting in a circle on the ground on said day in said pasture; and

that this is all the testimony offered by the state to prove that said game was not played at a private residence. Whereupon defendant requested the court to give in charge to the jury the following special charge: "In this case I instruct you, at the request of defendant's counsel, that the law requires the state to prove by legal and competent evidence beyond a reasonable doubt that the game of cards played, if you find any was played, was played at a place not a private residence then and there occupied by a family; and if you do not find from the evidence that such place was not a private residence, then you will say by your verdict, 'Not guilty'"—which charge the court refused. The court charged the jury: "If you believe from the evidence beyond a reasonable doubt that defendant Pete Williams did, in the county of Somervell, state of Texas, play at a game with cards at any place except a private residence occupied by a family, on or about the time alleged in the information, then you will find him guilty, and assess his punishment," etc. This charge is all that was authorized under the evidence, and covers the complaint urged in this bill of exceptions.

No error appearing in this record, the judgment is affirmed.

WINDOM v. STATE.

(Court of Criminal Appeals of Texas. Jan. 28, 1908.)

LARCENY—EVIDENCE—INSTRUCTIONS—INDICTMENT—VARIANCE.

1. On a prosecution for horse theft defendant claimed that a person allowed him to take the horse, stating that he had borrowed it from the owner; and the court charged that if the jury believed that another person borrowed the horse from the owner, and placed it in possession of defendant, or if they entertained a reasonable doubt whether defendant's connection with the horse arose in such manner, they should acquit. *Held*, that the instruction was not erroneous because it limited the jury to the consideration of the belief of accused.

2. Where, on a prosecution for horse theft, defendant claimed that he took the horse merely for the purpose of using it, and with intent to return it, it having been turned over to him by one who stated that he had borrowed it from the owner, an instruction that, if accused took the horse with intent not to deprive the owner of the value of it, but merely to use it, the jury should acquit, was proper.

3. Under the express provisions of Code Cr. Proc. art. 723, an objection that the trial court committed error in failing to apply the law to a certain issue cannot be made for the first time on appeal.

4. An indictment alleged that the horse stolen was the property of S. R. and J. R. The evidence showed that the horse was owned by two brothers with such names, and also that their father's name was S. R. *Held*, that there was no presumption that the S. R. named in the indictment meant the father from the fact that the word "junior" was not attached to his name, thereby constituting a variance.

5. Where, on an appeal from conviction of

horse theft, there is testimony showing that accused took the horse merely for the purpose of using it, and with intent to return the same, and there is evidence refuting such defense, and showing fraudulent taking, a judgment based on a verdict of guilty will not be disturbed.

Appeal from district court, Johnson county; W. Poindexter, Judge.

Buck Windom was convicted of horse theft, and he appeals. Affirmed.

D. W. Odell and Brown & Bledsoe, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for horse theft, the penalty being three years in the penitentiary.

The witness Geo. Perry was permitted to testify to facts criminative in their nature, after both sides had closed their testimony; the objection urged being that it was not in rebuttal. The court explains the bill by stating that when the cause was called for trial state's counsel informed the court that the old negro, Geo. Perry, was absent in Bosque county, sick, and perhaps unable to attend court. The court informed counsel that, if his presence could be procured before the close of the case, he would be permitted to testify, and as soon as the witness came in he was used as a witness. When necessary to the administration of justice, testimony may be admitted for either side before the conclusion of the argument. The statute authorizing this has been upheld by an unbroken line of decisions. Briefly stated, the evidence disclosed that appellant was a convict upon the county farm, and made his escape. During that night the horse in question was taken from the lot where placed by the owner, carried out through the field, and was ridden into Bosque county by appellant. Another county convict escaped at the same time—a negro, going under the euphonious name of "Black and Shine." Appellant claims that "Black and Shine" informed him that he had a friend from whom he could borrow a horse, on which they could ride out of the county; that "Black and Shine" disappeared, and came back with a horse, and they went together some distance, and parted company, appellant riding the horse into Bosque county, to the house of a friend, and the next day turned him into a pasture, with instructions that he be returned to the alleged owner, or the father of the alleged owner. The evidence further discloses that "Black and Shine" wore a very large shoe; that appellant wore about a No. 6 or 7; and that the track of the man who took the horse from the lot, and led him through the field, was a No. 6 or 7. Appellant also claimed that he simply rode the horse for the purpose of making his escape, with the intent to return or have him returned to the owner; in other words, that he was simply stealing a ride, and not the horse.

¶ 2. See Larceny, vol. 22, Cent. Dig. § 193.

Various objections are urged to the charge of the court, especially that portion of it which informs the jury, if they should believe from the evidence that another person borrowed the horse in question from the owner, and placed it in possession of defendant, or if they entertained a reasonable doubt whether defendant's connection with the horse arose in this manner, they should acquit. This is objected to because it limited the jury to the consideration of appellant's belief of the fact. This was rather favorable to defendant, because it was not a fact that the horse was borrowed by the negro "Black and Shine," and the court would have erred if he had confined the jury to a belief on their part that the fact did exist. The court was, therefore, correct in instructing the jury, if defendant received the horse under the belief that it was borrowed by "Black and Shine," he would not be guilty of theft. This was appellant's contention. This was his statement, and the issue was submitted upon the defendant's statement, as one of his theories.

The court also instructed the jury to the effect that, if defendant took the horse, and did so with the intention not to deprive the owner of the value of it, but simply to ride to Bosque county, or there was a reasonable doubt of that proposition, they would acquit. This was another contention of appellant, made so by his own testimony; and the court clearly submits it favorably to defendant.

We have carefully examined this record, and do not believe there was any error committed. Every issue presented by the testimony, as we understand the facts, was clearly, pertinently, and even favorably submitted by the charge. While appellant raised the question of the horse having been gotten by "Black and Shine," so that he and "Black and Shine" might ride away from the officers; and the further theory that he took the horse for the purpose of riding to Bosque county to elude the officers—yet the other facts do not sustain this.

The judgment is affirmed.

On Rehearing.

(Feb. 25, 1903.)

At a former day of this term the judgment herein was affirmed. It is now contended the court committed error in failing to apply the law to the issue of ownership, and that this is apparent of record, and fundamental in its nature, which would require a reversal. This might be answered by the decisions construing article 723, Code Cr. Proc., to the effect that it is too late to suggest such error for the first time on appeal. It should have been taken advantage of by bill of exceptions or in motion for new

trial in the court below. But, independent of these decisions and of this article, we do not believe there is any merit in the question suggested. This matter comes in this way: The indictment alleged the ownership to be in Savie Richardson and John Richardson. The evidence discloses that there were two other parties, father and son, by the name of Savie Richardson. The contention is that, where such is the case, the law would presume the ownership to be in the father, and not the son. If this be correct, it is but a presumption which could be overcome by proof. The word "Junior," or "Jr.," or words of similar import, are ordinarily mere matters of description, and form no part of a person's legal name, and to omit or add such appellation or cognomen is harmless error, both in civil and criminal proceeding. *Geraghty v. State*, 110 Ind. 103, 11 N. E. 1; *Ross v. State*, 116 Ind. 495, 19 N. E. 451; *People v. Cook*, 14 Barb. 259; *Padgett v. Lawrence*, 10 Paige, 170; *Com. v. Perkins*, 1 Pick. 388; *Cobb v. Lucas*, 15 Pick. 7; *Cargill v. Taylor*, 10 Mass. 203; *State v. Grant*, 22 Me. 171; *Coit v. Starkweather*, 8 Conn. 293; *Fleet v. Youngs*, 11 Wend. 522; *Prentiss v. Blake*, 34 Vt. 465; *Keith v. Ware*, 6 Vt. 680; *Blake v. Tucker*, 12 Vt. 39; *Headley v. Shaw*, 39 Ill. 354; *State v. Wear*, 38 N. H. 314; *Com. v. Parmenter*, 101 Mass. 211. In *Simpson v. Dix*, 131 Mass. 179, it was held that, where a conveyance is executed to the grantee of a certain name, and there are two persons, father and son, of that name, no presumption will be indulged that the conveyance is to the father, and evidence is admissible to show who in fact was intended as the grantee. The evidence in this case further shows that the father and son lived upon the same place; that the son lived with the father; that the horse was kept in the barn on the place, which is owned by the father. And it was further shown that the horse in question was in fact the property of the two sons, Savie and John Richardson, and that the father had no interest in the animal. Even had objection been urged upon the trial below, it would not have been well taken under the authorities cited.

The only remaining question urged on rehearing is the supposed insufficiency of the evidence. There were several theories advanced by appellant in reference to his taking the horse to ride away from the officers and escape further serving his time on the county farm in obedience to the judgment of the court punishing him for a misdemeanor. However, there is evidence refuting these theories, and showing a fraudulent taking. Under this state of facts or condition of the record, this court would not be authorized in disturbing the verdict.

The motion for rehearing is overruled.

LEE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

HOMICIDE — INDICTMENT — ALLEGATIONS — DEADLY WEAPON — INSTRUCTIONS — MANSLAUGHTER — AGGRAVATED ASSAULT — IMPEACHING WITNESS—SUSTAINING EVIDENCE.

1. An indictment for murder, charging that accused killed deceased by striking her with a leather belt, was not defective for failing to allege that the belt was a deadly weapon, or that death was calculated to result from the use of same.

2. An indictment for murder, alleging that accused killed deceased by unlawfully and with malice aforethought striking her with a leather belt, was not defective for failing to allege that the striking was done in a "cruel, brutal, inhumane, or unmerciful manner."

3. Defendant introduced witnesses who testified that certain witnesses for the state had made to them, out of court and after the indictment, statements at variance with their testimony on the trial. *Held*, that it was proper to permit the county attorney to testify that the state's witnesses had testified before the grand jury to the same effect as on the trial.

4. On a prosecution for murder of a baby, the evidence showed that accused, being annoyed by its crying, said that he would stop it, and took a leather belt and struck the baby, from which it died. The court charged that if accused, with a leather belt, being a deadly weapon or likely to produce death, in a sudden transport of passion, without adequate cause, struck deceased with the belt, and killed her, they should find him guilty of murder. *Held*, that the charge was applicable to the facts of the case.

5. An instruction that if accused, with a leather belt, being a deadly weapon, or a weapon calculated to produce death by the manner in which it was used, struck and killed deceased, the jury should find him guilty, was not rendered erroneous because there was no allegation in the indictment that the belt was a deadly weapon, or became such from the manner of its use.

6. On a prosecution for murder of a child, the evidence showed that accused struck his child several times on the stomach with a leather belt; that after that, its stomach being badly swollen, accused and his wife put some cotton leaves on it, but called no physician to see the child, which died about 48 hours after the beating. The court charged that if the child died from neglect or improper treatment at the hands of accused after the alleged wounds were inflicted, and death resulted therefrom, defendant would be guilty of manslaughter. *Held*, that such instruction was not warranted by the evidence.

7. It was not error to charge that, if the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured willfully fails or neglects to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death.

8. An instruction should not be given undue prominence by repetition.

9. Pen. Code, art. 653, provides that, if the person inflicting an injury which makes it necessary to call aid in preserving the life of the person injured shall willfully fail to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death. Article 717 provides that the instrument by which a homicide is committed is to be considered, in judging of the intent of the accused, and, if it be one not likely to produce death, it is not to be presumed that death was designed, unless the manner of use indicates

such intention. Section 720 provides that where the circumstances accompanying a homicide show an evil disposition, or that it was the design to kill, accused is to be deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument may not, in its nature, have been such as to produce death ordinarily. *Held*, on a prosecution for the murder of a child—deceased having been killed by being struck by accused with a leather belt while he was angry at the fact that the child was crying—it was error to give an instruction based on article 653, without also submitting articles 717 and 720, and charging as to manslaughter.

10. An instruction should have been given on aggravated assault.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Andy Lee was convicted of murder in the second degree, and he appeals. Reversed.

Ballew & Wheeler, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years.

Tibbie Galloway testified: That she and her husband were living in the same house with appellant and his wife. That defendant had a baby, eight or ten months old, named Mary Lee. "One day we came home for dinner from the cotton patch, and the baby was crying." Defendant asked, "What is the matter with the baby?" Witness replied, "Well, you know that it has been sick." He then said, "It ain't sick, either, and I'll be damned if I do not stop its crying." "He then took off a leather belt that he wore—the belt was about as wide as my three fingers, and had a buckle on one end—and hit the baby two or three licks with the belt. At this time the baby was in the arms of defendant's little girl, about six or eight years old. She ran with the baby from the kitchen to the bedroom. Defendant followed her into the bedroom, and told her to put the baby on the bed. He then struck the baby with his right hand on the side of its head, knocking it over, and its head hit against the footboard of the bed. While the baby was lying on its back, with its stomach up, defendant struck it on the stomach, with the belt doubled, three or four times, just as hard as he could. When he did this, the baby ceased crying, and began to tremble and quiver." Witness' husband said, "Andy, you have killed it." Defendant replied, "I don't give a damn. I will kill the whole lot." Defendant then walked away, and did not do anything to relieve or resuscitate the child. Witness' husband began to fan the baby, and after a while it came to again, but it never cried any more or took any more nourishment from that time until its death. Before it died its stomach was badly swollen, and defendant and his wife got some cotton leaves and put on its stomach. They never called in a physician to see the child. Defendant whipped the baby with a

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 219.

belt on Monday at noon, and it died Wednesday morning about 8 o'clock. This occurred in Navarro county on the 5th day of August, 1902. Andy Galloway testified to substantially the same facts as his wife, Tibbie Galloway. This is practically all of the evidence for the state.

The charging part of the indictment is as follows: That Andy Lee " * * * did then and there unlawfully with his malice aforethought, kill Mary Lee by beating and striking the said Mary Lee with a leather belt, contrary to the forms of the statute in such cases made and provided," etc. Appellant insists that the indictment is defective because the same does not allege that the leather belt was a deadly weapon, or that death was calculated to result from the use of the same, and it was not alleged therein that the striking was done in a cruel, brutal, inhumane, or unmerciful manner. This is not necessary. In our opinion, the indictment is good.

The first bill of exceptions is substantially as follows: L. A. Johnson was permitted, over defendant's objection, to testify: "I was county attorney when Andy Galloway testified before the grand jury, and also when Tibbie Galloway testified before the grand jury. Their statements were as follows: 'That Andy Lee came to the house at about 12 m., and the baby was crying, and he asked what was the matter with it, and his wife said it was sick. Andy said it was not, but that he would fix it. He took off his belt and whipped the baby in the east room, and then the little girl took it in the west room and laid it on the bed, and then Andy struck it five or six times on the stomach with the belt doubled, and then slapped it over, and its head hit a very hard blow against the footboard of the bed.'" Appellant objected to this testimony because it was introduced to build up and give strength to the testimony of Andy and Tibbie Galloway; because hearsay, and not made in the presence of defendant; that it was not in rebuttal; that the same was irrelevant and immaterial, and that it did not tend to corroborate; that the same was not legal evidence. The court appends the following qualification to the bill: "The defendant had introduced two witnesses who testified that the state's witnesses Galloway had made to them out of court, and since the indictment, statements flatly variant from and contradictory of their testimony on the trial." In view of the explanation of the trial court, we believe the testimony was admissible. White's Ann. Code Cr. Proc. § 1119, subsec. 4.

Appellant insists that the charge of the court is wrong, in paragraph 2 and clause 11, to the effect that, if the jury believed beyond a reasonable doubt that "defendant, Andy Lee, as charged in the indictment, with malice aforethought, with a leather belt, being a deadly weapon, or weapon well calculated and likely to produce death by

the manner in which it was used, in a sudden transport of passion, aroused without adequate cause, with intent to kill, did strike with the leather belt, and thereby kill Mary Lee, as charged in the indictment, you will find him guilty of murder in the second degree," etc. This charge is applicable to the facts of this case. The fact that there is no allegation in the indictment that the belt was a deadly weapon, or that it became such from the manner of its use, or not, did not render the charge erroneous.

Appellant insists that the court erred in the following portion of its charge, wherein it is stated that, if the child died from neglect or improper treatment at the hands of defendant after the alleged wounds were inflicted, and death resulted therefrom, defendant would be guilty of homicide. We do not find any evidence in this record to support such a charge, and the same should not have been given. *Taylor v. State* (Tex. Cr. App.) 51 S. W. 1106.

We do not think the court erred in charging on that phase of the case wherein he told the jury, "And if the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured shall willfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death." However, as suggested by appellant, this charge should not be given undue prominence by repetition.

The fifth ground of appellant's motion for new trial is that the court erred in the sixth paragraph of the charge, submitting article 653, Pen. Code, without also submitting articles 717, 720, Pen. Code, as it left the jury no option, when they found defendant guilty, except to find him guilty of one of the degrees of murder. The court only charged the jury on murder in the first and second degrees. We think this assignment is well taken. This question was passed upon by us in *Taylor v. State*, 51 S. W. 1106, where the matter is fully discussed. And see, also, *Honeywell v. State*, 40 Tex. Cr. R. 199, 49 S. W. 586; *Griffin v. State*, 40 Tex. Cr. R. 315, 50 S. W. 366, 78 Am. St. Rep. 718; *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361; *Johnson v. State* (Tex. Cr. App.) 60 S. W. 48; *Danforth v. State* (Tex. Cr. App.) 69 S. W. 159. We think the court should have charged on manslaughter, by reason of the peculiar phraseology of the last-cited articles of the Code, and should have also charged on aggravated assault. If defendant made the assault without any apparent intention to kill, with a weapon not reasonably calculated to effect that purpose, then he would not be guilty of any higher grade of offense than aggravated assault; defendant being an adult male, and the victim a child. The court did not err in charging on the different degrees of murder.

For the reasons pointed out, the judgment is reversed and the cause remanded.

CECIL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

MURDER—EVIDENCE—REBUTTAL—FORMER INDICTMENT—DISMISSAL OF PROSECUTION AGAINST ANOTHER—INSTRUCTIONS—HARMLESS ERROR.

1. In a prosecution for homicide, evidence that witness knew and used to work for a man who was with deceased at the time of the difficulty resulting in the homicide was nonprejudicial to defendant.

2. Where it was in evidence that a certain person had said after the killing that he did not know who it was that did it, evidence that a witness had heard this same person say, a short time after the killing, that it was done by defendant, was admissible in rebuttal.

3. Where it was shown that the person who committed the homicide ran past a certain street corner immediately thereafter, and it was claimed by defendant that a certain person did the killing, evidence that the person who ran by the street corner in question soon after the homicide was not the person whom it was claimed did the killing was admissible.

4. Where defendant claimed that a certain other person did the killing, it was not competent for the state to show the movements of such other person during the night of the homicide, the next day, and subsequent thereto.

5. Where defendant claimed that the killing was done by another party, it was not competent to show by an officer that he did not arrest such other party for the offense a day or two following the homicide.

6. Where it was claimed that the killing was done by another than defendant, a motion to dismiss a prosecution against such other person was not admissible to show insufficiency of evidence against him.

7. In a prosecution for homicide an original indictment found against defendant shortly after the killing, and which was subsequently dismissed, was inadmissible.

8. In a prosecution for homicide it was competent for defendant to show that a witness who had testified that defendant did the killing had stated on the examining trial that he did not know who did the killing.

9. Where defendant claimed that deceased was killed by another than himself in a general difficulty participated in by several parties, a charge that if the parties engaged in the difficulty and both defendant and the person whom he claimed did the killing made an assault on deceased, but that the other party did the killing, without any previous conspiracy and without any knowledge by defendant that the other party was killing deceased, and that the intention of defendant was simply an assault without any intent to kill, they should find him not guilty, should have been given.

10. Where it was claimed that deceased was killed by another than defendant, the jury should have been instructed that if such were the case, and no assault was made by defendant and no aid or assistance rendered by him at the time, they should acquit.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

Murray Cecil was convicted of murder, and appeals. Reversed.

Robt. B. Seay, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the

penitentiary for a term of 50 years; hence this appeal.

It appears from the record that deceased, Joe Gwinn, and another white man were together in the city of Dallas on the night of the homicide. They met appellant Murray Cecil and Berry Blankenship, two negroes. The parties drank together a number of times, and all of them seemed to be more or less under the influence of liquor. During the time, Berry Blankenship gave deceased \$3 to keep for him, in order to buy his wife a pair of shoes. Subsequently it seems that a return of this money was desired, and appellant insisted on the deceased giving it up, and the difficulty occurred in regard to this matter. The homicide occurred on the street at night; deceased being stabbed with a knife. The testimony of the state tended to show that Murray Cecil alone did the stabbing. Defendant's theory was that Berry Blankenship did the stabbing, and he introduced some testimony tending to show this. This is a sufficient statement of the facts to present the errors assigned.

In the first bill of exceptions, appellant excepts to the testimony of a number of witnesses. We think the testimony of Brooks to the effect that "I know Mr. Joe Gwinn, and I used to work for him," was admissible; at least, it could not have injured appellant. The testimony of Stampley, to the effect that, a short time after the killing, he heard Brooks say that it was done by a man by the name of Murray, is objected to. This testimony, as explained by the court, was admissible, inasmuch as appellant showed that Brooks said after the killing that he did not know who it was that did it; and this testimony was in rebuttal and corroboration of Brooks' evidence. We also think it was permissible to show by the witness Hearst that the man he saw run by the corner of Pearl and Elm streets near the place of the homicide was not Berry Blankenship, it being shown by other testimony that the person who stabbed deceased ran by there; and it being claimed by appellant that Berry Blankenship did the killing, it was legitimate to show that this person was not Blankenship, because the guilt or innocence of Blankenship was a legitimate issue, and it was competent for the state to introduce any legal testimony showing that Berry Blankenship was not the party who killed deceased. We also think it was competent for the state to show the movements of Berry Blankenship during that night, the next day, and subsequent to the homicide. But it was not competent for the state to introduce in evidence some act or conduct of some third party, indicating to the jury his opinion as to the guilt or innocence of Berry Blankenship. And so it was not competent to prove, as was done by Henry Jacoby, that he did not arrest Berry Blankenship for said offense the next day or the day thereafter. This was an indirect method

of getting before the jury the opinion of said officer as to the guilt or innocence of said Blankenship.

Nor was it competent for the state to introduce in evidence the motion to dismiss the case against Blankenship by the county attorney. This motion states that the case was dismissed because the state admitted the evidence insufficient to support a conviction. The court intimates that this testimony was admissible, because the defendant claimed all along that Berry Blankenship's case was dismissed because of a contract with the state. If such a claim was made by any testimony, the court should have so stated; and, in that event, it might have become proper to show that there was no contract by which Berry Blankenship was to turn state's evidence; but certainly it was not competent to show, in the attitude in which this case was presented, that the cause against Blankenship was dismissed because, in the opinion of the state, the evidence against him was insufficient. This was an indirect method of getting before the jury the opinion of the state, through its prosecuting attorney, with the indorsement of the court, as to the innocence of Blankenship, and was very hurtful to appellant.

We further believe that evidence introduced by the state of the original indictment, or the substance thereof, by Herman Mueller, which it seems had been dismissed, was not competent. This was an indirect method of getting before the jury the opinion of the grand jury, shortly after the homicide, to the effect that they believed appellant was guilty. The court explains this bill by stating that defendant was contending that Blankenship alone was guilty, and that the record so proved, and the above indictment was admitted to show the facts. Of course, it was competent for defendant to contend and prove, if he could, that Blankenship alone was guilty of the charge, but it was not legitimate rebuttal testimony for the state to show what the grand jury thought or did in that regard.

We hold that it was proper for the defendant to show, as he attempted to do, that on the examining trial Brooks stated that he did not know who did the killing, and this regardless of whether or not such statement was contained in the examining trial evidence.

We do not believe it was competent for the defendant to show, in connection with the testimony of the witness Brantley, what Williams said to him, at the time he pointed out Berry Blankenship, on the night of the homicide.

The court should have charged, on the testimony elicited by appellant on his contention, to the effect that if the jury believed the parties engaged in a difficulty, and both appellant and Blankenship made an assault on deceased, but that Blankenship did the stabbing, without any previous

conspiracy on their part, and without any knowledge at the time on the part of appellant that Blankenship was so stabbing deceased, and that the intention and purpose of the appellant at the time was simply an assault without any intent to kill, then they could not find him guilty of murder.

And the jury should have also been instructed that if Berry Blankenship killed deceased, without any assault being made by appellant or any aid or assistance rendered by appellant at the time, they should acquit appellant.

For the errors discussed, the judgment is reversed and the cause remanded.

DAVIDSON, P. J., and BROOKS, J. We concur in reversal of the judgment. But we do not agree that the acts of Berry Blankenship during the night of the homicide and subsequent thereto could be used as evidence against appellant; nor could his acts and movements on the day following be so used. Appellant was in no way connected with said acts or movements, and not bound by them. These matters were not *res gestæ*, were acts of a "third party," not suggested by or known to or by appellant. Appellant was guilty, if at all, by reason of his act and intent, and not by what Blankenship did not do or what he did after the separation of the parties.

HAYDEN et al. v. KIRBY et al.*

(Court of Civil Appeals of Texas. Feb. 12, 1903.)

TRESPASS TO TRY TITLE — PARTIES — EXECUTORS — PETITION — PLEA IN ABATEMENT — DEMURRER — APPEAL.

1. Where no exception was filed to a plea in abatement, an objection to the judgment rendered thereon on the ground that the plea was not filed in due order will not be entertained in the appellate court.

2. Where, in trespass to try title, plaintiffs alleged that they were executors under a will, and that they were lawfully seised and possessed of the land until a certain date, when they were ejected, and prays judgment for title and possession, etc., the allegation that they were executors should be treated as merely descriptive of the persons, and the petition construed as asserting a right to recover in their individual capacity.

3. Where a petition in trespass to try title shows that plaintiffs seek to recover as foreign executors, and also in their own right, their alleged right as executors should be stricken out on exceptions, but the suit should not be dismissed.

4. When defendants filed a general demurrer to the petition, and also a plea in abatement, and the court sustained the plea and dismissed the action without passing on the demurrer, the appellate court, on finding error in sustaining the plea, should not affirm the judgment on the ground that the demurrer should be sustained, since that would deprive plaintiffs of the right to amend.

Appeal from district court, Hardin county; L. B. Hightower, Judge.

*Rehearing denied.

Action by Sarah L. Hayden and others against John H. Kirby and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

John P. Work, Lemuel D. Lilly, O'Brien, Bordages & O'Brien, and Smith, Crawford & Sonfield, for appellants. Lanier & Martin, for appellees.

PLEASANTS, J. This is an action of trespass to try title, brought by appellants, Sarah L. Hayden, William B. Hayden, Chas. H. Hayden, and Albert L. Hayden, against the appellees, John H. Kirby, W. L. Moody, and Lit Swearingen, to recover a survey of 1,476 acres of land in Hardin county, Tex., patented to the heirs of Washington R. Griffin. The original petition was filed in the district court of Hardin county on December 20, 1900. In this petition, which is in the ordinary form of a petition in an action of trespass to try title, plaintiffs, who are all non-residents, allege that they "sue in their capacity as executors and trustees of the last will of Peter Hayden, deceased." On April 1, 1901 and 1902, respectively, the defendants Kirby and Swearingen each filed an answer consisting of a general demurrer, general denial, and plea of not guilty. The defendant W. L. Moody filed a disclaimer on March 23, 1901. On April 7, 1901, the plaintiffs filed their first amended original petition, which contains the following allegations: "Your petitioners, Sarah Leverett Hayden, a feme sole, William B. Hayden, Charles Hayden, and Albert L. Hayden, hereafter called 'plaintiffs,' complaining of W. L. Moody, Lit Swearingen, and of John H. Kirby, hereinafter called 'defendants,' represent that said Sarah Leverett Hayden and William B. Hayden are resident citizens of the city of New York, in the state of New York, said Charles Hayden is a resident citizen of Colorado Springs, in the state of Colorado, and that Albert Hayden is a resident citizen of the city of Chicago, in the state of Illinois; that the defendant W. L. Moody is a resident citizen of the county of Galveston, in the state of Texas, and the defendant John H. Kirby is a resident citizen of the county of Harris, in the state of Texas, and the defendant Lit Swearingen is a resident citizen of Hardin county, Texas; that plaintiffs are the duly qualified, acting, and surviving executrix and executors and trustees of and under the last will and testament of Peter Hayden, deceased; that said Peter Hayden departed this life about the 6th day of April, 1889, testate, and his last will and testament was duly probated in the surrogate court, in the county of New York, in the state of New York, under the laws of said state, and a certified copy of said will, the order and decree of said court admitting said will to probate, together with other proceedings had in said court in the matter of the probate of said will, were duly recorded in the deed records of Hardin county, Texas, in Book U, on pages 234, etc.,

and were also duly recorded in the deed records of various other counties in the state of Texas; that the said Sarah Leverett Hayden is the surviving wife of said Peter Hayden, and the other plaintiffs herein are the children of said Peter Hayden, deceased; that said plaintiffs, as such surviving wife and as such children, together with the other descendants of said Peter Hayden, are the only heirs of said Peter Hayden; that the said Peter Hayden during his lifetime was lawfully seised and possessed of, in fee simple, and was entitled to the possession of, the lands and premises hereinafter described; that upon the death of said Peter Hayden these plaintiffs became lawfully seised and possessed of, and entitled to the possession of, said lands and premises, and on the 1st day of January, 1900, were so lawfully seised and possessed of, and entitled to the possession of, the same, holding the same in fee simple; that thereafter, on the day and year last aforesaid, the defendants, and each of them, entered upon said premises and ejected plaintiffs therefrom, and wrongfully withhold from plaintiffs the possession thereof, to their damage of one thousand dollars; that the premises so entered upon and wrongfully withheld by defendants from plaintiffs are situated within the county of Hardin, in the state of Texas, and are bounded and described as follows." After describing the land, the petition, by proper allegations, sets up title to the land in plaintiffs under the five and ten years statutes of limitation, and closes with prayer for judgment for the title and possession of the land, for writs of possession and restitution, for rents and damages, and for general relief. To this amended petition the defendants Kirby and Swearingen on April 7, 1902, filed the following plea in abatement:

"No. 704. Sarah L. Hayden et al. v. John H. Kirby et al. In the District Court of Hardin County, Texas. To the Honorable District Court of Hardin County, Texas. In the above styled and numbered cause now come the defendants John H. Kirby and Lit Swearingen, and amend their original answer filed in said cause, by leave of the court first obtained (said Kirby's having been filed April 1, 1901, and that of defendant Swearingen April 1, 1902), and file this, their first amended original answer, in lieu thereof, and allege as follows, to wit: (1) These defendants plead in abatement of above styled, entitled, and numbered suit, and allege that it appears from the allegations of plaintiffs in their first amended original petition, filed herein on the 7th day of April, A. D. 1902, that the plaintiffs sue as executors of the last will and testament of Peter Hayden, deceased, and that they, and each of them, are citizens of and reside in a foreign state, and not in the state of Texas, and that said will was probated in the state of New York, and it does not appear from any allegations in said petition that said will was ever probated in any of the probate courts of the state of

Texas. (2) These defendants say that the said will above mentioned is a foreign will, and probated in a foreign state, and the plaintiffs, who are alleged to be the executors thereof, are foreign executors, and do not reside in the state of Texas, and said will has never been probated in Hardin county, Texas; and these defendants say that they have reason to believe, and do believe, and so charge the facts to be from said belief, that said will has never been probated in any of the counties of the state of Texas, wherefore they say that plaintiffs have no right, in law, to further prosecute this suit, and pray that same be abated and dismissed. John H. Kirby.

"Subscribed and sworn to before me this 7th day of April, A. D. 1902, by Jno. H. Kirby. Witness my hand and seal of office 7th day of April, A. D. 1902. W. W. Cruse, Notary Public, Hardin County, Texas. [Seal.]"

This plea was followed by general and special exceptions, general denial, and plea of not guilty, and by special pleas setting up the three, five, and ten year statutes of limitation in bar of plaintiffs' suit. The court below sustained defendants' plea in abatement, and dismissed plaintiffs' suit, from which judgment of dismissal plaintiffs prosecute this appeal.

The judgment of the court below is assailed by appellants upon the following grounds: First. Because the plea in abatement, having been filed after the defendants had answered to the merits, was not filed in due order of pleading, and should not have been considered by the court. Second. Because the allegations of the amended petition show that plaintiffs do not sue in their capacity as executors or as representatives of the estate of Peter Hayden, deceased, but seek to recover as individuals. Third. Because the petition clearly alleges title to the land in plaintiffs as trustees under the will of Peter Hayden, and as heirs of said Hayden, and further alleges title by limitation, which allegations are sufficient to entitle plaintiffs to maintain this suit in their individual capacity; and if, in addition thereto, the petition should be held to contain allegations showing that plaintiffs also seek to recover in the capacity of executors of a will not probated in this state, such allegations should be stricken out on exception, but would not require a dismissal of the suit.

The first objection to the judgment cannot be sustained—if for no other reason—because plaintiffs filed no exception to the plea of abatement, and the contention that it was not filed in due order cannot be made for the first time in this court.

We think the second and third objections to the judgment are valid. In the case of *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035, our Supreme Court held that a petition which alleges that the plaintiffs are the "executors and trustees under the last will and testament of E. Gibbons, deceased," and were lawfully seised and possessed of the land sued

for, but does not pray for a recovery of the land by plaintiffs in their capacity as executors, asserts a right in plaintiffs to recover in their individual capacity, and not as executors, and that the words "executors and trustees under the last will and testament of E. Gibbons, deceased," must be deemed as merely descriptive personæ, citing *Gayle v. Ennis*, 1 Tex. 186, and *Rider v. Duval*, 23 Tex. 624. It is true, the petition in this case contains allegations which do not appear in the petition under consideration in the case of *Roundtree v. Stone*, supra; but we do not think the allegations as to the probate of the will of Peter Hayden, deceased, and the record of a copy of same in the county in which the land is situated, and the further allegations that the deceased, Peter Hayden, was during his lifetime seised and possessed of the land, and upon his death the plaintiffs became lawfully seised and possessed of same, show that plaintiffs sue as representatives of the estate of Peter Hayden. On the contrary, the petition, considered as a whole, shows that the title asserted by plaintiffs is a fee-simple title in themselves. While plaintiffs were not required to plead their title, there is no rule which prevents their so pleading; and we think the allegations as to the probate of the will, and the record of a copy of same, should only be regarded as a statement of the title under which plaintiffs claim the land. But conceding, for the sake of argument, that the petition does show that plaintiffs sue in the capacity of executors, it is unquestionably true that they also seek to recover as trustees and as heirs of Peter Hayden; and, while so much of the petition as alleges a right to recover as executors should be stricken out on exception, that portion which alleges title in plaintiffs as trustees and as heirs is sufficient to show a cause of action against the defendants, and the suit should not have been dismissed.

It may be that the petition in this case should be held bad on general demurrer on the ground that it does not allege that there is no administration upon the estate of Peter Hayden pending in this state, and no necessity for such administration; but the general demurrer of the defendants was not passed upon by the court below, and it would be manifestly unfair to plaintiffs for this court, after holding that the plea in abatement was improperly sustained, to affirm the judgment dismissing the suit on the ground that the general demurrer should have been sustained. This would have the effect to deprive plaintiffs of the right to amend, to which he would have been entitled had the court below sustained the general demurrer, and of which he should not be deprived by the error of the court below in sustaining the plea in abatement. *Moore v. Byars* (Tex. Civ. App.) 49 S. W. 1104.

The judgment of the court below will be reversed, and the cause remanded, and it is so ordered. Reversed and remanded.

DENISON & S. RY. CO. v. ST. LOUIS S. W. RY. CO.

(Court of Civil Appeals of Texas. Nov. 22, 1902.)

RAILROADS — RIGHT OF WAY — USE OF CITY STREET — FORECLOSURE SALE — RIGHTS OF PURCHASER — FORFEITURE OF RIGHTS.

1. Where a railroad had obtained from a municipal corporation its unconditional consent to the construction of a railroad on one of its streets, a purchaser at foreclosure sale of all the properties, privileges, and franchises of the railroad acquired its rights to the use of the street.

2. The fact that the charter of the purchasing company conferred on it power to occupy the streets in the city in question for right of way purposes subject to the condition precedent that it obtain the city's consent, did not require it to surrender the right of way which it had acquired by its purchase, and reacquire the same by exercise of its charter powers.

3. Where a city ordinance granted a railroad the right to occupy a street for right of way purposes, and the company built on a portion of the street, and its successor in title assumed possession of the track, and extended the same, the city's grant to the use of the street was accepted.

4. Where a city granted a railroad permission to use a street for right of way purposes, another railroad, which was subsequently granted a right of way over the same street, could not insist that the first grantee had forfeited its rights by failing to exercise proper diligence in completing its track, only the state or city being entitled to enforce a forfeiture.

Bookhout, J., dissenting.

Error from district court, Grayson county; Rice Maxey, Judge.

Suit for an injunction by the Denison & Sherman Railway Company against the St. Louis Southwestern Railway Company. A temporary injunction was dissolved, and complainant brings error. Affirmed.

Moseley & Smith, for plaintiff in error. E. B. Perkins and Head & Dillard, for defendant in error.

TEMPLETON, J. In 1887 the St. Louis, Arkansas & Texas Railway Company of Texas, a corporation duly incorporated under the laws of this state, constructed a branch line of road from Commerce, in Hunt county, to Sherman, in Grayson county. On February 21, 1887, and before the road was built into Sherman, it applied for, and formally obtained from the corporation of the city of Sherman, the assent of said city to the construction of its road upon and over East street, one of the public streets of the city, from the point where the line of the Texas & Pacific Railway Company crossed said street to the southern terminus thereof. The assent was unconditional. East street runs north and south, and extends from the north boundary line of the city to or near the south boundary thereof; and the Texas & Pacific Railway, which runs east and west, crosses the said street about one-half mile from its northern terminus. The first street south of the Texas & Pacific Railway, running parallel with the railway, is Mulberry;

the next is Pecan; the next is Houston; the next is Lamar, and the next is Cherry. The said branch line from Commerce to Sherman was completed to Sherman in the summer of 1887. The depot was located on East street, north of Cherry, and just south of and adjoining Lamar. The track of the road was laid in the center of East street, and extended from the southern terminus of said street to a point just south of and adjoining Houston street. No further extension was made until 1892. In 1890 a mortgage theretofore given by the St. Louis, Arkansas & Texas Company was duly foreclosed in the circuit court of the United States for the Eastern district of Texas against all the properties, rights, privileges, and franchises of the said company. The sale under foreclosure took place in October, 1890, and was confirmed in December following. Conveyance was duly made to the purchaser, the St. Louis Southwestern Railway Company, and in November, 1891, that company took possession of the railway system it had purchased, and has ever since that time operated the same. The said purchasing company was chartered in 1890, and succeeded to the rights, powers, privileges, and franchises of the sold-out company, and by virtue of its purchase acquired all the properties, rights, privileges, and franchises of its predecessor. In 1892 the new company extended its line of road up East street about 200 feet to a point north of Houston street about 100 yards south of Pecan street. The Denison & Sherman Railway Company was duly and legally incorporated as a local and suburban railway, under section 2, art. 4352, c. 1, tit. 94, Sayles' Civ. St., with authority to construct and maintain a local suburban railway from the southern boundary of the city of Denison to the northern and eastern boundary of the city of Sherman, a distance of less than ten miles, and, in addition thereto, five miles in each of said cities. In 1900 the council of the city of Sherman granted to John Crerar, his heirs and assigns, the right to construct and operate an electric railway over that portion of East street lying between Mulberry and Pecan streets. Soon thereafter the franchise was assigned to the Denison & Sherman Railway Company. In 1901 the said company set its poles and strung its wires on East street between Mulberry and Pecan streets, but before it could lay its ties and rails the St. Louis Southwestern Company extended its track up East street beyond Pecan, and was in the act of building to and across Mulberry, when the Denison & Sherman Company brought this suit against it to enjoin the completion of the work. A temporary injunction was granted, but on final trial the same was dissolved, and all relief denied. The Denison & Sherman Company has appealed by writ of error.

The matter in controversy is the right claimed by the St. Louis Southwestern Com-

pany to build its road over East street, between Pecan and Mulberry. The principal question in the case is whether the right possessed by the St. Louis, Arkansas & Texas Company to build on East street has been acquired by the defendant in error. Our laws provide that railway companies may build across and upon the streets of a city, but only on condition of obtaining the assent of the city thereto. Rev. St. arts. 4426, 4438. When the consent of the city has been secured, the right of the company to build over and upon the streets named in the concession is complete. No further action is necessary as a prerequisite to a lawful appropriation. When the assent of the city has been given and acted upon, it cannot be recalled. When the city consents, in due form, to the use of any particular street or streets by a railway company for right of way purposes, and the company accepts the privilege, the right becomes vested, fixed, and certain, and can only be revoked in an action to forfeit brought by authority of the state. *Railway Co. v. Brownsville*, 45 Tex. 96; *Street Railway Co. v. Street Ry. Co.*, 68 Tex. 169, 4 S. W. 534; *Railway Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33; *Arcata v. Railway Co. (Cal.)* 28 Pac. 676. Our laws further provide for the sale under foreclosure of the entire roadbed, track, franchises, and chartered rights of a railroad company, and prescribe the rights of the purchasers at such sale. Rev. St. arts. 4549, 4550. The purchasers are vested with all the rights, privileges, and franchises of the foreclosed company, and are given the option of continuing the business in the name of the old corporation or of organizing a new corporation for that purpose. The right of way in controversy was part of the railway system of the St. Louis, Arkansas & Texas Company, and as such was covered by the lien of the mortgage creditors. It could be legally sold under foreclosure as a part of the said railway system. The fact that the purchasers elected, in the exercise of the option given by the statute, to form a new corporation to take the property, did not have the effect to destroy the title to the right of way which they acquired by their purchase. The St. Louis Southwestern Company was organized as the successor of the foreclosed company. It began business with no other properties, rights, privileges, and franchises than those acquired by its purchase and those conferred by its charter. Every duty of a public nature which lay upon its predecessor was assumed by it, and no obligation in conflict therewith rested upon it. No reason affecting the public existed why the said company should not have been permitted to acquire the right of way in controversy together with the other parts of the railway system to which it belonged. When acquired by the purchasing company, it was held upon exactly the same terms and conditions as those which accompanied the right and title

of the foreclosed company. The concession of the right of way to the original company was not personal in a sense which would preclude the transfer thereof to the successor of that company. The grant was to the company owning and operating the railway system in question, and made the right of way over East street a part of such system. Any company capable under our laws of taking the whole system could take every part thereof, including the said right of way. It is doubtless true that the concession could not have been legally segregated from the system, and assigned to an independent company, and that in this sense the grant was personal to the company receiving it. But there has been no attempt to make such disposition of the concession, or to use the same for any purpose other than those for which it was granted. The charter of the St. Louis Southwestern Company conferred upon it the general power to occupy the streets of the city of Sherman for right of way purposes, subject to the condition precedent that it obtained the assent of the city, but that fact did not require it to surrender the right of way over East street, which it had acquired by its purchase, and reacquire the same by the exercise of its charter powers. There is no question that the assent of the city to the use of East street was accepted. The old company built upon and occupied a portion of the street, and the new company, after its purchase, assumed possession of the track which had been placed in the street by its predecessor, and extended the track some distance farther toward the point destined for its terminus. If it has not used reasonable diligence in completing the extension, the state or the city, and not the plaintiff in error, is the proper party to insist on a forfeiture.

The evidence relating to the foreclosure and the sale thereunder is not contained in the statement of facts, the trial judge's conclusions on those issues being accepted by both parties. The judge found that all the properties, rights, privileges, and franchises of the St. Louis, Arkansas & Texas Company passed to and vested in the St. Louis Southwestern Company. The list is certainly comprehensive enough to include the right of way in controversy, and we must assume that the finding is supported by the evidence. It will be further assumed that the St. Louis Southwestern Company was organized for the purpose of taking over the said properties, rights, privileges, and franchises in the manner prescribed by law.

Our conclusion is that the trial court did not err in holding that the plaintiff in error was not entitled to an injunction restraining the defendant in error from building its road on East street to a junction with the track of the Texas & Pacific Company.

The trial judge found as a matter of fact that, if the plaintiff in error was permitted to lay its track in the center of East street,

it would be impracticable for the defendant in error to exercise its right to build on said street by placing its track between the track of the plaintiff in error and the edge of the street. Complaint is made that the evidence is not sufficient to warrant this finding. After a consideration of the evidence, we have concluded that the finding was justified, and that the complaint is without merit. The defendant in error has the right to construct and operate its road over East street to a junction with the Texas & Pacific road, and the city of Sherman cannot deprive it of the right by authorizing the plaintiff in error to lay its track at such place in said street as will render impracticable the exercise of the right.

The judgment is affirmed.

BOOKHOUT, J. I am compelled to dissent from the views expressed in the conclusions reached in the opinion by the majority of the court in this case. Owing to the importance of the questions involved, I deem it proper that I briefly express my views thereon.

On the 21st day of February, 1887, the city of Sherman, by ordinance, granted to the St. Louis, Arkansas & Texas Railway Company, a railroad corporation incorporated under the laws of Texas, the right and privilege to construct, operate, and maintain a railway over and along East street, a public street in said city, from the point where the Texas & Pacific Railroad crosses said street to the southern terminus thereof. Acting under the privilege granted in said ordinance, said railway company, in June or July, 1887, built its railroad in the center of East street from its southern terminus northward to Cherry street where it crosses East street, and there established and erected its depot. At the same time it continued its track northward about 200 feet to a point just south of Houston street, another street crossing East street. In this condition it operated its road until December, 1890, when it was sold out. Said corporation executed certain mortgages on its property, privileges, and franchises to secure certain bonds executed by it, and in June, 1889, suit was filed in the circuit court of the United States to foreclose these mortgages. A decree of foreclosure was had on the 24th day of July, 1890, under which a sale was made in October, which was confirmed in December, 1890, and a deed ordered made to the purchaser, the St. Louis Southwestern Railway Company of Texas, to all rights, properties, privileges, and franchises of the sold-out company. The purchasing company was a corporation incorporated under the laws of Texas. In 1901 the plaintiff in error, under and by virtue of a valid license granted by the city of Sherman, entered upon East street, and erected poles on each side of said street preparatory to the construction of its road thereon. About this time defendant in error, acting solely

under the license granted to the St. Louis, Arkansas & Texas Railway Company in 1887, entered upon said street in the nighttime, and, without the knowledge or consent of plaintiff in error, began the construction of a railway in the center of the street between Mulberry and Pecan streets. It was to enjoin defendant in error from building said road that plaintiff in error instituted this suit.

The controlling question presented is: Did the right or privilege to construct, operate, and maintain a railroad over that part of East street granted to the St. Louis, Arkansas & Texas Railway Company, and which that company had not used when the foreclosure proceedings were had and the conveyance made to the St. Louis Southwestern Railway Company, pass by such sale to said purchasing company? The privilege granted by the city of Sherman to the sold-out company to construct, operate, and maintain a railroad over East street was a mere license granted to that company, which the city could revoke at any time prior to its acceptance by that company. *Nellis on Street Surface Railroads*, p. 55, and authorities cited in note 8; *3 Elliott on Railroads*, sec. 1079, and authorities cited in note; *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 631. The only acceptance of the ordinance granting said license was the construction by the said company of its railroad over that part of East street as above stated, and the erection of its depot at Cherry street. This fact, together with the fact that the company operated its railroad as thus constructed for nearly five years, during which time nothing was done by it indicating an intention to make use of or accept the license to construct and operate a railroad over the remainder of the street stipulated in the ordinance, tends strongly to show that the company did not intend to accept the license granted, but to abandon and forfeit the license, except in so far as it had already constructed its road. This inference is strengthened by the fact that it had constructed its depot on the part used, and, it would seem, fixed the terminus of its road. Under the facts in the case the license did not vest any right in the licensee until it made use of the same. *8 Elliott on Railroads*, sec. 1079. It is true that ordinarily the company must accept the license upon the terms and conditions upon which it is granted, but the city is not complaining that the road stopped at Houston street, instead of building on north to the Texas & Pacific Railroad crossing.

Again, by the terms of article 4558, Rev. St., it is made the duty of every railroad organized under title 94 of the Laws of Texas, as was the St. Louis, Arkansas & Texas Railway Company, within two years after its incorporation to "begin the construction of its road and construct, equip and put in good running order at least ten miles of its

proposed road; and if any such railroad corporation, after the first two years, shall fail to construct, equip and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either of such cases, forfeit its corporate existence and its powers shall cease as far as relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation." This act is self-executing, and any railroad corporation organized under title 94 of the laws of this state failing to comply with its terms forfeits its corporate existence as to the unfinished part of its road without the necessity of a judicial declaration thereof. The St. Louis, Arkansas & Texas Railway Company, in 1890, was insolvent, and a foreclosure was had upon its property and franchises, and the same were ordered sold, and were sold to the St. Louis Southwestern Railway Company, a corporation created and chartered under the laws of the state of Texas prior thereto. Said sale stripped the company of all its property, and, it seems, deprived it of the ability to extend its road. The stockholders of the sold-out company never attempted, after the sale of its property, to organize under the charter of the sold-out company, or perform any corporate act thereunder. The record does not show that the purchaser of the property of the sold-out company ever attempted to organize under the charter of the sold-out company, even if it be conceded (which it is not) that a purchasing corporation was entitled to do so under the terms of article 4549 of the Revised Statutes. By the terms of article 4558 the failure of the St. Louis, Arkansas & Texas Railway Company for nearly five years to make use of the license granted to it, and its insolvency, and the sale of all its property, and the failure of the stockholders to reorganize after such sale, or make use of said license for nearly fourteen years after the granting thereof, at the end of which time the city granted the license to another company, which last-named company entered upon the street and began the construction of its road, operated as a forfeiture of the license granted to said St. Louis, Arkansas & Texas Railway Company in so far as it had not constructed its road and used the same. Sayles' Civ. St. art. 4558; S. S. & M. & P. Ry. Co. v. Ry. Co. (Tex. Civ. App.) 22 S. W. 107; Bywaters v. Railway Company, 73 Tex. 624, 11 S. W. 856; Ry. Co. v. State, 81 Tex. 572, 17 S. W. 67; Mayor v. Ry. Co., 84 Tex. 590, 19 S. W. 786; G. C. Ry. Co. v. G. C. S. Ry. Co., 63 Tex. 529, 65 Tex. 503; O. Ry. Co. v. B. & F. Ry. Co., 45 Cal. 373, 13 Am. Rep. 181; Toledo, etc., Ry. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492; Chicago, etc., Ry. Co. v. Storey, 73 Ill. 541; Chicago v. Railway Co., 105 Ill. 73; Atcheson St. Ry. Co. v. Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St.

Rep. 800; City of Detroit v. Railway Co., 37 Mich. 558. The city of Sherman seems to have taken this view of the matter, and intended the last grant as a revocation of its former grant to the St. Louis, Arkansas & Texas Railway Company in so far as said company had not constructed its road over said street. This view is strengthened by the evidence, which fairly shows that it is not practicable for both plaintiff in error and defendant in error to construct and operate their respective roads over said street, and the right was given to the plaintiff in error to place its road in the center of the street.

Conceding, for the purposes of this discussion, that the acts of the sold-out company amounted to an acceptance of the license in its entirety, and that the same had not been abandoned or forfeited, did the privilege which the sold-out company had to construct and operate its road over East street between Houston street and the Texas & Pacific crossing pass to the defendant in error by reason of the foreclosure proceedings? In the opinion of the majority of the court stress is laid upon the provisions of articles 4549, 4550, Rev. St., as vesting the rights, privileges, and franchises of the sold-out company in the purchaser under the foreclosure sale. Article 4549 makes provision whereby the purchaser of the sold-out company "shall be entitled" to organize under the charter of the sold-out company, and exercise the powers, privileges, and franchises of the sold-out company, which was not done in this case; and hence I cannot see that this article has any application. Article 4550 authorizes the purchaser to form a new corporation with all the powers and rights incident thereto under the laws of the state. The purchaser in this case, at the time of its purchase, was a corporation chartered under the laws of the state. It was a new corporation, and by virtue of its charter it took all the powers and privileges conferred by the laws of this state upon chartered railroads. Article 4550 does not vest in the new company the rights, privileges, and franchises of the old company, but makes provision by virtue of which the new company may acquire the road, and be entitled to all the powers and privileges conferred by the laws of the state upon chartered railroads. It is not by virtue of this article, but by virtue of its purchase, that the new company took title to the property. Such was the holding of this court in *Thayer v. Wathen*, 17 Tex. Civ. App. 383, 44 S. W. 906, in which a writ of error was refused. See, also, 2 *Morawetz on Corporations*, secs. 924 and 925; *Memphis, etc., R. R. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837.

The question, narrowed down, is, do the words used in the mortgage embrace such license or privilege, and, if so, did such right pass to the purchaser by the foreclosure proceedings and the conveyance made thereunder? The property mortgaged is desig-

nated in the mortgage as "its railway properties, privileges, and franchises." In discussing the meaning of the word "franchise," Mr. Justice Field, in the case of *Morgan v. Louisiana*, 93 U. S. 223, 23 L. Ed. 860, uses the following language: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with 'rights, privileges, and immunities,' though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as a franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. * * * The former may be conveyed to a purchaser of the road as a part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." This language has been repeatedly approved in later opinions of that court. *Chesapeake, etc., R. R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121. We have no statutory authority authorizing a conveyance of a license granted by a city to construct a railroad over one of its streets. Nor is there any equivalent provision in the statute authorizing the conveyance of such a license. Our statute authorizes a railroad to mortgage "its property and franchises." This language does not expressly or by implication authorize the company to mortgage such a license. In so far as said company had constructed its railroad over East street, and made use of the license, the same was necessary for the use of the railroad, and without it the road could not be operated. It was necessary to the preservation, use, and operation of the railroad, and of necessity passed to the purchaser of the property. *Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121. The unused privilege granted by the city of Sherman to the St. Louis, Arkansas & Texas Railway Company to construct its railroad on East street was not necessary or incidental to the existence, preservation, or use of the property mortgaged, and purchased by the defendant in error, and hence, in my opinion, it did not pass by the conveyance of the railroad.

Nor does the fact that the purchasing company extended the road about 200 feet, and across Houston street, after its purchase,

affect the question. If the privilege granted to the sold-out company did not pass to the new company by its purchase, such extension becomes immaterial.

Again, the ordinance granted the franchise to the St. Louis, Arkansas & Texas Railway Company. The grant is not to that company, "its successors and assigns." By the terms of the ordinance the grant is made a privilege personal to that company. Such personal privilege would not pass by a conveyance of the property and franchises of the company. It is held that immunity from taxation of a railroad company is personal to that company, and does not pass by a conveyance of its property. *Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. Ed. 121; *Pickard v. East Tennessee R. R. Co.*, 130 U. S. 637, 32 L. Ed. 1051. See, also, vols. 9, p. 944, and 10, p. 1046, *Rose's Notes on U. S. Reps.*

ST. LOUIS S. W. RY. CO. OF TEXAS v. EITEL.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

RAILROADS—DEATH OF LICENSEE—INSTRUCTIONS—ASSUMPTION OF NEGLIGENCE—EXCLUSION OF CONTRIBUTORY NEGLIGENCE—CONFORMITY TO ISSUES.

1. In an action for the death of a person killed while crossing a railroad track on a private way, the court instructed that, if the employés of the defendant company failed to ring the bell or blow the whistle, and such failure was the proximate cause of the injury, then plaintiff could recover. *Held*, that the charge was erroneous, in failing to leave to the jury the question whether the failure to ring the bell or blow the whistle was negligence, the place of the accident not being a public road or street.

2. In an action for the death of a licensee crossing a railroad track on a private way, an instruction that, if the public were in the habit of crossing defendant's track at that place, and defendant's employés knew of this, and in a reckless manner propelled the cars so as to show a total indifference to their acts, and the deceased was injured by reason of such wantonness, the defendant company was liable, was erroneous, as excluding the issue of contributory negligence from the consideration of the jury.

3. In an action for the death of a licensee while crossing a railroad on a private way, plaintiff's allegation of negligence was that there was no warning of any kind given, nor was there any watchman or light on the cars, and that the company's servants were guilty of gross negligence in propelling the train without ringing the bell or blowing the whistle, and without lights on the cars, and without having a watchman to warn deceased of his danger. *Held*, that an instruction submitting the issue of negligence in failing to have lights or other signals of danger at the place of injury was error, the allegations only charging negligence in failing to have lights on the train.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by B. F. Eitel against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

E. B. Perkins and Clark & Bolinger, for appellant. W. C. O'Bryan, T. A. Blair, and H. N. Atkinson, for appellee.

FISHER, C. J. We overrule all of the appellant's assignments of errors, except the fifth, sixth, and seventh, which, in our opinion, present reversible error.

The appellant complains of the following charge given by the court: "But if you find from the evidence that Horace Eitel was not a trespasser upon the railway company's tracks, or that he had a right to enter upon the railway track at the time and place he did, and you further find that the said Horace Eitel, at the time he attempted to cross defendant railway company's track, exercised that degree of care and prudence which a person of his age and intelligence and of ordinary care and prudence would have exercised under the same or similar circumstances, and you further find that the defendant railway company, through its agents, servants, and employés, in moving its train of cars, did so in such a manner that it run against Horace Eitel and inflicted injuries upon him from which he died, and you further find that the said agents and employés of the defendant company, in the operation of said train, failed to ring the bell or blow the whistle, and you further find that such failure on their part was the direct and proximate cause of the injury to the deceased, then and in this event the plaintiff in the cause would be entitled to recover." It is insisted that this charge was erroneous, because it did not leave to the jury the right to determine whether the failure to ring the bell or blow the whistle was negligence under the circumstances. The place where Horace Eitel was killed was a trail leading across the track, which was in use by the public; but it was not a public road or street, where the law absolutely required the whistle to be blown and the bell to be rung. The failure to ring the bell or blow the whistle in approaching the place where Eitel was injured might or might not have been negligence, and what the effect and result might have been of a failure to do either or both of these things was a question of fact for the jury. The charge, as quoted, did not leave to the jury the determination of the question whether the failure to ring the bell or blow the whistle, under the circumstances, was or was not negligence.

The sixth assignment complains of the following charge given to the jury: "Again, if you find from the evidence in this case that the public generally were in the habit of crossing the track of the defendant railway company at the place where Horace Eitel was injured at the time the injury occurred and for a long period of time previous thereto, and you further find from the evidence that the defendant's agents and employés knew that people were in the habit of crossing the track at that point, and you further

find from the evidence that said agents and employés of the defendant railway company in a reckless and wanton manner, propelled the cars in such a way as to show a total indifference of their acts, and that the deceased was injured by reason of such wantonness, the defendant company would be liable." The purpose of this charge was to make the appellant liable if it propelled its cars along the track where the deceased was injured in such a reckless and wanton manner as to indicate an indifference as to the consequences that might result from their acts to some member of the public in crossing the track. Such conduct as described might aggravate the negligence which the appellant might be charged with in propelling its cars at the time of the accident, but it would not have the effect to relieve the injured party of any consequences that might result from his contributory negligence. The issue of contributory negligence was in the case, and the effect of this charge was to hold the appellant responsible although the deceased might have been guilty of contributory negligence in putting himself in a place of danger under the circumstances.

The seventh assignment of error complains of the following instruction: "You are further charged that if you find from the evidence in this case that the defendant railway company did not provide a watch, or light, or other signal of danger at the place where the deceased was injured, and you further find from the evidence that such failure on the part of the defendant railway company was the direct and proximate cause of the injury which the deceased received, and you further find from the evidence that a person of ordinary care and prudence, under the same or similar circumstances, would have provided a watchman or light at said place, then, and in that event, such failure on the part of the defendant would constitute negligence. In this connection, however, you are charged that if you find from the evidence in this case, and under the charges hereinbefore given you, that the deceased, Eitel, was a trespasser upon the defendant railway company's track, or if you find that the deceased was guilty of contributory negligence, then, and in that event, the rule of law herein announced would not apply, and, if you so find, you will find for the defendant railway company upon this issue." It is insisted that there is no allegation in the plaintiff's petition that authorized submitting to the jury the issue as to whether the appellant failed to provide a watch, or light, or other signal of danger at the place where the deceased was injured. The allegations of negligence are as follows: "At the time said car was caused to be moved in the manner as aforesaid there was no warning of any kind given; the whistle of the engine was not blown, nor was the bell rung, nor was there any watchman or light on said car or cars to warn the boy

of his danger. That said agents, servants, and employes of said defendant company were guilty of gross carelessness and negligence in propelling the said train of cars and locomotive against said standing car in the manner aforesaid, and causing the same to move—that is, suddenly and rapidly, and without ringing the bell or blowing the whistle, and without lights on said car or cars, and without having a watchman on the lookout to warn the said Horace Eitel of his danger; and that said acts of negligence and carelessness were the proximate cause of the death of said Horace Eitel." The averment might be sufficient to charge that there was no watchman at the place where the deceased was injured, but the averment does not complain that there was no light or other signal of danger at the place where the deceased was injured. It does complain that there was no light on the car or cars. The charge complained of submitted as an issue of negligence whether there was a light or other signal of danger at the place where the deceased was injured. There is no such averment in the petition.

For the errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

SULLIVAN et al. v. KING et al.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

GARNISHMENT — BANKRUPTCY — WAIVER OF GARNISHMENT—PETITION IN BANKRUPTCY—CONSTRUCTION.

1. In proceedings in bankruptcy, the alleged bankrupt filed a plea in abatement, that the petitioner was plaintiff in a garnishment suit then pending, which had been brought within four months, whereupon petitioners filed a supplemental petition in which they waived, released, and relinquished all "liens, advantages, or preferences" by virtue of the garnishment. *Held*, that such supplemental petition did not amount to an abandonment of the garnishment proceedings, but merely waived any preference in favor of plaintiff therein, and hence the garnishment might be prosecuted after refusal of the federal court to declare bankruptcy.

2. On appeal from a judgment dismissing garnishment proceedings, certiorari would not be granted to bring up a further record, showing that a motion had been filed to dismiss the writ for defects, where such motion had not been prosecuted or passed on by the trial court.

On Rehearing.

3. Bankr. Act 1898, § 67c [U. S. Comp. St. 1901, p. 3449], enacts that a lien obtained in any suit at law or in equity, including an attachment, which was begun against one within four months before the filing of a petition in bankruptcy against such person, shall be dissolved by the adjudication of such person to be a bankrupt. *Held*, that a garnishment was not dissolved by the mere filing of a petition in bankruptcy against defendant in the garnishment suit, and, an adjudication of bankruptcy being refused, the garnishment remained in force.

4. A plaintiff in garnishment does not waive such proceeding by petitioning in the federal court that defendant be declared a bankrupt.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by D. Sullivan & Co. against W. W. King; the International & Great Northern Railway Company, garnishee. From a judgment dismissing the garnishment proceedings, plaintiffs appeal. Reversed.

Appellants brought action against W. W. King. They instituted this garnishment proceeding, based on said demand; the garnishee, the International & Great Northern Railway Company, answering that it had deposited with the clerk of the district court the sum it was indebted to W. W. King, which the record shows was the case. In a proceeding in the District Court of the United States for the Western District of Texas, D. Sullivan & Co. were parties, seeking to have W. W. King adjudged a bankrupt, for alleged insolvency and acts of bankruptcy. It appears that in this bankruptcy proceeding the defendant King filed a plea in abatement, which was overruled by the court, and the matter allowed to proceed, because of an express waiver by the petitioners in a supplemental petition in that proceeding, as will be understood from the following copy of the order entered: "D. Sullivan & Co. et al. v. W. W. King, Defendant. (No. 228.) In Bankruptcy. In the District Court of the U. S. in and for the Western District of Texas. On this, the 13th day of June, 1902, came on to be heard the defendant's plea in abatement of this cause, filed herein on said day, when counsel for the petitioning creditors admitted in open court that plaintiffs, D. Sullivan & Company, on the 27th day of March, 1902, filed in the district court of Bexar county, Texas, the Forty-Fifth judicial district, a suit against said defendant for the sum of \$2,124.38, together with ten per cent. attorney's fees, and contemporaneously with the filing of said suit made the affidavit and gave the bond required by the laws of the state of Texas for the issuance of a writ of garnishment, and procured to be issued writs of garnishment, which were served on the International & Great Northern Railroad Company and Mrs. Brenda C. Vinson, by which the interest of W. W. King in the judgment in the case of B. C. Vinson against the International & Great Northern Railroad Company was garnished, and that said suit and garnishment proceedings were pending at the time of the filing of the petition in this cause, and at the time of the hearing of the said motion, when the plaintiffs, on the 14th day of June, 1902, filed a second supplemental petition, in which they waived in this court all preference by reason of said suit and garnishment proceedings in favor of all the creditors of the said defendant; and the court, after considering said plea and the admission of counsel, and said waiver, is of the opinion said plea should be overruled. Wherefore it is ordered, adjudged, and decreed by the court that said plea be, and the same is, overruled, to which ruling defendant

then and there excepted. The clerk will duly enter this order of record. [Signed] T. S. Maxey, Judge." The waiver, as it was pleaded by D. Sullivan & Co., is as follows: "That as to their garnishment instituted in the district court of Bexar county, Texas, referred to in said plea of the defendant, and arising out of cause No. 13,569 in the district court of Bexar county, the Forty-Fifth district court of Bexar county, Texas, numbered 13,579 and 13,578 in said court, which said cause No. 13,569 is referred to in the original petition of plaintiffs, said plaintiffs, D. Sullivan & Co., for the benefit of any and all creditors of said King, hereby formally waive, surrender, release, and relinquish any and all liens, advantages, or preferences which they may have, or might hereafter obtain or acquire, by virtue of such garnishments, and all agreements entered into in reference thereto, or by virtue of any judgment which may be rendered in said suit or suits instituted in said district court." In the present case a motion to dismiss the garnishment proceeding was filed upon the ground that in the federal court, in the said supplemental petition, a copy of which was attached, plaintiffs had relinquished and abandoned these garnishment proceedings. The motion or plea was sustained, and from such ruling this appeal is taken. We here copy the judgment: "D. Sullivan & Company v. I. & G. N. Ry. Co. and Brenda C. Vinson, Garnishee. (Nos. 13,578 and 13,579.) June 28, 1902. This day came on to be considered defendants' motion to vacate the order heretofore entered in this cause on the 21st day of June, 1902, and, it appearing to the court that this court is now vested with jurisdiction, it is ordered and decreed that the said motion this day filed be, and the same is hereby, granted, and the order in this cause by this court on the 21st day of June, 1902, be, and the same is hereby, vacated, and hereby set aside. It is further ordered by the court that the said motion filed herein on the 19th day of June, 1902, be, and the same is hereby, granted, and said suit is hereby dismissed, at plaintiff's costs, for which execution may issue. To which plaintiff excepted, and in open court gave notice of appeal to the court of civil appeals, Fourth Supreme Judicial District. Clerk will rule in same decree in both case No. 13,579 and No. 13,578." The result of the bankruptcy proceeding was that the court refused to grant the petition, from which an appeal was sought to be taken to the Circuit Court of Appeals.

Henry E. Vernor and J. C. Sullivan, for appellants. Newton & Ward, Geo. C. Altgelt, Carter & Lewis, Jno. Sehorn, and Simp Russ, for appellees.

JAMES, C. J. (after stating the facts). The first and second assignments of error relate to a question which we think does not

require discussion from us. At the time the district judge rendered his judgment in the present case, it appears that no appeal had been taken from the judgment rendered in the federal court, within ten days, as the act reads; but the judge, by an order, allowed 90 days to perfect the appeal to the Circuit Court of Appeals. As the 10 days had elapsed, the district judge trying the present case considered the judgment of the federal court as final, and proceeded to hear and determine this cause. It is now shown by an agreement filed in this court that the appeal attempted to be taken, and which is claimed to have suspended the state court's jurisdiction of this matter until such appeal was heard and determined, has been, on motion, dismissed by the appellate court at New Orleans. Therefore the judgment refusing to declare W. W. King a bankrupt was, to all intents and purposes, final, at the time the trial court rendered the judgment now appealed from, and such judgment was not prematurely rendered.

The remaining assignments are directed to the effect given by the trial court to the waiver contained in D. Sullivan & Co.'s supplemental petition in the bankruptcy proceeding. The record before us discloses that in that cause the defendant pleaded in abatement that this petitioner had this and other garnishment suits then pending, which had been sued out within four months. To counteract this motion, petitioners, in a supplemental pleading, made the waiver which is above shown, in terms; and it appears that the court, in view of this waiver, overruled the plea. It seems to us that, had the court refused to adjudge the defendant a bankrupt, without any such waiver having been made, the garnishment would have stood as if no bankruptcy proceeding had ever been instituted, and could have been prosecuted. It seems to us, further, that they can now be prosecuted, unless the waiver amounted to an abandonment or dismissal of the same. *Brandenburg on Bankruptcy*, p. 171. This is the question upon which the trial court acted in dismissing the garnishment, holding that the waiver operated as an abandonment, and in this we think the court erred. We are of opinion that, under the circumstances, the appellants having evidently saved a dismissal of their bankruptcy petition, and having induced the federal judge to proceed with it, by voluntarily filing this waiver, they should be held to its terms. But its terms do not amount to an abandonment or renunciation of the garnishments. It "waives, surrenders, releases, and relinquishes," to any and all the creditors of defendant, what? The liens, advantages, or preferences obtained by them by reason of the garnishments, or thereafter to be obtained by reason of them, or by any agreements or judgments rendered in such proceedings. The waiver clearly contemplated the prosecution of such garnishment, in the interest of all the creditors; petition-

ers simply submitting to share all benefits accruing from said writs, with the creditors, without preference to themselves. In other words, they thereby simply submitted to placing themselves on an equality with other creditors of defendant in respect to the benefits of the garnishment proceedings. We conclude, therefore, that the court erred in dismissing the garnishment. Plaintiffs have not waived or lost their right to prosecute it, and this is all that is really necessary to decide on this appeal. If they succeed in securing the fund, questions may arise between them and other creditors as to the latter's right to participate in the recovery; but these questions are not before us, and, of course, we are not to anticipate them. It is enough at this time to decide that plaintiff's waiver did not, of itself, warrant a dismissal of the garnishment proceeding.

Before submission of the case, appellee asked for a writ of certiorari to bring up a further record showing that a motion had been filed in the district court to dismiss the writ of garnishment for alleged fatal defects therein appearing on the face of the papers; appellee claiming that, if such motion should appear to be well taken, this court ought, upon that ground alone, to affirm the judgment, although the motion had not been prosecuted nor passed on by the district court. We refused the certiorari because the motion appears not to have been presented to, nor passed on by, the trial court. The record before us indicates that, prior to the garnishment, defendant had assigned the fund in question to two of his creditors, and plaintiffs' purpose in prosecuting the case is doubtless to claim that these assignments were void, for some reason, notwithstanding defendants' clear legal right to prefer creditors. These issues have not been raised, so far as this record shows; the case not having reached that stage. In fact, it is not clear that the assignees have been brought in as parties.

Reversed and remanded.

On Motion for Rehearing.

(Feb. 25, 1903.)

Section 67c of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3449] enacts that a lien obtained in any suit or proceeding at law or in equity, including an attachment upon mesne process, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, etc. The language of the act is unmistakable. The garnishment in question was not dissolved by the filing of the bankrupt proceeding, but would have been dissolved by the adjudication of defendant to be a bankrupt. As such adjudication was not made, but refused, the garnishment was not dissolved. In our opinion, there is, un-

der these circumstances, no ground for the position that the garnishment was affected by the bankruptcy proceeding, except that it was suspended pending the judgment of the federal court on the application to adjudicate defendant a bankrupt. We regard the contention that plaintiffs abandoned and waived their garnishment suit, by resorting to the federal court to ask that defendant be declared a bankrupt, as wholly untenable.

The motion is overruled.

DENNY v. STOKES.

(Court of Civil Appeals of Texas. Feb. 10, 1903.)

MENTAL CAPACITY—EVIDENCE—SUFFICIENCY—JUDGMENT—UNSOUND REASON.

1. Two months before deceased died of consumption, his brother, without authority, turned over the fixtures of his jewelry store, and a part of the jewelry therein, to one of his creditors, in payment of the debt; taking up deceased's note, and giving a bill of sale in deceased's name; and the creditor took possession of the goods. The brother then informed deceased of what had been done, and he said he was glad of it. There was evidence that when he was first taken sick, several months before the settlement, he was extremely low, so that very few persons were allowed to see him, and, after the first week, would only recognize a few of his most intimate friends. After this he was removed to his brother's, at another town; and the brother testified that he was satisfied deceased's mental condition was such that he was incapable of transacting business, and that, "If you talked to him about any subject for awhile, he would either fall asleep, or become totally exhausted, so that he did not have capacity to listen or apply his mind to the subject." *Held*, that a finding that deceased was not lacking in mental capacity to ratify the settlement was justified; the testimony not overcoming the presumption of sanity.

2. Where a judgment can be sustained on the facts found by the court, it is immaterial that the court gave an unsound reason therefor.

Appeal from district court, Houston county; John Young Gooch, Judge.

Action by W. H. Denny, as administrator of the estate of H. L. Henderson, deceased, against R. C. Stokes. From a judgment for defendant, plaintiff appeals. Affirmed.

Aldrich & Crook, for appellant. Moore & Newman, for appellee.

PLEASANTS, J. Appellant, as administrator of the estate of H. L. Henderson, deceased, brought this suit against appellee to recover damages for the wrongful conversion of a stock of jewelry, jeweler's and watchmaker's tools, and shop furniture and fixtures, of the alleged value of \$2,900. The petition alleges that the property above described was owned by the said H. L. Henderson, and that the defendant, on or about the 15th day of March, and while the said Henderson was sick and was mentally and physically unable to transact any business, wrongfully took possession of said property,

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 3408.

and converted the same to his own use and benefit, to plaintiff's damage in the sum of \$3,000, for which amount judgment is prayed. The defendant answered by general denial, and specially pleaded that H. L. Henderson was indebted to him in the sum of \$1,500, evidenced by his promissory notes, which were secured by a lien upon the property of the said Henderson above described, and was further indebted to him for rent of the building in which said jewelry business was conducted, which rent was secured by a landlord's lien upon said property; "that during the last sickness of the said H. L. Henderson, about the middle of January, 1901, D. W. Henderson, a brother of H. L. Henderson, claiming to have authority, and who was acting as the agent of the said H. L. Henderson, and at the instance and request of the said H. L. Henderson, and in cancellation of the indebtedness due the defendant by the said H. L. Henderson, delivered to defendant a sufficient amount of the stock of jewelry, etc., on which the said lien existed, to satisfy the debt; that it was agreed by and between the said D. W. Henderson and defendant that the said notes, liens, etc., should be by them deposited with the First National Bank, and there left subject to the order of the said H. L. Henderson, and, when he ratified and confirmed the said sale so made by the said D. W. Henderson, that said notes, receipts, liens, etc., should be then and there delivered to the said H. L. Henderson; that said notes, liens, etc., was so placed with said bank, and thereafter the said H. L. Henderson placed with the said bank a bill of sale to all the property claimed by defendant, and took up his said notes, receipts, etc.; and that this constituted a full and complete settlement by and between the said H. L. Henderson and appellee." The cause was tried in the court below without the intervention of a jury, and judgment rendered in favor of the defendant.

The evidence shows that H. L. Henderson died March 20, 1901, at Loma, Walker county, Tex., and that the appellant is the duly appointed and qualified administrator of his estate. For some time prior to his death, H. L. Henderson had been conducting a jewelry business at Crockett, Houston county. He was taken sick some time in the fall of 1900, and, after being sick at Crockett for six weeks or two months, he was taken to the home of his brother, W. D. Henderson, in Walker county, at which place he died. After he was removed to Walker county, his brother, W. D. Henderson, came to Crockett, and took charge of the jewelry business. The defendant Stokes demanded a settlement of the indebtedness due him by H. L. Henderson, and in settlement of same he agreed to take the furniture and fixtures in the jewelry store, and a sufficient amount of the jewelry, at a price agreed upon between himself and W. D. Henderson, to satisfy said

indebtedness. All of these fixtures and furniture, and a portion of the jewelry, had been sold to H. L. Henderson by the defendant, and the notes due him were for the purchase money of same, and recited that a lien was retained upon said property to secure their payment. All of the furniture and fixtures, and a portion of the jewelry, was turned over by W. D. Henderson to the defendant, in accordance with the agreement above mentioned. The indebtedness due defendant by H. L. Henderson amounted to \$1,474. The notes held by the defendant were deposited with the bank at Crockett, with instructions to turn same over to W. D. Henderson, when he should deliver to the bank a bill of sale signed by H. L. Henderson, conveying the property to the defendant. This settlement was made with W. D. Henderson in January, 1901. W. D. Henderson carried a bill of sale to the property, prepared by the defendant, to his brother, in Walker county, for the purpose of having him execute it. He testified, however, that his brother was too sick to attend to the matter, and he signed H. L. Henderson's name to the instrument, without saying anything to him about it, and took it back to Crockett, delivered it to the bank, and got the notes. Some time after this, W. D. Henderson told H. L. Henderson of the settlement with Stokes, and the latter said he was glad of it. W. D. Henderson testified that he had no authority from H. L. Henderson to take charge of his business or to make the settlement with the defendant; that he was satisfied his brother's mental and physical condition was such that he was incapable of attending to business, and he does not think he remembered what indebtedness there was against him, and did not understand or appreciate what he was saying when he stated that he was glad the settlement with the defendant had been made. There is no issue raised by the evidence as to the amount of the indebtedness due the defendant, nor as to the reasonableness of the price paid by defendant for the property. H. L. Henderson died with consumption. W. A. Norris, at whose house he was boarding when he was taken sick, testified that he declined very rapidly while he remained at his house; that he was just barely alive, and scarcely knew any one; that only a few friends were allowed to see him; and that, after the first week of his sickness, he would only recognize his two brothers, the witness, and two other friends. W. D. Henderson further testified that, at the time he told H. L. Henderson of the settlement with the defendant, said Henderson's condition was such that, if you should introduce any subject, and talk to him about it for a while, that he would either fall asleep, or become totally exhausted, so that he did not have the capacity to listen to you, or to apply his mind to the subject about which you were talking to him. This is all the testimony in the record upon

the issue of the mental condition of H. L. Henderson at the time he ratified the settlement made with the defendant by W. D. Henderson. The court below found as a fact that this evidence failed to establish that H. L. Henderson was at the time of the sale of the goods to defendant of unsound mind, and so deficient mentally that he could neither make a sale or ratify the act of his brother, who purported to act as his agent in making such sale.

The law presumes all persons to be of sound mind and capable of understanding contracts entered into by them, and, when a contract is assailed on the ground of the mental incapacity of one of the parties, the burden is upon the person denying the validity of the contract to show such incapacity. It is a well-settled rule of evidence that a nonexpert witness is only permitted to give his opinion as to the sanity or insanity of a person, whose mental condition at a particular time is the issue before the court or jury, when such witness states the facts upon which his opinion is based. This rule presupposes that the court or jury is as competent to pass upon the facts from which sanity or insanity is to be inferred, as such witness. The opinion of the witness is to be given weight only when, in the judgment of the court or jury, it is a reasonable and probable conclusion from the facts stated; and its weight is always a question for the jury, to be determined upon a consideration of all the evidence in the case. It follows that unless the evidence in the particular case is such that the only reasonable conclusion that can be drawn therefrom is that the person whose mental condition is the issue to be determined was of unsound mind, or that any other conclusion would be so against the great weight and preponderance of the evidence as to indicate that it was the result of undue influence or improper motive, the judgment of the court or jury, finding that such person is of sound mind, should not be set aside on the ground that it is not supported by the evidence, or is against the weight and preponderance of the evidence.

The evidence in this case shows that H. L. Henderson died of consumption, with which disease he had been suffering several months before his death. It is a matter of common knowledge that consumption is not a disease of the mind, and that ordinarily such disease does not affect the mind of the sufferer, except by sympathy with the weakness of the body. The facts in this case show that only in this way and to this extent was H. L. Henderson's mind affected at any time. While he remained at Crockett, after he was taken sick, the evidence shows that he was extremely low, and was so sick that his physician would allow very few persons to see him, and after the first week of his sick-

ness he would only recognize a few of his most intimate friends. But this was several months before he ratified the settlement made with the defendant by his brother, W. D. Henderson. We have no evidence as to his condition after he was taken from Crockett, except the statements of W. D. Henderson that he was satisfied that his brother's mental condition was such that he was incapable of transacting business, and that "if you would introduce any subject, and talk to him about it for a while, he would either fall asleep, or that he would become totally exhausted, so that he did not have capacity to listen to you, or apply his mind to the subject about which you were talking to him." This witness does not say that H. L. Henderson fell asleep while witness was telling him of the settlement with appellee, or became so exhausted that he did not listen to what witness was saying. On the contrary, his reply to witness indicates that he fully understood what was said to him. There is no question as to amount of defendant's debt, and that same was due prior to the time the settlement was made, nor as to the settlement being a fair one. H. L. Henderson, knowing that he owed this debt, and that the same was due, upon being told by his brother that he had made a settlement of the same, and the terms of said settlement being confessedly fair and just, would naturally have said to his brother that he was glad such settlement had been made. We think, as before stated, his reply indicates that he fully understood what had been done, and approved of it. At most, there is no evidence in the record, except the opinion of W. D. Henderson, that he did not understand what he was saying. In addition to this, as before indicated, the evidence shows that H. L. Henderson lived for a month or more after he had ratified the sale, and it is therefore plain that he was not in as extremely low a condition physically as he seemed to be while at Crockett. Under this evidence, we cannot hold that the finding of the trial court that H. L. Henderson was not of unsound mind at the time he ratified the settlement made by W. D. Henderson with the defendant is unsupported by the evidence, or is so against the great weight and preponderance of the evidence as to require a reversal of the judgment, and the assignment presenting this issue cannot be sustained. It is immaterial that the trial court gave an unsound reason for his judgment, if such judgment can be sustained upon the facts found by the court. The remaining assignments present no issue which it is necessary for us to consider.

Upon the facts found by the trial court, no other judgment than one in favor of the defendant could have been rendered, and said judgment is affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. AUSTIN.

(Court of Civil Appeals of Texas. Feb. 7, 1908.)

MASTER AND SERVANT — RAILROADS — INJURIES TO SECTION MAN—ASSUMPTION OF RISK—QUESTION FOR JURY.

1. Plaintiff, who was 32 years of age and had previously hauled logs, sawed timber, etc., was employed in a railroad section gang, and was ordered to assist in throwing some railroad ties from a box car. Through defects in the fastenings of the door it could not be opened to its full width, and plaintiff threw his end of a tie, which struck the side of the door, and caused the other end of the tie to hit plaintiff, causing his injuries. *Held*, that the danger was one of the risks of the employment which plaintiff assumed.

2. Where the evidence wholly failed to show that the throwing of ties from a box car required any more skill or knowledge than that possessed by plaintiff, who was injured in so doing, it was error to submit such issue to the jury.

Appeal from district court, Hunt county; N. C. Connor, Judge.

Action by C. A. Austin against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. B. Perkins and Perkins & Craddock, for appellant. Looney & Clark, for appellee.

TEMPLETON, J. This suit was brought by C. A. Austin, an employé of the St. Louis Southwestern Railway Company of Texas, against said company to recover damages for injuries sustained by him while engaged in unloading cross-ties. On a jury trial he obtained judgment, hence this appeal.

The ties were in a box car which had been set out on a side track, and the car was standing still when the accident occurred. Appellee and Driggers, members of a section gang, were ordered by the foreman, Reed, to get in the car and throw out some of the ties. They got in, and threw some 10 or 15 ties out at the east door of the car. Reed then ordered them to throw a like number out at the door on the other side. The door was closed or partly closed, and appellee opened it. There was something the matter with the fastenings, and he could not open the door to its full width by from 6 to 12 inches. He and Driggers then began throwing out ties. Appellee was hurt while the first or second tie was being thrown out. Appellee threw his end, and it struck the side of the door. This caused Driggers to lose control of his end, and the tie flew around, hit appellee, and injured him. Appellee had never assisted in throwing ties out of a box car before that time, and Reed knew the fact, but had not instructed appellee how to perform that duty, or warned him of the dangers attending its performance. The evidence further shows that a tie is about 8 feet long 10 inches thick, and 8 inches broad, and weighs about 250 pounds; that two men are required in unloading ties, one at each end; that the ends

are not thrown simultaneously, but one end at a time; that the ties were unloaded in this manner on the occasion of the accident. No better or safer means of unloading ties is suggested by the testimony. It follows that appellee's injury cannot be attributed, under the evidence, to negligence arising from the manner in which the tie was handled. The negligence, if any, consisted in the foreman requiring appellee to throw ties out of a partially open door, without warning him of the danger. It is not clear from the evidence that the foreman knew that the door fastenings were defective or that the door was not open to its full width, and the evidence tends to show that the company had exercised due care to have the car door in proper condition and repair. Even if the company had failed to exercise such care, or the foreman knew of the defect in the door, the fact would not conclude the question of liability. Appellee knew that the door was defective and that it was not fully open. In attempting to throw the tie out at such a door, he assumed all the risks incident to his act of which he knew or ought to have known. Every condition which made the act dangerous was known to him, and the danger arising from the conditions was obvious. As appellee knew that the door was not open to its full width, he was bound to know that the fact increased the danger of one end of the ties striking the side of the opening. He was also bound to know that, if the end of the tie did strike the side of the opening, there was danger of the tie flying around and hitting him, if he was within reach. A man of the age and experience of appellee must be held to have known these facts, although he may have been without any special skill or knowledge in unloading ties. He was 32 years old, and had been raised on a farm. He had plowed, hoed, picked cotton, sawed wood, chopped wood, drove wagons, helped clear new ground, hauled logs, cut cord wood, sawed timber, made boards, and handled cord wood. He must have known the danger of the act he was doing, as well as the conditions which made it dangerous, and he therefore assumed the risks which caused his injury. Such being the case, it is immaterial that he received no instruction or warning. The foreman could not have informed him of any fact of which he was not already aware, or warned him against any danger of which he was not cognizant. *Oil Co. v. Shaw* (Tex. Civ. App.) 65 S. W. 693, and authorities there cited. See, also, *Webb v. Railway Co.* (Tex. Civ. App.) 65 S. W. 684.

The court submitted to the jury the issue whether skill or knowledge was required in unloading ties, as a basis, in part, of a recovery by plaintiff. As the evidence wholly fails to show that any skill or knowledge, other than that possessed by the plaintiff, was necessary, the charge was erroneous, and the contention of appellant that the

charge was upon an issue not raised by the evidence must be sustained.

In view of what has been said above, it is not necessary to discuss, in detail, the remaining assignments of error, which relate principally to charges given and refused on the issue of assumed risk. While the charge given was correct as far as it went, appellant was entitled to have the issue presented more fully than was done in the main charge. The special charges requested and refused did not state the law more strongly in favor of appellant than was warranted by the facts of the case.

The judgment is reversed, and the cause remanded.

SAN ANTONIO & A. P. RY. CO. v. GONZALES.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

CONVICT—HIRING OUT TO RAILROAD COMPANY—INJURY—NEGLECTANCE OF COMPANY—INSTRUCTIONS—RIGHT OF CONVICT TO PROTECTION—SUPERINTENDENCE BY STATE OFFICER—EFFECT.

1. In an action for injury to a convict hired out to a railroad company, the court instructed that if the convict, while rightfully upon the company's platform, and attempting to load goods on a flat car, was struck by a side-brake rod upon a moving car, which, through the company's negligence projected over the platform, and if in the exercise of ordinary care the company should have known of the defective rod, the jury should find for plaintiff, unless by use of ordinary care plaintiff could have seen the rod and avoided it. *Held*, that any error in the instructions was favorable to the company.

2. A convict, hired out to a railroad company, but in the custody and under the orders of a state officer, may recover damages for injuries inflicted on him by the company's negligence.

3. The convict, while on a railroad platform loading on a car goods which the railroad company had deposited there for that purpose, was struck by a brake rod negligently allowed to project beyond the side of a moving car. *Held*, that it would not affect the convict's right of recovery that at the time of injury he was disobeying the orders of the state officer.

4. Nor would it affect the convict's right of recovery had the work he was doing been for the state instead of for the company.

Appeal from district court, Gonzales county; M. Kennon, Judge.

Action by Bernardino Gonzales against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Harwood & Walsh, for appellant. S. H. Hopkins and J. W. Rainbolt, for appellee.

NEILL, J. This suit was brought by the appellee against appellant to recover damages for personal injuries alleged to have been inflicted upon him by the negligence of the railway company. The appellant answered by general and special exceptions, a general denial, and a special plea of con-

tributory negligence. The trial of the case resulted in a judgment in favor of the appellee for \$2,000, from which appellant has appealed.

Conclusions of Fact.

On November 2, 1900, the appellee was one of a gang of penitentiary convicts hired by the state of Texas to the appellant to work on its railroad. The convicts, during the term of their employment, were in the custody and under the control of one E. B. Stedman, a sergeant in the employ of the state of Texas, who was also employed by appellant as an assistant section foreman in working the gang of convicts. While appellant's section foreman directed and superintended the work done by them, in doing the work the convicts were under the immediate control, supervision, direction, and order of the sergeant, whose orders they were compelled to obey, any disobedience of them subjecting the convicts to punishment by flogging. During the time they were hired to the appellant, the rations were furnished the convicts by the state. On the day stated, the gang of convicts having ceased work for dinner at Slayden, the appellee and another convict were ordered by the sergeant to throw a sack of peas, furnished as rations, upon a flat car of a passing train, so that it could be carried to the commissary car in which the rations of the gang were stored, and, while in the act of obeying the order, appellee was struck on the head by a brake rod, which appellant had negligently permitted to become so bent as to project over the platform where appellee was at the time endeavoring to obey the order of the sergeant, and was thereby knocked from the platform under the wheels of the car, which ran over and mashed and mangled his foot and ankle so as to render their amputation necessary. The appellee was neither guilty of nor chargeable with any negligence proximately contributing to his injury, but the same was proximately caused by the negligence of appellant in running the train on which there was a car with a brake rod projecting over the platform where appellee was doing the work.

Conclusions of Law.

As the assignments of error are directed to the refusal of the court to give a number of special charges asked by appellant, and complain of the charge given, we will, in order to discuss them intelligently, insert the charge of the court, as well as such special instructions as were given at appellant's instance. Before doing so, we will remark that we believe that, when they are read and considered in reference to the evidence, they will be found to constitute a complete refutation of appellant's assignments of error.

After properly defining negligence and contributory negligence, the main charge of the court proceeds as follows: "(3) If you find

*Rehearing denied February 26, 1903, and writ of error denied by supreme court.

¶ 2. See *Convicts*, vol. 11, Cent. Dig. § 16.

from the evidence that on or about the 2d day of November, 1900, the plaintiff was a convict in charge of a sergeant at Slayden; that he was on the platform of the defendant's station at Slayden, and that he was rightfully upon said platform and rightfully at the place on said platform that he was at the time he was injured; and that, being at said place, he attempted to put a sack of peas upon a flat car attached to one of defendant's engines, and then in motion; and if you further find from the evidence that while attempting to put said sack of peas upon the car, a side-brake rod upon one of the flat cars of defendant, also attached to said engine and then in motion, was bent so as to project over the platform upon which plaintiff then stood, and that, by reason of its so projecting, said brake rod struck the plaintiff and knocked him from the platform to the ground; that thereby plaintiff's foot was crushed by defendant's train in such a manner as to necessitate the amputation of the limb above the ankle and below the knee; and if you further find from the evidence that the condition of the brake rod was known to the agents and servants of defendant in charge of the convict train, or if, in the exercise of ordinary care, its condition ought to have been known to said servants and agents of defendant, previous to the accident and in time to remedy the defect, and was known to the plaintiff; and if you further find from the evidence that as to the plaintiff it was negligence on the part of the defendant to operate the car upon which the bent brake was as it was then operated, and that the condition of the brake was the result of negligence on the part of the defendant, and that such negligence was the proximate cause of the injury to the plaintiff—then the plaintiff would be entitled to recover, unless you find that he was guilty of such contributory negligence on his part as to preclude his recovery, in regard to which you will be further charged." In special charge No. 5, given at appellant's request, negligence and contributory negligence are again defined. After these definitions such charge is as follows: "If, therefore, you believe from the evidence in this case that the plaintiff, Bernardino Gonzales, while attempting to load a sack of peas on a loaded flat car, and was knocked down and injured by being struck on the side of the head by a side brake on said flat car; and if you further so believe that the said Gonzales was guilty of negligence as negligence is hereinbefore explained, in attempting to load said peas on the said flat car loaded with dirt at the time and place and under the circumstances he was there; or if you believe from the evidence that the said Gonzales was attempting to load said sack of peas on said flat car in disobedience to his orders; and if you believe that he was guilty of negligence in failing to use ordinary care and proper care to exercise his faculty of seeing

said side brake; and if you further believe that such negligence on the part of the said Gonzales approximately caused or contributed to cause his injuries—then you will return a verdict for the defendant, the San Antonio & Aransas Pass Railway Company, no matter if you should find that the said side brake was actually bent and leaning out over the platform, or whether it was standing in its natural position. The condition or position of the brake under these circumstances would make no difference, and the plaintiff cannot recover." Special charge No. 6, given at appellant's instance, also contains definitions of negligence and contributory negligence. After these definitions, it proceeds as follows: "If, therefore, you believe from the evidence in this case that the plaintiff, Bernardino Gonzales, while attempting to load a sack of peas on a flat car, received the injuries complained of by being struck on the side of the head by a side brake of the flat car; and if you further so believe that the said Gonzales was acquainted with the said flat cars, and had been working in and around the same for a sufficient length of time for him to have become familiar with said flat cars and side brakes; and if you further believe that he could have seen the said side brakes by the exercise of ordinary care and using his eyes; or if you believe that the danger was apparent to an ordinary person, and that in the face of said danger the said Gonzales attempted to pitch said sack of peas on the car, and thereby was guilty of negligence and failure to use ordinary care and proper care to exercise his faculty of seeing; and if you believe that such negligence on the part of the said Gonzales approximately caused or contributed to his injuries—then you will return a verdict for the defendant, regardless of the condition of the said side brake; as it does not matter whether it was in good condition or whether it was bent over, the plaintiff cannot recover under these circumstances." Special charge No. 14, given at appellant's request, is as follows: "Railway companies are not bound under the law to furnish any particular kind of appliances on their trains, and they are not to be the judges of their suitability for the particular kind of work for which they are to be used, but it is their duty to see that they are to be reasonably safe, and to have them repaired if they are out of repair within a reasonable time after any defect is called to their attention; and if, under these circumstances, and after a reasonable notice, the railway company fails to put such appliances in such repair as will make them reasonably safe for its employes, and injury results from such defective appliances, the defendant is liable for damages, but even if injury does result it must be shown by the plaintiff that the injury, if any, grew out of the defective appliances. In this case you are instructed that, even if you should find that the brake was defec-

tive, or leaning, or bent, but that the accident to plaintiff was not caused thereby, but was caused from his leaning over the car to keep the bag of beans from falling, and that his head would have been struck, under the testimony, by the brake had it been in an upright and natural position, and the accident was caused from the act of leaning over the car, then you will find for the defendant."

If either the main charge or the special charges copied were complained of by the appellee, we should be constrained to hold that they are not free from criticism, but as to the appellant they present the law made by the pleadings and evidence in the most possible favorable light. To have given special charge No. 2, the refusal of which is made the subject of appellant's first assignment of error, would have been merely to repeat the substance of special charge No. 5, which was given to the jury at appellant's request.

By special charge No. 3 the court was requested to instruct the jury that "if they should find from the evidence that, in moving the sack of peas from the platform to the commissary car, Gonzales and the other convict assisting him attempted to throw the sack on the car which was being operated by defendant company, and if at the time he was acting under instructions and command of Stedman, sergeant of the state of Texas, then it would make no difference whether Stedman commanded Gonzales to throw the sack of peas on the flat car or whether he commanded him to desist from throwing said sack on the car; whether he did or did not give this command, if the evidence shows that he was acting under orders of Stedman and received his orders while so acting, he cannot recover." This charge ignores entirely the act of negligence of appellant in operating its train with a brake rod bent and extending over the platform where the appellee was compelled to be at work by the orders of the sergeant, who held him in custody for the state, and relieves the appellant from the act of such negligence, though it is shown to be the proximate cause and efficient cause of appellee's injury. Though a convict may be acting under the orders and instructions of an officer placed over him by the state, if while so acting he is injured by the negligence of a railway company, he is entitled to recover from it such damages as flow from the injuries inflicted by such negligence. It was the negligence of the appellant, and not appellee's obedience or disobedience to the order of the sergeant, that caused him to be knocked down and run over by the wheels of appellant's train.

Special charge No. 4 is to the effect that, if the jury believed from the evidence that at the time appellee received the injuries complained of he was disobeying the orders of the sergeant in attempting to throw a sack of peas upon a moving flat car loaded

with dirt, and that in such disobedience he was struck on the head by a side brake of the flat car, and thereby thrown under the train and had his foot cut off, he could not recover, no matter what condition the side brake was in that struck him, whether in or out of repair. This charge is subject to the same criticism given the one just considered. Though a convict, the appellant owed the appellee at least as much duty as it did members of the public liable to be where they would in all probability be injured by the projection of a brake rod propelled along its track. The case of *M. K. & T. Ry. Co. v. Scarborough*, 68 S. W. 196, 4 Tex. Ct. Rep. 905, is one where the plaintiff was knocked from a skidway by a piece of timber projecting from a moving car and run over and injured by the train, and this court held that the company was charged with the knowledge that members of the public were liable to be where they would in all probability be injured by projections from cars propelled along its track, and that it was the railway company's duty to save the public from such danger by seeing that the cars were free from such projections. In support of this holding we cite *Ry. v. Gee*, 66 S. W. 78, 3 Tex. Ct. Rep. 706; *Ry. v. Davie* (Ky.) 58 S. W. 698; *Doblecki v. Sharp*, 88 N. Y. 207; *Sullivan v. Ry.*, 2 South. 586, 4 Am. St. Rep. 239; *Hicks v. Ry.*, 64 Mo. 430; *Archer v. Ry.*, 106 N. Y. 589, 13 N. E. 318—which hold that a railway is responsible to persons who are injured, when they are where they had the right to be, and where the company might reasonably expect them to be, by the projection of anything from a car over where such persons were standing. The appellee not only had a right to be where he was when he was struck by the projecting brake rod, but he was compelled to be there. In being where he was he had no volition. He was not a free agent, but a convict and prisoner. When the railroad company unloaded the sacks of peas on the platform for the gang of convicts, it knew that some of them would be ordered there to remove the sacks to the commissary car, and, knowing this, it cannot escape the responsibility for the injury it inflicted upon the appellee by its negligence in running the car there along with a brake rod projecting over the platform where the sacks of peas were to be handled.

The appellant would have been as much liable for the act of negligence which caused appellee's injury if the work he was doing under the orders of Stedman was for the state, as it would have been had the work been done under Stedman's orders as an assistant foreman for the benefit of the railroad company. Therefore the appellant was not prejudiced by the failure of the court to give special charge No. 7 complained of in appellant's fourth assignment of error.

What we have said as to the assignments of error already considered, we believe, is

sufficient to show that there is no merit in any one of the remaining assignments.

There is no error assigned which entitles the appellant to a reversal of the judgment, and it is therefore affirmed.

**HOUSTON ELECTRIC ST. RY. CO. v.
ELVIS.***

(Court of Civil Appeals of Texas. Jan. 22, 1903.)

HARMLESS ERROR.

1. Where the undisputed facts in an action for injuries to a passenger on a street car showed that he was entitled to recover in any event, judgment in his favor was not reversible for error in the submission of the cause.

Error from district court, Harris county; Chas. E. Ashe, Judge.

Action by Frank Elvis against the Houston Electric Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Baker, Botts, Baker & Lovett and Jones & Oliver, for plaintiff in error. Hutcheson, Campbell & Hutcheson, for defendant in error.

GARRETT, C. J. This action was brought by the defendant in error, Frank Elvis, against the plaintiff in error, the Houston Electric Street Railway Company, in the district court for the Eleventh judicial district to recover damages for personal injuries received while a passenger on the railway of said company. The case was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$5,000, which the defendant seeks to reverse for errors assigned upon the action of the court below in the giving of instructions to the jury and the refusal to give certain special instructions requested by the defendant.

On October 17, 1899, the plaintiff received the injuries complained of while a passenger on one of the defendant's cars. The evidence showed that the car was being run at a high and dangerous rate of speed, when the trolley wire broke and fell upon and became wrapped around and involved with the car, the momentum of which gave such force as to break the guy wires and break and throw down five of the poles, which fell towards and threatened to strike the car, which jumped and pitched along the track. The plaintiff described the manner in which he was hurt as follows: "The car I was in was an open car with the seats running clear across the car. At the time the wire broke I was about two-thirds of the way back, and on the left-hand side of the car, which was the side I took when I first got on the car. I saw the wires on each side of the car, and at each end of the car. I judged that they were street car wires by the breaking and

by the way the car was lunging and pitching and the wires were dropping down upon the sides and the trolley poles breaking and falling. When that happened I pushed over to the right-hand side to keep some of the wires from striking me. I thought it was safer on the right-hand side than on the left-hand side, because I did not notice any wires close on the right-hand side. When I pushed over the car was lunging and pitching and going, I guess, as fast as it could. I judge from the way it was bounding along that it was on the track part of the time and on the ground a part of the time. The track was so rough along there one had to hold on with both hands on the front seat in order to keep in the car. Before I picked myself up in the street, I was sitting in the car, holding on with both hands to the seat in front of me, and the wires were dropping down on the left-hand side and also in front and in the rear, and I pushed over to the right-hand side to escape the wires, and the last recollection I have I was sitting there holding on with both hands looking straight ahead. When I picked myself up after the accident, I was about three car lengths in the rear of the car. The car stopped very soon after I got pulled off, or thrown off, whichever it was." The defendant offered no evidence to excuse the accident. We conclude that the plaintiff's injuries were caused by the negligence of the defendant without fault on his part, and that he sustained damages to the amount of the judgment.

The defendant has assigned error upon the following paragraph of the charge of the court: "If you believe from the evidence that the defendant, at or about the time and place mentioned in the plaintiff's petition, was operating one of its electric cars on which the plaintiff was riding as a passenger at a high and dangerous rate of speed, and that at said time the trolley wires and guy wires stretched over the line of its track at said point broke and fell upon the car or ground, and the trolley poles were thrown down and fell along the side of the car, and that the speed at which said car was being propelled, in connection with the breaking and falling of the trolley wires and guy wires and poles, caused said car to pitch and jump with such force and violence upon the track as to throw the plaintiff from the car upon the ground, or if you believe that the breaking of said wires and said poles appeared to the plaintiff to render his position in the car dangerous, and that plaintiff, acting upon apprehension of immediate danger of injury to himself, and in order to avoid danger, attempted to escape therefrom, in so doing then and there jumped from said car and fell upon the ground, or in such attempt to escape did then and there fall from the same on or against the ground, and that, as proximate cause of said fall, was thereby injured in one or more particulars, substantially as alleged in his petition, you will find

*Writ of error denied by supreme court.

for plaintiff, and assess his damages, if any, as hereinbefore directed, unless you should find for the defendant under other portions of this charge." We hardly think that the charge is subject to the objections urged against it. If it should be found by the jury that the evidence showed the facts set out in the charge, the fact of negligence would follow as a necessary result. But since the undisputed facts show that the plaintiff was entitled to recover, and that no other verdict could have been rendered, the judgment will not be reversed for error in the submission of the case. *Mex. Central Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103. We do not think that any of the assignments of error present any reason for a reversal of the judgment. It will therefore be affirmed.

Affirmed.

**SCOTTISH-AMERICAN MORTG. CO.,
Limited, et al., v. DAVIS et al.***

(Court of Civil Appeals of Texas. Nov. 22, 1902.)

REAL ESTATE BROKER—ACTION FOR COMMISSIONS—VENUE—LIABILITY OF AGENTS FOR SELLER—UNDISCLOSED DEFECT IN TITLE—EFFECT—OFFER OF SALE—ACCEPTANCE—MAILING LETTER—REFUSAL TO PURCHASE—SUFFICIENCY OF EVIDENCE.

1. In an action by a real estate broker for commissions, the purchaser secured by the broker, who lives in another county, cannot be made a party; being entitled to be sued only in the county of his residence.

2. Agents who employ a real estate broker to find a purchaser for their principal's lands are not liable to the broker for commissions; having acted within their authority, and fully disclosed their principal.

3. Mailing letter accepting a proposition to purchase land constitutes a sufficient acceptance thereof, so as to entitle the broker securing the purchaser to his commissions, and it will not affect the case that the sender intercepts the letter and secures its return to him before delivery to the addressee.

4. A real estate broker secured a purchaser, who instructed a third person to tell the broker that he had decided to take the land. The third person so informed the broker, who telegraphed and also wrote the fact to the vendor. The purchaser also mailed a letter of acceptance to the vendor, but intercepted it and withdrew it from the mails before the vendor received it. *Held*, that there was no neglect on the part of the broker to notify the vendor of the sale, which would forfeit his right to commission, even though the land had been sold before such notification to another purchaser.

5. In order to avail himself of the final refusal of a prospective purchaser, secured by a real estate broker, to take the land, because it is an ill-shaped tract, not in the form represented by the broker, the vendor, in an action by the broker for commissions, must show in what particular the shape of the land varied from the representations, so that the materiality of the variation can be determined.

6. Evidence in an action by a real estate broker for commissions considered, and *held* not to show such a misrepresentation as to the shape of the tract by the broker, misleading the purchaser, as to warrant the latter in refusing to complete the purchase, and deprive the broker of commissions.

Error from district court, Dallas county; Thos. F. Nash, Judge.

Action by W. S. Davis against the Scottish-American Mortgage Company, Limited, and others. Judgment for plaintiff, and certain defendants bring error. Modified, and motion for rehearing overruled.

Gano, Gano & Gano, for plaintiffs in error. Matlock, Miller & Dycus, for defendant in error W. S. Davis. W. P. Finley, for defendant in error J. R. Coutts.

RAINEY, C. J. W. S. Davis sued the Scottish-American Mortgage Company, Limited, and Brown Bros., to recover commissions alleged to have been earned by him in procuring a purchaser (one Coutts) for certain lands. Brown Bros. were the agents of said mortgage company, and represented it in the transaction. Plaintiff sought judgment against said Brown Bros. in the event the company was held not liable. The defendants answered generally and specially, but the special answer amounts to nothing more than a general denial, except that it alleges that if J. R. Coutts, the party whom Davis alleges he secured as a purchaser, did agree to purchase said land, they were not notified of the same, and that, if they are liable to Davis, the said Coutts is liable to them; and they pray that Coutts be made a party, etc. Coutts pleaded to the jurisdiction of the court, claiming the privilege of being sued in Parker county, the place of his residence. This plea was sustained. The case was submitted, as between the other parties, to the court, a jury being waived, and judgment was rendered in favor of the plaintiff.

Coutts lived in Parker county, and was entitled to the privilege of being sued in the county of his residence; there being no fact in the record which deprived him of such privilege. His plea to the jurisdiction was therefore properly sustained.

The court erred in rendering judgment against Brown Bros. They were acting for the mortgage company in the transaction. Their authority to so act was not questioned, and their principal was fully declared and known to Davis at the time he dealt with them. This being the case, no liability existed against them.

This brings us to the question of the liability of the mortgage company to Davis for the commissions claimed. Davis was authorized by Brown Bros. to procure a purchaser for the land, and his claim is that he found one Coutts, who was willing, able, and ready to purchase, but this is denied by the mortgage company. The evidence discloses that Brown Bros. resided in Austin, Tex. Davis resided in Ft. Worth, Tex., and the communication between them was through the mails. Coutts resided in Weatherford, and Davis first got in communication with him through Hon. I. W. Stephens, who stated to Davis that Coutts would like to purchase the land. After

*Writ of error granted by supreme court.

various communications between the parties, Brown Bros. submitted, through Davis, to Coutts, a proposition to sell. This Coutts declined. Davis then went to Weatherford, saw Coutts, and secured from him a written proposition to purchase. This was sent by Davis to Brown Bros., and on January 23, 1900, Brown Bros. returned the same to Davis, with this interlineation: "Subject to letter from Brown Bros. to W. S. Davis & Co., dated 20th of January, 1900." The letter of January 20, 1900, mentioned, related to a tax title on 12 sections of said land, and stated: "You will recollect that there is an old, absolutely invalid, tax title on twelve sections. We could clear off this title by suit easily, but prefer that the purchaser do it, and would pay half of the costs of the suit." The proposition, so interlined by Brown Bros., was sent to Coutts by Davis. After receiving same, Coutts, on the morning of January 26, 1900, met Judge Stephens in Weatherford, on his way to take the train for Ft. Worth, and told him (Stephens) that he could tell Davis that he (Coutts) had decided to take the land. Stephens said for him to confer direct with Brown Bros., which Coutts assented to. When Judge Stephens reached Ft. Worth, he told Davis of the conversation he had with Coutts. Davis on the same day wired Brown Bros. that Coutts had accepted and followed same with a letter. On that same day Coutts mailed to Brown Bros. the following letter, to wit: "January 26th, 1900. Messrs. Brown Bros., Austin, Texas—Gentlemen: You are hereby notified that I accept the interlineation above last line of first page of preliminary contract and will take the land as indicated by said agreement. I think, however, that you people ought to pay the whole cost of clearing title, but will not let that prevent the trade. You will please advise me what you think is best plan of procedure in clearing title. Shall we sue for same or act on the defense, and wait for adverse claimant to institute proceedings? The abstract received, which is too large for immediate examination. I accept, relying on your statement, and that it will show up as represented. Yours truly, J. R. Coutts." This letter never reached Brown Bros., it being intercepted the next day by a telegram sent by one Holland, at the instance of Coutts, to the postmaster at Austin, who returned it to Coutts; and on that day (27th) Coutts telegraphed Brown Bros. that he objected to the land on account of its shape, and declared the trade off. In the letter from Brown Bros. to Davis of January 22d, in which Coutts' proposal was returned, interlined by Brown Bros., they said, "Your commission, of course, will be payable only in the event of the sale going through according to the contract." This is the first time Brown Bros. said anything to Davis as to when the commissions were payable.

Appellee's right of recovery depends upon his having procured a purchaser who was willing, ready, and able to comply with the

terms proposed by Brown Bros. When the owner of land places it in the hands of an agent for sale, and nothing is said about the title, the law implies that he can make a good title to the land; and, if the agent finds a purchaser who is willing and able to purchase at the owner's price, he will be entitled to his commissions, although the title may be defective, and the trade fall through on that account. *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Davis v. Lawrence* (Kan.) 34 Pac. 1051; *Gauthier v. West* (Minn.) 47 N. W. 656; *Gerhart v. Peck*, 42 Mo. App. 644. When the land was placed in the hands of Davis, there was no stipulation that his commission should depend upon the condition of the title. The only stipulation, in effect, was that he would procure a purchaser willing and able to take the land on the terms proposed by the seller. He procured a purchaser who executed a written proposition in accordance with the seller's terms. Brown Bros. did not accept this, but imposed another condition relative to the cloud on the title to 12 sections. This condition was accepted by Coutts' mailing a letter of acceptance to Brown Bros., which letter was intercepted by Coutts, and never reached Brown Bros., but was returned to Coutts. The letter being intercepted, it is therefore claimed by appellant that such acceptance was not binding. It is held by the great weight of authority that, where negotiations relative to the sale of land are conducted through the mails, the contract is completed the moment the proposed purchaser mails a letter addressed to the party offering to sell, accepting the offer, if done within a reasonable time, and before he receives notice of a withdrawal of the offer to sell. *Blake v. Ins. Co.*, 67 Tex. 160, 2 S. W. 308, 60 Am. Rep. 15; *Kempner v. Cohn* (Ark.) 1 S. W. 869, 58 Am. Rep. 775; *Levy v. Cohen*, 4 Ga. 1; *Bryant v. Booze*, 55 Ga. 438; *Hunt v. Higman* (Iowa) 30 N. W. 769; *Taylor v. Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Ferrier v. Storer* (Iowa) 19 N. W. 280, 50 Am. Rep. 752; *Benj. Sales*, sec. 44; *Hallock v. Ins. Co.*, 26 N. J. Law, 268; *Lungstrass v. Ins. Co.*, 48 Mo. 201, 8 Am. Rep. 100; *Vassar v. Camp*, 11 N. Y. 441. In *Hallock v. Ins. Co.*, supra, the court says: "The acceptor can no more overtake and countermand his letter mailed, than he can his words of acceptance after they have issued from his lips. The bargain, if struck, must be eo instante with such overt act. Mailing letter containing an acceptance, or the instrument itself, intended for the other party, is certainly such overt act." In *Vassar v. Camp*, supra, where a letter was mailed accepting an offer, it was held that the contract was completed and binding, though it was never received by the proposer.

It is insisted by appellants that they knew nothing of Coutts' acceptance being mailed, and were not notified by Davis, and that before they knew of it the land had been sold to another party. While the evidence shows

they did not know of the letter, Davis notified Brown Bros. by wire that Coutts had accepted, and wrote them, "You have doubtless received or will receive a letter from him direct." Davis did not know of the letter of acceptance being mailed until some time afterward, but he insisted to Brown Bros. that the contract had been closed, and was binding on Coutts, and urged Brown Bros. to take steps to enforce it. This they did not do. R. L. Brown, one of the firm of Brown Bros., testified: "The reason we did not sue Mr. Coutts, to hold him to the trade, is that our principal did not like the law, and they preferred selling the land to somebody else, than have a lawsuit with Mr. Coutts." The record fails to disclose any dereliction of duty on the part of Davis in the premises.

The evidence, in our opinion, entitles the plaintiff to recover, unless his right is defeated by the refusal of Coutts to take the land on the ground of its "ill shape." Coutts testified that "the land was not in the shape that it was represented to me by Davis. He had represented to me that it was in a solid body, when in fact the abstract showed it to be in ill shape. As soon as I ascertained this, I instructed Mr. Holland that the trade was off, and to telegraph and stop the letter," etc. Davis denies that he made any representations to Coutts as to the shape of the land. Brown Bros. furnished a map of the land to Coutts through Davis. At its top there was, in large letters, words, and figures, "32,500 acres of land in a solid body." The map showed the shape of the land. While the land is irregular in shape, there is no direct testimony that it is not in a solid body. No objection was made to the title upon examination of the abstract. The only complaint is that "the abstract showed it to be in ill shape." In what particular the abstract showed the shape of the land to be different from that shown by the map is not stated. According to Coutts' testimony, Davis showed him the plat of the land when he (Davis) was in Weatherford, which was before the letter of acceptance, and that Judge Stephens and Mr. Holland had examined it, and expressed themselves that it showed the land to be in a solid body. In order to avail appellants, it was necessary for them to show in what particular the shape of the land varied from the representations made, if any, in order that the court might determine its materiality. This they have failed to do. Again, there was evidence that friends of Coutts had visited the land, who had described it to him; and we think it appears from the evidence that Coutts, in negotiating for the land, was acting upon the information received from them.

We are of the opinion that the evidence shows that Davis had complied with his contract with Brown Bros. to procure a purchaser who was able, ready, and willing to purchase the land; that the contract to pur-

chase was complete and binding, and the court did not err in rendering judgment for plaintiff against the mortgage company. The judgment is therefore affirmed as to said mortgage company and Coutts, but reversed and rendered as to Brown Bros.

On Rehearing.

(Feb. 21, 1903.)

In the original opinion we fell into error in stating as a fact that appellee Davis, pending the negotiations for the sale of the land, did not know of the tax title on 12 sections of the land. Davis during that time did know of said tax title. Hence it follows that our discussion, in so far as it is based on that finding, was inapplicable to the fact as it exists.

Counsel for appellant places a construction on a clause in our opinion never intended by us. We stated, "On the same day Davis wired Brown Bros. that Coutts had accepted and followed same with a letter." Counsel construes this to mean that Davis had not only wired, but also had written that Coutts had followed the telegram with a letter of acceptance. We did not intend to convey this idea. The idea that we intended to convey was that Davis had telegraphed Brown Bros. that Coutts had accepted, and Davis had followed said telegram with a letter stating that Coutts had accepted. This is made clear in a subsequent part of the opinion, where we say, "Davis notified Brown Bros. by wire that Coutts had accepted, and wrote them, 'You have doubtless received or will receive a letter from him direct.'"

At the request of appellant, we find that Judge Stephens was acting in the transaction merely as a friend, and was not employed either as agent or attorney by either party.

We adhere to our conclusion that the mailing of the letter of acceptance by Coutts was binding, and no sufficient excuse is shown to relieve him from its binding effect.

The motions for rehearing and for additional conclusions of fact are overruled, except in so far as additional conclusions of fact are stated herein.

SAN ANTONIO & A. P. RY. CO. v. ANKERSON.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

SERVANT—INJURY — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE—INSTRUCTION.

1. A railroad company's rules required engineers to signal on approaching stopping places, and not to stop until they had received a signal from the caboose, except in case of danger. There was evidence that the engineer of a freight train failed to signal on approaching a station, and slowed up without being signaled by the brakeman, thereby causing him to be thrown off his guard so that he did not discover

*Writ of error denied by supreme court.

a break in the train until too late to avoid a collision between the two parts of the train, whereby he was injured. *Held*, that the jury would have been justified in finding that the failure of the engineer to signal was the proximate cause of the injury.

2. An expression in an instruction in a suit for negligent injuries, that plaintiff could not recover if guilty of negligence which "contributed to plaintiff's injury," means the same as negligence which "contributed to cause or produce the injury."

3. Where a brakeman on a freight train was placed in a position of immediate danger by the failure of the engineer to give the required signals, and chose one of two expedients to avert an accident and was injured, while if he had chosen the other he might have escaped unhurt, it was a question for the jury whether he was guilty of contributory negligence.

On Rehearing.

4. Where an engineer of a freight train, by his carelessness, places a brakeman in sudden peril, who, acting under stress of the circumstances so created, chooses one of two methods to avoid the accident and is injured, though he might have escaped had he chosen the other, the negligence of the engineer is the proximate cause of the injury.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by H. P. Ankerson against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Houston Bros. and R. J. Boyle, for appellant. John Sehorn, for appellee.

FLY, J. Appellee instituted this suit to recover damages arising from personal injuries inflicted through the negligence of appellant. A trial by jury resulted in a verdict and judgment in appellee's favor for \$9,000. Before full daylight on the morning of January 30, 1901, appellee was in the cupola of the caboose, as rear brakeman on a freight train of appellant's that was leaving San Antonio. As the train approached Hot Sulphur Wells siding, he discovered that there was a break in the train, that the front section was running slower than the rear section, and that a collision was imminent. He stepped to the brake and applied it, but in about a second the collision occurred, and appellee was thrown down, and received serious and permanent injuries. The following rule promulgated by appellant was in force: "Engineers of freight trains, not working air over entire train, before making any stop will wait until a signal is received from the caboose. Approaching a station, tank, or other point, where a stop is made, engineers will give the usual signal, and, if it is not answered by a stop signal from the caboose, you will call for signals, and under no circumstances stop until the signal is given, unless in case of danger. This bulletin is issued for the purpose of preventing, if possible, some of our broke in two collisions. Conductors will see that en-

gineers are given the proper signals from the caboose." There is evidence that justifies the conclusion that the engineer did not give any signals of his desire or intention to stop, and did not receive any stop signal from the conductor or brakeman, and his negligence in disobeying the foregoing rule was the direct and proximate cause of the accident. The break in the train was not discovered until the front section was about to stop at the siding, and appellee did all in his power to stop the rear section of the train and avert the accident. The train did not have air brakes over its entire length.

The following instruction to the jury is complained of in the first assignment of error: "If you believe from the evidence that on or about the 30th day of January, 1901, plaintiff was in the employ of the defendant as a brakeman on one of its freight trains, and that as the train approached the station of Sulphur Wells the train came apart and separated, and that the front portion of the train was stopped, and that the rear or detached portion of the train then collided with the front portion thereof, and as a result of such collision, if you find there was a collision, plaintiff was hurled or thrown against the window frame of the caboose and thereby injured, as charged in his petition; and if you further find from the evidence that the defendant then had rules and customs in force governing the operation of freight trains, which provided that the engineer of the freight train, as he approached the station of Sulphur Wells, should signal by blowing the whistle of the engine, and if such signal was not answered by a stop signal from the caboose of the train the engineer should then call for signals, and should not stop the train until the stop signal was given from the caboose, unless in case of danger; and if you believe from the evidence that the engineer of the train upon which plaintiff was working failed to signal by blowing the whistle of the engine as he approached the station of Hot Sulphur Wells, or if you believe from the evidence that said engineer, as he approached said station, did give the signal by blowing the whistle of the engine, but you also believe from the evidence that no stop signal was given from the caboose of the train, and that said engineer stopped the front portion of the train without receiving a stop signal from the caboose; and if you further believe from the evidence that said engineer was negligent in failing to give a signal by blowing the whistle of the engine as he approached said station of Sulphur Wells, if you find he did so fail, or if you believe from the evidence that the said engineer was negligent in stopping the front portion of the train without a stop signal from the caboose, if you find that he did stop without such signal being given, and that the negligence of said engineer, if any, was the direct cause of the collision, if you find there was a collision,

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. § 1130.

and of plaintiff's injury, if any, and that plaintiff was not guilty of contributory negligence, and did not assume the risk—then in this event your verdict must be for the plaintiff." The charge is complained of on the ground that the evidence did not show that the failure of the engineer to whistle for the station could in any way have caused the injury to appellee. The evidence showed that it was the duty of the rear brakeman on a freight train, the position held by appellee at the time of the accident, in case of a break in the train to give a "go ahead" signal, and to stop the detached part of the train so as to prevent a collision. He concluded that the parts of the train would collide if he tried to give the "break in two" signal, and laid hold of the brake to stop the detached cars. He was led into not giving the "break in two" signal because the engineer had not given the stop signal, and he concluded that he was not looking back because he had not given such signal, and consequently could not have been looking for a signal from the rear brakeman. If the failure of the engineer to give the signal at the proper place resulted in throwing the rear brakeman off his guard, thereby causing the break in the train not to be discovered until it was too late to stop the detached portion, or to increase the speed of the engine so as to get it out of the way, such failure to whistle was the cause of the accident, and it was not improper to submit that issue to the jury. According to the testimony of the rear brakeman, he was led to believe that no stop would be made, and by that reason he did not discover the break in the train until it was too late to avert the disaster. The reason given for the adoption of the rule requiring engineers to give a signal when approaching a stopping point, and to wait for a signal until a stop signal is given from the caboose, was to prevent "break in two" collisions. Under the terms of that rule it was the duty of the conductor to see to giving the answers to stop signals from the caboose. The evident purpose of the stop signal from the locomotive was to place the conductor and rear brakeman on their guard, so that they would inspect the train and ascertain its condition, and, after that was done, signal an answer back to the engineer. The engineer failed to give the cautionary signal, and the consequence was that the break in the train was discovered too late to prevent the collision. Under the evidence, the jury could have found that the failure to blow the whistle was one of the causes leading to the collision of the two parts of the train. The second assignment of error is hypercritical, and without merit. The expression in the charge that precluded appellee from a recovery if guilty of negligence which "contributed to plaintiff's injury" would be understood by any jury to mean the same as negligence that "contributed to cause or produce the injury."

Appellee in one part of his testimony stated that, if he had given the "break in two" signal and the engineer had gone ahead, there would have been no collision, and it is the contention of the appellant that such evidence eliminated all question as to whether appellee's conduct contributed to the infliction of the injury upon himself. Whatever may have been the meaning of appellee in the evidence referred to, in another part of his testimony he stated: "If I had stopped to signal, the detached portion would probably have come into collision. * * * Under the circumstances I did the best I knew to prevent the accident. * * * I did not give him the 'go ahead' or 'break in two' signal. I knew he wouldn't see it. That is not the only reason I didn't give it; if I had stopped there to swing my arm, the rear part would have met the front part before it did." It was for the jury to say under the facts whether appellee was guilty of contributory negligence.

The complaint as to excess is not sustained by the facts.

The judgment is affirmed.

On Rehearing.

(Feb. 25, 1903.)

There was evidence to the effect that there was no stop signal given by the engineer, and that appellee, upon discovering the break in the train, to prevent a collision of the parts, was placed in a position where he had to choose between two methods, and that he chose that of putting on the brakes rather than to lose time in endeavoring to signal the engineer. No stop signal having been given, and there being no reason why the engineer should be looking towards the rear of the train for a signal, appellee was justified in assuming that the engineer was looking forward and would not see a signal, and no time could be lost in making such signals. The negligence of the engineer had created an emergency, and placed upon appellee the responsibility of choosing one of two methods to prevent a collision. He chose the brakes. If it be admitted that the engineer was looking back and would have received any signal given by appellee, and would, by increasing the speed of the locomotive, have prevented the collision, that would not necessarily relieve appellant of the charge of negligence, for the emergency had been created by the negligence of appellant, and it is responsible for the existence of the circumstances that forced a choice of expedients on appellee to prevent the collision. As said by the Supreme Court in the case of *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. 283: "The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of life or serious injury to his person, whether

that person be prudent or imprudent, if in an effort to save his life he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." Men, under stress of circumstances which create a fear of death or serious bodily injury, cannot usually act with calmness and composed judgment, and the party creating such circumstances will not be allowed to plead a lack of judgment on the part of the victim of the circumstances to excuse the negligent creation of them. The creator of such circumstances is the producer of the direct and proximate cause of the resulting injury.

The motion for rehearing is overruled.

MOORE v. WILLIAMS et al.*

(Court of Civil Appeals of Texas. Jan. 17, 1903.)

PARTNERSHIP—ADMISSIBILITY OF EVIDENCE—ISSUES—INSTRUCTIONS—AGREEMENT FOR DIVISION OF CORPORATE STOCK—EFFECT.

1. In an action on a note signed by one defendant, seeking to charge all three defendants as partners, plaintiff was asked why he did not get the other two to sign the note. Had he been permitted to answer, he would have said that the signer of the note told him that it was not necessary for the other defendants to sign, as they had agreed to pay the debt. *Held*, that this answer would have been inadmissible, there being no allegation in the petition that the other two defendants had agreed to pay the debt.

2. In an action on a note signed by one defendant, in which it was sought to charge all three defendants as partners, the preponderance of evidence negatived the partnership, and was not inconsistent with defendants' contention that the signer of the note had merely borrowed money from the other two. *Held*, that evidence of a statement by the signer of the note that a partnership existed, offered to prove the partnership, and made in the absence of the other defendants and without their knowledge or authorization, was inadmissible.

3. In an action on a note signed by one defendant, seeking to charge all three defendants as partners, plaintiff alleged that they were partners, or, if they were not, then the signer of the note was the agent of the other two. *Held*, that no issue was raised as to whether the other two defendants had agreed to pay for the work for which the note had been given in consideration of 10 per cent. interest on a loan therefor and two-thirds of the profits realized from the construction; and an instruction ignoring the effect of such an agreement as constituting a partnership was not erroneous.

4. A party constructing a waterworks system secured a loan, and pledged the stock and bonds of the company. He completed the waterworks, and turned them over to the company. Not being able to repay the loan, he agreed with the lenders that on an extension of time he would give them two-thirds of the stock and bonds left after enough had been sold to pay the debt. The stock and bonds were accordingly turned over to one lender, who executed his receipt therefor. *Held*, that the transaction did not constitute the borrower and lenders partners so as to make the latter liable for a note previously executed by the borrower for part of the expense of the construction.

*Rehearing denied February 21, 1903, and writ of error denied by supreme court.

Appeal from district court, Dallas county; Richd. Morgan, Judge.

Action by J. W. Moore against W. J. Williams and others. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

The third and fourth assignments of error in appellant's brief are as follows:

Third assignment of error: "The court in its charge, wherein it instructs the jury that if they find that Oliver and Storrie were partners on February 13, 1892, or that Oliver and Storrie agreed with Williams before July 16, 1892, they will find in favor of Oliver and Storrie, because the evidence conclusively shows that in the agreement made by Oliver and Storrie with Williams (the said Oliver for himself and as agent for Storrie), in consideration of Williams turning over to him the stock and bonds of the waterworks and agreeing to allow the said Oliver and Storrie 10 per cent. interest on the money advanced, and also to allow them two-thirds of the profits arising from the construction of the waterworks, the said Oliver and Storrie agreed to pay all the expenses of construction, of which the note sued on was for labor and work in building the waterworks, and the court, in attempting to fix the time for the jury to find when the partnership commenced, presented a false issue, which was misleading, and could serve no purpose than to confound the sense and jumble the judgment of the jury."

Fourth assignment of error: "The court erred in its charge to the jury in limiting the jury to the 13th of February, 1892, the time when the contract was first made by Williams with Moore, and the 16th of July, 1892, the time when the notes sued on were executed, for the reason that plaintiff did not allege that Oliver and Storrie were partners at those particular dates, nor was it an issue that they were partners at those particular dates. They may have been, or may not have been. If they were not partners at the inception of the work, they became partners before the work was completed, and it did not matter at what particular date they became partners. They agreed for a valuable consideration, to wit, 10 per cent. on the money advanced and two-thirds interest in the profits, to pay the cost of construction. This, if they were incoming partners, they had a right to do, and on this point there was no conflict in the evidence."

J. W. Brown and T. L. Camp, for appellant. Plowman & Baker, for appellees.

BOOKHOUT, J. This suit was brought by J. W. Moore, appellant, against W. J. Williams, T. J. Oliver, and R. C. Storrie, appellees, in which appellant sought to hold them liable on two certain negotiable promissory notes executed by W. J. Williams on July 16, 1892, each for the sum of \$500, with 10 per cent. per annum interest, and 10 per

cent. attorney's fees if placed in the hands of an attorney, the first of said notes maturing August 15, 1892, and the other maturing August 31, 1892, and executed on account of the Denton waterworks. It was charged that Williams, Oliver, and Storrie were partners in the construction of said waterworks, and if this was not so that they were individually liable for said notes. The defendants answered by a general denial, and specially answered under oath denying the partnership, and set out in detail and at great length the facts relating to the execution of the contract for, and the erection of, the waterworks for the Denton Light & Power Company. A trial with the aid of a jury resulted in a verdict and judgment in favor of Moore against W. J. Williams for \$2,135.23, and in favor of Oliver and Storrie, from which judgment plaintiff has prosecuted an appeal.

Conclusions of Fact.

On the 3d of February, 1892, W. J. Williams entered into a contract with the Denton Light & Power Company to construct and erect a system of waterworks for the said company at Denton, Tex., the same to be completed by July 1, 1892. Williams began work thereon, and thereafter, on February 13th, he entered into a contract with J. W. Moore whereby Moore was to perform certain portions of said work. Moore entered upon the performance of said work, and in July thereafter the same was completed, and there was due and owing him for such work the sum of \$1,000, for which Williams executed to him the two negotiable promissory notes sued upon, each for the sum of \$500, drawing 10 per cent. interest after maturity, and providing for 10 per cent. attorney's fees if placed in the hands of an attorney and collected by suit, the first maturing August 15, and the second August 31, 1892. After Williams had entered upon the performance of his contract with the Denton Light & Power Company in March, 1892, he applied to T. J. Oliver and R. S. Storrie for a loan. They, on March 19th, agreed to loan and did loan him \$24,000, to be repaid with 10 per cent. per annum interest on July 1, 1892, and to secure same Williams pledged to them the stock and bonds of the said company which he was to receive for constructing the said system of waterworks. Williams completed the waterworks in July, 1892, and turned the same over to the company. Williams not being able to pay the money borrowed from Oliver and Storrie, it was on August 23, 1892, agreed by Williams and Oliver and Storrie that in consideration of Oliver and Storrie carrying him on his indebtedness to them until July, 1893, Williams would give them two-thirds of the amount of stock and bonds left after Oliver and Storrie were paid from the sale of the bonds the amount of their loan. The stock and bonds were turned over to T. J. Oliver, who executed his

receipt therefor. Oliver and Storrie did not assume or agree to pay the indebtedness due by Williams to Moore, or authorize or ratify the execution of the notes sued upon. Moore was acquainted with both Oliver and Storrie, and frequently met them, but never demanded payment of the notes from them until February, 1894, the month in which this suit was filed.

Conclusions of Law.

The first assignment of error complains of the action of the court in sustaining the exception of defendants to the following question propounded to the plaintiff while a witness in his own behalf: "Why did you not get Oliver and Storrie to sign the notes executed and delivered to you by Williams for work done in the construction of the waterworks?" The witness would have answered "that Williams told him [Moore] that Oliver was on his bond, and Williams did not like to ask him to go on the notes; that in fact it was not necessary, as Oliver and Storrie had agreed to pay the debts of construction, and that the signature of Williams would bind them, as they were his partners in building the waterworks." To which question and answer Oliver and Storrie objected because "the question asks for a conclusion and a reason; that there was no allegation to support such testimony; that the evidence would be hearsay; that a statement made in the absence of Oliver and Storrie could not be used against them, and was made without their knowledge or consent, and in their absence, and made after the completion of the waterworks, and was immaterial and irrelevant." There was no allegation in the petition of appellant that Oliver and Storrie had agreed to pay the debts of construction, and hence that part of the answer stating that they had made such agreement was inadmissible. Appellant contends, however, "that, inasmuch as there had been evidence introduced tending to show that Oliver and Storrie were partners in the construction of the waterworks, the admission of Williams that they were partners in the construction of the waterworks was competent evidence to go to the jury." There was some evidence tending to prove partnership between the parties, but the evidence greatly preponderated against partnership. The general rule is that on the issue to prove partnership the admission of one partner is not admissible against another to prove him a partner. *Parsons on Part.*, sec. 78 (4th Ed.); *Buzard v. Jolly* (Tex. Sup.) 6 S. W. 422; *Wallis v. Wood* (Tex. Sup.) 7 S. W. 832; *Emberson v. McKenna* (Tex. App.) 16 S. W. 419; *Newberger & Sons v. Heintze & Co.*, 3 Tex. Civ. App. 259, 22 S. W. 867. The appellant seems to admit this general rule, but contends that there is evidence tending to prove that Williams, Oliver, and Storrie were partners, and, for this reason, the testimony was admissible. The sole purpose of the admission of

Williams was to prove partnership. Neither Oliver nor Storrie was present when it was made. They had no knowledge that such admission was made. They did not authorize Williams to make it. The great preponderance of the testimony on the trial was to the effect that there was no partnership between the parties. The jury so found. The evidence of appellant tending to prove partnership aliunde the admission is not inconsistent with the appellees' contention that the transaction between them and Williams was a loan. We conclude that there was no error in excluding the testimony. This holding is not in conflict with the holding of the Court of Civil Appeals for the Second District in *Bush v. Kellogg & Co.*, 34 S. W. 1036. In that case the preponderance of evidence sustained the issue of partnership, and, further, there was evidence that the admission was made with the knowledge and consent of the party sought to be charged as a partner. In the case of *Caraway v. Citizens' Natl. Bank*, 29 S. W. 506, the objection was not made to the testimony offered that partnership could not be proved by the admission of one partner not made in the presence of the party sought to be charged, and the opinion expressly restricts the ruling to the objection as made. In that case there was evidence indicating that the declaration was made with the knowledge of the party sought to be charged.

Appellant groups his third and fourth assignments of error, and contends thereunder that an incoming partner for a valuable consideration may agree to pay the debts of the concern into which he enters as a partner, and it is wholly immaterial at what time Oliver and Storrie became partners of Williams. That the issue in the case was whether Oliver and Storrie had agreed to pay the cost of construction in consideration of money advanced by them to Williams to build the waterworks, on which they were to get 10 per cent. interest and two-thirds of the profits realized from their construction. No such issue was raised by the pleadings. The appellant's pleadings charged substantially that Williams, Oliver, and Storrie were partners in the construction of the waterworks, and, if it should be determined that they were not partners, then appellant charged in his supplemental petition "that the waterworks were actually constructed by Oliver and Storrie under the name of Williams, who was their agent in the construction of said works." There was no pleading that Oliver and Storrie, in consideration of the money advanced by them to Williams to build the waterworks and two-thirds of the profits realized for the construction of said works, agreed to pay the costs of construction. Nor was there any evidence of such an agreement. The receipt executed by Oliver for the bonds on August 23, 1892, made him the custodian of the same, and, when sold, the proceeds to be applied to the payment of the

outstanding notes for cash and material used in the construction of said waterworks at Denton. There was evidence that the indebtedness to be paid was the amount of the loan made by Storrie and Oliver to Williams, and, after the payment, the remainder of the bonds, if any, was to be divided between Williams, Oliver, and Storrie. This did not make them partners in the contract to erect the waterworks. *Brown v. Watson*, 72 Tex. 217, 10 S. W. 395; *Buzard v. Bank*, 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7. The charge of the court fairly submitted the issue raised by the pleadings, and the same is not subject to the criticism set out in the third and fourth assignments.

The fifth and sixth assignments complain of the action of the court in refusing certain special charges requested by plaintiff. The charge of the court embraced the charges requested in so far as said charges are applicable to the case as made, and hence there was no error in refusing the same.

We have considered the remaining assignments presented in appellant's brief, and are of the opinion that no reversible error is pointed out therein, and the same are overruled.

Finding no error in the record, the judgment is affirmed.

LINCOLN v. CORBETT et al.*

(Court of Civil Appeals of Texas. Jan. 29, 1903.)

MORTGAGE—FORECLOSURE.

1. One having given notes secured by mortgage providing that in case of default in any payment all the notes might be declared due, and such declaration having been made and foreclosure proceedings commenced, the mortgagor is not entitled to have them stopped, by paying what otherwise would have been due, and the expenses to date.

Appeal from district court, Harris county; Chas. E. Ashe, Judge.

Suit by A. F. Lincoln against W. C. Corbett and others. Judgment for defendants. Plaintiff appeals. Affirmed.

John M. Cobb, for appellant. Rowe & Rowe, for appellees.

GARRETT, C. J. This suit was brought by the appellant against the appellees to enjoin the sale of land belonging to the appellant which had been advertised for sale by the appellee O. O. Drew, as trustee in a deed of trust executed to secure the payment of three notes in favor of the appellee W. C. Corbett. A preliminary injunction was granted, and the sale was restrained. Afterwards, when the case came on for trial, the injunction was dissolved, and judgment was rendered in favor of the appellee Corbett upon his cross-bill against the appellant for the amount of the notes, with foreclosure of a lien upon the

*Rehearing denied, and writ of error denied by supreme court.

land described in the trust deed. On May 21, 1900, the appellant executed three promissory notes in favor of the appellee W. C. Corbett, for the sum of \$690.85 each, payable one, two, and three years after date, respectively, at the Planters' & Mechanics' National Bank at Houston, Tex., with interest at the rate of 8 per cent. per annum, payable annually; and the failure to pay the principal or interest when due should, at the option of the holder, mature all of the notes. In the event of default in payment and the notes were placed in the hands of an attorney for collection, or suit brought thereon, an additional amount of 10 per cent. of the principal and interest was to be added to the notes as collection fees. As shown by a recital in the notes themselves and other evidence, a deed of trust, of even date with the notes upon the lands mentioned therein, and fully described in the deed of trust and the judgment of the court, was executed by the appellant to the appellee O. C. Drew, as trustee to secure the payment of the notes, in default of which the trustee was authorized to sell the land after due advertisement, and apply the proceeds of sale to the satisfaction of such amount of the notes as remained due and unpaid. When the first note matured, the appellant failed to pay the same, and the appellee Corbett declared the maturity of all of them, and requested the appellee Drew, as trustee, to sell the land for their satisfaction in accordance with the deed of trust. The trustee advertised the land for sale, and was about to sell the same when he was enjoined as above stated. No part of any of the notes has ever been paid. There is a conflict in the evidence about the offer to pay the note which matured May 21, 1901. The appellant testified that on the day the note was due he telephoned from his place of business in the city of Houston to the Planters' & Mechanics' National Bank and inquired for the note, but was told by some one answering that it was not in the bank. Drew, who was cashier of the bank, as well as trustee in the deed of trust, testified that he received no telephone message from the appellant about the payment of the note; and that he had the note in the collection box on his desk on the day it fell due, and would have received the money if it had been tendered and delivered the notes. The paying and receiving teller of the bank also testified that he did not receive any telephone message from the appellant about the note, and that the appellant had never offered to pay him the note or deposit the money for it with him. After the land had been advertised for sale, the appellant for the first time tendered the amount of the first note, principal and interest, together with the annual interest on the other notes, and also offered to pay the expense of advertising the sale. This tender was first made to Corbett, who refused it, and was afterwards made to the trustee. Appellant having failed to pay the note which

matured May 21, 1901, and the interest on the other notes, and the appellee Corbett having exercised his option to declare all of the notes matured, the trustee was in the lawful exercise of his power to sell, and the injunction was properly dissolved. The notes having all matured by the default of the appellant, and the appellee Corbett having pleaded over and asked for judgment thereon, with a foreclosure of his lien, judgment was properly rendered in favor of the appellee Corbett against the appellant for the amount of the notes, with attorney fees and foreclosure as prayed for, and it will be affirmed.

Affirmed.

PRESTON et al. v. BARBER.

(Court of Civil Appeals of Texas. Feb. 5, 1903.)

SALES—RECEIPT OF GOODS—EVIDENCE—SUFFICIENCY.

1. In an action for the price of goods sold, plaintiff's evidence showed that the goods were ordered to be shipped "order notify"—meaning that they were to be paid for on delivery; that the goods were so shipped, but that, at a point where they were transferred, they were forwarded as open freight; and that on their arrival they were delivered to defendant who paid the freight, and nothing else. Such back shipment and delivery were shown by one of plaintiffs, by the agent who made the sale, by the party to whom they were consigned at the transfer point, and by the one who delivered the goods. Defendant testified that he had no recollection of the transaction, that all the goods he ever bought were "order notify," and that he could not have got them otherwise. *Held*, that a verdict for defendant was against the weight of the evidence.

Appeal from Hardin county court; Jno. P. Work, Judge.

Action by Preston & Stauffer against W. H. Barber. From a judgment for defendant, plaintiffs appeal. Reversed.

Cruse & Nall, for appellants.

GILL, J. This suit was instituted by appellants against appellee in the justice court upon a sworn account for goods sold and delivered, and was answered by a sworn denial. A trial resulted in a judgment for appellee. The same result was reached in the county court, and Preston & Stauffer have appealed.

The only assignment of error which requires our consideration is that which assails the verdict as so against the weight and preponderance of the evidence as to make it the duty of this court to reverse upon the facts. According to the evidence adduced by plaintiff, some time prior to July 27, 1901, appellee, Barber, who was a merchant in Kountze, Tex., ordered from Preston & Stauffer, who were wholesale merchants in New Orleans, La., six barrels of sugar, to be shipped "order notify," which meant that it was to be paid for in cash on delivery of the goods to appellee at Kountze. All their transactions with appellee thereto-

fore had been conducted in this way. The six barrels of sugar in question were shipped to Beaumont, Tex., with a car load of other goods designed for other parties, and from that point were shipped as open freight to appellee at Kountze. This was done by mistake, as they were shipped from New Orleans "order notify," and should have been so shipped from Beaumont to Kountze. Upon their arrival at the latter point, they were delivered to Barber, who paid the freight, but did not pay for the sugar, and has not since done so. That the goods were so shipped, delivered, and received, and have not been paid for, is shown by one of the plaintiffs; by the agent who made the sale; by the party to whom they were consigned at Beaumont, and who reshipped them; by the railway agent at Kountze, who delivered the goods and received the payment of the freight; and by the drayman who hauled the goods to Barber's place of business. In other words, the goods were traced by undisputed evidence from New Orleans, La., into appellee's hands at Kountze, and the fact that they reached him as open shipment, instead of shipper's "order notify," is accounted for and explained. As against this, Barber opposes his own statement that he has no recollection of the particular transaction, that all the goods he ever bought of appellant were "order notify," and that he could not have gotten them otherwise. He is unable to tell how he paid for them, or to whom he paid the money. He states generally that he knows he owes appellants nothing, and has paid for all he ever purchased from them, and gives their former course of dealing as a reason for so testifying. We think that, as against the array of systematic and affirmative proof adduced by appellants, this vague and negative denial should not be allowed to prevail. The verdict is manifestly against the great weight and preponderance of the evidence, and the trial court should have granted a new trial.

For the reasons given, the judgment is reversed, and the cause remanded. Reversed and remanded.

**SAN ANTONIO & A. P. RY. CO. v.
MOORE.***

(Court of Civil Appeals of Texas. Feb. 4, 1903.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE — NEGLIGENCE — DAMAGES — MEDICAL EXPENSES — EXPERT EVIDENCE — MORTALITY TABLES.

1. Newly discovered evidence is not ground for a new trial unless it is discovered subsequent to the first trial, and there has been no lack of diligence.

2. Newly discovered evidence is not ground for a new trial unless material, and such as will probably change the result on another trial.

3. Newly discovered evidence, merely cumulative in its nature, is not ground for new trial.

*Rehearing denied February 26, 1903, and writ of error denied by supreme court March 12, 1903.

4. A motion for a new trial for newly discovered evidence is addressed to the discretion of the court, which will not be disturbed unless abused.

5. In an action for personal injuries, expenses incurred for medical treatment are proper elements of damage, though the money has not been actually paid.

6. In an action for personal injuries, the evidence showed that surgical treatment was rendered necessary, but there was no evidence to show what charges were made by the physician. A physician, testifying as an expert, stated that services such as were rendered plaintiff were reasonably worth a certain amount, but the question to which the statement was an answer assumed that a certain operation had been performed, while the evidence failed to show that such operation had been performed. *Held* error to submit to the jury the expense incurred for medical treatment as an item of damage.

7. A practicing physician, who had treated plaintiff and assisted in the operation performed on him for his injuries, was competent to testify as to the probable duration of the injuries.

8. Where the capacity of the party injured to earn money is partially, but permanently, impaired, mortality tables are admissible for the purpose of determining the damages.

Appeal from district court, Gonzales county; M. Kennon, Judge.

Action by S. E. Moore against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

Harwood & Walsh, for appellant. S. H. Hopkins and J. W. Rainbolt, for appellee.

NEILL, J. This suit was brought by the appellee to recover damages for personal injuries alleged to have been inflicted upon him by the negligence of the appellant. The appellant answered by a general denial, a plea of contributory negligence, and specially denied that the appellee received any injuries whatever from appellant, and averred that if he sustained any physical injury, such as is alleged in his petition, it was from being thrown from a horse. The trial of the case resulted in a judgment in favor of the appellee for \$6,250.

Conclusions of Fact.

On the 12th day of December, 1900, while the appellee was walking along a pathway, extending along appellant's right of way and near its railroad track in the city of Gonzales, Tex., which was used and had continuously for a number of years been used by the public, with the knowledge and acquiescence of the appellant, in passing from one part of the city to another, as well as in going to and from appellant's depot, he reached a point in the path opposite and within a few feet of where one of its engines drawing a train had stopped near the depot, and while in the act of passing the engine in going to the depot he was knocked down, and seriously and permanently injured by the force of steam escaping from the engine. Appellant's servants were negligent in blowing off steam with such violent force at a place where they

¶ 5. See Damages, vol. 15, Cent. Dig. § 251.

might reasonably expect a member of the public to be, and where, if they did not observe appellee, they could have seen him by the exercise of the slightest diligence, and have known that they would be liable to injure him by letting off the steam, and such negligence was the proximate cause of appellee's injury, unmixed with any negligence on his part contributing thereto.

Conclusions of Law.

1. The first assignment of error complains of the court's refusal to grant a new trial upon the ground of newly discovered evidence. When a new trial is applied for on this ground, it is necessary to show that a knowledge of the existence of the new evidence was acquired subsequent to the former trial, and that it was not owing to the want of diligence that it was not discovered and obtained in time to be used when the case was tried; that the evidence is material, and, if admitted, would probably change the result upon another trial; and that it is not merely cumulative. When appellant's motion, with the affidavits attached thereto, is considered and construed in connection with appellee's answer to it and the affidavits attached to such answer explaining and controverting the affidavits attached to the motion for new trial, we must conclude that it was owing to a want of due diligence that the alleged newly discovered evidence was not known and used by the appellant upon the trial of the cause, and that such evidence, if adduced upon another trial, would not probably change the result. In fact it appears that when the affidavits of Henderson and Dr. Caffery (whose evidence is claimed to be newly discovered), attached to appellee's reply to the motion for a new trial, are taken and considered in connection with their affidavits attached to the motion, such evidence is not materially different from that of the witnesses sought to be discredited by the alleged newly discovered evidence. Besides, if the construction contended for by appellant were given to the supposed newly discovered evidence, it would be merely cumulative of other evidence adduced upon the trial. A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and, unless it appears that such discretion was abused in overruling the motion, the action of the trial court is not subject to review on appeal. We believe that the motion was properly overruled.

2. The appellant asked the court to instruct the jury, in the event they should find that appellee was injured by the alleged negligence of the appellant, that they could only allow him for doctors' bills and medicines such sums as he had shown by the testimony to have been paid out by him, and were shown to be a reasonable and proper charge by competent testimony. There was no error in the refusal of the court to give this charge. To recover, as items of damages for an injury

negligently inflicted, expenses necessarily incurred for medicine and surgical treatment, it is not essential to prove that the money was actually paid, but it is only necessary to show that such expenses were actually incurred and were reasonable.

3. In the seventh paragraph of its charge the court instructed the jury, in the event they should find for plaintiff, that he would be entitled to recover reasonable and proper doctors' bills, if any, incurred by him for attention to such injuries. This part of the charge would be correct if there were evidence in the case upon which to predicate it. In his petition appellant alleged that, by reason of his injuries, it became necessary to be treated by physicians, and that he had incurred thereby an expense of \$500, and that such amount was a reasonable compensation for the services and treatment rendered him by the doctors. While the evidence shows that medical and surgical treatments were rendered necessary, there is a total failure of evidence to show what charges were made by the physicians for their services and attention; and, from a careful consideration of the testimony, we have concluded that the evidence is not reasonably sufficient to show the value of such services so rendered. It is true that physicians as experts testified, in answer to a hypothetical question which purported to state the facts and show what surgical and medical services were actually performed, that such services would reasonably be worth \$500. The question, however, to which this answer was given assumed that the doctors who performed the operation upon appellee had anchored his displaced floating kidney, and the answer as to the value of services is hypothecated upon the fact that this was done in the operation performed. There is no evidence in the record that warrants any such hypothesis. On the contrary, the facts show that, while appellee's kidney had been displaced so as to be what is termed a floating kidney, it was never anchored, but was simply pushed up and back from his descending colon. Therefore we are constrained to hold that the court erred in submitting the expenses incurred for medical treatment as an item of damages subject to recovery in this case, for the reason that the evidence was not sufficient to authorize its submission. This item of expense was alleged in appellee's petition to be \$500, and, as under the evidence the jury could not have found more than that upon it, this error can be cured by a remittitur.

4. The remarks of appellee's counsel, complained of in the fifth assignment of error, were authorized as argument by testimony contained in the record. The court, therefore, did not err in overruling appellant's objection that there was no evidence to support the argument complained of. The objection that the effect of the argument was to inflame and excite the passions and prejudice of the jury was not made.

5. The jury were fully and properly instructed upon the measure of damages by the main charge of the court. This rendered it unnecessary to give special charge No. 5 referred to in the seventh assignment of error.

6. There is no evidence in the record which would have authorized the court to have instructed the jury that appellee could not recover if his injuries were aggravated by his negligent failure to properly secure medical and surgical treatment. On the contrary, the uncontradicted evidence shows that he was prompt and diligent in securing such treatment.

7. The evidence shows that Dr. Oscar Davis was a practicing physician and surgeon, and as such had treated and assisted in the operation performed upon the appellee for his injuries, and was thoroughly cognizant of their nature. As an expert it was competent for him to give his opinion as to the probable duration and effect of such injuries. The court, therefore, did not err in refusing to sustain appellant's objections to such testimony.

8. Where the capacity of a party injured to earn money is partially though permanently impaired for life, mortality tables are admissible for the purpose of determining the amount of damages sustained. *Ry. v. Mangum* (Tex. Sup.) 67 S. W. 765; *Ry. v. Scarborough* (Tex. Civ. App.) 68 S. W. 200. In view of the fact that the evidence shows that appellee's injuries are permanent, the court did not err in admitting the testimony of a witness to show his life expectancy.

If the appellee will, within 10 days, file a remittitur of \$500, the judgment will be affirmed; otherwise it will be reversed and remanded.

FRYE et al. v. KELLER.*

(Court of Civil Appeals of Texas. Jan. 8, 1903.)

SALE BY BROKER—MEETING OF MINDS—CONVERSION.

1. A broker having only authority to make sales subject to confirmation by plaintiffs took an order from defendants for a certain number of cases at a certain price, but did not transmit it to plaintiffs. Afterwards he informed plaintiffs that he had sold to defendants a greater number of cases at a greater price, and plaintiffs confirmed the sale, and sent him the goods, but sent the invoice to defendants, showing the price. The broker delivered the goods to defendants after they received the invoice, but they returned to him all in excess of the order they had given him, and he sold them to another at the price he had named to them, and gave them the proceeds to remit to plaintiffs, which they did, also remitting for those they kept, at the price he had given them. *Held*, that there was no meeting of the minds on a sale at the price given by the broker, and no consummated sale at that price, and that plaintiffs were entitled to recover of defendants the goods they retained, or the value thereof, but had no right against them as to the other goods.

*Rehearing denied.

Appeal from Harris county court; E. H. Vasmer, Judge.

Action by Jed Frye & Co. against Theo. Keller. Judgment for defendant. Plaintiffs appeal. Reversed.

H. R. Mitchell, for appellants. W. P. & A. R. Hamblen, for appellee.

GARRETT, C. J. This action was brought by Jed Frye & Co. in the county court of Harris county against Theo. Keller for the recovery of 250 cases of sardines, or their value, which were alleged to have belonged to the plaintiffs and to have been converted by the defendant. The trial was by the court without a jury, and resulted in a judgment in favor of the defendant.

One J. G. Leavell, a broker in the city of Houston, about the last of September, 1899, claiming to represent the plaintiffs, solicited and procured from the defendant an order for 200 cases of sardines at \$2.75 a case, but never transmitted the order to the plaintiffs. Leavell was a merchandise broker, and had special authority from the plaintiffs to solicit orders for them, subject to confirmation by them. Afterwards, October 30, 1899, Leavell sent plaintiffs a telegram advising them that he had received their circular quoting sardines at \$3.55 a case f. o. b. New York, and had sold a car, asking confirmation. Plaintiffs replied confirming sale, subject to names of purchasers and assortment of goods wanted. Leavell then advised plaintiffs by wire and letter that Theo. Keller had bought 175 cases of oil sardines and 75 cases of mustard sardines, and that W. D. Cleveland & Co. had bought 150 cases oils and 50 mustards. Leavell asked that the goods be shipped to him via the Morgan Line of steamers, so that the buyers could get the benefit of car-load freight rates. The statements of Leavell were not true. Theo. Keller had not bought any sardines at all from him, except the order for 200 cases at \$2.75 a case above mentioned. The plaintiffs believed the statements to be true, and shipped the 450 cases of sardines to Leavell, and sent invoices for 250 cases to Keller, dated November 6 and 7, 1899. By mistake of the clerk the first invoice sent had the price of the sardines billed at \$2.70 a case for oils and \$2.73 a case for mustards, which was a mistake of \$1 a case, but almost immediately the error was discovered, and on November 7, 1899, a corrected invoice was sent, showing the price to be \$3.70 a case for 175 cases of oils and \$3.73 a case for 75 cases of mustards, which would be at the rate of \$3.55 a case f. o. b. New York. Plaintiffs prepaid the freight. The goods were shipped from New York November 6, 1899, consigned to J. G. Leavell, and arrived at Houston November 16th, and on November 18, 1899, were delivered to Theo. Keller on the order of Leavell. The corrected invoice was marked conspicuously: "Corrected Bill. Previous one rendered a

clerical error of \$1 per case, having been made in invoice already received." This corrected invoice was received by Keller. Fifty cases of the sardines were returned by Keller to Leavell after they had been received. Leavell sold them to another party at \$2.75 a case, and delivered the money to Keller, with the request that he would remit it to the plaintiffs. Upon the expiration of 60 days, when the price of the goods became payable, the defendant remitted to the plaintiffs exchange for \$687.50, being the amount for 250 cases at \$2.75. Plaintiffs received the remittance, collected the exchange, and gave the defendant credit therefor, and notified him that the sale had been reported to them at \$3.55 a case *f. o. b.* New York, which was equivalent to \$3.70 on oils and \$3.73 for mustards. After the sale by Leavell to the defendant of 200 cases at \$2.75 a case in September, there was a sharp advance in the price of sardines. Leavell had been corresponding with plaintiffs and had received quotations from them for a year prior to this transaction, but he was never in the employ of Jed Frye & Co., and was not a salesman of theirs. He was a merchandise broker, and endeavored to make sales by soliciting orders and submitting them to plaintiffs for their approval and acceptance. Leavell had only a special and limited authority to make sales, subject to confirmation by the plaintiffs. The sale of 200 cases of sardines at \$2.75 which he contracted with Keller in September was never submitted to plaintiffs for confirmation and was never completed. Plaintiffs shipped the goods on the reported sale of October 30, 1890, at \$3.70 and \$3.73 a case. The minds of the parties never met on a sale at \$2.75 a case, and no such sale was ever consummated. Plaintiffs were entitled to recover the possession of their goods from the defendant, or their value if the goods could not be recovered. But the defendant should not be held liable for the 50 cases returned to Leavell. He should be charged with 150 cases oils at \$3.70 a case and 50 cases of mustards at \$3.73 a case, and credited with the difference between 50 cases at \$2.75 a case and the sum of \$687.50 remitted to the plaintiffs, to wit, \$181.50.

The judgment of the court below will be reversed, and judgment will be here rendered in favor of the plaintiffs for the balance above shown. Reversed and rendered.

PARKER v. THOMAS.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

TRESPASS TO TRY TITLE—FAILURE TO MAKE DEFINITE FINDINGS OF FACT—ADDITIONAL FINDINGS—NECESSITY—SUFFICIENCY OF MOTION.

1. In trespass to try title, defendant answered that the line between himself and plaintiff, sought to be changed, was a well-established

one, recognized by the parties for many years. The court, in qualifying a bill of exceptions, stated that the most important issue involved was the location of plaintiff's eastern boundary. As conclusions of fact, the court found that the evidence failed to show conclusively that the defendant had trespassed upon any portion of plaintiff's land, and that the plaintiff had failed to prove what, if any, land belonging to her the defendant was in possession of. Plaintiff then moved for more specific findings; the motion reciting that the only issue involved was the true location of the division line between the parties, and that the court did not find upon that issue, nor determine where the line was located, wherefore plaintiff moved the court to state in writing the conclusion of fact and the law as found by him, governing such issue. *Held*, that the motion was not objectionable as too general to require specific findings.

Appeal from district court, Robertson county; H. B. Hurt, Special Judge.

Trespass to try title by Esther P. Parker against Monroe Thomas. From a judgment for defendant, plaintiff appeals. Reversed.

W. O. Campbell, for appellant.

STREETMAN, J. The petition in this case was in the form of an action of trespass to try title for a tract of 600 acres of land. The answer of the defendant contained pleas of not guilty, limitation, and a disclaimer of certain lands, and further alleged "that the line between himself and the said plaintiff, Esther Parker, which is sought to be changed by her in this suit, is a well-established line, agreed upon and recognized as such by and between the parties, owners, for many years prior to the filing of this suit," and prayed that the line be established where it now stands. There is no statement of facts in the record, and, from the description of the tracts claimed by plaintiff and defendant in their pleadings, we are unable to determine what land was really in controversy. The court, however, in qualifying a bill of exceptions, states: "The most important issue involved in the case was the location of the eastern boundary line of plaintiff's land, as described in the petition." The judgment does not attempt to locate the line between the parties, but is simply to the effect that the plaintiff take nothing by her suit.

The only question raised upon the appeal is the sufficiency of the court's findings of law and fact, which are as follows:

"Conclusions of Law. In an action of trespass to try title, the burden is upon the plaintiff to prove conclusively and specifically the land from which he claims to have been ejected by defendant.

"Conclusions of Fact. (1) I conclude from the proof in the case that the evidence fails to show conclusively that the defendant has inclosed or trespassed upon any portion of plaintiff's land; (2) that the plaintiff failed to make sufficient proof to warrant the rendering of judgment or issuance of execution, in that she failed to prove what, if any, land belonged to her the defendant was in possession of, either as to location, description, or amount."

On the next day after these findings were filed by the court, the plaintiff made a motion to require more specific findings; containing the following statements: "That while the said suit was, in form and nature, trespass to try title, yet, in fact and in truth, the only issue involved in the case, and to determine which the suit was brought, was the true location of the eastern line of the plaintiff's land, or the division line between plaintiff and defendant; and the court, in its purported findings of fact, does not find upon this issue at all, and does not determine from the evidence and the law where this line is located. * * * Wherefore the plaintiff, by her attorney, here now moves the court to state in writing the conclusion of the fact and the law, as found by him in said cause, covering the true issues involved in the case as above indicated." This motion was overruled by the court, and no further findings were filed; the court, in approving the bill of exceptions, giving as its reason for overruling the motion that it was, "in its nature, general, requiring no specific findings." If it be true, as stated by the court, and as indicated, to some extent, by the pleadings in the case, that the real issue was the true location of the boundary line between the parties, the court should have found the facts with reference to this issue. It will appear from the findings of fact above set out that the facts bearing upon this issue are not stated, and we cannot agree with the reason assigned by the court—that the motion was too general to require any specific finding upon this subject. The parts of the motion above set out indicated with sufficient clearness the particular issues upon which further findings were desired, and we are of opinion that it was error for the court to refuse to file further findings in accordance with this request. *Seymour Opera House Co. v. Wooldridge* (Tex. Civ. App.) 31 S. W. 234.

For this error of the court, the judgment is reversed, and the cause remanded. Reversed and remanded.

HUNTER v. MAGEE et al.*

(Court of Civil Appeals of Texas. Jan. 26, 1903.)

FRAUDULENT CONVEYANCE — EVIDENCE TO IMPEACH COMPETENCY — DEVISE OF GRANTOR — HOMESTEAD — HUSBAND AND WIFE — POSSESSION OF WIFE'S LAND.

1. When, in trespass to try title, defendant claimed the premises as the homestead of her deceased husband and as his sole devisee, it was incompetent for her to impeach a deed made by him to a former wife, reciting a valuable consideration, by showing that the deed was executed to defraud his creditors.

2. Where a husband conveyed his homestead to his wife for a consideration moving from her separate estate, his possession of the premises thereafter was not adverse to her.

*Rehearing denied.

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 527, 528.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Action by Eunice A. Magee and others against Laura Hunter. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. M. Gibson, for appellant. Brashear & Dannenbaum, for appellees.

PLEASANTS, J. This is an action of trespass to try title. Both parties claim title to the land in controversy through Thomas J. Hunter, deceased. Appellant, who was the second wife of Thomas J. Hunter, claims the land by virtue of her homestead rights and as sole devisee under the will of said Hunter. Appellees are heirs and devisees of Josephine B. Hunter, deceased, the first wife of said Thomas J. Hunter. The land in controversy is a part of a tract acquired by Thomas J. Hunter as his separate property prior to the 13th day of January, 1868. On the date last mentioned Thomas J. Hunter conveyed to his then wife, Josephine B. Hunter, all of said land except his homestead of 200 acres. This deed recites a consideration of \$4,125 received by the grantor from the separate estate of his wife, the grantee therein. On August 9, 1880, Thomas J. Hunter conveyed to Josephine B. Hunter the 200-acre homestead, reciting, as a consideration, \$7,500 received by him as proceeds of the sale by himself and wife of 500 acres of the land theretofore conveyed by him to his said wife. These deeds were duly acknowledged and filed for record on the respective dates of their execution. Josephine B. Hunter died April 20, 1881, and appellant married Thomas J. Hunter on June 7, 1890. Josephine B. Hunter, by her last will, bequeathed all of her property to her four children and her husband in the proportion they would inherit same had she died intestate, and named Thomas J. Hunter as executor of the will. Thomas J. Hunter, as executor of this will, conveyed to two of Mrs. Hunter's children their interest in the property. Appellees are the two remaining children of Josephine B. Hunter. Thomas J. Hunter died November 20, 1900. By his last will, which was duly probated, he bequeathed all of his property to the appellant. The land in controversy contains 277 acres, and was occupied by Thomas J. Hunter as a homestead from 1876 to the time of his death. This suit was instituted by appellees on the 18th day of December, 1900, and by sequestration proceedings appellant was ousted, and, failing to give a replevy bond, appellees obtained possession of the property. In the court below appellant, in addition to a plea of not guilty, specially pleaded that the deeds from Thomas J. Hunter to Josephine B. Hunter, under which appellees claim, were fraudulent and void; that the considerations named in said deeds were false and fictitious; that said deeds were executed by the said Thomas J. Hunter for the purpose of defrauding his creditors; and that the said Josephine B. Hunter knew of, and participated in, said

fraud. To this answer the appellees interposed the following exceptions: "For special exception plaintiffs say that said answer is insufficient in so far as it attacks and asks to set aside for fraud upon his creditors the conveyances executed by Thomas J. Hunter to J. B. Hunter, the mother of these plaintiffs, dated October 10, 1867, and August 9, 1880, conveying the land in controversy, because it appears from said answer that the defendant is not claiming said land nor a lien thereon as a creditor of said T. J. Hunter, nor is she seeking to enforce such a lien. (2) It appears from said answer that defendant claims said land as surviving widow of Thomas J. Hunter and sole devisee of said Hunter, and is therefore estopped from attacking said conveyances as having been executed in fraud of his creditors. Wherefore plaintiffs pray the court to strike out so much of said answer as alleges a fraudulent consideration of said deed and seeks to set them aside." "Plaintiffs further specially except to said answer in so far as defendant claims the property in controversy as the surviving widow and sole devisee of T. J. Hunter, for the reason that the said T. J. Hunter, by deeds above referred to, and as admitted in said answer, conveyed said property to his first wife, and the defendant is estopped from setting up a title subsequently acquired through the same grantor. Plaintiffs move to strike out, etc." These exceptions were sustained, and, upon a hearing of the cause upon its merits by the court below without the intervention of a jury, judgment was rendered in favor of plaintiffs for the land sued for, and against defendant on her claim for damages for the wrongful suing out of the writ of sequestration, from which judgment the defendant below prosecutes this appeal.

On the trial appellant, being upon the stand, was asked by her counsel if she knew the financial condition of Thomas J. Hunter from 1867 up to the time of his death, and if he was not insolvent during all of that time. Appellees objected to these questions on the ground that the testimony sought to be elicited thereby was irrelevant and immaterial. These objections were sustained by the court. Appellant then offered in evidence for the purpose of showing the financial condition of Thomas J. Hunter at the time of the execution of the deeds to Josephine B. Hunter an unsatisfied judgment for \$1,145.80 obtained against Thomas J. Hunter by T. W. House in the district court of Harris county on March 29, 1878. Objection of appellees to this evidence on the ground of irrelevancy was also sustained. Under appropriate assignments of error the appellant assails the rulings of a trial court upon the exceptions to the answer and the offered testimony above set out. None of these assignments can be sustained. It is well settled that a grantor in a deed executed for the sole purpose of defrauding the creditors of such grantor cannot recover the property from the grantee on

the ground of want of consideration. Such grantor is not permitted to profit by his fraud. He cannot, in the language of our Supreme Court in the case of Hoerer v. Kraeka, 29 Tex. 450, "say to the creditor that the property belongs to the grantee, having been purchased by him for a valuable consideration, and that the purchaser holds a regular deed therefor executed, delivered, and recorded, and at the same time say to the grantee that the deed was fraudulent, that no consideration actually passed, no delivery really took place, and that these facts were merely acknowledged for the purpose of putting the property beyond the reach of creditors." A court of equity will not interfere to relieve such grantor from the consequences of his own fraudulent act, and he cannot invoke the assistance of the courts to enable him to profit by his wrongdoings. *Farrell v. Duffy*, 5 Tex. Civ. App. 438, 27 S. W. 20. It is equally well settled that the heir or vendee of such fraudulent grantor is entitled to no more consideration from the courts than the fraudulent grantor. To hold otherwise would in great measure defeat the object sought to be obtained by the refusal of the courts to relieve the fraudulent grantor, and would tend to encourage rather than deter debtors from disposing of their property for the purpose of defrauding their creditors. *Eastham v. Roundtree*, 56 Tex. 114; *Brewing Co. v. La Rose* (Tex. Civ. App.) 50 S. W. 460. The application of this principle of the law is in no way affected by the fact that the grantee was the wife of the fraudulent grantor, and fully understood and acquiesced in the fraud, nor by the further fact that the husband and grantor retained possession of the property. His possession was in no sense adverse to hers, but under the law which gives him the right to the possession and control of her separate property she could only hold possession through her husband, or at least she could not hold possession as against him. The deeds from Thomas J. Hunter reciting a consideration moving from the separate estate of his wife, the property thereby conveyed would prima facie become her separate property. The only fraud alleged in the petition in this case being such as the appellant will not be heard to assert, there is nothing in the pleading or evidence impeaching the recitals in said deeds, and their effect was to place the title to the land in controversy in Josephine B. Hunter as her separate property. Had the deeds not recited a consideration moving from the separate estate of the wife, their prima facie effect would have been the same, even had the property at the time of such conveyance been community property. *Story v. Marshall*, 24 Tex. 306, 76 Am. Dec. 106; *Frank v. Frank* (Tex. Civ. App.) 25 S. W. 819. It follows that the appellant, as the second wife of Thomas J. Hunter, acquired no homestead right in said property, and, the title to same having vested in the appellees as devisees under the will

of Josephine B. Hunter, the trial court properly rendered judgment in their favor for the title and possession of the land, and said judgment is in all things affirmed.

Affirmed.

**WESTERN UNION TELEGRAPH CO. v.
UVALDE NAT. BANK.***

(Court of Civil Appeals of Texas. Jan. 21, 1903.)

TELEGRAPHS — NEGLIGENCE — TAPPING OF WIRES — DISCLOSURE OF CALLS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — SUFFICIENCY OF EVIDENCE.

1. Where an operator in the employ of a telegraph company informed a stranger, who was an operator, what the "call" was for a certain town, and subsequently the latter tapped one of the company's wires, and sent a message to a bank in such town, whereby the bank was led to cash a worthless draft for a confederate of the one who had tapped the wire, and such person had control of the wire for the space of four hours, the telegraph company was guilty of negligence, and liable to the bank for the amount of the draft.

2. Where one fraudulently tapped a telegraph wire, and sent a message to a confederate in care of a bank, which purported to state that another bank would advance the confederate a sum of money, and the bank telegraphed back, asking if a draft would be honored, and the one who had tapped the wire intercepted the message, and sent back another to the effect that it would be honored, the evidence was sufficient to justify a finding that the bank had not been guilty of contributory negligence.

3. In an action against a telegraph company for damages owing to plaintiff's having received a message sent to it over the lines of defendant by one who had fraudulently tapped defendant's wire, it was proper to refuse to admit the stipulations on the back of the message sent by plaintiff, to which the fraudulent message purported to be an answer, to the effect that defendant should not be liable for delays through unavoidable interruptions in its line, and that the company was the mere agent of the sender, without liability.

4. Where the agent of a telegraph company writes a message on the company's blank, which the sender does not see, sign, or agree to, the stipulations on the back of such blank are not binding on the sender.

5. In an action against a telegraph company for damages owing to defendant's lines having been fraudulently tapped, and a message sent to plaintiff authorizing it to cash a draft for a swindler, a conversation between the president of plaintiff and the swindler, taking place immediately preceding the cashing of the draft, was properly admitted as a part of the res gestæ.

Appeal from district court, Uvalde county; I. L. Martin, Judge.

Action by the Uvalde National Bank, of Uvalde, Tex., against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Norman G. Kittrell and Webb & Finley, for appellant. Ellis, Garner & Love and H. L. Ball, for appellee.

NEILL, J. This action was brought by the appellee, the Uvalde National Bank, against appellant, the Western Union Telegraph Company, to recover \$1,200, alleged to

have been paid to one C. W. Fisher, an impostor, upon the faith of certain fraudulent telegrams, copied in our conclusions of fact, which were transmitted over appellant's wires, and received and acted upon by appellee as genuine. The ground upon which the recovery is sought is the alleged negligence of the appellant in transmitting and delivering the messages. It is averred that appellant was negligent (1) in permitting Fisher and his confederate to tap its telegraph wires near Uvalde station, and send the false and fraudulent messages; (2) in failing to adopt any means to prevent the tapping of its wires; (3) in allowing Fisher and his confederate to come into possession of the instrument with which the wire was tapped; (4) in informing Fisher and his confederate of the way and manner in which its wire could be tapped, or in permitting them to learn the way and manner in which it could be done; (5) in permitting them to learn the manner in which messages could be intercepted and taken off appellant's wire between its offices; (6) in permitting said parties to learn the calls and signals of the San Antonio and Uvalde offices; (7) in permitting them to learn the usual method of sending messages to and from Uvalde and San Antonio; (8) that appellant, through its agent at Dunley station, was negligent in permitting Fisher's confederate to handle and manipulate its instruments and wires, and send a message to Fisher at Uvalde, and to learn the calls and signals of the San Antonio and Uvalde offices; (9) in permitting Fisher and his confederate to use its telegraphic system in sending the false messages; and (10) in failing to adopt a suitable system of rules and regulations, or to secure competent employes, by which impostors might be prevented from tapping and using its wires. After pleading a general denial, appellant alleged, in its answer, that appellee suffered the loss complained of as a result of the unlawful and felonious acts of wicked third persons, in no way under its control, and for which acts appellant was in no manner responsible; that its wires had been interfered with without the knowledge of itself or its servants, and without any negligence on their part; and that appellant, being neither an insurer or common carrier, is in no way responsible for the fraudulent acts of said third parties. It further pleaded certain stipulations printed on the back of its telegrams as a part of the contract between the parties at the time the messages were transmitted. The case was tried before a jury, and the trial resulted in a judgment in favor of appellee for the amount sued for, from which judgment this appeal is prosecuted.

Conclusions of Fact.

The town of Uvalde is situated about a mile south of the Galveston, Harrisburg & San Antonio Railroad opposite Uvalde station thereon. At the station the Western

*Application for writ of error pending in supreme court.

Union Telegraph Company, a private corporation, maintains a telegraph office, its lines extending therefrom to San Antonio, Tex., and thence to Kansas City, Mo., and to other points in the United States. The Uvalde Telegraph Company, which is owned and operated by Will White, extends from the town to the station. Messages sent over appellant's lines for parties in the town are received by its agent at the station, and by him transmitted thence over the line of the Uvalde Telegraph Company to their destination, where they are received by its owner, and delivered to the persons to whom addressed. Messages from the town are transmitted over the wires of the Uvalde Company to the station, where they are received by appellant's agent, and sent over its wires to their destination, and delivered by its servants to the persons for whom intended. For each of its telegraph stations the appellant has different calls, indicated by letters used in calling up a station to which a message is to be sent, as well as designating the one from which it is to be transmitted. To illustrate: The operator, sending the message from San Antonio to Uvalde station, calls "D.A." (the call for that station), and then signs "S.A.," the call of its office at San Antonio, and, when it receives an answer to the call, transmits the telegram. The name of each of appellant's operators is indicated by a letter, which is used and placed on the messages to designate the operator who sends and the one who receives the dispatch. Appellee, the Uvalde National Bank, of Uvalde, Tex., carries on a banking business in the town of Uvalde, and John Woods & Sons, a partnership, are private bankers, residing and doing business in the city of San Antonio, Texas. These relations, conditions and facts prevailed, obtained and existed on the 16th day of August, 1900. On that day the Uvalde National Bank received the following telegram: "San Antonio, Texas, 15th. To C. W. Fisher, c/o Uvalde Bank, Uvalde, Texas: We will advance forty-five hundred your wire Cline. Jno. Woods Sons"—which was received by appellant's agent at Uvalde station, and transmitted by him over the line of the Uvalde Telegraph Company to the town of Uvalde, where it was received by Mr. White, and delivered in a sealed envelope of the appellee. In sending this message the call indicated by the letters which designate Uvalde station was given, as well as the letters which indicate that it was sent from its office in San Antonio, and a letter which indicates the name of one of appellant's operators at its office in said city was given as designating the operator who transmitted the message, and the call was answered as though it had been received at San Antonio. A few minutes after appellee received the envelope containing this message, a scoundrel, who gave his name as C. W. Fisher, called at its bank, and asked the president thereof if he had a telegram for

him. In response to this inquiry the envelope was handed to him, and he opened it in the presence of the president of the bank, stating to him that he would draw on John Woods & Sons for the amount, whereupon the president told him that he would not permit him to do so until the bank had wired John Woods & Sons, and received from them a confirmation of the telegram. The bank then wrote out on one of the Uvalde Telegraph Company's blanks, upon which was printed, "Send the following message subject to the rules of Western Union Telegraph Company," the following message: "Uvalde, Texas, Aug. 16, 1900. John Woods & Sons, San Antonio, Texas: Will you pay draft of C. W. Fisher \$4,500? Answer quick. Uvalde National Bank"—which was delivered to the Uvalde Telegraph Company, and transmitted over its line to Uvalde station, where it was received by appellant's agent, and by him transmitted to its wires extending to its office in the city of San Antonio. Before an answer was received to this telegram, and about half an hour after the receipt of the one first mentioned, the appellee received the following message: "Kansas City, Mo., 15th. To Bank of Uvalde, Texas, Uvalde, Texas: If our representative, Mr. Fisher, calls, please notify to go ahead and contract for balance of Moore cattle. Scraggs-Hall Co." This, like the former message, was received from appellant's wires at the station by its agent, and by him sent over the Uvalde Telegraph Company's line to the town, where it was delivered by Mr. White to the bank. About an hour after the bank delivered its telegram for transmission to John Woods & Sons, it received in reply the following message: "San Antonio, Texas, 16th. To Uvalde National Bank, Uvalde, Texas: Yes, we will honor C. W. Fisher's draft for \$4,500. Jno. Woods & Sons." This message was taken by appellant's agent at its office in Uvalde station from the wires of the Western Union Telegraph Company, and by him transmitted to the town of Uvalde over the line of the Uvalde Telegraph Company, and by its owner, White, delivered to the bank. In sending the last three messages quoted, the calls of the several offices to which they were to be transmitted and from which they were to be sent were given, and answers received in like manner, as we have stated, in regard to the first telegram quoted. When the message last mentioned was received by the bank, the person calling himself C. W. Fisher drew on John Woods & Sons the following check: "San Antonio, Texas, 8/16/90. Jno. Woods & Sons, Bankers, San Antonio, Texas. [2c. Revenue Stamp.] Pay to the Uvalde National Bank Uvalde, Texas, or bearer, \$4,500.00 (forty-five hundred dollars). C. W. Fisher." On the strength of the foregoing telegrams, the Uvalde National Bank honored the draft, paying the drawer \$1,200 in cash thereon, and giving him a letter of credit for the balance. The check was then sent

by the bank to its regular correspondent in San Antonio for collection, and its payment was refused by Jno. Woods & Sons, for the reasons that it was unauthorized, and they had no funds or valuables of the drawer in their possession. Neither of the telegrams purporting to be from John Woods & Sons was authorized or sent by them, or any member of the firm; nor was the telegram of the Uvalde National Bank, inquiring if John Woods & Sons would pay C. W. Fisher's draft for \$4,500, ever received by the firm; or any of its members. C. W. Fisher had no funds or valuables deposited with John Woods & Sons during the month of August, 1900, nor at any other time. Nor did he have any authority to draw on them for \$4,500, nor for any amount. In fact, the firm did not know Fisher, and never had any business transactions with him at all.

The person calling himself C. W. Fisher had been in and around the town of Uvalde for some time prior to the time he procured the money from the bank in the manner stated, and had been known to its cashier and another officer of the bank by such name a week prior thereto. While there he claimed to be a cattle buyer, representing Scraggs-Hall Company, of Kansas City, Mo., in the purchase of cattle. All the telegrams copied above, except the one of inquiry from the Uvalde Bank to John Woods & Sons, were forgeries, and fraudulently devised by Fisher and his confederate, who gave his name as Rief, who was operating with Fisher, for the fraudulent purpose of obtaining the money from the bank by the means and in the manner stated. Rief was a telegraph operator, and on the 14th or 15th of August, 1900, obtained from appellant's operator at Dunley, on the line of the Galveston, Harrisburg & San Antonio Railway Company, its call for Uvalde. This call was obtained by his asking the operator there to give it to him, and it was given him as "D.A.," which is the correct call used in calling up appellant's office at that station. At the time this information was imparted to Rief, appellant's agent at Dunley was told by him that he (Rief) was a telegraph operator, and the information was given him for no other reason, although he was a stranger and otherwise unknown to appellant's agent and operator at that place. Having obtained this information, Rief left Dunley as though going to San Antonio, but in fact went west to within about half a mile east of Uvalde station, where he was joined by his co-conspirator Fisher, and with him tapped appellant's telegraph wires extending between the station and the city of San Antonio. This was done by taking the wire from its insulator and attaching to and along it about a foot of insulated wires. After this attachment was made, the insulating was removed, and electric connection was thus made with appellant's line. Fisher then proceeded to the town of Uvalde. Rief cut the main wire, and carried the in-

ulated wires away from the road out into the brush, and attached them to an instrument which he had for transmitting and receiving telegrams. The rascals were then ready for business. In pursuance of it, Rief sent in this manner the first two telegrams above copied, over appellant's wires, to Uvalde station, intercepted the one sent by the appellee to John Woods & Sons, preventing it from reaching its destination, and forged and transmitted the fourth telegram in answer thereto, which purported to be from John Woods & Sons. In this manner the fraud was perpetrated, and the money obtained, without appellant's agent at Uvalde station or appellee knowing or having reason to suspect that the telegrams so transmitted and acted upon by the bank as genuine were fraudulent; it not being discovered until late in the afternoon of that day that appellant's wires had been tapped and used for such fraudulent purposes. Yet the foreman of the section gang of the railway company, to whom is partly intrusted the duty of keeping up appellant's line of telegraph wire, at 7:40 a. m. of that day saw two men working with the wire, as if repairing it, at the place where it was tapped. This fixes the time when the wires were tampered with. The last message (the one purporting to be from John Woods & Sons, confirming the first) was received at 11:35 a. m. of that day, which shows that appellant's wires were cut and in the hands and used by the perpetrators of the fraud for about four hours before it was consummated. It is inconceivable to us that a telegraph line, extending along one of the world's greatest commercial highways, connecting the principal business cities on the continent, used for directing and controlling the management of trains and in the furtherance of commerce, could be severed, tapped, and used for such fraudulent purpose for such a length of time without it being discovered had such care and diligence been used by the appellant as the nature and character of business transacted by it demanded. Neither Fisher nor his confederate was seen or heard of in the country afterwards, though diligent search and inquiry were made both by appellant and appellee. Fisher, however, was afterwards seen by Mr. Collier, the president of the bank, in jail at Lawson, Mo., where he had been carried from the penitentiary for trial in another case. Neither he nor his confederate has any property in the state of Texas.

From these facts we conclude that appellant was guilty of negligence, and that such negligence was the proximate cause of appellee's loss, unmixed with any contributory negligence on its part.

Conclusions of Law.

The question in this case which dwarfs all others is, who shall bear the loss occasioned by the false and fraudulent telegrams—appellant or appellee? In determin-

ing it the relation of telegraph companies to the public, and the nature and character of their business, should be regarded. They are instruments of commerce, and are granted by their creators special rights, privileges, and immunities because they are. The very purpose of their creation is for the service of the public. This service they must honestly, diligently, faithfully, and carefully perform. If it be in aid of interstate or foreign commerce, they may defy the power of sovereign states to control or regulate it, and shelter themselves in so doing under the Constitution of the United States. Through their instrumentality business transactions of the greatest importance are daily carried on throughout the civilized world by the transmission and delivery of messages to its utmost ends. They invite the public to confide in their care, skill, fidelity, and integrity, and this invited confidence is by the business world reposed in them. For the careful and faithful conduct of their business they are amply remunerated by the receipt of tolls fixed by themselves. In the conduct of their business they incur a responsibility corresponding to the importance of the transaction carried on through their instrumentality, and should be held to the exercise of such care and caution as it is reasonably in their power to employ in order to avoid being made the instrument of deception and of fraud. "The business of telegraph companies is in some respects different in its relations with the public from that of other corporations. It is important because of its instantaneous means of communication, and because it is intended to influence the action of the party to whom the telegram is directed. Such party is, in most cases, compelled to act upon the telegram which he receives, and has the right to trust to its correctness, and rely upon the representation made upon its face that the sender whose name is signed to the message has sent that particular telegram to the party named in the message." *Pac. Postal Tel. Co. v. Bank of Palo Alto*, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711. If this were not so, telegraphic communications could not, with any degree of safety, be acted upon in important business transactions. The receiver of a message has of himself no way of testing and ascertaining its accuracy and genuineness. He has nothing to do with the construction, operation, and maintenance of the company's lines. He has no power to select its agents, nor of controlling or directing them, nor means of determining their competency or efficiency. It is not for him to guard their wires, so as to protect them from being tapped or tampered with; nor can he take any precautionary measures to prevent spurious and fraudulent messages from passing over them. He must receive the message on the faith that it is what it is held out to him by the company to be when it is delivered him by its agent—a gen-

uine one, regularly received and transmitted by the company from the sender in the usual and ordinary conduct of its business, with that care and prudence which the nature and importance of the transaction to which it relates require. If he has any doubt as to the genuineness of the telegram, he can, ordinarily, do only what the record shows appellee did in this case—send another message by the telegraph company for the purpose of verifying the genuineness of the one already received. When he has done this, he has the right to rely upon its being transmitted and delivered, and that the reply he received, taken and delivered him from the company's wires, confirming the genuineness of the first dispatch, is itself genuine. Had the last telegram copied in our conclusions of fact been genuine, it would have unquestionably constituted an acceptance by John Woods & Sons of the draft drawn on them for \$4,500 by C. W. Fisher (*North Atchison Bank v. Garretson*, 51 Fed. 168, 2 C. C. A. 145; *Randolph*, Com. Paper, §§ 600, 1775), and they would have been liable to appellee on such acceptance. This is clearly the legal import of the message appearing upon its face, and the appellant must be held to its knowledge when it took the telegram from its wires at the station, and transmitted it over its connecting line to the town of Uvalde. Knowing its import, and that it would probably be acted upon by the appellee, it was the company's duty to have used such care and precaution in the conduct and management of its business as would be reasonably sufficient to prevent its wires and operators from being used as instruments of fraud, in its transmission, as well as to detect any such fraud. Its duty to the public, when the nature and importance of its business is considered, cannot be so measured as to fall short of this, though it may not be held as an insurer. An operator of a telegraph company, when he is employed to receive and transmit messages in the regular management and order of its business, is necessarily informed of the several calls of its various offices where telegrams are sent and received. Without this information he could not properly discharge the duties of its employment. Those who can operate telegraph instruments used for sending messages are not confined to the employés of any one company, as is demonstrated by the facts in this case. But, to enable one who is not an operator of a company to successfully transmit a fraudulent message over its wires, he must know the calls of its office from where he pretends to send the message, as well as the one where it is to be received. If he obtains this information through one of the company's operators who was intrusted with it, and successfully uses it for the purpose of imposing upon a member of the public, to his injury, a spurious message as a genuine one, the responsibility, as well as liability, for the wrong should fall upon the

company, who, through its agent, has enabled a third party to commit the fraud, rather than upon the innocent party who has been imposed upon by it. In such a case the information possessed by the company's operator is that of his principal, and when he discloses to a third party his principal is as much responsible for a wrong perpetrated upon another by reason of such disclosure as though it had itself imparted the information. When a stranger, an irresponsible party, receives information in this manner which enables him, if he is an operator, and can procure an instrument, to tap the company's wires, and, through forged telegrams, deceive its operators and defraud the public, the liability for such fraud should certainly rest upon some one, and there is no reason for its being placed upon an innocent party who has been victimized by it. Therefore we think, when the principles above enunciated are applied to the facts of this case, that the negligence of appellant was the proximate cause of the damage sustained by the appellee through the means of such false and fraudulent telegrams, and that the loss occasioned thereby should be borne by the appellant, whose negligence caused it, rather than by the appellee.

It will be observed by those acquainted with the judicature of Texas, as well as the other states of the American Union, that the facts make this a case of first impression. While the cases, viz., *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280; *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 39 N. W. 353, 1 L. R. A. 143, 12 Am. St. Rep. 636; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 141; and *Pac. Postal Tel. Co. v. Bank of Palo Alto*, supra (which last case analyzes and discusses the preceding ones), are analogous in principle to the one at bar, in this: that the telegram, sent without authority, was false and forged; that the party sending it committed a criminal act; that the telegram upon its face appeared to be genuine and true, and was received in the usual manner, and was calculated and intended to deceive and defraud the bank or party to whom it was delivered—the distinguishing feature between those cases and this one is, in the former the telegrams were sent in the usual manner, and in this case they were only apparently sent in that manner; appellant's negligence being the cause of the false appearances. The question as to whether appellee was guilty of negligence in paying the money to Fisher upon the faith of the fraudulent telegrams was one of fact, which was properly submitted to the jury, and, they having determined it in the negative upon the evidence reasonably sufficient to support their finding, the verdict should not, on this question, be disturbed. The doctrine of "last clear chance" has, under the facts in this case, no applicability to the question. *Bogan v. Ry.* (N. C.) 39 S. E. 808, 55 L. R. A. 418.

There was no error in the court's refusal to admit in evidence the stipulations on the back of the message sent by the Uvalde National Bank to John Woods & Sons, for the stipulations that appellant company should not be liable in case of delays arising from unavoidable interruption in the working of its lines, as well as that the company was made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination, could not, in view of the testimony in this case, constitute any defense to appellee's cause of action. Besides, it appears that appellee had not signed or agreed to said stipulations, appellant's agent having written the message on the blank where they were stipulated, which appellee never saw, signed, or agreed to.

The conversation between Collier, the president of appellee's bank, and Fisher, which took place immediately preceding the cashing of the draft, was part of the res gestæ, and was properly admitted in evidence.

We deem it unnecessary to extend the length of this opinion by discussing assignments of error not already directly passed upon, but deem it sufficient to say that we have examined and considered carefully each of them, and, in our opinion, none disclose an error requiring a reversal of the judgment, which is affirmed.

On Motion for Rehearing.

(Feb. 25, 1903.)

It is urged in this motion that we erred in concluding as a fact that appellant, in imparting, through its agent and operator at Dunley, to Rief, one of the fraudulent conspirators, the company's call for Uvalde station, for the reason that the evidence shows that he was an operator, and that any operator can get the calls while sitting on the platform, or standing near the window, from hearing the clicks of the instrument receiving and transmitting messages, and that, therefore, no information was disclosed to Rief that he could not in that manner readily obtain. It may be conceded the evidence shows that an operator within hearing of the instrument may catch the sounds, and know that certain letters are indicated, but, without his being informed, we cannot perceive how he can tell what letters are used for the call of any particular station. As is shown in our findings of fact, "D.A." is the call of Uvalde station; thus the sound given for these letters could be heard and known to indicate them by an operator, but, without his being informed that they constituted the call for Uvalde station, he could not know their meaning. It was this information that was given by the company's agent at Dunley to Rief, and through this information, in connection with that he had obtained that the call of San Antonio was "S.A.,"

that enabled him and his conspirator to perpetrate the fraud. And this information, we have held, was negligence in the company to impart to a stranger, known to be an operator, who could use it to defraud a party dealing with the company of his money. The theory of appellant's counsel that the call of Uvalde station was given Rief by its agent at Dunley to establish the "brotherhood" between them as operators, if correct, furnishes no excuse. An express company, whose safe had been robbed of valuables intrusted to it, by one who had obtained the combination of the safe from the company's agent, which had enabled the robber to open its door, might as well say it was guilty of no negligence because the combination was given only for the purpose of "establishing a brotherhood" between its agent and the robber. In our conclusions of fact the evidence which shows that appellant's wires were cut and in the hands of and used by the perpetrators of the fraud for about four hours before it was consummated is given. The conclusion, from such facts, cannot be escaped that appellant was negligent in not discovering that its wires had been in some way tampered with. If, as is contended by appellant in this motion, after the box relay was put in, the main line on the loop cut connection established, and the electricity went through the instrument in the woods just as it would a set of instruments in the office, communication continued just the same with all the offices along the line, how was it that the message of appellee to John Woods & Sons never reached San Antonio? If the communication was not broken, it was bound to have reached there. If it did, and had been answered, the reply must have also reached Uvalde station. But according to appellant's own evidence this dispatch was never received in San Antonio, and the reply was not sent from there. If this evidence is not true, then the message of inquiry reached San Antonio, and was either not delivered to Woods & Sons nor answered by them, or the forged message in response was sent from the San Antonio office. So, if appellant take either horn of the dilemma, its negligence is established. But our finding that communication was cut off, and the wires in the hands of and operated by swindlers for nearly four hours without being discovered, is the only one that finds support in the evidence. Then, when it is considered that the wires of appellant's line were cut, and in the hands of swindlers for four hours, it, as we remarked in our original opinion, is inconceivable to us that it could not have been discovered had appellant used such care and diligence as the nature and character of its business required of a person of ordinary prudence.

The bank's action against appellant was not based upon the latter's liability for delays of telegrams arising from unavoidable interruption in the working of its lines. There was no such delay pleaded or relied upon by either party as a cause of action or ground of defense. Therefore the testimony made the basis of appellant's second assignment of error was irrelevant, and properly excluded by the court.

The other points made in the motion were fully considered and discussed in the original opinion, and we deem it unnecessary to add anything more to what has been said upon them.

The motion is overruled.

RENFRO v. HARRIS.*

(Court of Civil Appeals of Texas. Jan. 7, 1903.)

APPEAL—NECESSITY OF STATEMENT OF FACTS —MATTERS REVIEWABLE.

1. In the absence of a statement of facts, assignments of error relating to rulings on evidence, the court's charge, its refusal to retax costs because more than two witnesses testified to the same fact, and to the action of the jury in taking with them documentary evidence on which certain sections of law were printed relating to matters in controversy, cannot be reviewed on appeal.

Appeal from district court, McCulloch county; John W. Goodwin, Judge.

Action between T. O. Renfro and E. W. Harris. From the judgment, Renfro appeals. Affirmed.

Shropshire & Hughes, for appellant. A. W. Moursund, Jenkins & McCarty, and F. M. Newman, for appellee.

STREETMAN, J. On a former day of this term the court sustained a motion of appellee to strike out the statement of facts in this cause because it was not filed within 10 days after adjournment of the district court. The assignments of error relate to the admission and exclusion of evidence, the charge of the court, the refusal of the court to retax certain costs because more than two witnesses testified to the same fact, and the action of the jury in taking with them documentary evidence on which were printed certain sections of law relating to the matters in controversy. In the absence of a statement of facts, it is impossible to determine whether there was error in any of the particulars complained of, and, if so, whether it was prejudicial to appellant. *Lockett v. Schurenberg*, 60 Tex. 610. The judgment is therefore affirmed.

Affirmed.

*Rehearing denied February 25, 1903, and writ of error denied by supreme court March 12, 1903.

CITY OF SHERMAN v. CONNOR et al.*

(Court of Civil Appeals of Texas. Jan. 24, 1903.)

MUNICIPAL CORPORATIONS — CONTRACTS — ERECTION OF WATERWORKS—BREACH BY CONTRACTOR — DAMAGES — RECOVERY ON QUANTUM MERUIT.

1. In an action against a contractor for breach of a contract to construct city waterworks, the city is entitled to recover as damages the difference, if any, between the contract price plus the value of extra materials furnished by the contractor, and the amount reasonably paid by it to complete the works plus the sum paid to the contractor on account of the contract.

2. A contractor failing to construct city waterworks according to his contract is entitled to recover the value of the work done by him, the benefits of which the city has accepted, less the payments made to him on account of the contract, added to the amount reasonably paid by the city to complete the works.

3. The contractor was not prevented from recovering the value of his work though the fund procured by the sale of the waterworks bonds, and made chargeable with the amount due the contractor, had been paid out by the city in completing the waterworks.

4. Where the original contract for the construction of city waterworks was valid, and permitted changes and additions in the works, and the jury found that the value of the materials and labor furnished, including the changes and additions, was less than the contract price, the contractor could recover for the charges and additions though there was no provision for the levy of a tax to pay the interest and create a sinking fund for the discharge of the debt created thereby.

5. Where, in an action against a contractor for breach of a contract to construct city waterworks, there was no evidence on which to base a verdict that the city had sustained a loss of profits on account of the breach, the city was not entitled to damages though the contractor failed to procure the water supply called for in the contract, if the amount reasonably expended by the city to complete the waterworks did not exceed the contract price plus the value of the extra materials furnished by the contractor.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by the city of Sherman against W. C. Connor and another. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Caruthers, Sidney Wilson and W. J. Brown, for appellant. Galloway & Templeton, H. B. Heflin, and Sidney L. Samuels, for appellees.

BOOKHOUT, J. This is a suit instituted by the city of Sherman against W. C. Connor and T. J. Oliver to recover damages for an alleged breach of contract to construct and erect a system of waterworks and furnish water supply for the city of Sherman. The defendants answered, denying the breach, and alleging that they complied with the contract in all respects, and also alleged that there was a balance due them on the contract price, for which they prayed judgment. They also pleaded facts authorizing a recovery on a quantum meruit, in the event

it should be determined that they did breach the contract. A trial resulted in a verdict and judgment for the defendants for \$8,000, with interest from September 6, 1887, at 6 per cent. per annum. The plaintiff appealed.

Conclusions of Fact.

On the 19th day of November, 1886, W. C. Connor and associates entered into a contract with the city of Sherman to build and construct for said city a system of waterworks, and to furnish the necessary labor and material therefor, in accordance with plans and specifications prepared by said city, in consideration of which, Connor and associates were to receive \$68,000 in waterworks bonds of said city, the issue of which said bonds was provided for by ordinance of said city passed in July, 1886; and said city, as well, was to pay in addition thereto to said Connor and associates the sum of \$5,000, to be paid in 6 per cent. interest-bearing waterworks bonds to be issued thereafter by the city council of said city, or, in lieu thereof, in 8 per cent. interest-bearing treasury warrants of said city, to be paid and delivered to said Connor and associates in the following way and manner, to wit: "\$10,000 in bonds upon delivery of pumps, boilers, and standpipe material; \$15,000 on delivery of one-half of the pipes, hydrants, and valves; \$15,000 on delivery of all materials and when construction of works was in actual progress; the balance of \$33,000 to be paid upon final completion of the works and acceptance of the same by the said city. Connor and associates in said contract agreed to secure an underground water supply equal in quantity to 250,000 gallons every 24 hours, for a period of 12 months from the completion and acceptance of said works, they to have the privilege of using the grounds where the test wells were located. And should the requisite quantity of water not be found at that place, then they should have the right to resort to another and second source of underground supply, and if, after having used reasonable means to secure the required quantity of water at said two places, they failed to procure same, they should be allowed to resort to a storage or overground supply. All of said locations subject to the approval of said city of Sherman. Connor and associates to furnish two compound duplex Worthington suction pumps, each to have a capacity of 500,000 gallons every 24 hours. Said contract provided that upon completion of said works said Connor and associates were to run and operate the said works for a period of 30 days at their own expense, and furnish a water supply for said city as a test of the efficiency of the works, and upon completion of said test, if the works were in all respects found complete in accordance with the terms of the contract, then Connor and associates were to turn the works over to the city, and the contract, so far as the erection and completion of the

*Rehearing denied February 21, 1903.

works were concerned, as distinguished from the water supply, should be considered by both parties as complied with. The contract provided that Connor and associates were to commence work on the system within 30 days from the day of the contract, and complete said works within 6 months from the date of same, from which 30 days' trial heretofore mentioned should be excluded. Connor and associates to file a bond, with good and sufficient sureties, in the sum of \$25,000, for the faithful performance of the contract. This contract was ratified by the city council, and signed by the mayor in behalf of the city, and by W. C. Connor for himself and his associates. On December 8, 1886, the city of Sherman entered into a supplementary contract with W. C. Connor and associates for the purpose of extending the pipe distribution and establishing additional hydrants. This contract, after referring to the original contract of date November, 1886, provided that Connor and associates should furnish and lay 11,000 feet of 4-inch pipe in addition to that required by the original contract, and to furnish and set 15 additional hydrants in places as the city council should direct, the city agreeing to pay the said Connor and associates the additional sum of \$8,705, less a credit of \$3,500, leaving a balance of \$5,205, said credit of \$3,500 growing out of the lessening of the size of the pipe required in the original contract, by reason of which the cost of the pipe was diminished to that extent. Connor and associates to be paid for such work and material in city warrants, or in additional bonds of said city as provided in the original contract, and, should the said city issue city warrants in payment of said last-named sum, it agreed in said supplementary contract to appropriate and set aside annually all the net earnings and revenues arising from the operation of said works, in payment of said sum, and until the same shall have been fully paid. This supplementary contract is signed by C. N. Buckler, as mayor, on behalf of said city, and by W. C. Connor and associates. Connor and associates entered upon the performance of the contract, furnished the material, and constructed the waterworks—as distinguished from the water supply—in substantial compliance with the contract, and on the 4th of July, 1887, tendered the same to the city; but the city refused to accept the same, insisting that the water supply was not up to the requirements of the contract, and that the test required by the contract had not been made. Thereupon the further prosecution of the work by Connor and associates ceased, and they locked up the pumping station. Thereafter, on September 6, 1887, the city of Sherman took charge of the works, and have since been using the same. The reasonable value of the material used and work done by defendants when the city took charge of the same was \$51,400; which sum was the reasonable value of the waterworks system,

as constructed by defendants, on September 6, 1887. After the city took charge of the waterworks system it procured a water supply of more than 250,000 gallons of water every 24 hours for 12 months, independent of the supply furnished by Connor and associates. The amount expended by the city in procuring said supply, added to the sum paid defendants—\$43,400—was less than the contract price and the reasonable cost of extra material furnished and put in the works by defendants at the instance and request of plaintiff. The amount paid defendants for the work done and material furnished by them was \$43,400. Defendants made repeated propositions to the city with a view of compromising the differences between them, but the city would not accept any of them.

Opinion.

The appellant complains of the fifth and sixth paragraphs of the charge of the court as not announcing correct propositions of law.

1. The contention of appellant is that the contracts between the city of Sherman and Connor and associates attempted to create a debt against the city for approximately \$79,000, and that part of the same in excess of \$68,000—the bonds then issued—was void, for the reason that at the time of making said contract no provision was made to pay the interest thereon and create a sinking fund for the payment of the principal. This suit was instituted in the latter part of 1887, and upon a trial, the date of which is not shown, a judgment was rendered for the defendants, which was reversed by the Supreme Court. 88 Tex. 85, 29 S. W. 1063. After the mandate was returned, the parties amended their pleadings. The plaintiff, city of Sherman, alleged that it had at great expense procured an underground supply of water of 250,000 gallons every 24 hours as stipulated in the contract sued on, and set out the items of expense which it charged it had incurred in securing the same. The city also claimed various items of damage, which it alleged it had sustained by reason of defendants' breach of the contract sued on, and sought a recovery therefor. There was no contention made on the former appeal, nor on the trial in the lower court resulting in the judgment from which this appeal is prosecuted, that the contract was not valid and binding on the parties. This contention is raised for the first time in this court on this appeal. Conceding for the purposes of this discussion that appellant's contention is sound, still we think the judgment should be affirmed. The suit is by the city to recover damages from the defendants for their failure to construct a system of waterworks and furnish a supply of water as provided by the terms of their contract. The defendants plead that they constructed the system of waterworks and completed same and furnished a water supply in all respects as stipulated

and required by their contract, and sought to recover the contract price therefor, less the amount paid them. They further plead that if they failed to furnish a water supply for the amount stipulated in the contract, they did furnish material and perform labor for said city, and did construct a system of waterworks and furnish a supply of water which was reasonably worth \$88,245.45, which the city took possession of and accepted and was using, and they sought to recover judgment therefor, less the amount paid them thereon. The court instructed the jury in the fifth paragraph of the charge, substantially, that, if defendants failed to construct said waterworks system in accordance with the terms of the contract, and failed to secure a water supply of 250,000 gallons every 24 hours for a period of 12 months, and that the city took charge of said system of waterworks and completed the same, and in so doing expended such sums of money as were reasonable and necessary to complete said works and secure an underground water supply of 250,000 gallons every 24 hours for 12 months, and the amount so expended, added to the sum paid by the city to Connor and associates, exceeded the price stipulated in the contracts to be paid for said system, and the procuring of said water supply, and the reasonable value of the entire material furnished, if any, then they should find for plaintiff the difference between the contract price which the city contracted to pay, to which should be added the reasonable value of the extra material furnished by defendants, and the amount paid by the city and which was reasonably necessary to complete said work and furnish said water supply, to which should be added the amount paid by the city to defendants. In paragraph 6 the court told the jury that if defendants failed to construct said waterworks system and procure a water supply as required by the contracts, and the city took charge of the works, and expended an amount of money necessary to procure an underground water supply, and the amount expended in procuring said water supply, added to the sum paid by plaintiff to the defendants, is less than the reasonable value of the extra material furnished by said defendants at the instance of plaintiff, added to the contract price to be paid defendants, then and in that event plaintiff was not damaged, and would not be entitled to recover against defendants. Paragraphs 5 and 6 of the charge state the measure of damages as announced by the Supreme Court on the former appeal under the state of facts now shown to exist. The court say: "If the works actually constructed were to the extent of their construction in substantial compliance with the contract, then if the amount it would take to complete the works according to the contract, added to the amount paid, would not exceed the contract price, the city would not be damaged." 88 Tex. 43, 29 S. W. 1057. When

the case was before the Supreme Court the city had not made any attempt to complete the work by securing a water supply equal in quantity to the requirements of the contract. Since then it has done so, and has secured a supply in excess of the amount contracted for, at an expense less than the difference between the contract price, added to the cost of extra material, and the amount paid defendants. In paragraph 7 of the charge the jury were instructed that, if defendants complied with the terms of their contracts in each and all respects, then they should find for defendants for the contract price, to which should be added the reasonable value of the extra material furnished by defendants at the instance of plaintiff, less the amount which defendants had been paid by plaintiff. They were further instructed as follows: "Or, if you believe from the evidence that defendants failed to construct said waterworks according to contract, and failed to procure the amount of water and make the test provided by the terms of the contract, but you further believe from the evidence that the reasonable value of said system of waterworks at the time plaintiff took possession of the same exceeded in amount the sum of \$43,400, added to the amount, if any, which was reasonable and necessary to expend, and which was reasonably and necessarily expended by the plaintiff in order to complete said work and thereby procure the amount of water provided for in said contract, then you will find for the defendants the difference between the reasonable value of the waterworks at the time plaintiff took possession of same and the sum of \$43,400, added to the amount, if any, which was reasonable and necessary to expend, and which you find was reasonably and necessarily expended, by the plaintiff in order to complete said work and thereby procure the amount of water provided for in said contract, and for interest on said difference, if any you find, at the rate of 6 per cent. per annum from the date plaintiff took possession of said waterworks to this date." The jury found against the plaintiff, and found for defendant in the sum of \$8,000, with 6 per cent. interest per annum from September 6, 1887. The size of the verdict clearly shows that the jury found for the defendants under that paragraph of the charge authorizing a recovery on a quantum meruit. Had they found for defendants under the clause of the charge authorizing a recovery upon the express contract, the verdict must necessarily have been for defendants in a much larger sum, for the contracts amounted to approximately \$79,000, and it was conceded that the defendants had only been paid \$43,400. The verdict of the jury necessarily includes a finding that the value of the waterworks and water supply constructed and furnished by the defendants at the time the city took charge of the same was \$51,400, that is, the amount paid defendants—\$43.

400—and \$8,000 found by the verdict. This amount was earned by the defendants, and they were entitled to the same, less the amount paid when the city took possession of the works on September 6, 1887, and the jury so found, for they allow interest on the \$8,000 from that day. The bonds had been sold for \$68,000—their face value—and this sum deposited with the city, and that amount, less the \$43,400 paid defendants, was in the possession of the city when it took charge of the works. This fund was chargeable with the amount due defendants, and the fact (if such is a fact) that the city paid out the same for completing the works would not prevent a recovery by defendants herein.

2. It is contended by appellant in its third assignment of error that the court erred in instructing the jury that defendants could recover from the city of Sherman, or charge it with, the extra material which the jury believed was furnished by the defendants at the instance and request of plaintiffs, over and above the material named and described in the two instruments, for the reason that it is not shown that any provision was made, by the levy of a tax, to pay the interest and create a sinking fund to discharge such debt. The original contract entered into by plaintiff and defendants was a contract to construct, build, and finish "a system of waterworks in and through the city of Sherman in accordance with the plans and specifications" therein referred to. The plans and specifications were not introduced in evidence. There was testimony that the defendants, at the request of the city, put fastenings around the standpipe so that wires could be fastened to it to keep it from blowing over; that this was reasonably worth \$150; that under a supplemental contract defendants were to furnish and did furnish 975 feet of 4-inch pipe and 888 feet of 6-inch pipe; that the 4-inch pipe cost \$0.75 per foot, including putting down, and the 6-inch pipe \$1.00 per foot; that the original contract provided that changes could be made as the work progressed, adding to or deducting for the pipe to be used. This testimony was not objected to by plaintiff. The original contract being for the construction of a system of waterworks in and through the city of Sherman, and having made provision for changes and additions to or deductions from the same, we think the changes and additions made were contemplated and provided for in the original contract, and, when made, became a part of it. It being conceded that the original contract was valid to the amount of \$48,000, and the verdict of the jury in effect finding that the material, labor, and plant furnished were only of the value of \$51,400, the contention of appellant is not tenable.

3. It is insisted that the court erred in instructing the jury to the effect that the city was not damaged, even if defendants did fail to procure a water supply of 250,000 gal-

lons per day, if the \$43,400 paid by plaintiff to defendant, added to the amount of money that was reasonable and necessary to be expended by plaintiff, and which plaintiff did reasonably and necessarily expend in order to complete said waterworks and secure the said water supply of 250,000 gallons every 24 hours, did not exceed the contract price, added to the value of the extra material furnished by defendant. It is contended that there was evidence to justify the jury in finding that the plaintiff had lost money and was damaged in not having the amount of water contracted for, and that it could have sold more water had the supply been greater. There was no sufficient evidence upon which to base a verdict that the city had sustained a loss of profits on account of the failure to furnish consumers water. The evidence does not point out any particular consumer who failed to get a supply of water, the amount he would have used, and the price to be paid therefor.

The appellant having failed to point out any reversible error, the judgment is affirmed.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. PRIEST et al.*

(Court of Civil Appeals of Texas. Jan. 29, 1903.)

REWARDS—CONSTRUCTION OF OFFER—MISDEMEANOR—CONVICTION—CLAIM BY OFFICER—STATUTES—APPEAL—ASSIGNMENT OF ERROR.

1. Pen. Code, art. 784, makes it an offense to willfully interfere with the transmission of messages along a telegraph or telephone line. *Held* that, to constitute an offense under such article, there must be a breaking, cutting, etc., of some wire, post, machinery, or other necessary appliances, so as to interfere with the transmission of messages.

2. A telephone company offered a reward for the conviction of any person guilty of cutting, pulling, tearing down, or misplacing its telephone wires, posts, or machinery, or unlawfully obstructing the transmission of messages, in violation of article 784. *Held* that, in an action against the company to recover the reward because of the conviction of one for cutting a wire, the fact that the wire cut was a dead one, and did not come within the offer, and that plaintiff had personal notice that the reward did not apply to such wires, was properly pleaded as a special defense.

3. A constable who arrests a person for misdemeanor in the discharge of his duties as an officer is not entitled to recover a reward offered for the conviction of any one committing such misdemeanor.

4. In an action to recover a reward offered for the conviction of any one committing certain misdemeanors, two other persons beside plaintiff, who claimed the reward, were made parties, and defendant appealed from a judgment dividing the reward between all the claimants. *Held*, that a claimant, not having appealed from the judgment, could not file an assignment of error, and have the judgment below reversed, and judgment rendered in the appellate court in his favor for the entire amount.

*Rehearing denied.

Appeal from Harris county court; E. H. Vosmer, Judge.

Action by John Priest and others against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Harris & Harris, for appellant. Jas. A. Breeding, G. W. Tharp, F. L. Schwander, C. E. Johnson, and Fisher & Sears, for appellees.

GARRETT, C. J. John Priest brought this action against the appellant to recover a reward of \$1,000 offered by the company for the arrest and conviction of any person guilty of cutting, pulling, tearing down, or misplacing its telephone wires, posts, or machinery, or unlawfully obstructing or interfering with the transmission of messages along its telephone wires, in violation of article 784 (877), Pen. Code. Thomas Hennessy intervened, and made himself a party to the suit, and claimed the reward for himself. Thomas Williams, who was made a party to the suit on motion of the defendant, also claimed the reward, and, dying pending the suit, his heirs were made parties. The pleadings of the parties claiming the reward showed that it was offered for the arrest and conviction of any person violating article 784 of the Penal Code, which declares against willfully obstructing or interfering with the transmission of messages along a telegraph or telephone line, and that one Taylor had been arrested and convicted in the criminal district court of Harris county upon a charge of cutting, pulling, and tearing down the wires of the appellant. The appellant answered, as to Priest, that, at the time of the arrest of Taylor, Priest was a watchman in the service of the telephone company, and that when he was employed he was informed that the wires which were being cut, and which he was expected to watch, were what is known as "dead wires," and not in use, and that they did not come under the reward offered by the company. As to Hennessy, it alleged that he participated in neither the arrest nor the conviction of Taylor; and, as to Williams, that he was a constable of Harris county, and in making the arrest was acting in the simple performance of his duties as a peace officer, and not entitled to the reward. Exceptions of Hennessy and the heirs of Williams to the answer were sustained, and this action of the court has been assigned as error.

The reward was offered for the arrest and conviction of any person violating the provisions of article 784 of the Penal Code. This was shown on its face. To constitute an offense under this article, there must have been a breaking, cutting, etc., of some wire, post, machinery, or other necessary appurtenance, in such manner as to interfere with the transmission of messages along the line. The fact that the wire cut was a dead wire,

and did not come within the meaning of the offer, and the fact of personal notice to Priest that the reward did not apply, were properly pleaded as a special defense. The language of the offer itself showed that it applied only to a conviction under article 784, Pen. Code; but the appellant was entitled to allege and prove as a defense that the wire cut and torn down and taken was a dead wire, and that Priest was personally notified as to the application of the offer. If the constable, Williams, made the arrest, as alleged, in the discharge of his duties as an officer, he was not entitled to recover any part of the reward. *Kasling v. Morris*, 71 Tex. 588, 9 S. W. 739, 10 Am. St. Rep. 797. The case cited shows the distinction between the facts under which an officer would be entitled to recover the reward, and those under which a recovery would not be allowed. The facts alleged as to the participation of Williams in the arrest presented a complete defense as to him, and it was clearly error to sustain the exception to the answer setting them up. The court erred to the prejudice of the appellant in sustaining the exceptions of Priest and Williams' heirs to the answer. No other error has been assigned for which we would have reversed the judgment.

Priest seeks, by cross-assignment of error against his co-appellees, to have the judgment of the court below, which divides the amount of the reward between the three claimants, reversed, and judgment rendered by this court in his favor for the entire amount. He has not appealed from the judgment now complained of, and is in no position to have it reversed, even if it should not be reversed for the errors assigned by the appellant. *Halsell v. Neal* (Tex. Civ. App.) 56 S. W. 137.

For the error of the court in sustaining the exceptions to the answer as above pointed out, the judgment of the court below will be reversed, and the cause remanded. Reversed and remanded.

ASHBURN et al. v. EVANS.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

STATUTE OF LIMITATIONS—ACTION ON NOTE—EVIDENCE—UNAUTHORIZED STAMPING OF NOTE AS PAID—PLEADING—RIGHT TO ATTORNEY'S FEE.

1. Testimony that the maker of a note told the holder that E. would take it up for him, and he, as soon as he got able, would repay E., and that the holder should assign and transfer the note to E. on payment of the amount due thereon, and evidence that the holder left the note at the bank, and E. sent a check for the amount due, and the note was stamped "Paid" and delivered to the person who brought the check, and by him put in the safe of E., where it remained, showed that the note was not paid, but transferred to E., so that, as regards the statute of limitations, his cause of action against the maker's estate is on the note, and not for money loaned to him.

2. Where the stamping of a note "Paid" by a bank at which it was left was an unauthorized act, without knowledge or consent of any of the parties interested, this may be shown in an action on the note without any pleading, it not being an effort to reform for mutual mistake.

3. That plaintiff, an attorney, had placed the note sued on in the hands of attorneys for collection, and so was entitled to the collection fee provided by it in such case, does not follow as matter of law from the fact that he had the assistance of other attorneys in prosecuting the action.

Appeal from district court, McLennan county; T. P. Stone, Special Judge.

Action by William W. Evans against M. E. Ashburn, individually and as executrix, and others. Judgment for plaintiff. Defendant Ashburn appeals. Affirmed.

D. A. Kelley, for appellant. Sleeper & Kendall and Evans & Davis, for appellee.

STREETMAN, J. W. W. Evans brought this suit on a note for \$500, dated December 29, 1896, due 90 days after date, payable to the order of S. W. Slayden & Co., executed by E. J. Ashburn, and providing for a collection fee of 10 per cent. "if placed in the hands of an attorney for collection." Before maturity of the note, Slayden & Co. sold the same to T. B. Dockery, and indorsed it in blank. When the note matured, an extension of 90 days was granted at the request of Ashburn, and with the consent of Slayden & Co., who at the same time waived protest and notice. About the time the 90 days expired, Ashburn arranged to have W. W. Evans take up the note. Dockery, who held the note at that time, testifies: "Ashburn came to me, and stated that he himself would not be able to take up said note after having been so extended as aforesaid, but that he had spoken to Judge W. W. Evans in regard to his (Evans) paying the amount due on said note, and had arranged with Evans to take up said note for him, said Ashburn, and that he, said Evans, would carry said note for him, said Ashburn, until he could pay same, stating that he had so requested said Evans to do this; and asked me that, upon said Evans paying to me the amount due on said note, that I would assign and transfer said note to Evans. Ashburn said to me Evans would take it up for him (Ashburn), and carry it for him (Ashburn), and that he (Ashburn), as soon as he got able, would repay Evans." The note was left by Dockery at the State National Bank, Waco, for collection, and Evans sent to the bank a check for the amount due, and this check was delivered to the bank, and it stamped the note "Paid," and delivered it to the person who brought the check. This person carried the note to Evans' office, and placed same in the safe, and Evans did not see it. He shortly afterwards became sick, and unable to attend to business for three or four years. He finally sold the safe, and the purchaser delivered to him the papers con-

tained in it, among which was this note, and he immediately proceeded to collect it. Dockery testified that the act of stamping the note "Paid" was done without his knowledge or direction. In the meanwhile, E. J. Ashburn died, leaving his wife, M. E. Ashburn, his sole devisee and independent executrix, and she received from him property subject to execution largely in excess of the amount of the note. This suit was against M. E. Ashburn, as sole heir and devisee and independent executrix of the will of E. J. Ashburn, the maker, and against S. W. Slayden & Co. as indorsers of the note, and judgment was rendered against them for the amount of principal and interest, but not for the attorney's fees provided for in the note. M. E. Ashburn alone appeals.

Mrs. Ashburn pleaded the two and four years' statute of limitation. The evidence clearly excluded the operation of the four-years statute, but it is insisted that the two-years statute is applicable; appellee claiming that the note itself was satisfied, and that the only cause of action was for money loaned by Evans to Ashburn to pay off the note. We are of opinion that the facts showed that the note was not, in fact, paid, but was transferred to and became the property of Evans; and the suit was on the note, and not for money loaned to Ashburn. Therefore there was no error in not applying the two-years statute of limitation.

An exception was reserved to the admission of Dockery's evidence that the act of stamping the note "Paid" was done without this knowledge or consent, because the plaintiff had not pleaded mistake. We do not think any pleading was necessary. It was not an effort to reform a mutual mistake of the parties to the contract. The act of stamping the note "Paid" was done without the knowledge either of the maker or the holder of the note, and was not discovered by Evans, who was buying the note, until about the time he brought suit. It was simply an unauthorized act of the bank officer, done without the knowledge or consent of any of the parties interested, and proof of these facts was admissible without a special plea.

Appellee has presented a cross-assignment of error on account of the refusal of the court to allow the 10 per cent. attorney's fees provided for in the note. No evidence was introduced to show that the note had been placed in the hands of attorneys for collection. Appellee contends, however, that sufficient evidence of the fact is afforded by the signatures to the pleadings in the case. The original petition is signed, "Nat. L. Davis and Evans & Davis"; the amended petition, "Evans & Davis"; and certain interrogatories propounded by plaintiff were signed "Sleeper & Kendall and Evans & Davis." In a motion made by the plaintiff after the judgment, it is stated that, "while this plaintiff tried said cause in his own person,

said Davis, being a member of the firm of Evans & Davis, took part in the proceedings of said cause." These are the only portions of the record which throw any light on the question, and, while they indicate that the plaintiff had the assistance of attorneys in the prosecution of this case, yet we cannot say that the court was compelled, under these circumstances, to conclude that the plaintiff had placed the note in the hands of these attorneys for collection.

Finding no error in the judgment, it is therefore affirmed. Affirmed.

HOUSTON COTTON OIL CO. v. TRAMMELL.*

(Court of Civil Appeals of Texas. Jan. 21, 1903.)

SALE OF UNWHOLESOME FEED—EVIDENCE—DAMAGES—IMPLIED WARRANTY.

1. The measure of damages for selling unsound feed for cattle, whereby they are made sick, and fall off in weight and deteriorate in market value, is their diminished market value at the time and place they are injured, so that evidence that 40 or 50 days later they sold for the market value, at the time of sale, of cattle of that grade, is not admissible, unless it be shown that the amount received was equal to the market value at the time and place of the injury.

2. On the issue whether the meal sold by defendant to plaintiff for feed for his cattle was unsound and unwholesome, evidence is admissible that the cattle of others, fed about the same time, and under the same conditions, and with the same kind of meal, were made sick in the same manner, though theretofore in good condition.

3. Though a contract in writing to furnish sound cotton seed meal does not specify the purpose for which it is to be used, yet, the sellers having understood that it was to be used for feeding cattle, there is an implied warranty that it is wholesome and fit for that purpose.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by D. M. Trammell against the Houston Cotton Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Boynton & Boynton, for appellant. Henry & Stribling and Spell & Phillips, for appellee.

FISHER, C. J. D. M. Trammell brought this suit against the Houston Cotton Oil Company, on January 14, 1901. In the amended petition, on which trial was had, he alleges: That he was in August, 1900, engaged in the cattle-feeding business, and at that time entered into a contract with the appellant, in which it was agreed that the appellant should furnish and deliver to him at West, Tex., sound cotton seed meal, for the purpose of feeding plaintiff's cattle at that place. The cotton seed meal and hulls, according to the terms of the written contract, were to be delivered to the plaintiff in October, 1900,

and thereafter. In October he put in the pens at West, Tex., about 420 head of cattle, for the purpose of feeding and fattening them on the cotton seed meal and hulls that were to be furnished by the appellant under the contract. That from the 26th of October, 1900, until about the 6th day of December of the same year, the defendant furnished him sound cotton seed meal and hulls, upon which the cattle fattened and flourished, but that on about the last-named date the defendant knowingly and willfully began to furnish him unsound and inferior cotton seed meal, and that the same was fed by the plaintiff to his cattle under the belief that it was sound and wholesome. That its defective condition was not discovered, and could not have been discovered, before feeding the same to the cattle. That the effect of the inferior and unsound meal upon his cattle was extremely hurtful and injurious, and greatly damaged them, in that it caused them to become sick; causing their bowels to run off, and said cattle to scour badly; causing them to pass from their bowels large quantities of blood and mucous, and producing upon said cattle permanent injury and damage. That on or about the 13th of December, 1900, the plaintiff discovered the injured and damaged condition of his cattle, and that it was caused and produced by the unsound meal, and that thereupon he immediately ceased to use the same, and notified the agents of the defendant, who thereupon promised the plaintiff that he should thereafter be furnished sound and wholesome meal, as provided for in the contract. That he relied upon these promises and representations, and resumed the feeding of meal furnished by the defendant, believing the same to be sound, but which in fact was unsound, and was not of the quality promised and agreed to be furnished. That the unsound condition of the meal was known to the defendant, its agents and employes. The damages to the 420 head of cattle by reason of being fed with the unsound meal is alleged to be the market value of \$10 per head. By supplemental petition the plaintiff alleged that he was not guilty of want of care or negligence in preventing the injury to his cattle; that he was not aware of the unsound condition of the meal, but believed the same was wholesome, and relied upon the promises of the appellant to furnish sound meal. The defendant, in its answer, admitted the execution of the contract in writing, substantially as set out and described in the plaintiff's petition, and denied that the cotton seed meal and hulls caused the sick and damaged condition of the plaintiff's cattle, and alleged other grounds and reasons why the plaintiff's cattle became sick, and that if the meal was unsound the plaintiff should have rejected the same, in that he could have procured and purchased suitable and sound meal, so as to avoid the injury to his cattle, and if the cattle had become sick,

*Rehearing denied February 25, 1903, and writ of error granted by supreme court.

as described, he could have put them in a pasture and fed them hay, or reduced the feed of meal, none of which was done, and all of which was usual in such cases, and alleged generally that it complied with the contract in furnishing the meal.

After stating the issues made by the pleadings, the charge of the court is as follows:

"Under the contract between plaintiff and defendant, by which defendant agreed to furnish to the plaintiff feed for his cattle, it was the duty of the defendant to furnish plaintiff with sound cotton seed meal (that is, cotton seed meal suitable and proper for feeding and fattening cattle in pens for market); and it was the duty of the plaintiff, in receiving said meal, to exercise ordinary care (that is, such care as a person of ordinary prudence would have used under the same circumstances) to have ascertained, before he fed such meal as was delivered to his cattle, if the same was sound and suitable for the purpose for which it was delivered.

"Now, if you believe from the evidence that any of the meal furnished by the defendant to the plaintiff under said contract was not sound and suitable for such feeding purposes as aforesaid, and that the same was fed to the plaintiff's cattle, and caused them to become sick, as alleged by the plaintiff, and that injury resulted to the plaintiff therefrom, and you further believe from the evidence that plaintiff and his said agent receiving and feeding said meal exercised ordinary care, and did not discover before feeding it that such meal was unsound and unsuitable for such feeding purposes, if you find it was, then, if you so find, you will find for the plaintiff. The burden of proof rests upon the plaintiff to establish the facts relied upon by him for a recovery, as set forth in the foregoing paragraph, and by a preponderance of the evidence.

"If you find that plaintiff's cattle were sick, as alleged by him, but that such sickness was not caused by unsound meal, as hereinbefore defined, furnished him by defendant, or if you believe from the evidence that plaintiff or his agents receiving said meal discovered its unsoundness, if you find it was unsound, or by the exercise of ordinary care would have discovered such unsoundness, before feeding the same to plaintiff's cattle, then, in either event, you will find for the defendant.

"If you find from the evidence that plaintiff's cattle were made sick by unsound meal furnished him by the defendant, then it was the duty of plaintiff, upon the discovery of such sickness, to use ordinary care to cure them; and if you find from the evidence that plaintiff or his representative in charge of said cattle, after said cattle became sick, failed to exercise such care to cure them, and you further find that, if such care had been exercised, the damage, if any, to said cattle, would have been reduced, then you are instructed that plaintiff cannot recover

of defendant such damage as was sustained by reason of lack of such care, if any; and the burden of proof rests upon the defendant to show by a preponderance of the evidence that plaintiff did not exercise such care as mentioned in this paragraph.

"If you find for the plaintiff, you will assess his damage from the evidence by determining what was the fair market value of his cattle which were made sick, if any, immediately before they became sick, and such market value thereafter. Then, if you find their market value after their sickness, if any, to be less than it was before such sickness, the difference between the two you will find as plaintiff's damage, if any, unless you should find that after plaintiff's cattle became sick he failed to exercise ordinary care to cure them, in which event, if you so find, you will assess his damage at such sum as he would have sustained, if any, had he exercised such care to effect their cure.

"You are the exclusive judges of the weight of the evidence and the credibility of the witnesses, and, as you find, so say by your verdict."

Verdict and judgment resulted in plaintiff's favor in the sum of \$2,100. The evidence introduced by the plaintiff, upon which the verdict is based, authorizes us to find the following facts: In August, 1900, the plaintiff and appellant executed the written contract set out in plaintiff's petition, whereby the appellant agreed that it would, in October of the same year, and thereafter, furnish and deliver to the plaintiff, at West, Tex., sound cotton seed meal. The written contract is silent as to the purpose of the plaintiff in purchasing the meal, and as to the use he intended it for; but the appellant, through its agents and officers, knew that the plaintiff, in the purchase of the meal, intended to use it for the purpose of fattening beef cattle for market. On October 17, 1900, at West, Tex., the plaintiff put in pens, for the purpose of feeding, 423 head of cattle, which he intended to feed and fatten for market with the cotton seed meal and hulls. In pursuance of the contract the plaintiff then demanded cotton seed meal of appellant, and, after some delay, sound meal and hulls were delivered to the plaintiff at West, Tex., by the appellant, which was fed to the cattle, upon which they thrived, until about the 6th day of December, 1900, when, about that time and afterwards, the appellant delivered and furnished to plaintiff unsound and unwholesome cotton seed meal, which was fed to plaintiff's cattle, and caused them to become sick, and injured them in the manner set out in plaintiff's petition. From the 6th of December to the 13th of December the plaintiff was absent from West, and during that time left the cattle in charge of an employé who was inexperienced in feeding cotton seed meal to cattle, and in ascertaining the quality of such meal. Upon the return of plaintiff on the 13th of December, he discov-

ered that the cattle were sick and in bad condition. The plaintiff's evidence upon this subject is as follows: "They [meaning the cattle] were standing around in the lot with their ears flopped, eyes sunk in their heads, hair all turned up, and they were scouring badly—passing a bloody mucus. They would lay down, and this matter would pass from them, and would trail after them when they would get up. They were off their feed and were sick. I examined their food, and found some sour meal, made of rotten cotton seed, that had been burned out, in my judgment." The plaintiff, upon this discovery, notified the agents of appellant of the condition of the cattle, and demanded sound cotton seed meal, which the appellant then, through its agents, agreed to furnish. Upon the discovery of the bad condition of the meal, plaintiff ceased feeding it to his cattle. The appellant thereafter furnished other meal, which was fed to the cattle, and which at the time was, by plaintiff's servant in charge of said cattle, supposed to be sound meal; but this meal was also unsound and unwholesome, and aggravated and increased the sick condition of the cattle. As soon as the plaintiff discovered that the meal was not sound and wholesome, he ceased feeding same to the cattle. The injuries from this last feeding were in the latter part of December, 1900. The cotton seed meal furnished by appellant was not sound and wholesome for the purpose of feeding cattle, which fact was known to the agents of appellant, or could have been discovered by the exercise of ordinary diligence; and by reason thereof the cattle became sick, and fell off in weight, and deteriorated in market value at West, Tex., in December, 1900, \$10 per head. About the last of January or the first of February, 1901, plaintiff sold 81 head of the cattle in West, Tex., and the balance in Kansas City and Chicago, and up to the time of these sales the cattle had not recovered or been restored to the health and sound condition they were in before the unsound meal was fed to them. But they were, to some extent, improved, in comparison to their condition in December, 1900, immediately and soon after they were fed the unsound meal. The plaintiff and his servants, in feeding the cattle, exercised ordinary care to discover the condition of the meal, and the same was fed in ignorance of the fact that it was not wholesome and sound; and the evidence warrants the conclusion that the plaintiff, after discovering the condition of the cattle, used ordinary care to cure them and restore them to their former condition.

The defendant offered to introduce evidence to the effect that plaintiff, in the sale of the cattle, which was 40 or 50 days after they were injured, received the full market value of such grade of cattle at the time and place where they were sold. Upon objection, this evidence was not admitted—this upon the ground that the measure of damages

was the difference in the market value of the cattle at West, Tex., at the time they were injured, and not at the time they were sold, which was 40 or 50 days after they were damaged. It is not made to appear that the market value which the plaintiff finally obtained for the cattle was the same as the market value of the cattle at West, Tex., before they were injured; nor does it appear what this difference between the two values would be, if any. The measure of damages was the diminished market value of the cattle at the time and place they were injured. The appellee was entitled to his cause of action at that time for all the damages then sustained, and it seems that he brought his suit to recover his damages prior to the time that he finally sold the cattle. The rule laid down in *Gulf, Colorado & Santa Fé Railway Co. v. Hume* (Tex. Civ. App.) 24 S. W. 917, and the same case in 87 Tex. 221, 27 S. W. 110, controls this question. Therefore there was no error in declining to admit this evidence.

Evidence of market value that the plaintiff received at a time subsequent to the injuries would not affect his right to recover the damages sustained at the time and place his cause of action accrues, which would arise in a case of this kind immediately upon the infliction of the injuries, unless the evidence was of such a character as to show that the amount received in the sale of the property was equal to, or greater than, what would be its market value at the time and place when injured. Besides the two cases cited, this principle is illustrated in *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. 411; *Gulf, Colorado & Santa Fé Ry. Co. v. Stanley* (Tex. Civ. App.) 29 S. W. 806; *G., H. & S. A. Ry. Co. v. Thompson* (Tex. Civ. App.) 44 S. W. 9; *Oppenheimer v. Halff*, 68 Tex. 413, 4 S. W. 562; *Moore v. Temple Grocer Co.* (Tex. Civ. App.) 48 S. W. 845; *San Antonio & Aransas Pass Ry. Co. v. Wright* (Tex. Civ. App.) 49 S. W. 147.

The court admitted the evidence of other parties besides the plaintiff who were engaged in feeding cattle for market near West, Tex., during the fall and winter of 1900 and 1901, to the effect that they had purchased meal from the defendant out of meal which it had for sale, and was part of the same car of meal sold the plaintiff, and came out of the same pile as that fed by the plaintiff to his cattle, that made them sick, and that the effect of feeding this meal was to cause their cattle to become sick. The sickness described by these witnesses was similar to that of the cattle of the plaintiff. The appellant objected to this testimony because the evidence was too remote and immaterial, and not sufficient to connect it with the issue before the court, and because the feeding of cattle, and as to whether they continued to do well, or became sick, was dependent upon so many other conditions than the character of the feed, which con-

ditions were not susceptible of investigation in this case, and because the defendant had no notice that such issue was to be raised, and therefore had no opportunity to investigate the same. All of these objections were overruled by the court, and each of the witnesses was allowed to testify substantially as stated. We do not think there was any error in admitting this evidence. The testimony of these witnesses, in effect, shows that their cattle, like those of the appellee, were in good condition before they commenced to feed them upon the cotton seed meal, and that they were fed about the same time and under the same conditions, and with the same kind of meal. It was a controverted issue in the case whether or not the meal furnished by the appellant was unsound and unwholesome. There was evidence to the effect that it was not unsound and unwholesome. The evidence of the plaintiff was to the contrary. What effect would be produced by this meal when fed to other cattle than those of the plaintiff, under the same or similar conditions, was an important experimental and practical test in determining the quality of the meal. The remarks of the court in *Darling v. Westmoreland* (N. H.) 13 Am. Rep. 58, in discussing this question, are pertinent. It is said: "When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to, to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that on this subject the law prefers speculation to experience, abhors actual experiment, and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him, and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can justly be called a principle." Here is a practical demonstration by witnesses, who subjected the meal to an experimental test in feeding it to cattle, that it was not sound and wholesome for that purpose. How much more reliable and satisfactory is this character of evidence than the mere guesswork and speculative opinion of expert witnesses as to the quality of the meal in question?

It is contended that the court erred in its charge in defining what constituted sound cotton seed meal. The court instructed the jury that sound cotton seed meal was "cot-

ton seed meal suitable and proper for feeding and fattening cattle in pens for market." It is contended by appellant that the charge in this respect was erroneous; that, where article is sold by a written contract which describes the same, the seller warrants that it will be of that description, and that no warranty will be implied that it is suitable for the buyer's purpose. The written contract requires the appellant to furnish sound cotton seed meal, and the purpose for which the plaintiff intends to use it is not disclosed by the terms of the contract, but the testimony is clear upon the point that the defendant understood that the cotton seed meal was to be used by the plaintiff for feeding cattle for market at West, Tex. There is evidence in the record which shows that the appellant was a manufacturer and dealer in cotton seed meal. Where a manufacturer or dealer agrees to deliver and supply an article to be used for a known purpose, there is an implied warranty that it is reasonably fit and suitable for such purpose. *Parks v. O'Connor*, 70 Tex. 369, 8 S. W. 104; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Needham v. Dial*, 4 Tex. Civ. App. 143, 23 S. W. 240; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; *Suth. on Dam.* vol. 2, 1492, 1491, and 1518. The law will also imply a warranty that feed sold for consumption is wholesome and fit for that purpose, and this doctrine is correctly held to apply to the sale of food for domestic animals. *Cooley on Torts*, 562. We are of opinion that there was no error in the charge of the court complained of, and the court did not err in refusing to give appellant's special charge set out under the fifth assignment of error.

If the court erred in submitting any issue as to the exercise by the plaintiff, or the failure to exercise, of reasonable care and attention towards his cattle after they became sick, it was, in effect, invited in part by appellant's special charge No. 6. But however, upon this subject, we think that the charge of the court was correct and was justified by the facts, and was all the charge that was necessary to be given upon this question. Therefore we are of the opinion that there is no merit in appellant's sixth, seventh, and eighth assignments of error.

The court's charge was full enough on the questions presented in the ninth and tenth assignments of error. The question as to whether the meal was sound and fit for use, and whether this fact was discovered or could have been discovered by the plaintiff, and whether he exercised proper diligence to discover the condition of the meal, was covered by the charge of the court, and the evidence was of such a character as to authorize the conclusion that the unsoundness of the meal would not have been discovered before being fed to the cattle. We therefore overrule the ninth and tenth assignments of error.

We cannot agree with appellant in its construction of the averments of the plaintiff's petition, as insisted upon in its eleventh and twelfth assignments of error. The effect of the allegations was to charge both a permanent and temporary injury.

Our findings of fact dispose of the appellant's thirteenth, fourteenth, and fifteenth assignments of error.

We find no error in the record, and the judgment is affirmed. Affirmed.

JONES v. NATIONAL COTTON OIL CO.*
(Court of Civil Appeals of Texas. Feb. 7, 1903.)

**SALES—CONTRACTS—WHAT LAW GOVERNS—
STATUTE OF FRAUDS—PART
PERFORMANCE.**

1. Where a contract for the sale of cotton seed meal and hulls was made and was to be performed in Arkansas, where it was unenforceable, for noncompliance with the statute of frauds, an action for its breach could not be maintained in Texas, though the contract, if governed by the laws of Texas, would have been enforceable there.

2. Where plaintiff purchased certain feed from defendant, intending to use the same for fattening cattle, the fact that plaintiff expended money in gathering cattle, buying lumber, building pens, and making troughs, etc., depending on defendant's compliance with the contract, was not such a part performance as would take the contract out of the statute of frauds.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by J. F. Jones against the National Cotton Oil Company for breach of contract of sale. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

P. A. Turner, for appellant. Glass, Estes & King, and Scott & Head, for appellee.

RAINEY, C. J. Appellant sued to recover of appellee damages for the alleged breach of an oral contract by the terms of which appellee was to deliver to appellant cotton seed hulls and meal at a specified price. The defendant pleaded the law of Arkansas, under the provisions of which no recovery could be had in that state. A trial was had before the court without a jury, and judgment rendered for defendant.

Conclusions of Fact.

The conclusions of fact of the trial court are supported by the evidence, and same are adopted by this court. They are as follows: "(1) I find that the plaintiff and the defendant about the 1st day of September, 1901, entered into a contract whereby the defendant agreed to furnish and deliver to plaintiff the cotton seed meal and hulls described in plaintiff's petition; that defendant afterwards refused to deliver said meal and hulls to plaintiff; that the plaintiff agreed to pay, and the defendant agreed to accept, \$3 per ton for the

hulls, and \$18 per ton for meal. (2) That plaintiff failed to get said hulls and meal from defendant, and that the difference in price to be paid, and the price he had to pay for such hulls and meal in order to feed his stock which he had gathered, amounts to \$1,229.70, and that plaintiff, by reason of the refusal of defendant to deliver said meal and hulls, has been damaged in said sum. (3) I find that the defendant held out M. F. Borham as its authorized agent, and I find that he was authorized by defendant to make said contract. (4) I find that said contract was made and was to be entirely performed in the state of Arkansas. (5) I find that the law of Arkansas relating to the making, construction and enforcement of said above contract is section 3470 of the statutes and laws of Arkansas, and is as follows: 'No contract for the sale of goods, wares and merchandise, for the price of \$30 or upwards, shall be binding on the parties, unless, first, there be some note or memorandum signed by the party to be charged; second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or third, shall give something in earnest to bind the bargain or in part payment thereof.' And said law is in force now and was in force when said contract was made. (6) I find that no memorandum or note of said contract or sale was signed by either of the parties to this suit; that the purchaser, the plaintiff, did not accept and actually receive any part of said hulls and meal; and the plaintiff did not give anything in earnest to bind the bargain or in part payment thereof. (7) I find that the plaintiff did not perform any part of the said contract. That he was willing and demanded its performance, but that defendant refused to do so. The plaintiff was willing to perform his part of it."

Opinion.

The contract, for a breach of which a recovery is sought, was made in Arkansas, and was to be performed there. By the laws of that state, it was not enforceable there. Such a contract, if made and performable in this state, would be enforceable. The question, then, is, will the courts of this state grant relief, under the circumstances, notwithstanding none could be had in Arkansas, where the contract was made and was to be performed? The provision of the law of Arkansas affecting the contract reads: "No contract for the sale of goods, wares and merchandise, for the price of \$30 or upwards, shall be binding on the parties unless, first, there be some note or memorandum signed by the party to be charged; second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or third, shall give something in earnest to bind the bargain or in part payment thereof." The contention of appellant, in substance, is that said law does not affect the validity of the contract, but that it only prescribes the kind

*Rehearing denied February 21, 1903, and writ of error denied by supreme court March 12, 1903.

of evidence by which it must be proved, and therefore, the contract being of such a nature as would be enforceable in this state if made here, the courts will enforce it here, though it could not be enforced in Arkansas; in other words, that the law of Arkansas does not affect the right, but only the remedy. Appellant cites numerous authorities to support this contention, which hold, in effect, that a valid contract entered into in one state, and enforceable there, will not be enforced in another state, where the statutes of fraud would prevent a recovery. The authorities on this proposition are not in harmony; many of the states holding, in effect, that a contract not obnoxious to the statute of fraud where made or to be performed will be enforced, though, if made in those states, it would be obnoxious to such statutes. *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186; *Gring v. Vanderbilt*, 13 N. Y. St. Rep. 457; *Eldridge v. Heaton*, 7 Ohio Cir. Ct. 499; *Allshouse v. Ramsey* (Pa.) 37 Am. Dec. 417; *Anderson v. May*, 57 Tenn. 84; *Forward v. Harris*, 30 Barb. 338; *Ringgold v. Newkirk*, 3 Ark. 96; *Scudder v. Bank*, 91 U. S. 406, 23 L. Ed. 245; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331. In this state a contract made in another state, and enforceable there, will be enforced in this state, though, if made here, it would not be enforceable. *Ryan v. Railway*, 65 Tex. 13, 37 Am. Rep. 589; *Thomas v. Telegraph Co.* (Tex. Civ. App.) 61 S. W. 501. But no case is cited, and we know of none, which holds that a contract not binding in the state where made and performable will be enforced in another state, though if made in the latter it would be enforceable. The validity and enforcement of a contract must be tested by the laws of the state where made and performable. In *Life Association v. Harris*, 94 Tex. 35, 57 S. W. 638, 86 Am. St. Rep. 813, our Supreme Court say: "The leading principle is that the law is to govern to which, 'it is just to presume, they [the parties] have intrusted themselves.' Unless a contrary intent is to be deduced from the transaction, the presumption is that the parties contracted with reference to the law of the place where the contract was made; but, if they have fixed a different place for the performance of it, the law of that place is to govern, unless something else appears, showing they had a different intention." In *Shelton v. Marshall*, 16 Tex. 354, it is said: "It is a universal principle that a contract which is invalid by the law of the state where made will be held to be invalid in all other places or countries where it may be drawn in question." In *Cantu v. Bennett*, 39 Tex. 310, it is said: "A contract not valid where made is valid nowhere else. As contracts relate either to movable or immovable, or, to use the phraseology of our own law, to personal or to real, property, the following distinction is taken; if the contract refers to personal property, the place of the con-

tract governs, by its laws, the construction and effect of the contract." In *Shreck v. Shreck*, 32 Tex. 588, 5 Am. Rep. 251, the court say: "It is certainly a general principle that in judicial actions upon contracts the law of the place where the contract was made governs in determining its construction, obligation, and enforcement, its validity or invalidity." Story on Conflict of Laws (7th Ed.) sec. 262, says: "Thus, by the English and American law, contracts which fall within the purview of what is called the 'Statute of Frauds' are required to be in writing; and such are contracts respecting the sale of lands, contracts for the debts of third persons, and contracts for the sale of goods beyond a certain value. If such contracts, made by parol—per verba—in a country by whose laws they are required to be in writing, are sought to be enforced in any other country, they will be held void exactly as they are held void in the place where they are made. And the like rule applies, vice versa, where parol contracts are good by the law of the place where they are made." In *Cochran v. Ward* (Ind. App.) 29 N. E. 795, 51 Am. St. Rep. 229—a well-considered case, where the same contention was made as here—the court say: "But it is insisted that, as to mere matters of procedure, every forum must apply its own laws and rules, regardless of the character of the action; and, to a certain extent, we think this must be true. In the case before us, however, under the findings of the jury, the place of the contract and the situs are the same, and the judgment of the trial court must be upheld, unless we regard the statute of frauds as relating merely to the procedure, and not as affecting the obligatory character of the agreement. It is impossible to consider a contract separately from the remedy given by law for its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties in their deliberations. If the law of the place stamps upon an agreement the quality that it shall be voidable, and that its performance shall be a pure matter of conscience or grace with the parties, that quality becomes a part of the substance of the agreement, and characterizes it wherever it may be. A right without a remedy for its enforcement is mere fiction." In *Edwards v. Kearzey*, 96 U. S. 596, 24 L. Ed. 793, it is said: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its vitality, construction, discharge, and enforcement. * * * The obligation of a contract includes everything within its obligatory scope. Among these elements, nothing is more important than its means of enforcement. This is a breach of its vital exist-

ence. Without it, the contract, as such, in view of the law, ceases to be, and falls in the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. Want of right and want of remedy are the same thing. There can be no doubt, we think, to the extent that the remedy affects the validity and obligation of a contract, it is imported into and becomes an essential part of it, and characterizes it whenever it is the subject-matter of litigation. The Illinois statute of frauds became a part of the agreement in suit, and the provision that no action should be maintained for damages for breach of the agreement became as much a part of its character and substance as if specifically incorporated therein. The right to defend against a contract growing out of any of its inherent qualities becomes vested, and a right of property, as much as the right to enforce any other beneficial provision." In *Pritchard v. Norton*, 106 U. S. 129, 1 Sup. Ct. 106, 27 L. Ed. 104, it is said: "The principle is that whatever relates merely to the remedy, and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country, but whatever goes to the substance of the obligation, and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

As we have seen, contracts are governed by the law of the place of their performance. By the law of Arkansas, the contract was not binding, and could not be enforced against the party invoking the law. Either party had the right, by virtue of that provision, to prevent its enforcement. Therefore its performance was left to the conscience of either party, from which it follows, we think, that this right inhered in or attached to the contract. But it is argued that in Arkansas the courts would enforce such a contract, unless the provision of the law was invoked in the proceeding, and hence it did not affect the right, but the remedy. Such might be said of many defenses that prevent the enforcement of many illegal contracts. A consideration is essential to the validity of a contract, yet, to defeat a contract for that reason, a failure of it must be specifically pleaded. So of infancy. So of the statute of limitations, etc. All these affect the right, and not the remedy. A "defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every place where the question may come to be litigated." Story on Conflict of Laws, sec. 331; *Ryan's Adm'rs v. Bouton*, 10 Tex. 62. No case, as far as we are advised, has arisen in this state where the courts have passed upon the question as

to the right to enforce a contract obnoxious to the statutes of fraud of the state where made and performable. But in several instances they have refused relief where no remedy existed at the place of the transaction. *Telegraph Co. v. Preston* (Tex. Civ. App.) 54 S. W. 650; *Thomas v. Telegraph Co.* (Tex. Civ. App.) 61 S. W. 501. We are of the opinion that the contract was subject to the laws of Arkansas, and the appellee was entitled to interpose any defense to an action thereon in this state that was effectual in that state.

Appellant complains that the court erred in its findings of fact that the contract was performable in Arkansas. The evidence supports the finding, and there is no error therein.

It is insisted that because appellant performed certain acts and expended certain sums of money in gathering cattle, buying lumber, building pens, making troughs, etc., depending upon the appellee complying with the contract, he is entitled to recover. The suit is upon the breach of a contract for the delivery of hulls and meal at a stipulated price, and the damages sought is for the difference between the agreed price and what he had to pay. The doing of the acts stated was in no sense a part performance of the contract entered into, and does not take the contract out of the statute of frauds. *Ray v. Young*, 13 Tex. 552; *Cross v. Everts*, 28 Tex. 535; *Osborne v. Kimball* (Kan.) 21 Pac. 163.

The judgment is affirmed.

WESTERN UNION TEL. CO. v. SNOW.*
(Court of Civil Appeals of Texas. Jan. 21, 1903.)

TELEGRAMS—DELAY IN DELIVERY—LIABILITY FOR DAMAGES—CONSUMMATED SALE.

1. Plaintiff wrote C., making an offer for cattle, and saying, if he could have them, he would start or send a man at once. C. answered by telegram: "Offer on cattle accepted. Come on quick." Held, that the parties regarded time as the essence of the contract, so that the telegraph company could not escape liability to plaintiff for delay in delivering the telegram, during which C. sold the cattle to another, concluding that plaintiff was not coming for them, on the ground that the telegram showed a consummated sale, which C. was not authorized to breach.

2. Even though, if plaintiff, on receiving a telegram accepting his offer for cattle on condition of his coming on quick, had telegraphed, he could have prevented their sale to another, the telegraph company is liable to him because of its delay in delivering the telegram to him, in consequence of which the cattle were sold to another before his arrival for them; he not having discovered that the telegram was delayed.

Appeal from Coryell county court; R. E. West, Judge.

Action by W. L. Snow against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

*Rehearing denied February 25, 1903.

Geo. H. Fearons and Clark & Bolinger, for appellant. S. B. Hawkins and Owens Miller, for appellee.

FISHER, C. J. Appellee instituted this suit against appellant for damages resulting to him by reason of appellant's failure to transmit and deliver to him in due time a telegraphic message from one C. P. Cooper, and alleges: That in February and March, 1899, he was negotiating with C. P. Cooper, by correspondence, for the purchase of 200 head of cattle owned by said Cooper, and located near Ruston, La. That he on the — day of March, 1899, offered said Cooper, by letter, \$6.50 per head for said cattle, and that Cooper immediately notified appellee of his acceptance of said offer, but, on account of illness in his family, appellee was prevented from going to receive said cattle. That afterwards, on the 17th of March, he wrote another letter to said Cooper in regard to the purchase of said cattle in words, to wit: "I can come now if you have not disposed of the cattle. If I can get them, wire me at my expense and I will start or send a man at once." That by this letter appellee meant to, and did, renew his offer of \$6.50 per head for said cattle, and the said Cooper so understood, and in reply to said letter, and as an acceptance of appellee's said offer, did on the 22d day of March, 1899, deliver a telegraphic message to appellant's agent at Ruston, La., addressed to appellee at De Leon, Texas, in words, to wit: "W. L. Snow, De Leon, Texas. Offer on cattle accepted. Come on quick. Letter was delayed. [Signed] C. P. Cooper." That by said message Cooper meant to, and did, accept said offer of \$6.50 per head for said cattle, on condition that appellee would come to Ruston, La., at once and receive them. That appellant undertook and agreed to transmit said message to De Leon, Texas, and deliver same to appellee without delay, and that said message was transmitted and received at appellant's office in De Leon at 2 o'clock p. m. on the 22d day of March, 1899. That on said 22d day of March, 1899, appellee was in the town of De Leon from 1 o'clock p. m. to 6 o'clock p. m., and within 200 yards of appellant's office during all this time. That he was well known to the principal business men of said town and to appellant's agents at said office. That he had received former messages at said office, and that he inquired in person at said office on the 19th, 20th, and 21st days of March, 1899, for messages, and that he sent other persons to defendant's said office on the 23d and 24th days of March, 1899, for said message, and was informed each time by appellant's agents that they had no message for him. That he made inquiry at the post office in De Leon on the 22d, 23d, and 24th days of March, 1899, for mail, and received no notice of said message. That with all these opportunities the appellant withheld and failed to deliver

said message to him until the 25th day of March, 1899. That on receipt of said message, appellee started and traveled to Ruston, La., with all possible haste, and applied to said Cooper for said cattle at his said offer of \$6.50 per head, and learned from Cooper that, on account of appellee's delay in coming to receive the cattle, he (Cooper) had concluded that he was not coming to receive them, and he (Cooper) sold the cattle to another purchaser only a few hours before appellee's arrival. That by reason of the delay in delivering said message, appellee lost said purchase of said cattle, and sustained damage in the sum of \$900, etc. Appellee further averred that the contents of said message put appellant on notice of its importance, and, further, that he informed appellant's agents of the nature of said message, and that they were aware of the fact that appellee was likely to suffer loss by any delays in its delivery to him.

The defendant Western Union Telegraph Company answered by general and special exception, general denial, and special answers, as follows: (1) That the plaintiff was practically unknown in the town of De Leon; that he lived about three miles out in the country, and that it had used all reasonable and proper diligence and every effort in its power to find the plaintiff, W. L. Snow, and make delivery of said message; that it sent two service messages to Ruston, La., the sending office, and C. P. Cooper, the sender of said message, advising them that W. L. Snow could not be found, and asking for better address, and also mailed notice to plaintiff through the United States post office, addressed to him at De Leon, advising him that it had said message, and requesting him to call for the same. (2) That the plaintiff was constantly expecting said message, and was guilty of contributory negligence in failing to leave his particular address with the defendant's agent in De Leon, and in not providing some means by which this defendant could promptly reach him upon receipt of any message directed to him, which was the proximate cause of defendant's failure to make prompt delivery of said message. (3) That the plaintiff was guilty of further contributory negligence which directly contributed to and caused the loss, if any, he sustained in not receiving said cattle under his contract of purchase, as alleged by him, in that after the receipt of said message by him on the 25th day of March he failed to notify the said Cooper by wire that he was coming for said cattle, and to hold the same for him, and in this respect failed to exercise ordinary care to prevent said damage; that said Cooper did hold said cattle for the plaintiff, under his contract with him, until some time in the afternoon of the 27th of March; and that plaintiff's failure to notify Cooper that he was coming for said cattle was the direct and proximate cause of his loss, if any. (4) That the alleged negligent delay of

the defendant in the delivery of the message in question was not the direct or proximate cause of the plaintiff's failure to receive said cattle under his contract with said C. P. Cooper, in that he had a binding contract with said Cooper for the purchase of said cattle, and the alleged delay in delivering said message afforded no proper or legal cause or excuse for the said Cooper breaching his contract of sale with the plaintiff and selling said cattle to some one else.

A trial of the case before the court on March 19, 1902, resulted in a verdict and judgment in favor of the plaintiff for \$256, interest and costs.

We find that the evidence in the record supports the conclusions of fact as found by the trial court. They are as follows: "I find: That W. L. Snow, prior to March 22, 1899, had made an offer in writing to C. P. Cooper of \$6.50 per head for all of his cattle, to be delivered at Ruston, La., and requested his acceptance by wire at De Leon, Texas. That on March 22, 1899, said C. P. Cooper delivered to defendant at Ruston, La., the following message, which the defendant agreed to transmit by wire to De Leon, Texas, to wit: 'Ruston, La., March 22d, 1899. W. L. Snow, De Leon, Texas: Offer on cattle accepted. Come on quick, letter delayed. C. P. Cooper.' That above message was transmitted to defendant's agent at De Leon, Texas, on March 22, 1899, and was received by said agent at De Leon at 2:45 p. m. of same date. De Leon is a town of about 1,000 people, having only one business street and about sixteen business houses, and a person on said street can be seen from defendant's office. That W. L. Snow had inquired in person on March 18th, 19th, 20th, and 21st, from defendant's agent, for said message, and had informed defendant's agent of the importance of said message to him. That W. L. Snow had received prior messages from defendant's agents, and was well known to them, and they well knew that W. L. Snow lived three miles in the country from De Leon. That W. L. Snow was well known to a great number of business men in De Leon, Texas. W. L. Snow was in De Leon on March 22, 1899, from 1 o'clock p. m. to 6 o'clock p. m. on said date, in full view of defendant's office, and could have been found by defendant's agents by very slight care. That on the morning of March 23, 1899, W. L. Snow had his daughter call at defendant's office and inquire of its agent for said message, and she was informed that there was no message for W. L. Snow, and on evening of same day W. L. Snow caused his nephew to call on defendant's agent at De Leon, and was informed by defendant's agent that there was no message for W. L. Snow. W. L. Snow, by person and by others, inquired for his mail at De Leon on the 22d, 23d, 24th, and 25th days of March, 1899, and on the 25th of said month received a notice from defendant's agent that the above

message was in its office for him. That said notice was not mailed until late in the evening of the 24th or morning of the 25th, and the mailing of said notice was the only effort made to deliver said message by defendant's agent. That after receiving said message the defendant [plaintiff] took the first train out of De Leon for Ruston, La. That on receiving said message, W. L. Snow's attention was not called to the fact that same was a delayed message, and he did not discover the same until he had reached Ruston, La., about 1 o'clock on the 27th day of March, 1899. That by reason of W. L. Snow not coming at once, as requested in said message, C. P. Cooper declined to hold said cattle longer, and sold same about two hours before W. L. Snow arrived in Ruston, La. That if said message had been delivered to W. L. Snow on the 22d, 23d, or 24th of March, the said W. L. Snow would have reached Ruston, La., before said C. P. Cooper had sold said cattle, and would have secured from said Cooper 128 head of cattle at the price of \$6.50 per head. That the 128 head of cattle that he would have secured were reasonably worth on the market of Ruston, La., not less than \$8.50 per head. That Cooper's reason for offering said cattle for less than their market value was that he was pressed for money, and was holding said cattle at great expense, and his acceptance of plaintiff's offer was conditioned on immediate delivery of said cattle. By use of reasonable care, the defendant could have delivered the message on the 22d, and, failing in this, could and should have delivered said message on the 23d or 24th days of March. That W. L. Snow exercised ordinary care and prudence after the receipt of said message, and the loss of his bargain was the direct and proximate result of defendant's negligence. In sending the message to W. L. Snow, C. P. Cooper guarantied to defendant the payment of all charges necessary for the transmission and delivery of said message, and defendant accepted the guaranty, and W. L. Snow paid the charges on receipt of said message. That defendant was engaged in operating a telegraph line from Ruston, La., to De Leon, Texas."

In addition to the facts as found, we also find that the telegram upon which the cause of action was based was in response to a letter written by appellee to Cooper on the 17th of March, which is as follows: "I can come now, if you have not disposed of the cattle. If I can get them wire me at my expense, and I will start or send a man at once."

The trial court overruled a general demurrer, of which ruling the defendant complains, on the ground that the telegram sent by Cooper, the delivery of which was delayed, shows upon its face an acceptance of the offer made to appellee, the effect of which was to consummate the sale of the cattle. In the letter set out in the petition, written

by Snow to Cooper, which called for the telegram in question, it is stated that, if the offer was accepted, Snow would start or send a man at once. The telegram in reply to this letter, after stating that the offer on the cattle was accepted, contains the expression, "Come on quick." This statement, in connection with that part of the letter in which Snow stated that he would start or send a man at once, indicates that the parties regarded time as, to some extent, the essence of the contract. If this was not the case, these expressions in the letter and the telegram would serve no useful purpose, and would be quite meaningless; but effect must be given to these words in construing the contract, as well as to what else may be there stated. The fact that the telegraph company may not have had any actual notice or knowledge of the purpose intended by the expression, "Come on quick," would not relieve it from liability, because the expression was sufficient, at least, to excite its inquiry as to what was intended and meant, and, if it wanted any further information upon this subject, it could have been obtained from the sender. *Western Union Telegraph Co. v. Turner* (Tex. Sup.) 60 S. W. 432; *Western Union Telegraph Co. v. Adams* (Tex. Sup.) 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920.

The remaining assignments are to the effect that the evidence does not warrant the judgment of the trial court. The findings of fact dispose of these assignments. They authorize the conclusion that the defendant was guilty of negligence in delaying the delivery of the message, and that such delay was the proximate cause of plaintiff's damages, in the sum found by the trial court. And the facts also authorize the conclusion that the plaintiff was not guilty of negligence in not notifying Cooper by telegram of the receipt of his telegram, and that he would immediately come and receive the cattle. Upon this point there is evidence to justify the findings of the trial court, to the effect that the appellee did not discover that the telegram was a delayed message until after he had reached Ruston, La.

We find no error in the record, and the judgment is affirmed. Affirmed.

MOODY v. OGDEN.*

(Court of Civil Appeals of Texas. Feb. 6, 1903.)

DEEDS—RECORD—COPY—EVIDENCE—OBJECTIONS—BURDEN OF PROOF.

1. Under Rev. St. art. 4642, providing that every conveyance, or certified copy thereof, copied from the records of any county where the same has been regularly recorded, though the land mentioned may not have been situated in such county, may be recorded in the county where the land lies, and shall take effect from the time such conveyance or copy was filed for record, where a deed was recorded in a county in which no part of the land was situated, and

a certified copy thereof was subsequently recorded in the proper county, such copy was admissible in evidence, both as proof of the original deed, and to show the record in the proper county.

2. Objection to a certified copy of the record of a deed as evidence, on the ground that the original deed was not accounted for, and no notice was given of the intent to use copies, is untenable, in the appellate court, where not made below.

3. Where plaintiff claimed title to land under a deed which was junior to one executed by the same grantor to defendant, but recorded in the wrong county, after a certified copy of such record was recorded in the proper county, the burden was on plaintiff to show that he was a purchaser for value, without notice.

4. Recital of a consideration in a deed is insufficient to show that the grantee was a purchaser for value, as against the grantee in a prior unrecorded deed from the same grantor.

Appeal from district court, San Jacinto county; L. B. Hightower, Judge.

Action by William L. Moody, Jr., against E. C. Ogden. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Geo. E. Mann and J. S. Gregory, for appellant. Robinson & Hansbro and Lanier & Martin, for appellee.

GILL, J. This was an action of trespass to try title brought by Wm. L. Moody, Jr., against E. C. Ogden, for the recovery of 1,280 acres of land situated in San Jacinto county, Tex. Defendant answered by a plea of not guilty, and limitation of three, five, and ten years. The case was tried to the court without a jury, and resulted in a judgment for defendant, from which plaintiff prosecutes this appeal.

In support of his claim of title, plaintiff adduced in evidence a patent from the state to Niles F. Smith, a deed from Niles F. Smith to Abigail Smith, a deed from all the heirs of Abigail Smith to their mother, Mary E. Smith, and a deed from Mary E. Smith to the plaintiff. Abigail Smith being the common source, defendant adduced certified copy of a deed from her to Edmondson & Gardner, of date October 26, 1859, recorded in records of deeds of Montgomery county October 30, 1872, and it is admitted that defendant has whatever title was shown to have passed to Edmondson & Gardner. It is thus seen that plaintiff's evidence, standing alone, showed a complete and unbroken chain of title from the sovereignty of the soil, and, unless defendant has overthrown the case thus made, judgment should have been for plaintiff. This, however, was done, if the certified copy of the deed from Abigail Smith was properly admitted in evidence, for this deed is senior to the deed from the heirs of Abigail Smith, under which plaintiff claims, and the proof is silent as to notice and purchase for value. The land is, and has always been, situate in San Jacinto county. The certified copy above mentioned purports to be a copy from the deed records of Montgomery county of

*Rehearing denied March 13, 1903, and writ of error denied by supreme court March 12, 1903.

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 1262.

an instrument recorded in that county in 1872—two years after the organization of San Jacinto county, which is composed of territory formerly belonging to Polk county—and it does not appear that the instrument purported to convey any land situated in Montgomery county. This certified copy had been recorded in San Jacinto county on June 27, 1901, under article 4642 of the Revised Statutes, and the fact was evidenced by the certificate of the county clerk of the latter county. Its admission in evidence was objected to on the ground that the Montgomery county record was not constructive notice to plaintiff, and that it was immaterial.

The first objection was not sound, because, if competent, it was clearly admissible on the issue of title. Under the second objection, it is contended by plaintiff that the record in Montgomery county was a nullity, and a certified copy thereof could not be used for any purpose; no part of the land conveyed being situate in that county. The question thus presented involves a construction of article 4642, enacted in 1895, amending article 4334 of the Revised Statutes. Article 4642 (Gen. Laws 1895, p. 157) is as follows: "Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the state where the same has been regularly recorded, although the land mentioned may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies, and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only; provided, however, that all certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record; and provided, further, that nothing in this [article] shall be construed to make valid any instrument which was at the time of its execution from any cause invalid." Article 4334 is as follows: "Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, which shall be acknowledged, proved or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration, without notice, and as to all creditors, from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from

that time only." Prior to the amendment *supra*, the record of a deed in a county other than that in which was situated the land, or some of the land, which it purported to convey, was a nullity, and certified copies thereof were inadmissible to prove the existence of the original. *Land Co. v. Chisholm*, 71 Tex. 527, 9 S. W. 479; *French v. Groesbeck*, 8 Tex. Civ. App. 19, 27 S. W. 43; *Sullivan v. Dimmitt*, 34 Tex. 114; *Tomlinson v. League* (Tex. Civ. App.) 25 S. W. 313; *Hancock v. Lumber Company*, 65 Tex. 225. But if any part of the land was situated in the county of registration, such record not only constituted constructive notice as to lands situated in that county, but constituted proof of the lost original as to all the lands which the original purported to convey. It thus appears that a deed recorded in a county other than that in which some of the land affected by it was situated was not "regularly recorded." Article 4642 appears in the Revised Statutes as a part of our registration laws. It was an amendment thereof as they then existed. The article amended made no provision for the registration of copies of deeds which had been registered in a wrong county. Looking to the evil to be remedied, which is stated in the emergency clause in the act, we are constrained to conclude that it was the legislative purpose to aid those who by mistake or otherwise had recorded their deeds in a county other than that in which the land was situated, and had lost the originals. Under the law as it then stood, such persons had no way of proving the lost original, except by the common-law method of establishing the existence of instruments which had been lost or destroyed, and no means of protecting their rights under the registration laws. This aid could be extended only by validating such invalid records so that they might become proof of the execution of the original, and by authorizing a copy of such record to be recorded in the county in which the land was situated. That it was competent for the Legislature so to do is not questioned, and we think the legislative purpose is plain. The record in the wrong county could not have been left a nullity, for it is made the basis of the copy which for the purposes of notice may be recorded in the county where the land lies. The act gives verity to the first record, and, that being true, certified copies thereof are admissible, as of any other valid record. It follows that the certified copy was properly used for the double purpose of supplying proof of the original, and to show the record of the copy in San Jacinto county.

The further objection that the original was not accounted for, and that no notice was given of the intent to use copies, is untenable, because no such objection was made at the trial, and for the further reason that such proof and notice were waived by agreement.

As stated before, plaintiff's deed is junior.

The burden was therefore upon him to show that he was a purchaser for value, without notice, and the recitals in the deed are insufficient for the purpose. *Turner v. Cochran*, 61 S. W. 923, 2 Tex. Ct. Rep. 309.

The judgment is affirmed. Affirmed.

POCHILA v. CALVERT, W. & B. V. RY. CO. et al.

(Court of Civil Appeals of Texas. Feb. 6, 1903.)

RAILROADS—EMINENT DOMAIN—INJURY TO ADJACENT PROPERTY—MEASURE OF DAMAGES—GENERAL INCREASE IN VALUE—BURDEN OF PROOF.

1. A general rise in the value of real estate caused by the construction of a railroad cannot be offset against the damage actually caused to an individual piece of property by the excavation of the street in front of it for the railroad's right of way.

2. In assessing damages caused by the construction of a railroad, the erection of a depot in the vicinity cannot be regarded as having especially benefited the property, so as to offset the damages, where the benefit caused by the building of the depot has affected alike all property located in its neighborhood.

3. The measure of damages caused by the construction of a railroad is the difference between the value of the property just before and just after the road was constructed, with any general increase in value on account of the construction added to the value just before.

4. In an action for damages to property caused by the construction of a railroad, the burden is on defendants to show to what extent any special benefits resulting from the construction of a road affect the property.

5. In an action for damages to property caused by the construction of a railroad in an adjacent street, defendant could not show an offer by it to grade down the street, made some time after the action was instituted.

6. In an action for damages to property caused by the construction of a railroad, the fact that the plaintiff's possession extended into the street occupied by the railroad company, and that he had not acquired the right thereto, was a proper subject of consideration in determining the extent of the injury.

Appeal from district court, Brazos county; J. C. Scott, Judge.

Action by Edward Pochila against the Calvert, Waco & Brazos Valley Railway Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

Ford & Ford, for appellant. Taliaferro & Armstrong and Doremus & Butler, for appellees.

GARRETT, C. J. This action was brought by the appellant in the district court of Brazos county originally against the appellee the Calvert, Waco & Brazos Valley Railway Company, for the recovery of damages alleged to have been sustained by the appellant on account of injuries to land. The International & Great Northern Railroad Company having subsequently become the owner of the Calvert, Waco & Brazos Valley Railway, it was made a party defendant to the

suit. The appellant owned and occupied as a homestead lots Nos. 9 and 10, block 133, in the city of Bryan, and the improvements thereon situated. The premises fronted north on Burleson street, and abutted on Wheelock street on the west. Red Top street bounded the block on the east. Appellee, the Brazos Valley Company, having obtained the consent of the city constructed its railway from the west to the east along Burleson street in front of the appellant's property, and made a deep excavation in said street for its roadbed, and graded down Wheelock street and Red Top street for the crossings, so that access to the appellant's property was made difficult, and it was subjected to the smoke and cinders and noise incident to the operation of trains along said Burleson street. The cause was tried to the court without a jury, and the trial resulted in a judgment in favor of the defendants. The trial judge held that the plaintiff was not entitled to recover, because there was no depreciation in the value of the property. By a construction of the plaintiff's petition, the court was of the opinion that, in order to entitle him to recover, it would be necessary for him to show that the property was worth less immediately after the railroad was constructed in front thereof than it was before. The averment of the petition was that acts of the defendant depreciated the value of plaintiff's property; also that the property had been greatly damaged and depreciated. There was evidence tending to show that from a number of causes there had been a general advance in the value of real estate in the city of Bryan, and that the building of the railroad, and other causes, had combined to cause such advance in values, and witnesses testified that plaintiff's property was worth just as much after the construction of the railroad as before on account of such increase in values. That the property was injured, the physical facts give undisputed evidence; but the court was of the opinion that there could be no recovery unless its value was less just after the construction of the railroad than it was before, because the plaintiff had alleged that the construction and operation of the railroad had depreciated the value of the property. Plaintiff also alleged that the railroad had damaged the property, but we think that the court improperly construed the allegation depreciated, for, as the property advanced in value on account of the construction of the road and other causes, it may have been at the same time depreciated by the physical injuries caused by the construction and operation of the railroad, and have maintained its value on account of such increase in value of property generally, notwithstanding the injuries received. Proof of such injuries, and the extent thereof, was admissible under the allegation of depreciation, although the property may have not lost value.

¶ 1. See *Eminent Domain*, vol. 13, Cent. Dig. § 390.

The general rule for the measure of damages where property has been injured or damaged by a railroad in the exercise of its right of eminent domain is to ascertain the difference between its value just before the construction of the railroad and just after. *Eastern Texas R. R. Co. v. Eddings* (Tex. Civ. App.) 70 S. W. 98, and authorities cited. But it is also well settled that general benefits to the property, common to property in the neighborhood generally, caused by the construction of the railroad, cannot be considered in offset in estimating the damage. This rule was established by the courts in analogy to the statute of eminent domain. *G., C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 473. Not only was the property of plaintiff and other property in the city of Bryan increased in value by the construction of the railroad, but other causes conspired to increase the value of property generally from 20 to 25 per cent., according to the testimony of the witnesses. The plaintiff was entitled to the benefit of such increase in value, but the court gave it to the defendants. Another reason assigned by the court for denying the plaintiff the benefit of any increase in value was that the defendants had built a depot in the vicinity, which was of that peculiar and special benefit to the property which might be taken into consideration in offset in the estimation of the damages. No such peculiar benefit was shown by the evidence. The benefit caused by the building of the depot affected all property alike in its neighborhood, and was not peculiar to the plaintiff's property. In order to be peculiar to a piece of property, the benefit must affect it directly, so as not to be shared by other property in the neighborhood, and the value of its use must be increased by improvement of of the physical condition of the property. *Ry. v. Fuller*, supra; *Roberts v. Brown Co.*, 21 Kan. 247; *Washburn v. M. & L. W. R. Co.* (Wis.) 18 N. W. 333; *Little Rock, etc., Ry. Co. v. Allister* (Ark.) 60 S. W. 955; *City of Omaha v. Schaller* (Neb.) 42 N. W. 722; *Hickman v. City of Kansas* (Mo. Sup.) 25 S. W. 228, 23 L. R. A. 658, 41 Am. St. Rep. 684.

The court also took an erroneous view of the law; holding that the burden of proof rested upon the plaintiff to show special damage, and what part thereof was attributable to the construction of the railroad and common to the community, and what part was attributable to other causes. The plain rule of damages in this case is the injury done the property by the construction of the railroad, to be ascertained by ascertaining the difference in value of the property just before and just after the construction of the railroad, with the increase in value added to its value just before. *G., C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 473; *Ry. Co. v. Becht* (Tex. Civ. App.) 21 S. W. 971; *Ry. Co. v. Allister* (Ark.) 60 S. W. 954; *Eachus v. Ry.*

Co. (Cal.) 37 Pac. 752, 42 Am. St. Rep. 149; *Hickman v. City of Kansas* (Mo. Sup.) 25 S. W. 228, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Ry. Co. v. Frick* (Md.) 37 Atl. 651; *Schaller v. City of Omaha* (Neb.) 36 N. W. 535; *City of Omaha v. Schaller* (Neb.) 42 N. W. 721; *Sullivan v. North Hudson Co.* (N. J. Err. & App.) 18 Atl. 690; *Chicago, K. & N. R. Co. v. Weihe* (Neb.) 41 N. W. 297; *City of Denver v. Bayer* (Colo.) 2 Pac. 6.

The defendants are not entitled to have considered in offset of damages any general benefits caused either by the railroad or other causes, and, if there should be any special benefits shown on another trial, the burden would be on the defendants to distinguish these, and show to what extent they affected the property.

It was not proper to receive in evidence the offer of the defendant International & Great Northern Railroad to grade down the street in front of plaintiff's property, made long after the measure of damage had been fixed, and this suit instituted. If the plaintiff's possession extended into the street, and he had not acquired the right thereto by limitation or otherwise, this fact may be considered in determining the extent of the injury to his property.

The judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

ADAIR v. HAYS et al.

(Court of Civil Appeals of Texas. Feb. 14, 1903.)

PUBLIC LANDS—SCHOOL LANDS—LEASE—APPLICATION TO PURCHASE—APPROVAL OF APPLICATION—ENTRY BEFORE REMOVAL—ACTION BY LESSEE—TRESPASS.

1. Act 1900, as amended by act approved April 15, 1901 (section 6), provides that any one desiring to purchase unsurveyed school lands shall make an application to the proper surveyor for a survey of the land desired, and thereafter apply to the Commissioner of the Land Office for the land, and that if the Commissioner finds the field notes correct, and the survey pursuant to law, he shall classify and value the land, whereupon payment may be made therefor. *Held*, that where one had made application, and caused a survey to be made, but the Commissioner had not approved the notes or classified the land, etc., an entry on the land by the applicant was a trespass, as against one holding the same under a lease from the Commissioner of the General Land Office.

Appeal from Armstrong county court; Q. Moore, Judge.

Action by Mrs. Cornelia Adair against W. V. Hays and others. From a judgment for defendants, plaintiff appeals. Reversed.

Ware & Smith, for appellant. A. W. Cole, for appellees.

CONNER, C. J. Appellant has appealed from an adverse judgment for damages, which she sought in a suit in the county

court against appellees Hays and W. H. and Ester Norris for trespass in and upon appellant's pasture by grazing thereon some 250 head of cattle owned by W. H. Norris. The evidence is undisputed that appellant is the owner of a large pasture in one general inclosure, situated in Armstrong and adjacent counties, and that appellee Hays entered such inclosure and pastured cattle substantially as alleged. Appellee Hays justifies as an applicant to purchase four sections of public school lands to which said pasturing has been substantially confined. The further facts show that within said pasture was a large quantity of what was known as "unsurveyed public land," set apart for the benefit of the public free school fund by the act approved February 23, 1900. At the time under consideration, this land, including that claimed by appellee Hays, was held by appellant by virtue of leases from the Commissioner of the General Land Office, and had been so held for several years. The leases were in good standing, and appellant was entitled to the use and control of the land, unless appellee, as asserted, acquired a superior right to the particular four sections claimed by him. By section 6 of said act of 1900, as amended by an act approved April 15, 1901, any person desiring to purchase any of the unsurveyed lands specified therein is required to make verified application in writing to the proper surveyor, describing the land desired, by metes and bounds, as near as practicable; stating that he desires to have said land surveyed, with the intention of purchasing the same, and that he is not acting in collusion with any other person, etc. It is then made the duty of the surveyor to file and record such application, and within 60 days thereafter to survey the land applied for, in accordance with the directions of the Commissioner of the General Land Office, into a section or sections of one mile square, when practicable, and within 30 days after such survey to certify, record, and plat the field notes of the same, and return the same, together with the application, to the General Land Office; stating whether or not the land is agricultural, grazing, or timber, and, if timber, the probable value of the land. If the Commissioner of the General Land Office finds that the field notes are correct, and that the survey has been made according to law, he is required to at once approve and file said field notes, and to classify and value the land as the law requires, and to notify the applicant by mail that the land is on the market for sale; stating the classification and value thereof. Within 60 days from the mailing of said notice, the applicant is required to make application and affidavit to purchase said land, describing the land sought to be purchased in accordance with the field notes approved by the Commissioner of the General Land Office, and to make first payment to the State Treasurer, and to execute his obligation for

the unpaid purchase money in the manner provided by law for surveyed school lands. The act further provides that if, on the expiration of 60 days from the giving notice of classification and valuation, the Commissioner of the General Land Office shall not have received the application to purchase such lands as provided for in the act, then he is required to place said lands on the market for sale as other school lands. All that is shown is that appellee Hays made application and caused the survey of the four sections of land upon which the trespasses in this case took place, and the surveyor had forwarded the field notes to the General Land Office. The Commissioner, however, had not approved such field notes as required by the act, nor had he valued or classified said lands, and given notification thereof to appellee Hays, that the land was upon the market for sale. Indeed, it appears that other applications and surveys for part of this land had been made, but the field notes of none of said surveys had been approved, nor had any one of the applicants been notified that the lands were upon the market.

In this condition of the proof and of the law, it seems clear to us that appellee showed no right to pasture the 250 head of cattle belonging to appellee Norris on the lands in controversy. It appears that there are quite a number of other actual settlers on the body of school land situated in appellant's pasture, and that no objection has been made in behalf of appellant to appellee Hays or to others becoming actual settlers. The objection is to the use of the lands during the continuance of appellant's lease by grazing cattle thereon, and, as stated, we think this contention must be sustained. Appellees cannot state, nor can we state, that surveys made under the Hays application will ever be approved, or that he will ever be given the opportunity presented by the act in question of becoming the purchaser thereof. In order to acquire the rights of an applicant under said act, actual settlement, it seems, is not required; the application merely securing the right to have the survey made, and, in 60 days after the approval of the field notes by the Commissioner of the General Land Office, and notification that it was on the market, to become the purchaser as required in cases of sales of other school lands. Appellee Hays' application was but a preliminary step in the acquisition of title, and the fact that the legislative act appropriated the lands to the public school fund, and provided for their sale, cannot be considered as ipso facto abrogating appellant's leases. These leases were valid, and conferred upon appellant the sole right to the use of the land covered thereby until such right was legally divested in the manner provided by law. We accordingly conclude that appellant's motion for new trial should have been granted.

Judgment reversed and cause remanded.

WATTS et al. v. BRUCE et al.*

(Court of Civil Appeals of Texas. Jan. 30, 1903.)

COMPROMISE JUDGMENT—SETTING ASIDE—MISREPRESENTATIONS—DEED TO WIFE—SUBSEQUENT EXECUTION SALE—GOOD FAITH—LIMITATIONS—EVIDENCE—CONFEDERATE SCRIP—LOCATION—APPEAL—DEFAULT—ASSIGNMENTS OF ERROR.

1. Setting aside a default judgment is a matter largely in the discretion of the court, and will rarely be reviewed on appeal.

2. A judgment rendered on a compromise in an action for the recovery of land will not be set aside as obtained by fraud and misrepresentations of the defendant where the only representations made were those contained in the pleadings, and in regard to the truth or falsity of which those bringing the suit should have known.

3. In an action to set aside a judgment rendered on a compromise in an action for the recovery of land, it is immaterial to plaintiffs that the adverse party in the former litigation did not represent all the adverse title; since, if such title was superior to their own, they could not recover in any event.

4. Where in an action to set aside a compromise judgment and to determine the rights of the parties to certain land the former judgment is not set aside, but in accordance therewith all the land, except that given to plaintiffs by the former judgment, is adjudged to defendant, the rights of a plaintiff not a party to the former action are nevertheless disposed of.

5. A deed from a husband to a wife is sufficient to vest the title in her without any recital that it is to become her separate property, or proof of payment from her separate estate.

6. In the absence of an affirmative showing that one purchasing land at execution sale, subsequent to a deed by the judgment debtor to his wife, purchased without notice and in good faith, those claiming through the wife need show no more than that the deed was sufficient to pass title.

7. The three-year statute of limitations as to those in possession under "color of title" does not apply to one purchasing at execution sale after the title has passed from the judgment debtor to his wife.

8. The five-year statute of limitations does not apply where those claiming thereunder fail to show a deed of record or a payment of taxes.

9. Under the direct provisions of Rev. St. art. 33-4, the 10-year statute of limitations in favor of one in possession cannot include more than 100 acres, in the absence of a monument of title on record fixing larger boundaries.

10. In an action for the recovery of land, the evidence showed that C. went on the land under a contract with plaintiff's ancestor as owner, but, after living there seven years, made an attempt, repeated twice within the next eight years, to file on part of the land as a homestead, and on one of these occasions notified the heirs of his former landlord of his purpose. C. himself stated that he was only holding a portion of the land and that for himself. Held sufficient to support a finding that C. had held the land for himself, and not for plaintiffs, and that his possession in their behalf had not been of sufficient duration to establish title in them by adverse possession under the 10-year statute.

11. When Confederate land scrip has been located, and the land surveyed, the scrip becomes merged in the land, though no patent has issued, and a deed to the land passes title.

Appeal from district court, Hardin county; L. B. Hightower, Judge.

*Writ of error denied by supreme court.

Action by Mrs. M. Watts and others against Charles G. Bruce and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Oliver S. Kennedy, for appellants. Greer & Minor, for appellees.

GILL, J. On the — day of —, 1901, Mrs. M. Watts, P. S. Watts, Mrs. Lina Richardson, joined by her husband, Mrs. Isabella Mitchell, joined by her husband, Oliver S. Kennedy, and W. A. Richardson, as administrators of the estate of P. S. Watts, deceased, brought an action in trespass to try title against Charles G. Bruce for the recovery of the Mary E. Hopkins 1,280 survey of land situated in Hardin county, Tex. This suit was numbered 788 on the docket of the district court of said county, and was settled by an agreement of compromise by which plaintiffs should receive 70 acres of the land and the defendant was to have the remainder. On October 3, 1901, in pursuance of this agreement, a judgment was entered according to its terms without hearing proof. Mrs. M. Taylor and Mrs. Lou Sessler, not being included in the compromise, took a nonsuit. On the 7th day of December, 1902, the same plaintiffs and Lea A. Work, one of the heirs at law of P. S. Watts, deceased, brought this suit against Charles G. Bruce, J. B. Hooks, C. M. Votaw, John H. Kirby, and H. A. Hooks. By supplemental petition John T. Smith, W. F. Cotton, Mrs. Lou Sessler and husband, and Mrs. M. Taylor and husband were made parties defendant. The purpose of this suit was to set aside the compromise judgment on the ground of fraudulent representations on the part of Bruce as to his title to the land and the quantity contained in the survey. The parties to the last suit who were not parties to the first were joined in order to determine the questions of title and extent of interest as to all claimants, whether their interests were acquired prior to or subsequent to the compromise judgment. A trial before the court without a jury resulted in a judgment for defendants, from which the plaintiffs have appealed. The court filed no conclusions of fact and law. The decree indicates that the court refused to annul the judgment rendered in cause No. 788, and allowed the interests of the various parties to remain as fixed by the judgment. As between the defendants, Mrs. Sessler and Mrs. Taylor were decreed specific portions of the land, and they are not complaining.

We find from the record the following facts: J. F. Cotton became the owner of the land in controversy in 1881. Thereafter certain judgments were obtained against him, and under executions issued on these judgments and levied on the land same was sold by the sheriff and bought in by P. S. Watts, deceased, to whom the land was deeded by the sheriff in 1884. Between the date of the

judgments and the levy and sale J. F. Cotton deeded the land to his wife. It is not claimed that the judgments against Cotton were abstracted and placed of record in the county in which the land was situated. Plaintiffs and Mrs. Sessler and Mrs. Taylor are the heirs of P. S. Watts, deceased, and claim the land under the sheriff's sale and deed. The defendants (except the two last above named and one W. F. Cotton) claim the land under deeds from the children of Mrs. J. F. Cotton, wife of J. F. Cotton, which were adduced in evidence. They also resisted the claim of plaintiffs on the ground that the compromise judgment (which was shown to have been rendered as above stated) estopped them, and that neither under the allegation nor the proof were plaintiffs entitled to have reopened the questions therein adjudicated. In this suit a judgment by default was rendered against defendant John T. Smith, who had acquired an interest in the land under Bruce subsequent to the compromise judgment. Subsequently, and during the term of the court, a motion to set aside the default judgment was sustained by the court. Of this appellant complains by several assignments of error. We shall not discuss them in detail or at length. Such matters rest largely, if not entirely, in the discretion of the court, and appellate courts rarely, if ever, review the action of a trial court where such a judgment is set aside. The assignments are without merit.

The question presented which controls the case as to all the appellants except Lea Work is whether the court erred in refusing to set aside the judgment rendered in cause No. 788. The evidence adduced by appellants in support of their prayer for this relief was that C. G. Bruce represented that he was the owner of the land; that his lawyer had advised that he could recover it; that it was then being held adversely to appellants, but that he preferred to surrender a small part of it, rather than continue the litigation; that he offered to let appellants have 70 acres; that they accepted the offer on the faith of these representations, and a judgment was entered accordingly leaving out Mrs. Taylor and Mrs. Sessler; that they did not discover the falsity of these representations until the term of the court expired. They sought to prove that they had the best title, and, further, that Bruce had not acquired the entire title of the heirs of Mrs. J. F. Cotton, but had acquired the title of only eight of the eleven heirs. As a matter of fact Bruce asserted no more in these representations than he asserted in his pleadings in the case. Appellants had sued for the land, and, in the nature of things, should have known of the truth or falsity of the representations. As to the fact that Bruce had not acquired title from all the heirs of Mrs. Cotton it was immaterial to appellants, for, if the Cotton title was better than theirs, they could not recover in any event. We think the court cor-

rectly refused to set aside the compromise judgment.

Lea Work, a grandson of P. S. Watts, was not affected by the compromise judgment, and as to him the cause must have been determined, and must here be determined, upon the merits of the case. Appellants contend that the judgment should be reversed as to him, because his rights were in no way disposed of by this judgment. A complete answer to this rests in the fact that all the lands were adjudged to defendants except the 70 acres given to appellants in cause No. 788, and that plaintiffs take nothing otherwise.

Work further complains that the court erred in not rendering judgment in his favor because he is an heir of P. S. Watts, deceased, and the evidence shows that P. S. Watts had title to the land both by limitation and by purchase under the sheriff's sale. As to limitation, the evidence was conflicting, and we do not think the record authorizes us to disturb the judgment upon that ground. As to title under the sheriff's deed, it is plain to us that appellant could not recover upon that ground. When the levy was made the title to the land had passed to the wife of J. F. Cotton in her separate right by virtue of her husband's deed to her. If this deed was made in fraud of the rights of creditors, it might have been annulled by a timely action brought for the purpose, but the right to annul it has long since been barred by limitation. The truth of the entire case may be said to be that the appellants, who were plaintiffs below, failed to show title in themselves, and the defendant Bruce and those claiming under him showed title in themselves, or title outstanding in the heirs of Mrs. J. F. Cotton. So, in no event, could any other judgment have been rendered.

It is unnecessary to notice the remaining assignments. They present no error for which the judgment should be reversed. It is therefore in all things affirmed.

Affirmed.

Additional Conclusions of Law and Fact.

(Feb. 17, 1903.)

In response to the motion of appellants for addition conclusions of facts and law we find the following:

On the 11th day of August, 1883, J. F. Cotton, for a recited consideration of \$500, executed and delivered to his wife, E. G. Cotton, a deed conveying to her the land in controversy, and it was duly placed of record on the same day. J. F. Cotton testified that the consideration for this deed was a debt due by him to his wife, he having years prior to its date used some of her separate means, and wished to repay her. The deed did not recite that the land should become her separate estate. The certificate of acknowledgment began, "The State of Texas, County of Hardin." It recited that it was

given under the hand and seal of the officer taking, and is signed, "O. O. Lane, C. C. C. H. C., by E. H. Collins, Dept." Its execution was proved upon the trial by the vendor, J. F. Cotton, who was a witness in the case. This instrument was adduced in evidence over the protest of appellants, who objected to its admission (1) because it showed on its face that it was not acknowledged before any officer authorized by law to take acknowledgments; (2) because there was no impress of the seal of the officer thereon; and (3) because there was nothing on the face of the deed to show that the land was paid for with the separate means of the grantee, or that same was to become a part of her separate estate, and that "Watts purchased without notice of her equity." Appellants' seventh assignment of error, in which it is undertaken to present these objections to this court, is followed neither by proposition nor statement, and it is nowhere made to appear in appellants' brief that these criticisms of the instrument are borne out by the record. For these reasons we did not discuss the assignment in the main opinion, and for a like reason we do not notice it now, further than to dispose of the effect of the deed as evidence.

Even in the absence of the testimony of J. F. Cotton as to the purpose of the deed, its effect would have been to place the title to the property in the wife in her separate right. *Story v. Marshall*, 24 Tex. 306, 76 Am. Dec. 106; *Lewis v. Simon*, 72 Tex. 475, 10 S. W. 554; *Frank v. Frank* (Tex. Civ. App.) 25 S. W. 819; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027. In the absence of affirmative proof that P. S. Watts, Sr., bought at sheriff's sale without notice, and for value, appellees needed the deed for no other purpose than to show title in Mrs. E. G. Cotton prior to Watts' purchase, and this it effectively did.

On the issue of limitation plaintiffs showed that J. R. Bevil, W. G. Wallis, and D. H. Hart ran a saw mill on the land in question, though not continuously, from December, 1884, until the spring of 1889, under a contract with Watts, as owner of the land. In 1887 W. F. Cotton went upon the land under a contract with Watts, as owner, by the terms of which he was promised 160 acres thereof when the title was perfected. Under this contract W. F. Cotton built houses on a portion of the land, and continued to occupy and cultivate a portion thereof, and was in possession when the suit was brought. He had, however, within the eight years preceding the suit, made three attempts to file upon 160 acres as a homestead, and in one instance had notified some of the heirs of Watts of his purpose. He also stated that he was holding only 160 acres, and that for himself. It is plain that the three-years statute does not apply, because the sheriff's sale occurred after the title had passed to the wife of E. G. Cotton. *Wright v. Dally*, 26 Tex.

731; *Snowden v. Rush*, 69 Tex. 594, 6 S. W. 707. The five-years statute does not apply, because no deed of record and no payment of taxes was shown. The 10-years statute cannot avail appellants, because, since no written muniment of title was of record, they could claim under the naked possession of W. F. Cotton no more than 160 acres. Rev. St. art. 3344. And as to that we think the evidence sufficient to support the conclusion of the trial judge that for a part of the time Cotton was claiming that for himself, and not for the heirs of Watts, and that his possession under his claim for Watts was not for a sufficient time to complete the 10-years bar. We do not deem it necessary, as regards the action of the trial court in setting aside the judgment by default rendered against J. F. Smith, to add anything to what was said in the main opinion. The matters inducing the court's action appear without dispute.

We stated in the main opinion that P. S. Watts, deceased, purchased the land at sheriff's sale. This finding is not complained of, but is not technically accurate. The Confederate land scrip which had been issued to Mary E. Hopkins had been located upon the land in controversy, but patent had not issued. The sheriff levied upon and sold this scrip. J. F. Cotton, after the location of the scrip, and before the levy and sale, sold and conveyed the land to his wife. There is no difference, in legal effect, as the scrip, when located and the land surveyed, was merged in the land, and became real estate, and the deed to Mrs. Cotton passed the title to her. *Abernathy v. Stone*, 81 Tex. 434, 16 S. W. 1102; *East v. Dugan*, 79 Tex. 330, 15 S. W. 273.

We had not regarded a fuller finding than that contained in the main opinion necessary or useful to appellants' rights, either on motion for rehearing or elsewhere, but in deference to the opinion of counsel for appellants we have prepared the above.

W. F. TAYLOR CO., Limited, v. BAINES GROCERY CO.*

(Court of Civil Appeals of Texas. Feb. 5, 1903.)

DEBTOR AND CREDITOR—COMPROMISE—CORPORATIONS—CONTRACTS—OFFICERS—AUTHORITY—RATIFICATION—EVIDENCE—HARMLESS ERROR.

1. Where a creditor of an insolvent corporation agreed to advance money to pay the corporation's indebtedness at 33 $\frac{1}{4}$ cents on the dollar, and to take in full satisfaction of its claim the property and other assets of the corporation, and the individual notes of two stockholders therein for any deficit which should remain between the creditor's claim and the amount which should be realized from sale of the property and collection of the outstanding obligations, such agreement was a complete defense to an action against the corporation,

*Rehearing denied.

brought before all the outstanding claims had been collected.

2. Where an agreement for the compromise of a claim against a corporation was made on behalf of the corporation by two of its stockholders, who had actual management of its affairs, and the corporation ratified and complied with the terms of the compromise, the agreement became that of the corporation, and was binding on both parties.

3. The fact that an agreement for the compromise of a claim against a corporation contemplated the giving of the individual notes of two of the stockholders for a part of the indebtedness of the corporation was no objection to its validity.

4. On the issue whether creditors of a corporation had agreed, by way of compromise, to take notes of the corporation, or of two individual stockholders, an agent of the creditor had testified directly that the agreement was that notes of the corporation should be given. In support of the contention that notes of the stockholders should be given, a letter from one of them, dated December 30th, was introduced, and in connection therewith the witness was asked if the first he ever heard of the claim that the individual notes were to be accepted was not about December 31st. *Held*, that the exclusion of this question was non-prejudicial.

5. Rejection of evidence that the two stockholders were insolvent at the time of the alleged agreement was not error, it being admitted that the corporation was also insolvent.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Action by the W. F. Taylor Company, Limited, against the Baines Grocery Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Blount & Garrison, for appellant. Geo. F. Ingraham, for appellee.

GARRETT, C. J. This was an action of debt, brought by the W. F. Taylor Company, Limited, against the Baines Grocery Company. The plaintiff is a corporation chartered by the state of Louisiana, and the defendant is a corporation chartered under the general law of the state of Texas. The petition sets out the cause of action as upon a balance on open account for \$2,345.82 for cash, and goods, wares, and merchandise furnished the defendant, and two promissory notes, dated August 14, 1901, due respectively November 1 and November 20, 1901, for \$512 each. After some dilatory pleas and the general denial, the defendant pleaded as a special defense to the plaintiff's cause of action that the indebtedness sued upon had been discharged by a settlement between the plaintiff and defendant, in support of which the facts were averred substantially as follows: That in October, 1901, the Baines Grocery Company became insolvent, and so notified its creditors, and that a meeting of the creditors was held in Nacogdoches on November 11, 1901, for the purpose of settling and adjusting their claims with the defendant. A list of creditors, with the amounts due each, was attached to the petition, and it was shown that the plaintiff was the largest creditor, with a claim amounting to \$2,-

241.40; the claims of all the creditors amounting to about \$10,000. It was further alleged that the defendant then had on hand a stock of goods of the estimated value of \$2,800, which had been examined by the plaintiff, and that it had also about \$2,000 in notes and accounts; that the plaintiff, with full notice and a better knowledge of the condition of said assets of the defendant than any other creditor, agreed with C. S. Baines and D. C. Baines, who are stockholders of the Baines Grocery Company, that, if the creditors could be settled with at 35 cents on the dollar, it would furnish the money to pay that amount, provided the stock of merchandise and the notes and accounts aforesaid, or the proceeds thereof, should be delivered to plaintiff, and the said D. C. Baines and C. S. Baines would execute to it their notes for whatever balance might be due upon a final settlement of the matter; that in pursuance of such agreement the plaintiff furnished the money necessary to pay off said claims at the rate of 35 cents on the dollar, and said claims were paid and extinguished, and the stock of merchandise was sold for cash, and the proceeds were delivered to the plaintiff, and said notes and accounts were placed in the hands of a collecting agency, with instructions to pay over the proceeds to the plaintiff, and that all amounts collected had been paid to it; and that the said D. C. Baines and C. S. Baines had always been, and were still, willing to execute their notes for the balance of plaintiff's claim whenever the same could be ascertained. The cause was submitted to the court without a jury, and the trial resulted in a judgment in favor of the defendant.

The defendant, the Baines Grocery Company, was a private corporation organized for mercantile purposes, and did business in the town of Garrison, Nacogdoches county. C. S. Baines and D. C. Baines were stockholders in said corporation, and the business thereof was conducted by D. C. Baines. In October, 1901, the company became insolvent. Its indebtedness amounted to about \$10,000, and the plaintiff was its largest creditor, to whom it owed \$2,241.55. It had a stock of merchandise on hand worth about \$2,800, and there were notes and accounts due the company by customers amounting to \$1,800 or \$1,900. A meeting of the creditors of the defendant was held at its instance on November 11, 1901, at which it was agreed that the creditors would accept in payment of their claims 35 cents on the dollar. Prior to this meeting the plaintiff, acting by its agent, Z. R. Lawhon, agreed with the defendant, which was represented by C. S. Baines and D. C. Baines, who were conducting the business of defendant, to furnish the money for the payment of the claims in accordance with the terms of the settlement. As found by the trial judge, the agreement was as follows: "Plaintiff was to fur-

nish cash enough to pay off all the creditors of defendant at 33½ cents on the dollar. That defendant was to turn over the stock of merchandise on hand, and all notes, accounts, and claims due to defendant, or the proceeds of the same, to plaintiff; the stock to be sold, and the claims to be collected by C. S. and D. C. Baines, and, as the goods were sold and claims collected, the proceeds thereof to be delivered to plaintiff, provided they could get the other creditors of defendant to accept the 33½ cents on the dollar for their claim. After the stock of goods had been sold, and the claims collected, and all turned over to plaintiff, then C. S. and D. C. Baines were to give to plaintiff their individual joint note for whatever amount the assets of defendant lacked of paying plaintiff one hundred cents on the dollar of its indebtedness to plaintiff, including the sum to be advanced by plaintiff to pay other creditors the 33½ per cent. of their claim, as well as the \$2,241.55 then owing by defendant to plaintiff." The agreement to settle was proved by oral testimony, but it was shown to have been reduced to writing and signed by all of the creditors, including the plaintiff, except some of them whose claims aggregated less than \$500. The arrangement between Lawhon, representing the plaintiff, and the Baines Grocery Company, was concealed from the other creditors, except A. Wettermark & Co., who accepted, however, and, at the request of Lawhon and C. S. Baines and D. C. Baines, received the money and disbursed it to the creditors. The plaintiff furnished and paid to A. Wettermark & Son the sum of \$2,715.65, the amount necessary to pay off all the debts of defendant at the rate of 35 cents on the dollar, except the debt of plaintiff, and A. Wettermark & Son paid the claims as they were presented. The stock of goods was sold, and some of the notes and accounts due the defendant were collected, and the proceeds, amounting to \$1,593.05, were remitted to the plaintiff and accepted by it. The balance of the notes and accounts were turned over to a collecting agency at Garrison, with instructions to collect the same and remit the proceeds to the plaintiff, and there was in the hands of such agency when the cause was tried the sum of about \$300 in money and about \$1,400 in solvent claims. The Baines Grocery Company performed their part of the agreement, and C. S. Baines and D. C. Baines both testified at the trial as to their willingness to execute their note for the balance due when it could be ascertained.

The agreement entered into between the plaintiff and the defendant for the advancement of the money to pay the amount agreed on in compromise of the claims of the creditors of the defendant should be enforced. By its terms the plaintiff undertook to advance for the use of the defendant the sum of \$2,715.65, and to surrender its claims

against the defendant, in consideration that the defendant would deliver to it the stock of goods belonging to the defendant, and the notes and accounts due the defendant by its customers, to be sold and collected, and the proceeds paid to the plaintiff, and credited to defendant's account, including the money advanced, and that C. S. Baines and D. C. Baines should execute to plaintiff their note for the balance of the entire indebtedness, for which the plaintiff accepted the promise of the said C. S. Baines and D. C. Baines. Plaintiff advanced the money as it had agreed to do, and the defendant performed its part of the agreement by the delivery of the goods and the notes and accounts. If, when these credits have been exhausted, C. S. Baines and D. C. Baines should fail to execute their note for such balance as may remain, the plaintiff would have a right of action against them upon their promise. If the judgment of the trial judge is correct, it does not matter that he may have given a wrong reason therefor. The pleadings do not raise the issue of fraud, and evidence tending to show fraud by the plaintiff in the procurement of the settlement cannot be considered in support of the judgment. But the conclusion of the trial judge that the agreement set out in the defendant's answer, having been shown by a preponderance of the evidence, was a valid defense to plaintiff's cause of action, was correct, and authorized the judgment rendered. The first and second assignments of error are therefore overruled.

By the third and fourth assignments of error it is claimed that the defendant, being a corporation, could only act by its duly authorized officers, and that it could not avail itself of the benefit of the individual contract of C. S. Baines and D. C. Baines. It was shown by the evidence that the affairs of the corporation were managed by C. S. Baines and D. C. Baines, who were stockholders therein, and, in their capacity as managers and agents, they had authority to bind the corporation, which, it is shown, ratified and complied with the terms of the contract. There could be no objection to the Baines Grocery Company's accepting and availing itself of the benefit of the promise of C. S. Baines and D. C. Baines to the plaintiff, as individuals, to pay any portion of its debt.

Under the sixth assignment of error, the plaintiff complains of the exclusion of the testimony of Lawhon, offered by it, to the effect that the first he ever heard of the claim of C. S. Baines and D. C. Baines that plaintiff was to accept their individual note was about December 31, 1901. It was a controverted fact in the testimony of Lawhon and the Baineses whether or not the note should be executed by the corporation, or C. S. Baines and D. C. Baines individually. A letter from D. C. Baines to the plaintiff, dated December 30, 1901, put in evidence, tended to sustain the defendant's contention, and in

this connection the above question was asked Lawhon. As Lawhon had testified that the agreement was that the note was to be executed by the Baines Grocery Company, and that he had at no time agreed to take the individual note of C. S. Baines and D. C. Baines, it is not likely that the exclusion of the evidence could have injured the plaintiff, even if it was admissible.

It was also immaterial, if error, whether or not C. S. Baines and D. C. Baines were insolvent at the time of the settlement, and the exclusion of testimony to show that they were insolvent was not error, since the Baines Grocery Company was confessedly insolvent.

None of the other assignments require attention. The eighth is disposed of by the fourth, and the tenth by the general conclusion in favor of the defendant.

The judgment of the court below will be affirmed. Affirmed.

HALL v. LEVY et al.*

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

HUSBAND AND WIFE—GIFTS TO WIFE—COMMUNITY PROPERTY—LIABILITY FOR HUSBAND'S DEBTS.

1. B. insured his life in favor of his wife, and on settlement of the policy he gave her the amount received therefrom. Thereafter the firm of B. & Bro. borrowed the money from the wife, and executed a note to her therefor, and in part payment executed deeds to her to the land in controversy. B. testified, without contradiction, that such fund was the separate property of his wife, and was used to pay for the land, and at the time the money was given to the wife he and the firm were solvent. *Held*, that the land so conveyed was not community property, and was not subject to B.'s debts.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by Lee Levy and others against F. Norwood Hall. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Potter & Potter, for appellant. Robt. E. Cofer, for appellees.

STEPHENS, J. Appellees (plaintiffs below) recovered of appellant block 40 in Perry's addition to the city of Gainesville. Their title consisted of a judgment rendered June 29, 1891, in favor of Warren Boot & Shoe Company against D. Baum & Bro., and an execution sale thereunder, with sheriff's deeds to them, dated August 5, 1891. Appellant's paper title consisted of deeds from E. P. Bomar and D. T. Lacy to Bertha Baum, wife of D. Baum, made in the year 1889, and a deed to him from Bertha and D. Baum, made November 21, 1900. Recovery was had by appellees upon the ground that

the block of land in controversy was the community property of D. Baum and wife, Bertha Baum, when levied on and sold as such, which recovery was resisted by appellant upon the ground that it was the separate property of Bertha Baum. The testimony offered to sustain this defense was that of D. Baum, which, so far as relevant to this issue, was as follows: "Bertha Baum is my wife, and we were married in 1868. Soon after I married, I took out an insurance policy on my life for ten thousand dollars. In about 1885 or 1886 the company that I took this policy with liquidated. My policy was an endowment policy, and under the laws of New York I had a preference, and in 1885 or 1886 they paid five thousand dollars on my ten thousand dollar policy. The ten thousand dollar policy was made payable to my wife, Bertha Baum. At this time I was in the mercantile business in partnership with my brother, doing business under the firm name of D. Baum & Bro. I turned this five thousand dollars over to my wife. It was her money. Not long afterwards the firm of D. Baum & Bro. borrowed thirty-four hundred dollars of this money from her, and gave her a note of D. Baum & Bro. During the year 1888-89, Capt. Ed Morris did business with us, and owed us a balance in 1889 of four hundred and fifty dollars. * * * It was understood and agreed that if Ed Morris would deed us block 40, Perry's addition to the city of Gainesville, that we would mark the store account 'Paid.' At this time D. T. Lacy and E. P. Bomar were holding title to this land for Ed Morris, and in 1889 D. T. Lacy and E. P. Bomar each executed a deed conveying lot 40 in Perry's addition to the city of Gainesville to Bertha Baum. We marked the store account 'Paid,' and entered a credit of four hundred and fifty dollars on the note that D. Baum & Bro. owed Bertha Baum. * * * At the time this land was deeded to my wife by D. T. Lacy and E. P. Bomar, the firm of D. Baum & Bro. was solvent. We were doing a good business, and we were in good financial shape. We failed in business in 1891. I was solvent from the time I married till 1891. * * * I paid the insurance premiums on this policy out of community property." On cross-examination this witness testified: "The insurance policy I had on my life was a regular twenty-year endowment policy. If I lived for twenty years, I was entitled to a settlement under the provisions of said policy in my lifetime. * * * In 1885 or 1886 the insurance company failed. I succeeded in compromising with the insurance company, and got five thousand dollars. Part of this money went to buy our homestead—the place where we are now living—and the balance was loaned to the firm of D. Baum & Bro., who gave their note to my wife. This note is now at my home." At this point the statement of facts contains the

*Rehearing denied February 23, 1903, and writ of error denied by supreme court.

following, on which much stress seems to be laid by appellees: "Being requested by the court to go and bring the note into court, the witness was excused to go and get the note, but the witness did not return again." The rest of the evidence related to the issue of notice, on which the court found in favor of appellant; that is, that notice was given at execution sale of Bertha Baum's claim before appellees purchased the property, which finding we approve. The court also found that D. Baum had "had his life insured in favor of Bertha Baum," that the firm of D. Baum & Bro. had borrowed from Bertha Baum the \$5,000 paid in liquidation of the insurance policy, and that, "in part payment for said indebtedness, D. Baum & Bro. caused the deeds from Lacy and Bomar, hereinbefore mentioned, to the land in controversy, to be made to said Bertha Baum," but further found in this connection that "it was not intended to give said land to said Bertha." These findings of fact we also adopt. The court, however, "as matter of law," concluded "that the money realized upon said insurance policy was not the separate property of Bertha Baum, but that it was community property of said D. Baum and Bertha Baum," and upon this ground rendered judgment for the plaintiffs below. But in this we think there was error. The court seems to have accepted as credible the testimony of D. Baum, quoted above, which, when so accepted, clearly shows, we think, that the property in controversy was paid for with the separate funds of Bertha Baum. The decision of the case does not depend alone upon the character and effect of the insurance policy; for, in addition to having "his life insured in favor of Bertha Baum," as found by the court, D. Baum delivered the proceeds of the liquidated policy to her, and afterwards borrowed the same from her, executing a note of the firm payable to her, in part payment of which the lot in controversy was conveyed to her. The insurance fund was thus clearly treated by D. Baum as belonging to his wife long before any rights of creditors intervened, and we see no escape from the conclusion that what he did in the premises amounted to a gift of this fund to her, both principal and interest. *Martin Brown Company v. Perrill*, 77 Tex. 190, 13 S. W. 975; *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725.

The judgment is therefore reversed, and here rendered for appellant.

WESTERN UNION TEL. CO. v. WALLER.*
(Court of Civil Appeals of Texas. Jan. 31, 1903.)

**TELEGRAPH COMPANY—NEGLIGENCE—DELAY
IN DELIVERING MESSAGE—DAMAGES
—EVIDENCE—CONTRACT.**

1. In an action for negligent failure to deliver a telegram addressed to plaintiff reading,

"Come at once. Mamma dangerously sick," until too late to enable him to reach his mother's bedside before her death, evidence that the relations between him and his mother were more than ordinarily affectionate, and that she frequently called for him; was properly admitted.

2. Where a telegram was delivered to the telegraph company in Texas, to be transmitted to a person in the Indian Territory, the rights of the parties and rule of damages are to be determined by the laws of Texas, though the breach of the contract occurred in the Indian Territory.

3. Where, in an action for negligent delay in the delivery of a telegram, it appears that on inquiry at the hotel the messenger boy of the telegraph company was referred to a certain person as one who could give information as to where to find the plaintiff, the admission of the testimony of such person that, had inquiry been made of him he could and would have stated where plaintiff was to be found, was not error.

Error from district court, Wichita county; A. H. Carrigan, Judge.

Action by A. H. Waller against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Geo. H. Fearons, Mathis & Barwise, and Chas. C. Huff, for plaintiff in error. Montgomery & Hughes, for defendant in error.

CONNER, C. J. Appellant appeals from a judgment in favor of appellee in the sum of \$808 as damages for a failure to transmit and deliver with due diligence the following telegram: "H. A. Waller, Care Some Hotel, Duncan, I. T.: Come at once. Mamma dangerously sick. R. H. Waller." The telegram was delivered to appellant's agent at Jacksboro, Tex., for appellee's benefit about 4 o'clock p. m. on March 23, 1901, and was not delivered to appellee until some time the next day, when it was too late to enable him to reach his mother's bedside until after her death.

Error is assigned to the action of the court in admitting, over the objections that it was immaterial and prejudicial, the testimony of R. H. and W. R. Waller, appellee's brothers, to the effect that the relation between appellee and his mother was more than ordinarily affectionate, and that the mother, prior to her death, frequently called for him, saying, "Harvey, why don't you come to me?" This expressed desire of his mother was communicated to appellee after his arrival in Jacksboro, soon after her decease. The decisions in this state perhaps do not make it very clear that this character of testimony is admissible, but in their present condition we hardly feel justified in sustaining the assignments relating thereto. While perhaps not necessary for decision, our Supreme Court in *Telegraph Company v. Lydon*, 82 Tex. 366, 18 S. W. 701, very plainly say that evidence that appellee in that case "was his mother's favorite child" was not objectionable on the ground that it "indicated what the mother's feelings were, which was not the issue being tried." Un-

*Rehearing denied February 23, 1903.

der the twentieth and twenty-first assignments of error in the case of *Telegraph Company v. Taylor* (Tex. Civ. App.) 63 S. W. 1076, it was urged before us that the court, "over the objection of the defendant, should not allow the plaintiff to plead or prove that specially strong ties of parental and filial love existed, in the absence of a charge that defendant, in undertaking the service, had notice of such extra ties of love." While not noticed in our opinion, the assignments and propositions were overruled, and writ of error thereafter refused. We are not advised, however, whether this particular ruling was complained of in the Supreme Court, or of the ground or grounds upon which the writ of error was refused. In the case of *Telegraph Company v. Evans* (Tex. Civ. App.) 21 S. W. 266, it was alleged that a son, before his death, frequently called for his mother, who sued, and expressed desire to talk with her. While perhaps not strictly necessary to the ruling, this court, in disposing of the demurrer to such allegation, say, "We are not prepared to say that the jury would not be authorized to conclude that the anguish alleged would be increased by the knowledge that her son wished to see her, and was unable to do so." It has been often held that a telegram of the character in question affects the telegraph company with notice of the relationship existing between the parties named. *Telegraph Company v. Adams*, 75 Tex. 532, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Telegraph Company v. Moore*, 76 Tex. 63, 12 S. W. 949, 18 Am. St. Rep. 25. The whole includes all of its parts, and the telegraph company, having notice of the relationship, should anticipate its naturally varying forms. A natural and probable consequence of the relation of mother and son is that the relationship between them should be one of the most affectionate known to humanity, and that a conscious dying mother should have and express an intense desire to see an absent son; and of all this, we think, notice must be imputed to appellant from the very terms of the message. The language objected to in this case tending to show the tender feeling existing between mother and son was not more forceful than the natural inferences arising from the known facts. It seems unreasonable to require that degrees in affection and desire must be described in a telegram in order to affect the transmit-

ting agent with notice of mere natural and probable consequences of a failure to fulfill its obligation to transmit and deliver with due diligence. Nor do we think the case of *Telegraph Company v. Stiles*, 89 Tex. 315, 34 S. W. 438, so earnestly urged in behalf of appellant, necessarily conflicts with the foregoing views. The *Stiles Case* is distinguishable from this in that it was held that the evidence there offered in no way tended to establish affection on the part of the sister, but, on the contrary, tended to show unnatural ill feeling on the part of the dying brother that could not have been anticipated by the telegraph company, and it was this feature that was stressed in the opinion. In the case before us we think, as stated, that the contrary is true; that is, that the testimony here objected to was but evidence of natural and probable circumstances attending the relationship between appellee and his mother that should reasonably have been anticipated from the terms of the message.

The remaining assignments require but brief notice. The contention that mental anguish is not an element of damages because not so by the laws of the Indian Territory, where the delivery was made, is no longer an open question in this court. See *Telegraph Company v. Cooper* (Tex. Civ. App.) 69 S. W. 427.

The testimony of A. A. Robinson to the effect that, had inquiry been made of him in Duncan, he could and would have stated where appellee was to be found, was relevant on the issue of negligence in delivery; it otherwise appearing that upon inquiry at the hotel the messenger boy was referred to him as the person who could give such information.

The evidence failed to raise the issue of contributory negligence, and the court in the general charge correctly defined appellant's duty in the premises, and as a whole otherwise properly submitted the issues.

The evidence, in our judgment, establishes negligence in delivery as alleged, and tends to show that, had due diligence been used, appellee could and would have reached his mother before her death. We also feel unable to declare the verdict excessive, and, having found no reversible error, and believing, as we do, that the material allegations of appellee's petition are sufficiently supported by the evidence, the judgment is affirmed.

HILLEBRANDT et al. v. DEVINE et al.*

(Court of Civil Appeals of Texas. Feb. 6, 1903.)

SCHOOLS—ELECTION OF TRUSTEES—STATUTES—TIME FOR ELECTION—STATUTORY CONSTRUCTION.

1. Acts Feb. 21, 1900, c. 7, § 10, provided that any town or village which might desire to incorporate for school purposes could apply to the county judge for the organization of an independent school district, as provided by general statutes, and for the election of a board of trustees. Section 1 enacted that there should be elected on the first Saturday in May, 1900, in each independent school district, "subject to the exceptions hereinafter named," seven trustees, etc. The statute exempted from its operation the cities of Dallas and Ft. Worth, and those which had chosen their trustees by appointment of the city council or board of aldermen under Rev. St. art. 4018. Prior to such statute the law required school trustees to be elected on the first Saturday in June, and the election of trustees was by Rev. St. arts. 3994, 3999, at an election subsequent to that at which the incorporation was determined. *Held*, that the election of trustees for the first time was required to be held at the same time that the question of incorporation was voted on, such election falling within the exception made in section 1.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Suit by L. Hillebrandt and others, as trustees of common school district No. 25, Harris county, Tex., against Joseph Devine and others, as trustees of the independent school district of Chaneyville. From a judgment in favor of defendants, complainants appeal. *Affirmed*.

W. J. Howard, for appellants. Dan H. Triplett and Coleman & Abbott, for appellees.

GARRETT, C. J. This action was brought in the district court of Harris county in the Fifty-Fifth judicial district October 30, 1902, by L. Hillebrandt and Robert Ward, as trustees of common school district No. 25, Harris county, Tex., and Eva Harrell, a teacher employed by said trustees to teach the Chaneyville school in said district, against Joseph Devine, H. E. Detering, H. Werner, John Mann, J. S. Williams, J. H. McNew, and G. Hochmuth, who were acting as trustees of the independent school district of Chaneyville, and J. H. Crawford, whom such trustees had employed to teach said school, to enjoin defendants from interfering with the plaintiffs in the control and management and possession of said school and the property belonging thereto, and praying judgment for such possession and control, and that the county superintendent of schools be restrained from making an apportionment of part of the school fund of said common school district to said independent school district. As presented by the pleadings and evidence, the question before the court was the validity

of the election of the defendants, except Crawford, as trustees of the independent school district of the town of Chaneyville, which had been a part of the common school district No. 25, and had recently voted to become incorporated as a town for school purposes only, the trustees having been voted for at the same election at which the question of incorporation was submitted. The case was tried to the court without a jury, and resulted in a judgment in favor of the defendants sustaining the validity of their election as trustees and employment as teacher. The plaintiffs Hillebrandt and Ward are the trustees of common school district No. 25 of Harris county, which, on July 23, 1902, included within its limits the town of Chaneyville. On said date, on the application of the citizens of said town, the county judge of Harris county ordered an election to be held at the schoolhouse therein on August 20, 1902, to determine whether the inhabitants of said town, embracing a definite portion of the territory of said common school district No. 25, and including the Chaneyville schoolhouse, should become incorporated as a town for free school purposes only, and at the same time and place to elect seven trustees for said independent district should the same be incorporated. An election was held as ordered, and a majority of the votes cast were in favor of incorporation, and of the said Devine, Detering, Werner, Mann, Williams, McNew, and Hochmuth as trustees; and on August 22, 1902, the county judge declared said territory to be incorporated as the independent school district of Chaneyville, and the commissioners' court declared the said Devine, Detering, Werner, Mann, Williams, McNew, and Hochmuth duly elected as trustees of said district, and they thereupon took possession of the school of Chaneyville and of the schoolhouse and property belonging thereto, employed the defendant Crawford as teacher, and have since had possession and control of said school and property, against the protest of the plaintiffs. The matter in controversy was submitted to the state superintendent of public instruction on appeal to him, and the validity of the election of the defendant trustees was sustained by that officer; and on further appeal to the state board of education his decision was affirmed. It was agreed by the parties that the rights of the teachers depend upon the validity of the election of the trustees. Section 10 of chapter 7 of the Laws of the First Called Session of the Twenty-Sixth Legislature, approved February 21, 1900 (Laws, p. 18), is as follows: "At any time hereafter it shall be lawful for any town or village, which may desire to incorporate for school purposes only, to make application to the county judge for the organization of an independent school district, as provided for by the general statutes governing such cases, and for the election of a board of trustees, as provided in

*Rehearing denied, and writ of error denied by supreme court March 12, 1903.

this act, and, on receipt of such application, it shall be the duty of the county judge to proceed as required in section 8 of this act." Prior to the passage of this act the election of school trustees of a town incorporating as an independent school district was held at an election subsequent to the election at which the question of incorporation was determined. Rev. St. arts. 3904, 3999. There was also in force a law requiring elections for school trustees to be held on the first Saturday in June. Rev. St. art. 3953. And it is said in argument that the election for the first trustees under the law as it was before the passage of the act of the Twenty-Sixth Legislature could only have been held on the first Saturday in June, and that by analogy the first election of trustees under the present law must be held on the first Saturday in May. But that is begging the question. The present law was passed for the purpose of providing a uniform method for the election of school trustees, subject to the exceptions therein named. In order to make the application of the law general, it was necessary to provide for all elections, including first elections, when independent school districts are to be formed. Section 10 of the law makes such provision, and requires the county judge to order an election, to be conducted in accordance with section 3, upon application of the inhabitants of the proposed district, for the purpose of determining the question of incorporation and the election of a board of trustees. Only one application and one order is contemplated by the law. This construction is borne out by section 3, which provides that the county judge shall order the first election required to be held under the act, and that all subsequent elections should be ordered by the board of trustees. It is the usual constitutional method for the questions of organization and the election of officers to be submitted to the people at the same time, and no inference can be indulged against the construction that both questions were required to be submitted at the same time on the ground that no officers could be elected until the incorporation had been determined upon. It is contended by counsel for appellants that a proper construction of

the law would give force to the provision that it should be lawful "at any time hereafter" for any town or village to incorporate for school purposes by permitting the election to be held only for the purpose of determining the question of incorporation at any time, and requiring the election for trustees to be held on the first Saturday in May. This is sought to be enforced by the argument ab inconvenienti that no apportionment of the school fund could be made, the law making no provision for a scholastic census for the purpose. But this objection, as well as others, seems to be met by article 2938d of the Revised Statutes, which confers authority on the state superintendent of public instruction to provide rules for the conduct of the schools. A proper construction of the law would require the terms of the trustees elected at the incorporation of the district to be determined and expire at the succeeding general elections, as they would had they been elected at such election. No other construction can be given to section 10 of the law than that the election of trustees is required to be held at the same time that the question of incorporation is voted upon, and that such election falls within the exception made in section 1, providing that the election for trustees shall be held on the first Saturday in May, subject to the exceptions named in the act. It is contended that it is obvious that the exceptions named are only of the cities of Ft. Worth and Dallas; but by reference to section 9 it will be seen that towns and cities are excepted also which have chosen their trustees by appointment of the city council or board of aldermen under the provisions of article 4018 of the Revised Statutes. The act of 1900, under consideration, repealed all laws in conflict therewith, and it is clear that in providing for the incorporation of towns as independent school districts the board of trustees for such districts is required to be elected at the same time that the election on the question of incorporation is held. That the town of Chaneyville was incorporated is not denied. The defendant trustees were elected at the same time, and their election is valid.

The judgment will be affirmed. Affirmed.

KNOEDLER et al. v. TEEGARDEN.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

ASSIGNEE FOR THE BENEFIT OF CREDITORS—DISCHARGE—JURISDICTION OF COUNTY COURT.

1. Ky. St. § 93, providing that an assignee for the benefit of creditors may move the county court for his discharge, and shall cause notice to be given of his application, and at the second regular term held after the motion is entered the court, on proof of notice, shall discharge the assignee, does not authorize the county court to hear and grant a motion for the discharge of an assignee on the day it is entered.

Appeal from circuit court, Bracken county. "Not to be officially reported."

Action by L. P. Knoedler and others against Jeff Teegarden, assignee of the firm of Teegarden & Bonfield. From an order sustaining a demurrer to the petition, plaintiffs appeal. Reversed.

John B. Clarke, for appellants. W. A. Byron, for appellee.

HOBSON, J. The firm of Teegarden & Bonfield, in Bracken county, made a deed of assignment on March 6, 1894, to appellee, Jeff Teegarden, of all their property for the benefit of their creditors. He qualified, and proceeded with the administration of his trust until October 12, 1896, when he appeared in the county court, and on his motion was discharged as assignee, and released from all further liability on account of the trust. On October 12, 1899, appellants, who were creditors of Teegarden & Bonfield, filed this suit, setting out their debts, which had been duly proven up, and alleging that but little or none of them had been paid; that the order of the county court discharging the assignee was void; that since it was made he had collected other moneys belonging to the estate, which he had not distributed; that there was a large amount of the property in his hands as assignee, which he had not accounted for, and which was more than sufficient to pay all the debts in full; that he had made no settlement of his accounts in the county court, and that the order of the county court discharging him was obtained by fraud. The circuit court sustained a demurrer to the petition.

The only question we deem it necessary to notice is as to the validity of the order of the county court discharging the assignee. On October 12, 1896, this motion was entered: "Now comes Jeff Teegarden, as assignee of Teegarden & Bonfield, and moves the court to release him from any further responsibility as such assignee, for the reason that the longer keeping open of said assignment will result in expenses to pay which there is no money on hand, and the assignee has paid out all the money that came to his hands." On the same day the court made this order: "This day Jeff Teegarden came personally into court, and adduced proof showing the publication as by law required of his ap-

plication to be discharged as assignee of Teegarden & Bonfield. It is therefore ordered that the motion herein be sustained, and that the said Jeff Teegarden be discharged from his trust as assignee aforesaid, and released from all liability on account thereof." This order was entered by virtue of section 93, Ky. St.: "The assignee may, when he becomes satisfied that it is no longer to the interest of the estate to keep the assignment open, move the county court to discharge him from the trust and release him from all liability on account thereof, and he shall cause notice to be published in four issues of some newspaper published in the county, if any; if not, by notice posted at the court house door for at least four weeks, of his application to be discharged; and at the second regular term of the county court held after the motion is entered the court shall upon proof that the required notice was given, enter an order discharging the assignee from his trust and releasing him from all liability on account thereof, unless objection is made; if objection is made, the court shall hear the same and make such orders as are proper." This is a special proceeding, and, to be valid, must be strictly in accordance with the statutory requirements. It will be observed that the statute requires the motion to be entered in the county court, and notice given of the motion, and then at the second regular term of the county court held after the motion is entered the court shall, upon proof that the necessary notice was given, enter an order discharging the assignee, if no objection is made. The purpose of requiring the delay until the second regular term of the county court after the motion is entered is to give the creditors an opportunity to learn of the proceedings, and determine what course to follow. In this case, on the same day the motion was entered, the court heard the motion and discharged the assignee. This it had no jurisdiction to do. Its jurisdiction in the premises is special, and the order in question, not being within its jurisdiction, was void. We are therefore of opinion that the court erred in sustaining the demurrer to the petition.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

DUPOYSTER et al. v. FT. JEFFERSON IMP. CO.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

LIENS—ENFORCEMENT—RECEIVER PENDENTE LITE.

1. Civ. Code Prac. § 298, provides that if, on the motion of any party to an action, he shows that he has a lien on any property which is in danger of being materially injured, the court may appoint a receiver. In a proceeding to enforce a lien on a three-eighths interest in land, it appeared that the lien would probably not be satisfied by the sale of such interest, and also that the owners of the other five-eighths interest, who were in possession of the whole tract,

were cutting and removing valuable timber from the land. *Held*, that it was proper to appoint a receiver for the timber land by an order providing that the owners of the five-eighths interest should remain in possession of the land in cultivation, and should be entitled to remove from the timber land firewood, fence posts, and timber for repairs.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by the Ft. Jefferson Improvement Company against J. B. Dupoyster and others to enforce a lien against certain realty. From an order appointing a receiver pendente lite, defendants appeal. *Affirmed*.

For former opinions, see 51 S. W. 810, and 66 S. W. 1048.

Geo. W. Reeves and Jno. W. Ray, for appellants. J. M. Nichols & Son and F. H. Sullivan, for appellee.

PAYNTER, J. This is the third time this case has been appealed to this court. The sole question here is, did the court err in appointing a receiver? As the record now stands, the appellee, Ft. Jefferson Improvement Company, is asserting a lien on three-eighths of the land, and claiming such interest as belongs to J. C. Dupoyster. This is subject to a certain mortgage lien. Five-eighths of the land is owned by J. B. Dupoyster and Mrs. Edwards. The appellants were in possession of the whole tract, several hundred acres of which is fenced and in cultivation; and the evidence is that the appellant J. C. Dupoyster, so far as he could as the agent of the co-appellants, was selling and removing some of the valuable timber from the land; but the evidence is that the land in cultivation is being improved by appellants by building barns, fences, etc. Upon this showing, the court made the following order, namely: "This day the motion of the Ft. Jefferson Improvement Company against J. C. Dupoyster, Mrs. R. S. Dupoyster, Jo B. Dupoyster, and Dalva D. and J. P. Edwards, coming on for trial upon the notice and affidavits filed herein, and it appearing that the said parties are wrongfully cutting and selling valuable timber off of the land in controversy in this action, the court being sufficiently advised, and it appearing that the said Ft. Jefferson Improvement Company is entitled to the relief sought, it is therefore ordered and adjudged that Geo. M. Woodward, this court's master commissioner and receiver, be, and is hereby, appointed receiver in this action, and the said J. C., Jo B., and R. S. Dupoyster, and Dalva and J. P. Edwards, are hereby ordered and directed to surrender at once the possession of all of the timber lands in controversy in this action to the said receiver, who will take and hold the possession of said lands under this order; and he will forbid and prevent the said parties and all others from cutting, removing, or destroying any timber whatsoever on said lands, except he may permit the said par-

ties and their tenants to cut and use such timber as may be suitable and necessary for firewood, or for fence posts, rails, or planks to be used on fences in necessary and reasonable repairs. And if any person should attempt to cut, remove, or destroy said timber, the said receiver is directed to apply to the Ballard circuit court, or to the judge thereof, for rule against them, to show cause why he should not be fined for contempt." It will be observed that only the timber land is placed in the hands of the receiver, and the appellants have the right to remove from it firewood, fence posts, rails, timber, and planks for repairs, etc. The effect of the order is to leave the appellants in possession of the land under cultivation.

The question is, have the parties who own five-eighths of the land, through their agent, J. C. Dupoyster, or otherwise, the right to cut and remove from the entire tract the timber upon it? The lien asserted by the Ft. Jefferson Improvement Company will not probably be satisfied by the sale of the interest which may be sold to pay it. Section 298 of the Civil Code is as follows: "On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property, or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court, or the judge thereof during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order and coerce the delivery of it to him. The order of a court, or the judge thereof, appointing or refusing to appoint a receiver, shall be deemed a final order for the purpose of an appeal to the Court of Appeals. Provided that such order shall not be superseded." The record shows the appellee has at least a lien upon whatever interest in the property is owned by J. C. Dupoyster, and is interested in protecting that right. Certainly the court would not sustain an order appointing a receiver to take charge of the land belonging to J. B. Dupoyster and Mrs. Edwards unless they, through their agent, were producing the injury to the property complained of. The fact that they owned five-eighths of the land did not give them the right to remove valuable timber from it.

We think the court properly placed the timber land in the hands of a receiver. It is suggested that on a former appeal of this case the court intimated that the lower court had erred in originally placing the property in the hands of a receiver. This intimation was evidently made upon the idea that there were no grounds to justify the court in taking the land—especially the land in cultivation—from the possession of J. B. Dupoyster and Mrs. Edwards, and placing it in the hands of a receiver. Upon the facts as they appeared on the former appeal, the court

may have been of the opinion that the receiver should not have been appointed; but that opinion would not prevent the court, upon a subsequent state of facts, from holding that the court thereafter properly appointed a receiver to take charge of that part of the land which was being injured by some of the co-tenants.

The judgment is affirmed.

CAUDLE v. FORD et al.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

PAROL EVIDENCE—ADMISSIBILITY—CONFLICTING EVIDENCE—CONCLUSIVE—NESS ON APPEAL.

1. It was competent to show by parol that, at the time the payees of an accommodation note indorsed the same, it was agreed that, before the maker should sell it, he should obtain the name of another party as payee, and that the latter should also indorse it, and that the maker should execute a mortgage to indemnify the payees against loss.

2. In an action by an indorsee against the three indorsers of an accommodation note, where defendants all testified to an agreement whereby their indorsement was not to take effect until certain conditions were complied with, and that plaintiff had notice thereof, a verdict for defendants could not be disturbed on appeal, though plaintiff testified that he purchased without notice of the agreement.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Action by J. D. Caudle against J. W. Ford and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James Goble, J. M. Roberson, R. T. Burns, and W. H. Flannery, for appellant.

BURNAM, J. On the 19th of May, 1898, James Matney executed the following obligation: "\$2,000. Pikeville, Ky. Four months after date I promise to pay to the order of J. W. Ford, W. H. Williams, and W. B. Mitchell two thousand dollars at the Bank of Pikeville. James Matney." The note was indorsed by three payees, Ford, Williams, and Mitchell, and returned to the payor, James Matney. Before the maturity of the note, it was sold by James Matney to the appellant, J. D. Caudle, for \$1,700, paid in cash; and, not being paid at maturity thereof, Caudle instituted this suit in the Pike circuit court against the maker, Matney, and the three indorsers, Ford, Williams, and Mitchell, to recover from them the sum which he paid for the note, with protest fees, and the cost of a suit which he had instituted against Matney, and prosecuted to judgment and return of nulla bona. The defendants Ford, Williams, and Mitchell, in their answer, admit that they signed the obligation and delivered it to Matney, but say, by way of defense, that it was agreed between them and Matney that, before he was authorized to sell the note, he was to procure the name of L. J. Williamson as one of the payees thereon, and he was also to indorse it and to become jointly bound with them,

and that Matney was then to execute to them and Williamson a mortgage on a farm and a house and lot in Pikeville, belonging to him, to indemnify them against loss, and that the plaintiff, J. D. Caudle, before he purchased the note, was fully informed of the condition upon which they had executed the obligation, and warned not to purchase or advance money on it until all these conditions were complied with. They further allege that Williamson never in fact became a party to the obligation, and that no mortgage was executed by Matney as agreed. A trial before a jury under proper instructions resulted in a verdict for the defendants, and plaintiff has appealed, and asks a reversal of the judgment rendered pursuant thereto, upon the ground that the trial court erred in permitting the defendants to testify upon the trial to the facts connected with the execution of the obligation, which were set out and relied on in their answer, upon the ground that parol evidence is not competent to contradict or vary the terms of a written contract.

We are unable to see how this rule of evidence has any application to the facts of this case. The law is well settled in this state that if a surety executes a note on the payee's agreement to procure the signature of another name thereto, and which the payee failed to do, this fact cannot be relied on as a defense when sued by a purchaser for value, who had no notice of such agreement. But if the payee or obligee had notice of such condition or agreement, the fact of the agreement, and knowledge thereof on the part of the obligee or payee, would constitute a valid defense; and it is entirely competent to show the existence of such knowledge by parol testimony. The gist of the defense in this case is that plaintiff, before he acquired the obligation sued on, or parted with his money, knew that the defendants were not bound thereon unless Williamson signed the note, and a mortgage was made to protect them. And it was perfectly competent to show that fact by parol testimony, as it in no wise tended to contradict or alter the obligation sued on. Questions analogous to the one at bar were considered by this court in *Smith v. Moberly*, 49 Ky. 266, 52 Am. Dec. 543; *Jones v. Shelbyville Fire & Marine Ins. Co.*, 58 Ky. 58; *Hubble v. Murphy*, 62 Ky. 279. And all these authorities were reviewed in the recent case of *Dils v. Bank of Pikeville* (Ky.) 60 S. W. 715.

It is hard to believe that appellant would have advanced \$1,700 in good money for the obligation sued on, after notice from appellees of the alleged conditions of liability on their part, and that they had not been complied with by Matney. Yet this is a fact which, under our system, is left to the determination of the jury, who are the sole judges of the weight and credibility of the witnesses. However much we may be disinclined to agree with the verdict of the jury,

we cannot say that it was palpably against the weight of evidence. For, as against the statement of appellant, that he had no notice of such alleged contemporaneous agreement, the three defendants all testify that he did have such information.

For these reasons, with some reluctance, we conclude that the judgment must be affirmed.

WILLIAMS v. WILLIAMS et al.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

GUARDIAN AD LITEM—COMPENSATION—ALLOWANCE—PRACTICE.

1. Where a guardian ad litem is appointed in the lower court under Civ. Code Prac. § 38, his claim for an allowance for his services as guardian, both in the lower court and on appeal, should be made by motion in the lower court, and not by petition in the Court of Appeals.

Appeal from circuit court, Grant county.

"Not to be officially reported."

Action by John D. Williams against James Williams and others, in which William Carnes, as guardian ad litem for certain minor parties, filed a petition for compensation as guardian. Petition overruled.

H. Clay White and B. F. Graziani, for appellant. W. W. Dickerson, A. G. De Jarnette, and Wm. Carnes, guardian ad litem, for appellees.

BURNAM, O. J. William Carnes, guardian ad litem for D. W. Robinson, Charles Robinson, Maggie Robinson, Earl Williams, James McManus, Raymond McManus, Monica McManus, and M. B. McManus, has filed his petition in this proceeding, reciting the services rendered by him for his infant wards in this court, and asked that he be allowed a fee of \$300 for such services. It appears from the record that Carnes was appointed as guardian ad litem for his infant wards in the lower court, pursuant to the provision of section 38 of the Civil Code of Practice, and we are therefore of the opinion that he should make his motion for an allowance for his services as guardian ad litem in the entire case in that court. See *Robinson v. Fidelity Trust & Safety Vault Co.*, 11 S. W. 806.

For this reason alone, the motion for an allowance is overruled.

STEWART v. ROSE.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

ELECTIONS—ILLEGAL VOTING—EFFECT.

1. Under the express provisions of section 12, c. 5, of the laws passed at the extra session of 1900, where "there has been such fraud, intimidating, bribery or violence in the conduct of an election that neither contestant or contestee can be adjudged to have been fairly elected, the circuit court * * * may adjudge that there has been no election."

2. Evidence in an election contest examined, and held to disclose a case where, on account of

illegal voting, "neither contestant nor contestee could be adjudged to have been fairly elected," and the election was accordingly void.

Appeal from circuit court, Whitley county.

"Not to be officially reported."

Proceedings to contest an election, instituted by Bond Stewart against R. S. Rose. Judgment in favor of contestee, and contestant appeals. Reversed.

K. D. Perkins, for appellant. C. W. Lester, for appellee.

O'REAR, J. Appellant and appellee were rival candidates at the election held November, 1901, for the office of police judge of the town of Jellico, a city of the sixth class. The officers of election certified that each of the candidates received 41 votes. There were 8 questioned ballots, not counted for either of them. One of these ballots was a blank. The remaining two were counted, one for appellant, and one for appellee. The result being a tie, appellee was selected by lot, and awarded the certificate. Appellant instituted the contest, and charged that a number of persons, who were named in the petition, were not legal voters at that election; that they voted for appellee; that a numbers of voters who were legally qualified voters (naming them) had been prevented, by force, intimidation, bribery, and fraud, from voting at the election; that they were the adherers and supporters of appellant, and would have voted for him. A large volume of evidence has been taken, from which the circuit court found that it was impossible to determine from the legal evidence for whom illegal votes had been cast.

We are of opinion that the voters J. H. Singleton, John Lewis, John Powell, and Walter Clark were illegal voters, undoubtedly. It is not so clear whether P. L. Garner and George M. Rose were qualified voters. Excepting Garner and Rose, mentioned, the other voters, each introduced as witnesses on behalf of contestee, after they had been shown conclusively by contestant's evidence to have been illegal voters, testified that they had voted for appellant. Contestant then introduced evidence impeaching their veracity because of their general reputation in the community where they live. No evidence was offered for appellee to sustain them or any of them. There must have been an exceedingly spirited contest for this office in this little town. A number of witnesses testified that they had been approached, and had been offered money and given whisky to influence them in voting, although none of them stated that they had voted because of such influence. One of the witnesses testified that friends and relatives of appellee agreed to give her \$10 (\$10 seems, from the evidence, to have been the prevailing price for such votes) if she would move her household furniture, etc., out of the corporate limits of the town a few days before the elec-

tion, and remain away until after the election, so as to disqualify her husband and son from voting. She said that she accepted the offer and moved. Her husband, however, returned to town, and refused to leave the corporate limits until after the election, and testifies that he voted, and that he voted for appellant. The son was refused the right to vote, although it seems that he was a legal voter. He claims to have been for appellant. Evidences of intimidation and other irregularities are also shown in the record. It is proper to say, however, that appellee is not personally connected with any of it. These acts seem to have been done, in the main, by his adherents and supporters—whether with his knowledge or approval is not shown in the record. Some of the witnesses mentioned as being illegal voters stated before the election for whom they intended to vote, and after the election for whom they voted. In *Commonwealth v. Barry*, 98 Ky. 394, 33 S. W. 400, *Major v. Barker*, 99 Ky. 306, 35 S. W. 543, and *Tunks v. Vincent* (Ky.) 51 S. W. 622, it has been held that such statements are hearsay, and are not competent to establish the fact of how such voter did actually vote.

Under such state of case, what are the rights of the constituency affected by this election, and what is the duty of the court? It is not every act of violence, fraud, or even bribery, that will vitiate an election. Such things, where their effect can be measured with any degree of certainty, will, in a contest involving the result of the election, be eliminated, and the result declared from what remains, if it can be done. So long as existing conditions continue, it may be impossible to conduct elections without some unlawfulness on the part of some one—officers or voters or meddlers. It obviously would not do to say that in every such case the election will be void. But where the illegal voting—the bribery or fraud or intimidation—has prevailed so that its effect upon the result is such that no degree of certainty exists as to the fairly expressed will of the electors, the election should be declared void. The voters of the district or community affected by it are entitled to an opportunity by a fair election, to select their officials. It is of the first importance to the people that their rights, before the claims of rival candidates, be protected and preserved. The last amendment to the election laws of this state (section 12, c. 5, of the Laws of the Extra Session of 1900) is as follows: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the Court of Appeals finally may adjudge that there has been no election. In such event the office shall be deemed vacant, with the

same legal effect as if the person elected had refused to qualify." Under all the facts shown in this record, we are bound to conclude "that neither contestant nor contestee can be adjudged to have been fairly elected." The circuit court should have so adjudged.

The judgment is reversed, and cause remanded, with directions to enter a judgment in conformity with this opinion.

PHILLIPS et al. v. KEEL, Sheriff.

(Court of Appeals of Kentucky. Feb. 24 1903.)

ESTATES—SALE OF LAND—CONFIRMATION—FAILURE TO JOIN REAL PARTIES IN INTEREST—DISMISSAL.

1. Pending exceptions to confirmation of the sale of land by an executrix, she died; and the sheriff, as public administrator, qualified as administrator with the will annexed, and was made a party to the proceeding, asking that the sale be confirmed. On appeal from confirmation of the sale, appellant's statement, filed in conformity with Civ. Code, § 739, named only the sheriff as appellee; the purchasers of the land not being made parties. Held that, as the real parties in interest would not be affected by any decision the court might make, the appeal should be dismissed, without prejudice.

Appeal from circuit court, Pike county.

"Not to be officially reported."

Suit by N. L. Phillips, as executrix of Frank Phillips, deceased, against Goldie Phillips and others, as heirs and creditors of deceased, for permission to sell certain lands. Pending exceptions to the sale, plaintiff died, and W. J. Keel, as sheriff, was substituted. From an order confirming the sale, defendants appeal. Appeal dismissed.

J. M. Roberson, for appellants. T. L. Edelen, for appellee.

BURNAM, C. J. This suit was instituted by N. L. Phillips, as executrix of Frank Phillips, against his heirs and creditors, for a settlement of the estate, and for a sale of enough of his land to pay his debts. At the January term, 1901, of the Pike circuit court, a judgment was entered directing the master commissioner of the court to sell seven tracts of land belonging to the estate of decedent, two of which were in the state of Virginia, and the remaining five in Pike county, Ky. At the sale N. J. Auxier and J. F. Butler, who represented plaintiff in the suit as attorneys, became the purchasers of the third, fourth, and fifth tracts in Kentucky, at the aggregate price of \$116. These three tracts of land were appraised at \$650. They also purchased tract No. 6 at the price of \$700. After the master commissioner filed his report of sale, Auxier and Butler transferred their bids on the land to Williamson and York, who were the purchasers of the remaining tract; and on their motion the commissioner was permitted to file a supplemental report that he had made a mistake in reporting their bid to them as attor-

neys for plaintiff—that it should have been to them as individuals. Numerous exceptions were filed by the infant children of Frank Phillips to the confirmation of the sale, and they also objected to the transfer of the bid from Butler and Auxier, as attorneys, to Auxier and Phillips, as individuals, and insisted that the property was sold for a song. After the judgment of sale, Mrs. N. L. Phillips died, and W. J. Keel, sheriff of Pike county, and public administrator, qualified as administrator with the will annexed of decedent, and filed his petition to be made a party to the proceeding, and asked that the commissioner's sale of the land should be confirmed. This was done in spite of the objections of appellants, and they have appealed to this court, and ask a reversal upon numerous grounds. But in their statement, filed in conformity with section 739 of the Civil Code, the only person named as an appellee is W. J. Keel, sheriff of Pike county, who has no pecuniary interest in the matter, so far as we are able to discover. The real parties in interest—the purchasers of the land and their transferees—are not made parties, and would not be affected by any judgment this court might direct to be entered in case we should conclude that the judgment appealed from was erroneous.

We therefore conclude that the appeal should be dismissed, without prejudice, and it is so ordered.

PARSONS v. WELLER et al.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

INJUNCTION—RESTRAINING REMOVAL OF CITY OFFICIAL—PREMATURE APPLICATION.

1. Injunction cannot be obtained by a city official to restrain private persons who had been nominated as members of the city's board of public works, but who had not assumed their duties as such, from threatening to remove him from his position when they did assume their duties.

2. The fact that no injury could result to defendants from the granting of the injunction, as the bond given by plaintiff would indemnify them against loss, was not ground for granting it.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by C. W. Parsons against John H. Weller and others. Judgment dismissing the petition, and plaintiff appeals. Affirmed.

O'Neal & O'Neal and Lane & Harrison, for appellant. Kohn, Baird & Spindle and Stanley E. Sloss, for appellees.

NUNN, J. The appellant instituted an action in the Jefferson circuit court, common pleas division, against appellees, John H. Weller, John Vreeland, and John Phelps, to enjoin them from molesting or depriving him of his office of chief engineer of the city of Louisville. After setting forth in his petition

facts showing the importance of the office to him, as well as to the city, and his right to hold the office for the term of four years from the 10th day of December, 1901, and that it was to his interest and to the interest of the public that he be permitted to hold said office without being disturbed or interfered with in the performance of his duties or the exercise of his official powers, the following allegations are made: "This plaintiff says that the defendants hereto, John H. Weller, John Vreeland, and John Phelps, were each, at a meeting of the board of aldermen of the city of Louisville, held at its chamber on the evening of the 10th day of December, 1901, nominated by the mayor, and their nomination consented to by the board of aldermen, to be members of the board of public works of the city of Louisville for a period of four years after their qualification as members of such board; that said defendants have each consented to said appointment, and will, as this plaintiff is informed and charges to be true, qualify each as a member of said board on the evening of the 17th day of December, 1901, and thereby become members of, and constitute a board of public works for, the city of Louisville. This plaintiff says that said defendants, John H. Weller, John Vreeland, and John Phelps, are giving out, reporting, and claiming that when qualified as members of, and as soon as they constitute, the board of public works, they will possess and be invested with full right and power, and that they will remove this plaintiff from the office of chief engineer of the city of Louisville, and will appoint another one in the place and stead of this plaintiff, and put such appointee so made by them in possession of said office, and terminate the right of this plaintiff to said office and to its emoluments, salary, etc." It is further alleged: "That the claim of said defendants casts a cloud upon his title to said office, and that his threatened removal from said office impairs his efficiency in the discharge of his public duties, and creates uncertainty and doubt in the mind of the public as to who is entitled and has the right to said office." The petition also states that on the 10th day of December, 1901, when the petition was filed, T. L. Jefferson, John Weller, and T. P. Satterwhite were the duly elected, qualified, and acting members of and constituted the board of public works in and for the city of Louisville. Appellant gave notice to the appellees that he would apply to the judge of said court on December 23, 1901, for said order of injunction. On that day appellees filed a demurrer to the petition, "because the court has no jurisdiction of the subject-matter, and has no jurisdiction to grant the relief asked, and because the petition does not state a cause of action." The lower court dismissed the petition, and appellant has appealed to this court.

It appears that at the time this action was instituted the appellees had only been named

by the mayor and board of aldermen to be members of the board of public works, and that appellees had merely consented to accept said positions, and would at a future date, December 17, 1901, qualify as such, and thereby become members of the board of public works. At the time when it is claimed appellees were "giving it out, reporting, and claiming that when they did qualify as members" they would remove appellant from his office, they were simply private citizens, and no official responsibility resting upon them. Appellant was premature in bringing this action. If, as stated in his petition, he was legally entitled to hold his office, he should have waited until appellees had accepted their offices and been qualified as such; in the meantime appellees may have reconsidered their "consent" to accept their offices, or perhaps they would have reconsidered their "threats" to remove appellant. At all events, it is fair to presume that after appellees had been qualified as, and become the board of public works, they would not violate their oath of office by removing the appellant from his office if he was legally entitled to hold it. It appears that this suit is against three private individuals, and that appellant expects these individuals to become members of said board, and that when they do become such members they will remove appellant from an office he holds and appoint another person. This court is of opinion that such an action cannot be upheld on either principle or reason. Appellant refers to the cases of *Todd, Mayor, etc. v. Dunlap, etc.*, reported in 99 Ky. 449, 36 S. W. 541, and *Poyntz, etc. v. Shackelford and others*, reported in 54 S. W. 855, as sustaining his position. The cases are unlike the case before us. The *Todd Case* was where the members of the board of public safety and the board of public works, who were executive boards of the government of the city of Louisville, and who were then in office, brought actions against Mayor *Todd* and the board of aldermen, who were then in office, and had the responsibility of their position resting upon them, and were acting under the solemnity of their oaths of office; and under the circumstances it was alleged and proven that they were about to unlawfully remove the plaintiffs from their positions. The issue in that case was the construction of a statute. In the case of *Poyntz, etc. v. Shackelford and others*, the facts were about as follows: When *Pryor* and *Ellis* resigned their positions as election commissioners, *Poyntz*, claiming the right to do so under the statute creating the board of election commissioners, appointed *J. A. Fulton* and *M. K. Yonts* as members of said board, and Governor *Taylor*, claiming that act to be unconstitutional, and that it was his duty under the law to appoint persons to fill said board, named *W. H. Mackoy* and *A. M. J. Cochran* as members of said board. To test the legality of the

appointments, said *Poyntz, Fulton, and Yonts* filed their action against *Shackelford*—whose duty it was under the law to administer the oath to *Mackoy* and *Cochran*—and *Mackoy* and *Cochran*, thus making the three defendants, and alleging that *Mackoy* and *Cochran* were claiming the right to said offices, and were threatening to qualify, and were interfering and had interfered with plaintiffs' free exercise and duties of said office. In this case the Governor had appointed persons—*Mackoy* and *Cochran*—to take the places of *Fulton* and *Yonts* on said board of election commissioners. To make the case like this one before us, *Shackelford* and others should have brought suit against Governor *Taylor* and enjoined him from appointing any person as a member of said board before he qualified as governor, alleging that he was "giving it out," reporting, and claiming that when he did qualify as governor he would remove *Fulton* and *Yonts*, and place others on said board.

Appellant's counsel claim that no wrong or injury could result by granting the injunction, as the bond to be given by him would indemnify the defendants against loss. In this case there could not be any loss of any consequence that he would be liable for on his bond. These defendants did not want his office, they were not asking for it, they would not, by the injunction, have sustained any loss of salary, but, if defendants had qualified as members of said board and made an order removing appellant, and named some person to take his place, and then appellant had sued that person, and these defendants had obtained an injunction against and preventing them from interfering with and removing him from said position, and if that action had resulted against appellant and in favor of the person so appointed in his place, then that person could have obtained remuneration for his loss by action on the bond. An injunction is a harsh remedy, and should not be granted except in cases of the most urgent necessity.

The judgment of the lower court in dismissing the petition was right, and it is therefore affirmed.

TRADEWATER COAL CO. v. JOHNSON. (Court of Appeals of Kentucky. Feb. 26, 1903.)

SERVANTS — INJURIES — NEGLIGENCE — SAFE PLACE TO WORK—FELLOW SERVANTS.

1. Plaintiff was employed in defendant's coal mine to remove the dirt while another workman bored under the vein of coal in order that it might be broken by blasting from above. The person employed to do the blasting drilled holes into the vein further than it had been undermined, so that, when the blast was exploded, it left some coal partially detached from the vein. With knowledge of this condition of the vein, plaintiff's companion (an inexperienced employé) proceeded to undermine the vein as usual, until the loose coal gave way, injuring plaintiff. *Held* negligence, as matter of law.

2. Plaintiff's injury resulted from the master's failure to furnish a safe place in which to work, and hence the negligence of the other workmen, even if it were conceded that they were fellow servants, was imputable to the master.

3. Where a servant's injury is the result of the master's failure to furnish a safe place to work, it is not necessary to show gross negligence in order to recover.

Appeal from circuit court, Union county.

"Not to be officially reported."

Action by J. C. Johnson against the Trade-water Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. X. Morton, for appellant. Drury & Drury, B. F. Saunders, and H. N. Davis, for appellee.

PAYNTER, J. Whilst in the employ of the appellant as laborer, the appellee was injured in a coal mine—had his leg broken and crushed. He was inexperienced, having worked only about two hours in the mine when the accident occurred. One Bryant was in the employ of the appellant—was what is commonly called a "machineman." Appellee was his helper—commonly called his "hostler." The mines are divided into rooms. The machineman and his hostler enter a room. The machineman so manipulates the machine as to make an excavation under the vein of coal for a distance of five or six feet. While thus boring under the vein, dirt is brought out, and it is the business of the hostler to remove it. After this is done, the shooter or driller enters the room, and drills holes into the face of the coal near the top of the vein to the depth of the undermining or excavation which has been made by the machineman. The driller then places an explosive in the holes made by him, and touches it off, which results in breaking the coal from the vein between the holes and undermining. This is followed by the loaders, whose business it is to remove any loose coal hanging to the vein, resulting from the shots. In the room where the injury took place, the driller had bored the holes 18 inches further back than the undermining had been extended, so, when the explosion took place, some coal was left hanging on it, partially detached from the vein. The loaders made this discovery, and, when Bryant entered the mine, they told him of its condition. Notwithstanding this, he proceeded to undermine it, and, after working on it awhile, the loose coal gave way, causing the injury stated. The appellee had no knowledge of coal mining, and his inexperience did not lead him to discover the condition of the coal. The uncontradicted testimony is that the room was in an unsafe and dangerous condition—such a condition that Bryant should not have proceeded with the work until the loose coal was removed. There being no conflict in the evidence, and

it being of such a character that reasonable men could not differ as to the conclusions or inferences to be drawn therefrom, the court can, as a matter of law, say that the injury in this case was the result of negligence. If the master is responsible for the negligence which resulted in the injury, then it necessarily follows that the jury did not err in finding for the appellee.

It is urged that Bryant and the loaders were fellow servants of the appellee, and therefore there can be no recovery, and, furthermore, if they were not the fellow servants of the appellee, but superior in authority to the appellee, then the court failed to submit to the jury the question of gross negligence. It is the duty of the master to furnish his servant a reasonably safe place in which to perform the work assigned to him, and the servant has the right to presume that the master has performed this duty; and, if an injury results from failure to perform it, the master is liable, unless a reasonably prudent and intelligent man, under like circumstances, would have been able to discern the defects, and failed to do so, thereby contributing to his injury. It is the duty of the appellant to have the rooms in the mines inspected, and see that they are in reasonably safe condition for the servants to work in. *Ashland Coal & Iron Ry. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207. This was a duty that the master could not rid himself of by casting it upon a servant in his employ, as that was a duty which the master owed. If he intrusted the performance of the duty to one who was negligent, it was the negligence of the master. In contemplation of law, in such cases, the acts of the servant were those of the master. There is no question of fellow servant in this case, because the servants guilty of the negligence represented the master. This doctrine was recognized in the case of *Van Dycke v. M., N. O. & C. Packet Co.* (Ky.) 71 S. W. 441. As the injury in this case, in contemplation of law, was the result of the master's failure to furnish a safe place for the servants to work, it was not necessary to show gross negligence, to entitle the appellee to recover. There was no error in the instruction prejudicial to the rights of the appellant.

Judgment is affirmed.

FRANCK v. FRANCK et al.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

WILLS—ADEMPTION.

1. Testator devised all his personal property to his daughter-in-law, and also certain land. Such legatee claimed that when the will was executed testator held a mortgage on certain lots, which he thereafter foreclosed, and purchased at the judicial sale, and that, as she was to have the money owned by the testator at the execution of his will, these lots passed to her. Held that, as the property acquired by the foreclosure was not included in the specific

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. §§ 321, 330.

devise of real estate to the daughter-in-law, and was not disposed of by will, it passed to the heir at law.

2. Ky. St. § 2068, providing that the conversion of money or property devised to one of testator's heirs into other property or thing with or without the consent of testator shall not be an ademption unless a contrary intention appears, applies only where the devisee is an heir of testator.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by John L. Franck and others against Katie Franck. From a judgment for plaintiffs, defendant appeals. Reversed.

Burnett & Burnett and Wallace Coulter, for appellant. Harris & Marshall, for appellees.

BURNAM, C. J. This is the second appeal in this case, and, as the facts out of which the litigation grew are fully recited in the former opinion, reported in 54 S. W. 195, it will not be necessary for us to restate them. We declined in the former opinion to pass upon the question as to whether the two cottages on Madison street could be subjected to appellant's judgment for \$2,707.90, rendered as of the 5th of May, 1897, because they were in the possession of and claimed by Mrs. Clara Franck, the wife of John L. Franck, and who was not a party to this action upon that appeal. After the entry of the mandate in the lower court, the appellant, Katie Franck-Bollinger, known in the former record as "Katie Franck," had an execution issued upon her judgment, which was by the sheriff levied upon the Madison avenue cottages. Thereupon Clara B. Franck tendered and was permitted to file a petition to be made a party to this proceeding, in which she alleged that under the fourth clause of the will of Jacob F. Franck, deceased, which is as follows: "I give and bequeath all personal property that I have or may have after my death to my daughter-in-law, Clara Franck, also all the ground or lots on both sides of Pote St. shall belong to her, also all ground fronting on Frankfort Av. west of Pote St. and extending back to Hunter's line, also the old dwelling house shall belong to my daughter-in-law Clara Franck free from the control of her husband"—the cottages sought to be subjected belonged to her; and to support this contention she says that when the will of Jacob F. Franck was executed he held a mortgage on these lots; and that after the will was made he brought suit on his mortgage, and bought in the property at a judicial sale made to satisfy his judgment; and that the effect of this purchase was simply to convert money loaned upon the lots into the lots themselves; and that under the will she was to have all the money owned by testator at the date of the execution of his will, as well as such as he might have after his death; that these lots passed to her; and

that she was then, and had since the death of Jacob F. Franck been, in the full and adverse possession thereof; and she asked that plaintiff Katie Franck and the sheriff should be enjoined from levying on or selling them under execution. A demurrer was interposed by plaintiff to this answer, and overruled. And the plaintiff Katie Franck-Bollinger tendered and offered to file a reply, in which she controverted all the affirmative averments of the answer of the appellee Clara B. Franck, and alleged that the mortgage held by Jacob F. Franck on the Madison avenue cottages was not for loaned money, but was made to indemnify him as surety of one John C. Struss; and that they were not his property at the time the will was written, but were acquired several years thereafter. And she alleged that they were not disposed of by the will, but passed under the law to J. L. Franck; and asked that they be subjected to the payment of her judgment. The appellee Clara Franck filed a general demurrer to the answer and cross-petition of Katie Franck-Bollinger, which was sustained, and the property adjudged to Clara Franck as devisee under the will of Jacob Franck; and Katie Franck-Bollinger has appealed.

It is perfectly clear that Jacob F. Franck intended that his daughter-in-law, Clara Franck, should, at his death, inherit his entire real and personal estate, excluding the special bequests. But it is equally manifest that the Madison avenue cottages are not included in the specific devise of real estate to her in the fourth clause of his will, and these lots, not having been disposed of by will, passed, under the statute, to John L. Franck as his heir at law, and were liable to his debts. This question was fully considered by this court in the recent case of Todd v. Gentry, 60 S. W. 639, and in the opinion in that case all the Kentucky cases bearing upon the question, as well as the leading text-writers, are considered, and the conclusion reached that, whatever may have been the intention of testator, real estate not disposed of by his will passes to his heirs at law as undivided property. Section 2068 of the Kentucky Statutes, which provides that "the conversion in whole or in part of money or property or the proceeds of property advanced to one of the testator's heirs into other property or thing, with or without the assent of testator, shall not be an ademption unless a contrary intention on the part of the testator appear from the will, or by parol or other evidence," only applies where the devisee is an heir of testator. See Hazelwood v. Webster, 82 Ky. 409. The order of December 1, 1900, sustaining the motion of John L. Franck to have the judgment for alimony rendered on the 15th of May, 1879, set aside and vacated, except as covered by the judgment of the 15th day of May, 1897, for \$2,707.90, was purely interlocutory, and does not in any wise affect the right of ap-

pellant to enforce the collection of the latter judgment. We are of the opinion, therefore, that the court was in error in adjudging the Madison avenue cottages to be the property of the appellee Clara Franck, as devisee under the will of Jacob F. Franck.

Upon the former appeal of this case we overlooked the fact that section 2068 only applied to property devised to one of testator's heirs, and, in consequence thereof, indulged in comments which were, perhaps, misleading in their tendency. But for reasons indicated in this opinion, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

REYNOLDS v. COMMONWEALTH.

(Court of Appeals, of Kentucky. Feb. 24, 1903.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—EVIDENCE.

1. In a prosecution for murder, an instruction that if, at the time defendant killed deceased, he was about to do defendant or his brother some great bodily harm, and that to shoot deceased was necessary, or seemed to defendant to be necessary, in the exercise of reasonable judgment, to protect himself or his brother from such injury, "either real, or to the defendant apparent," the jury should find defendant not guilty, on the ground of self-defense and apparent necessity, was not objectionable on the ground that it required the jury to believe that defendant or his brother "really was in imminent danger of great bodily harm at the hands of deceased, instead of being apparently so."

2. An instruction, in a prosecution for murder, on the subject of self-defense, which collects the evidence as to former acts of violence on the part of deceased, and charges that defendant had a right to bear arms openly and keep a lookout for decedent, and that, if he casually met him, he need not wait to be assaulted, but may consider the past, and, if he believes that he is in apparent danger of great bodily harm at decedent's hands, he may shoot him, is erroneous, as unnecessarily grouping and emphasizing the facts, and giving undue prominence to particular evidence.

3. In a prosecution for murder, evidence held to justify a conviction.

Appeal from circuit court, Bell county.

"To be officially reported."

Noah M. Reynolds was convicted of murder, and he appeals. Affirmed.

Salzer & Baker, W. G. Colson, A. B. Smith, and J. G. Forrester, for appellant. M. R. Todd and Clifton J. Pratt, for the Commonwealth.

BARKER, J. The appellant, Noah Reynolds, and J. C. Reynolds were jointly indicted by the grand jury of Letcher county, charged with the willful murder of William S. Wright. The case was transferred, by a change of venue, to Bell county. The trial of appellant by a jury in the Bell circuit court, resulted in his conviction, and his being sentenced to confinement in the penitentiary for the term of his natural life. His motion for

a new trial having been overruled, he prosecutes this appeal.

Appellant, by his counsel, urges several objections, of small importance, we think, to the court's action in reference to the admission of, and refusal to admit, certain evidence. These various objections have no meritorious foundation, and, after a careful examination, we are not willing to say that the substantial rights of appellant were injured by the court's rulings upon the questions involved.

There are always arising, in a case like this, questions of the relevancy and competency of evidence, which lie along the debatable line of the rules of evidence, of which the trial court can better judge than the Court of Appeals, because often the decisions of these narrow questions are properly influenced by considerations which the lower court sees and understands, but which cannot always be fully reproduced in the bill of exceptions. Of such import are all of the questions raised as to the evidence in this case; and, as we have said, we do not think, after a careful weighing of them, that the lower court's rulings were erroneous.

Appellant complains of instruction No. 5, which relates to the right of self-defense. His objection is that it required the jury to believe that, at the time of the shooting, appellant or J. C. Reynolds really was in imminent danger of great bodily harm at the hands of William S. Wright, instead of being apparently so; and he cites, in support of this objection, the case of *Cockrill v. Commonwealth*, 95 Ky. 23, 23 S. W. 659. The instruction under discussion is very readily distinguished from that involved in the case cited. Instruction No. 5, if it contained only the language which appellant's counsel quote in their brief, would be inimical to the principle of the *Cockrill Case*; but, if all the instruction is considered, every substantial right of self-defense to which appellant was entitled is found to be carefully preserved. Said instruction is as follows: "Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant, in Letcher county, and before the finding of the indictment in this case, shot and killed deceased, yet if they believe from the evidence that at the time defendant shot and killed deceased the deceased was then and there about to do him or the said John Reynolds some great bodily harm, and that to shoot deceased was necessary, or seemed to the defendant to be necessary, in the exercise of a reasonable judgment, to protect himself or John Reynolds from such injury, either real, or to the defendant apparent, you will find the defendant not guilty, on the grounds of self-defense and apparent necessity." It will be observed that this instruction required the jury to acquit the defendant if they believed from the evidence that, at the time defendant shot and killed deceased, the deceased was then and there about to do him or the said John C. Reynolds some great bodily harm, and that to

shoot deceased was necessary, or seemed to the defendant to be necessary, in the exercise of reasonable judgment, to protect himself or the said John C. Reynolds, from injury, "either real, or to the defendant apparent"; and this was all to which appellant was entitled. It may be that this instruction is not drawn as artistically as the learned counsel for appellant would have written it, but, as a whole, it protects every right of self-defense which the law awards to one standing in the position of appellant.

Appellant also complains that, under the evidence in this case, he was entitled to the instruction authorized by the case of *Oder v. Commonwealth*, 80 Ky. 32. We freely admit that there was evidence in this case to have warranted the court in giving the instruction authorized in the case cited, if the principles enunciated therein can be upheld either in reason or on authority. The instruction in the case of *Oder v. Commonwealth*, is as follows: "If the jury shall believe from all the evidence that, previous to the time of the killing, the deceased, Volney Hall, lay in wait for the defendant, and menaced and threatened to kill him, and attempted violence upon his person with a deadly weapon, or did any or either of them, then he had the right to consider the same in determining whether he was in danger of losing his life or of suffering great bodily harm at the hands of Hall whenever with or near him. These alone will not excuse the killing; but the defendant had the right to bear arms openly, and, when he met the deceased, if, from such lying in wait, threats, menaces, and attempted violence, if any, and from the circumstances attending the meeting, or if, from the circumstances attending the meeting alone, he in good faith believed, and had reasonable grounds to believe, that he was then and there in danger of losing his life or of suffering great bodily harm at the hands of the deceased, then he was not obliged to wait until he was actually assaulted, but he had the right to use such means as were at hand, and as were necessary, or apparently necessary, to protect himself from such immediate danger; and if, in doing so, he shot and killed deceased, he is excusable on the ground of self-defense, and should be acquitted, unless the jury shall believe from all the evidence, beyond a reasonable doubt, that at the time of the killing the defendant sought the deceased with the intention and for the purpose of killing him, in which case he is not entitled to an acquittal on the ground of self-defense." This instruction, the court said, did not sufficiently protect the defendant, because by its terms he was excluded from considering the menace, lying in wait, and threats unless the jury believed from all the evidence that this actually occurred, whereas, in law, the defendant had a right to act upon them, whether they actually occurred or not, provided he in good faith believed, and had reasonable ground to believe,

from the circumstances as they appeared to him, that the deceased had waylaid and threatened him. The question, said the court, is not whether the jury believed the deceased threatened and waylaid the defendant, but whether the defendant believed, and had reasonable ground to believe, he had done so, and the jury should have been so instructed, and allowed to decide. Said the court: "The maintenance of self-defense in a court of justice, under such a state of facts as exhibited by this record, requires, upon the part of the court, the utmost care, so that the accused may not be deprived of its right, upon the one hand, and assassination excused, on the other. After a careful review of the authorities on the subject, we declare the law to be this: That when a person has been merely threatened, by even the most lawless character, it furnishes no legal excuse for taking his life. But when a person has been threatened, waylaid, menaced, and assaulted with a deadly weapon, and he afterwards casually meets his foe, if, from his character, antecedent conduct, and the circumstances of the meeting, and his presence, he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict upon him loss of life or great bodily harm, or will then and there carry into execution his design to kill him or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger; but it is always a question for the jury to judge of the reasonableness of the apprehended danger, and the unfeigned belief of its existence by the person imperiled by it. And in this connection, in view of the qualification added to the instruction quoted, it is necessary to determine the rights of the accused under an opposite tendency of the evidence from that contemplated by the qualification. It must be recorded as a right, to which all citizens are entitled, that the accused 'may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose,' and while so engaged, having reasonable grounds to believe, and in good faith believing, that he had been threatened, waylaid, and assaulted with a deadly weapon, he had the right to carry arms openly, and keep a lookout for his enemy, or procure information of his movements in good faith, and alone for the purpose of guarding himself from surprise or being taken unawares; and if, under such circumstances, a meeting casually occurs, then the law of self-defense applies in the same manner, under similar circumstances as indicated where the meeting is casual, and without precaution against surprise, further than being armed for the purpose of self-protection; but in no state of case is one person allowed by law to hunt down or seek another for the purpose of killing him, and in pursuance of such an intention, accompanied

by such an act, take his life; hence if the defendant sought the deceased with the intention of killing him, or purposely brought about the meeting between them, or made his presence a mere pretext for slaying him, he cannot rely upon the law of self-defense to excuse his act, although he may have believed that he had been threatened, waylaid, and assaulted by the deceased, who would at some future time execute his design. It will be seen, from this view of the law, that the instruction was erroneous in two aspects: First, in making the right of the appellant to rely upon the threats and waylaying of him by deceased dependent on the establishment of their existence to the satisfaction of the jury by the evidence; second, in not informing the jury, in connection with the qualification, that the accused had the right to keep a lookout for the deceased, or procure information of his movements, for the sole purpose of avoiding a surprise."

We freely agree with the language of the court in this case, in so far as it asserts that, in giving the instruction authorized by the reasoning of the opinion, there is great danger that assassination may be excused. This court has, time and again, decided that it is error to unnecessarily group together facts, or supposed facts, established by the evidence, and to place them in the form of an instruction to the jury, thus unnecessarily emphasizing these facts, and giving them undue prominence in the estimation of the jury in reaching a verdict. The instruction authorized by the case cited is peculiarly inimical to this principle. It gathers up all the testimony as to former threats or attempted violence on the part of the deceased, together with the truisms that the defendant had the right to bear arms openly; to go about his ordinary business; that he might keep a lookout for his enemy; and then it adds that, if he casually meets him, he need not wait to be assaulted, but may consider all of the past, and if he believes that he is in apparent danger of great bodily harm at the hands of his enemy, he may shoot him down. We believe that, as a practical detail, the giving of the instruction authorized by the case of *Oder v. Commonwealth* is accepted by the average jury as meaning that, if one has been threatened or been assaulted in the past, when he meets his foe afterwards he may, without more ado, assassinate him. The principle enunciated is unsound, by every canon of the criminal law, and is unwarranted by any authority with which we are acquainted. All of the facts which the opinion authorizes to be placed in the instruction on self-defense are competent as evidence, to be weighed by the jury, in connection with all of the other testimony adduced on the trial, in considering the defendant's plea of self-defense; but they have no place in the instruction, and, when placed there, are, as a rule, considered by the jury as warranting one in assassinating the en-

emy, who may have previously threatened to do him violence. In so far as the case of *Oder v. Commonwealth* is inimical to the principle here laid down, it is overruled.

Appellant further complains of the closing speech of the commonwealth's attorney. We have examined this speech carefully, and we do not believe that it contains anything which would warrant us in reversing this case. Some of the statements are exaggerated; some of the conclusions are overdrawn; but there is some evidence tending to support every statement made; and while the speech in question is florid in style, and quite zealous in seeking a conviction of appellant, on the whole we cannot say that it is substantially out of the line usually adopted by the commonwealth's attorneys in criminal cases.

The evidence fully warranted the conclusion the jury reached. The killing of William S. Wright by appellant and his brother, John C. Reynolds, was admitted. The theory of appellant, that William S. Wright rode up behind him and his brother, who were walking along the road, each with a Winchester rifle in his hand, and that the deceased, seeing them thus armed, himself on horseback, with his pistol in a holster under his vest, attracted their attention by calling them vile names and telling them he was going to kill them—attacked them, under these circumstances, without first drawing his pistol—is a proposition which staggers even credulity itself. Every man of any experience is bound to know that it is exceedingly difficult, while mounted upon a restive horse, to use a pistol with any degree of accuracy; and for one mounted on a horse thus to attack two men on foot, each armed with a repeating Winchester rifle, would be, practically, to commit suicide. The jury heard this story of appellant, and they rejected it as untrue. They believed from all the evidence in this case that appellant and his brother assassinated William S. Wright in cold blood.

For these reasons, the judgment is affirmed.

WREN v. BOSKE, Sheriff.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

TAXATION—PERSONAL PROPERTY—SITUS—RESIDENCE OF OWNER.

1. Under Ky. St. § 4044, providing that personal property must be stated and valued separately from real estate, and section 4050, providing that the person owning property on a certain day shall list it with the assessor, etc., personal property which has been listed by the owner in the county where the owner resides cannot be assessed in the county where the property is located.

Appeal from circuit court, Kenton county.
"Not to be officially reported."

Action by S. T. Wren against John T. Boske, as sheriff. From a judgment for defendant, plaintiff appeals. Reversed.

J. B. Finnell, J. F. Askew, T. L. Edelen, and D. A. Glenn, for appellant. Robt. O. Simmons, for appellee.

HOBSON, J. Appellant, S. T. Wren, resides in Scott county. He has some horses, mules, cattle, and sheep on a farm in Kenton county, and has had them there for about eight years. This stock he gave in to the assessor with the rest of his personal property in the county of Scott, where he resided; but, notwithstanding this, the stock was assessed for taxation in Kenton county, and he instituted this action to restrain the sheriff of Kenton county from selling the sheep for taxes. It is conceded that the stock had obtained a situs in Kenton county, and if personal property in this state which has obtained a situs in a county other than that of the owner's residence may be assessed in that county, although the owner gives it in for taxation in the county of his residence, then the judgment of the circuit court dismissing the plaintiff's petition is right. We are referred to a number of decisions holding that personal property of nonresidents of the state, which has obtained a situs in the state, may, if the legislature so provides, be taxed in that state; and the same rule, no doubt, would apply between the different counties of the same state, if the legislature so provided. But the question, after all, is one of legislative intent. By our statute, land shall be listed in the county in which it is located. Ky. St. § 4025. The assessor calls on the taxpayers and takes their lists. Ky. St. § 4044. Personal property of every kind must be stated and valued separately from real estate. Section 4050. All taxable estate shall be assessed as of September 15th, and the person owning or possessing it on that day shall list it with the assessor. Section 4052. The assessor, before returning any one as delinquent, must apply at his residence. Section 4065. There is no provision in the statute anywhere for the assessment of personal property in the county in which it is situated, although there are such provisions as to the assessment of land; and, taking the whole statute together, we think it reasonably clear that the legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence. In *Jones v. Commonwealth*, 53 Ky. 2, this court said: "By the general law, the owners of property subject to taxation are called on and give in their lists in the county in which they reside, though the property may be in other counties." Again, in *Gates v. Barrett*, 79 Ky. 296, the court said: "In general, movable property is to be assessed for taxation at the place of the owner's residence." See, also, *Boske, Sheriff, v. Security Trust & Safety Vault Co.* (Ky.) 56 S. W. 524; *Covington v. Wayne* (Ky.) 58 S. W. 776. We therefore conclude that this personal property was properly

listed by the owner in the county of his residence, and, having been taxed there, was not subject to taxation in the county of Kenton, under the statute above referred to.

Judgment reversed and cause remanded, with directions to perpetuate the injunction.

CADIZ R. CO. v. ROACH.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

RAILROADS—RIGHT OF WAY—DONATION—CONSIDERATION—ESTOPPEL.

1. Where plaintiff, with a number of other landowners, agreed to donate land as a railroad right of way, and it appeared that it was three miles and a half from his residence to the nearest depot, and that the building of the new railroad would provide a depot within a mile and a half, the necessary increase in the value of plaintiff's land was a sufficient consideration for his agreement.

2. Where a landowner agreed to donate land to a railroad company for a right of way, and thereafter the railroad commenced work upon its road, and graded the roadbed to a point near the grantor's land, who, then, for the first time, repudiated his grant, he was estopped from denying the obligation of his agreement on the ground that it was without consideration.

3. The partial building of a railroad in reliance on a promise to donate a right of way was a sufficient detriment to the promisee to constitute a good consideration for the promise.

Appeal from circuit court, Trigg county. "To be officially reported."

Action by C. J. Roach against the Cadiz Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sims & Thomas and Sims, Garnett & Burnett, for appellant. Kelly & Son and D. P. Smith, for appellee.

SETTLE, J. The appellant railroad company undertook to construct and operate a railroad between Cadiz and Gracey, in Trigg county, Ky., for which purpose it received subscriptions in money, and donations of right of way over the lands of divers citizens of that county. The appellee, C. J. Roach, gave such right of way over his land, evidenced by the following writing, signed by him and one L. A. Miller, who had likewise given appellant the right of way over his land: "Office of Cadiz Railroad Company. Cadiz, Ky., Feb'y 21st, 1901. I hereby donate to the Cadiz Railroad Company a 60-foot right of way through my farm, according to surveys. L. A. Miller. C. J. Roach." It appears from the record that the route for the railroad had previously been surveyed through appellee's land, and marked by stakes. After the execution of the writing mentioned, appellant began the work of constructing its road; and, while engaged in cutting and removing timber and undergrowth from the right of way through appellee's land, the latter met the foreman in charge of appellant's workmen, and for-

bade the doing of any further work on his land, and soon thereafter instituted this action to obtain a cancellation of the writing whereby appellant had been granted the right of way over his land, upon the alleged ground that it had been procured by fraud. The original petition avers, in substance, that appellee was induced to execute the writing upon the false representation made by appellant's agents at the time that all of the neighbors had donated to appellant the right of way over their lands for its road, and in fact that the right of way had been donated from Cadiz to appellee's farm. It is further averred that this statement was false, but that he, being unaware of its falsity, was induced thereby to execute the writing, which he would not otherwise have done. Afterwards an amended petition was filed, in which it was alleged that the writing in question was and is without consideration, and consequently void. The answer of appellant specifically denies the allegations of fraud and want of consideration contained in the petition as amended, and avers that the work of building its line of railroad was undertaken by the citizens of Trigg county upon subscriptions of money and donations of lands for the right of way, that appellee's grant of the right of way over his land was made pursuant to this undertaking, and that appellant, relying upon these subscriptions and donations, including that of appellee, had commenced the construction of its line of railroad, and proceeded with the same to the extent of expending \$15,000 or \$20,000 in grading and otherwise preparing its roadbed for laying ties and rails. The answer further avers that the subscriptions and mutual undertaking of the parties to construct the railroad constituted a good and sufficient consideration for the subscriptions made, whether of money or right of way, and, in addition, that appellant's land will be greatly enhanced in value by the building of the railroad and the erection of a depot, which will be only a mile and a half from his residence. By consent of parties the evidence on the issues formed by the pleadings was heard orally by the court, and the trial resulted in a judgment in favor of the appellee, from which, and the refusal of the lower court to grant it a new trial, appellant prosecutes this appeal.

It is proper to say that the charge of fraud in the procurement of appellee's signature to the writing executed by appellee was wholly disproved on the trial, and the only remaining question for this court to determine is as to the plea of no consideration.

We find that appellee, when asked by appellant's agents, Street & Gaines, to give the right of way, said he "wanted the road." In thus expressing himself, appellee seems to have been actuated by the general desire that inspired his neighbors and friends to contribute to the one common object that was expected to benefit the people of the

county, which was the securing of a railroad. The undertaking originated with the citizens of Cadiz and vicinity, for they alone seem to have furnished by subscription the capital necessary to the success of the enterprise—some giving money, and others the right of way over their lands. "Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others." Parsons on Contracts, vol. 2, page 452; *Twin Creek & Colmanville T. P. Road Co. v. Lancaster, etc.*, 79 Ky. 552; *Stovall v. McCutchen & Co. (Ky.)* 54 S. W. 969, 47 L. R. A. 287. But whether we are to regard appellee's grant to appellant of the right of way over his land as binding, upon the principle of mutuality, or not, we cannot regard it as a mere gift of his property to a public charity, for by the building of the road he will derive profit from the increase in the value of his land. Besides, it appears that it is three and a half miles, or more, from his residence to the nearest depot, whereas the building of the new railroad will provide a depot within a mile and a half of his residence.

There is yet another ground which we think, in all fairness, should operate as an estoppel to the plea of no consideration made by appellee. We find from the record that no work had been done by appellant in constructing its road at the time appellee executed the writing granting the right of way over his land, which was February 21, 1901, but after that date work was begun, and continued down to June or July, 1901, during which time the roadbed had been graded from Cadiz, a distance of seven miles, to a point near appellee's land; and, as it then became necessary for appellant's servants to grade and construct the roadbed on appellee's land, they went upon the same for that purpose, and had about finished clearing the roadway thereon of timber and other obstructions, when appellee met them, and for the first time advised them of his purpose to repudiate the writing granting the right of way, and by his command the work was then and there stopped. We know of no reason why the law of equitable estoppel should not be made to apply to a case like this. Indeed, we are told in the very admirable work of Thompson on the Law of Corporations, vol. 4, sec. 5279, that it may be applied "where a landowner encourages, actively or passively, the appropriation of his land by a corporation for public use"; and we may add that a greater reason exists for its application where the landowner has, in writing, expressly consented to such use of his land.

There is yet another rule of law which holds that "any advantage to promisor or prejudice to promisee" is a sufficient consideration to support the contract. *Stapp v. Bacon's Ex'r*, 1 A. K. Marsh. 538. Applying this rule to the facts of the case at bar,

we find that appellant, relying in good faith upon the subscriptions and donations made in aid of its undertaking, including the donation from appellee of the right of way over his land, began the construction of its road, and completed the roadbed to appellee's land, expending, as alleged, \$15,000 or \$20,000 in so doing. We think, therefore, that in view of the labor and expense thus incurred by appellant, superinduced, as it was, in part, by the grant from appellee of the right of way over his land, it would greatly prejudice its rights to permit appellee to withdraw the permission given to it to run its railroad over his land.

For the reasons herein given, the judgment of the lower court is reversed, and cause remanded, in order that appellee's petition may be dismissed.

BARNES v. BARNES et al.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

TENANTS IN COMMON—ACCOUNTING—LIENS—SUBROGATION.

1. Where plaintiff and defendant purchased certain real estate in common and gave a note for a part of the price, with B. as surety, and the latter paid one-half of the note, he was entitled to a lien on the property purchased by subrogation, for his debt and interest.

2. Plaintiff and defendant purchased land for \$700, of which plaintiff paid in cash \$350, and both parties gave their note, with B. as surety, for the balance. The note was subsequently paid by plaintiff and B., each contributing one-half thereof. Plaintiff had possession of the property, and collected therefrom \$850, and paid in improvements, taxes, insurance, etc., \$345. *Held*, on an accounting between plaintiff and defendant, that the amount received each year for rent should be credited by the amount expended, and that the balance should bear interest from the end of the rental year until the settlement of the account, that defendant was entitled to one-half of the aggregate of these balances, with interest, from which should be taken one-half of the \$350 cash paid by plaintiff, with interest until the settlement, added to one-fourth of the sum paid by plaintiff and B. on the note with interest, and the judgment rendered for the balance should be satisfied out of any balance of the purchase money due the debtor, after payment to B. of his lien, from the whole amount realized from a sale of the property.

Appeal from circuit court, Logan county.

"Not to be officially reported."

Action by W. E. Barnes against Clarence Barnes and another. From a judgment in favor of defendants, plaintiff appeals. Reversed in part.

W. P. Sandidge and Browder & Browder, for appellant. Roark & Finn, for appellees.

BARKER, J. In 1890, the appellant, William E. Barnes, and the appellee Clarence Barnes, his brother, purchased a small lot and storehouse in the town of Olmstead, Logan county, Ky., for the consideration of \$700; \$350 of which was paid in cash, and for the balance of \$350. William E. Barnes

and Clarence Barnes, as principals, together with John B. Barnes, another brother, as surety, executed their promissory note. In 1899, William E. Barnes instituted this action in the Logan circuit court against his brother Clarence Barnes, claiming to have paid the \$350 cash, himself, and that he also paid off and discharged the note of \$350 for the remaining part of the consideration; and praying for a judgment against Clarence Barnes for one-half of said sums thus paid by him, with interest from the date of payment by him until the same should be repaid him by Clarence Barnes, and for a sale of the property to satisfy his claim. Clarence Barnes filed an answer, denying that William E. Barnes paid off the purchase price of said house and lot, and alleging that William E. Barnes had used and occupied said premises for a number of years, and had failed to account to him for any of the rents of said property, and asked a judgment against William E. Barnes on his counterclaim and set-off. In the action thus instituted, J. B. Barnes intervened, claiming to have, himself, paid off the \$350 note executed for the deferred payment on said house and lot, as surety for his brothers, and asking that he be adjudged a lien upon the house and lot in question for the amount thus paid by him. The allegations of this pleading, on the part of J. B. Barnes, were confessed by Clarence Barnes, and denied by William E. Barnes. The issues were made up along the lines thus indicated, and the case was referred to the Commissioner, to ascertain the rents with which William E. Barnes should be charged; the taxes, insurance, repairs, and improvements which he had made, and with which he should be credited. The Commissioner reported that he should be charged with the aggregate sum of \$850 rent, and that he had paid out, for taxes, insurance, and repairs, the sum of \$345. This report of the Commissioner was confirmed by consent of all the parties. The evidence having been taken on the issues involved, and the case having been heard and submitted, the court entered the following judgment: "That W. E. Barnes paid the first payment of \$350 upon the house and lot in controversy, and that the second payment of \$350 was made by W. E. Barnes and J. B. Barnes jointly. It is therefore ordered and adjudged that J. B. Barnes has a lien upon the property hereinafter described to secure him in the payment of one-half of the second payment, which was made by him and W. E. Barnes jointly, which amounts to \$290.75. It is further ordered and adjudged by the court that the defendant Clarence Barnes shall recover of the plaintiff, W. E. Barnes, the sum of \$250, with interest from date, for which execution may issue, the amount due him for the rent of the place hereinafter described, after deducting taxes, repairs, and improvements to the extent of \$100, making a total reduction of \$350—\$850 having been

collected by W. E. Barnes for rents. It is further ordered that the following described property, to wit: A certain storehouse and lot or parcel of ground at Olmstead, Logan county, Ky., described as follows: 'Beginning at a stone at Olmstead station on the Memphis branch of the L. & N. Railroad, 30 feet from the center of railroad and corner to Wintersmith; thence on a line of said railroad and parallel with same S., 43 W., 2.88 chains to a stone corner to B. C. Jenkins' lot; thence S., 43 E., 2.49 chains to a stone in the middle of the Ash Spring road and corner to said Jenkins; then with said road N., 5 E., 3.95 chains to the beginning, and purchase money, with interest from time of house and lot which was conveyed to Clarence Barnes and W. E. Barnes by the Boyd heirs—be sold at the courthouse door in Russellville, Logan county, Ky., upon a credit of 6 and 12 months, the purchaser being required to give bond with approved security, bearing 6% interest from date of sale until paid, and a lien be retained upon the property conveyed for the purchase money."

As to the claim of J. B. Barnes, we think that the court correctly ascertained that he paid one-half of the note for the deferred payment on the house and lot in controversy, and was entitled to a lien, by subrogation, for his debt and interest.

As to the issue between William E. Barnes and Clarence Barnes, we are not sure that we understand what principle governed the lower court in applying the facts ascertained by the judgment and agreed Commissioner's report; but, without entering into any analysis of the judgment, we think it is erroneous. The report of the Commissioner, confirmed by agreement, should have been taken as a basis, to wit, \$850, the aggregate amount of rent collected by William E. Barnes, and \$345, the aggregate amount of taxes, insurance, repairs, and improvements paid out by him. The amount of each annual gale of rent should be credited by the amount expended in said rental year for taxes, insurance, repairs, or improvements, and the balance should bear interest from the end of the rental year until settled as herein indicated. One-half of the aggregate of these balances, with interest, will show what William E. Barnes owes Clarence Barnes. Then one-half of the \$350 cash paid by William E. Barnes, with interest from the time of payment until settlement of the account as herein provided for, added to one-fourth of the sum paid by William E. Barnes and J. B. Barnes on the note for deferred payment of purchase money, with interest from time of payment until settled herein, will show what Clarence Barnes owes William E. Barnes. A judgment should be rendered for the balance shown by taking the lesser of these two sums from the greater; this judgment to be satisfied, so far as possible, out of any balance of the purchase money due the debtor, after payment to J. B. Barnes of his first lien on

the whole amount realized by the sale of the property herein involved.

We have not attempted to be minutely accurate in giving the details of this case, but have been satisfied with such substantial outline as we think necessary to illustrate the conclusions reached. We have agreed with the lower court on the findings of facts, but have differed from the conclusions as to the application of those facts and the manner of stating the account between William E. and Clarence Barnes.

Wherefore the judgment is affirmed as to J. B. Barnes, and reversed as to Clarence Barnes, with directions to enter a judgment, as to him, consistent with this opinion.

COOK v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

MANSLAUGHTER—SELF-DEFENSE—INSTRUCTIONS—PHRASEOLOGY—APPEAL—MOTION FOR NEW TRIAL.

1. Under Cr. Code Prac. § 281, providing that the decision of the court on motion for a new trial shall not be subject to exceptions, action of the trial court in denying such a motion, based on newly discovered evidence, cannot be reviewed on appeal.

2. In a murder prosecution, an instruction allowing a verdict for voluntary manslaughter on such provocation as was "reasonably calculated to excite ungovernable passion" was not objectionable as failing to define a standard for the measurement of the question of provocation.

3. A defendant indicted for murder could not complain of alleged error in the instruction in regard to voluntary manslaughter, for failing to define a standard of measurement of the question of provocation, where, by the verdict, he was found guilty of voluntary manslaughter.

4. In a murder prosecution, use of the word "avoiding" in the instruction relative to self-defense, "and there reasonably appeared to him no other safe means of avoiding impending danger," was not error.

5. An instruction that if the killing was not done in self-defense, but was done in sudden heat or passion, etc., the jury should find defendant guilty of voluntary manslaughter, was not bad for failing to use the word "feloniously."

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Richard Cook was convicted of manslaughter, and appeals. Affirmed.

Sweeney, Ellis & Sweeney, for appellant.
Clifton J. Pratt and M. R. Todd, for the Commonwealth.

PAYNTER, J. The appellant seeks a reversal on two grounds: (1) Newly discovered evidence; (2) errors in instructions. It was on the motion for a new trial that it was made to appear that evidence had been discovered after the verdict of the jury. Section 281, Cr. Code Prac., provides that "the decision of the court upon challenges to the panel and for cause upon motion to set aside an indictment and upon motions for a new trial shall not be subject to exception." The action of the court in refusing a new trial

cannot be reviewed by this court. *Nichols v. Commonwealth*, 11 Bush, 575; *Lewis v. Commonwealth*, 93 Ky. 238, 19 S. W. 664.

The defendant was indicted for murder, and found guilty of manslaughter. Instruction No. 2 was on voluntary manslaughter, in which the court told the jury that if they believed from the evidence, beyond a reasonable doubt, that the killing was not done in his necessary or apparently necessary self-defense, but was done in sudden heat or passion or sudden affray, or upon such provocation as was reasonably calculated to excite ungovernable passion, they should find him guilty of voluntary manslaughter. It is insisted that this is in error, because the phrase underscored did not define any standard by which the jury was to measure the question of provocation. It is true the language gives no definition of what kind of provocation is reasonably calculated to excite ungovernable passion so as to reduce the killing to manslaughter. In *Payne v. Commonwealth*, 1 Metc. 374, the court told the jury, if the killing was done upon legal provocation, and without malice, in sudden heat and passion, and not in self-defense, they were to find the accused guilty of manslaughter. It is urged that the language in question is equivalent to saying "legal provocation." We do not think so. This court, in *Lewis v. Commonwealth*, said: "It would have been better to have told the jury that the provocation must be such as is ordinarily calculated to excite the passions beyond control." In the instruction under consideration the court used the words "reasonably calculated," which words are quite as proper to be used as "ordinarily calculated," and are just as favorable to the accused. The law allows the jury to find the defendant guilty of voluntary manslaughter when the provocation is such as is calculated to excite the passions beyond control. The expression in the instruction in question, "excite ungovernable passions," is substantially the same as the expression "excite the passions beyond control"; for, if ungovernable passions have been excited, they are necessarily beyond control. If the passions are beyond control, they are certainly ungovernable. But, even if there was error in the instruction in the particular mentioned, it could not be complained of, because it did not prevent the jury from finding the appellant guilty of voluntary manslaughter; hence did not prejudice the rights of the appellant. The purpose of the instruction was to enable the jury, if the facts warranted it, to find the appellant guilty of manslaughter, instead of murder. It accomplished its purpose.

In the self-defense instruction this language appeared: "And there reasonably appeared to him no other safe means of 'avoiding' impending danger." If he could have averted or avoided the danger, it was his duty to do so, and it was eminently proper to put the expression quoted in the instruction. The word "escape" has been used in instructions,

but has been criticised, although this court, in some cases since the criticism upon the use of that word, has affirmed cases where it was used in the instruction on self-defense. The word "averting" might have been used instead of "avoiding," but it would have conveyed the same idea. The word "feloniously" was not used in the manslaughter instruction, but it was not necessary to use it. The authorities quoted are to the effect that in an indictment for murder it is necessary to use the word "feloniously," and likewise in the murder instruction.

The judgment is affirmed.

COPE et al. v. SLAYDEN et al.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

AMENDMENT OF COMPLAINT—CHANGING CAUSE OF ACTION—VOID JUDGMENT.

1. J., W., and C. were owners of land subject to the homestead right of occupancy of B. for life and of C. till his majority. W., who had a one-fifth interest, commenced action against the others, alleging purchase from B. of a relinquishment of one-fifth of her homestead right, and praying for enforcement thereof, and an allotment to him of a one-fifth interest in fee. Held, that an amendment of the petition alleging that the land which had been set aside to B. and C. as a homestead exceeded \$1,000 in value, and praying the court should so adjudge, and out of the overplus should set aside to W. his one-fifth interest in the land, set up a distinct cause of action from that in the original petition, so that the default judgment in accordance therewith was void against J., no process having been issued on the amended petition.

Appeal from circuit court, Graves county. "Not to be officially reported."

Action by John T. Cope and others against W. F. Slayden and others. Judgment for defendants. Plaintiffs appeal. Reversed.

W. J. Webb, for appellants. Speight & Anderson, for appellees.

BARKER, J. This action was instituted by the appellants in the court below for the purpose of vacating a judgment in the case of W. F. Slayden against B. M. Mason and others, rendered at the November term, 1901, of the Graves circuit court, which appellants claim was void. This proceeding, while not exactly according to the method pointed out by section 763 of the Civil Code for the purpose of vacating a void judgment, substantially complies with said section, and brings up the question on this appeal as to whether or not the judgment rendered by the court in the case of Slayden against Mason and others is void, or merely erroneous. The circuit court of Graves county had set aside a tract of land as a homestead to B. M. Mason, as the widow of T. F. Mason, who owned said tract of land at his death, and to her infant son, Cleveland Mason; the widow having the right of occupancy during her life, and Cleveland Mason, her son, the right to occupy it jointly with her until his majority.

Cleveland Mason was also the owner of a one-fifth. Appellants were, between them, the owners of three-fifths, and W. F. Slayden was the owner of one undivided one-fifth interest in remainder in said land. With this state of facts existing, W. F. Slayden instituted an action in the Graves circuit court, wherein he set up, in substance, that he had purchased one undivided one-fifth interest in remainder in said land from one of the heirs at law of T. F. Mason, and that, as a part of the consideration of his purchase, the widow, B. M. Mason, had agreed with him that she would relinquish in his favor one-fifth of her homestead right in said land, so that he would be entitled to immediate possession of his interest; that, notwithstanding her agreement, she in bad faith now refused to carry out the same, and refused to allow him to enter upon said land, or to occupy it in any way. Whereupon he prayed a judgment against said B. M. Mason, requiring her to carry out her said agreement, and praying that a commissioner be appointed to divide the land between W. F. Slayden and said B. M. Mason, allotting to said B. M. Mason four-fifths for the term of her natural life, and the plaintiff one-fifth interest in fee simple in said land, according to its quantity, quality, and value, taking into consideration the adjacency and contiguity of plaintiff's land thereto. Upon the filing of this petition summons was issued against all parties in interest in said land, including appellants in this case, which summons was duly and legally executed upon them. Afterwards plaintiff, W. F. Slayden, by leave of court, amended his original petition, in which he correctly sets out the holdings of the various owners of the remainder interest in said land, and alleges that the tract of land which had theretofore been set aside to B. M. Mason and Cleveland Mason as a homestead was worth more than \$1,000, and praying that the court should so adjudge; that out of the overplus in said land of the homestead interest there should be set aside to him, and he should be adjudged the owner in fee simple of, one-fifth of the whole tract of said land, and that the same be set aside to him out of that part which was contiguous to the adjoining tract of land owned by him. No process was issued on this amended petition, but the case was at once submitted, and a judgment by default awarded by the court against appellants and all the other defendants, by which it was adjudged, in substance, that said tract of land was worth exceeding \$1,000; that four-fifths thereof was worth more than \$1,000; that said land was susceptible of division; and it was ordered that J. N. Crutchfield, William Baldwin, and Robert Newsom be appointed commissioners to divide said land, and they were "directed to go upon the same Wednesday, December 18, 1901, if convenient;

if not, upon some convenient day thereafter, and to allot to Cleveland Mason a homestead in said land of the value of one thousand dollars. If as much as one-fifth of said land remains, said commissioners will allot one-fifth of said entire land to W. F. Slayden, on the west side of same, adjoining his other land, in fee simple; and if, after allotting said homestead to Cleveland Mason, there is not as much as one-fifth of said land remaining, said commissioners will add to the land allotted to W. F. Slayden in fee simple enough of the land allotted to Cleveland Mason for a homestead, but subject to the homestead right of Cleveland Mason, as to make one-fifth interest in same. In making said division said commissioners will take into consideration quantity, quality, value, and improvements, and they will report their acts to court." The only question involved in this appeal is whether or not the amended petition sets up a distinct cause of action from that set up, or attempted to be set up, in the original petition. If it does not, then the court properly sustained the demurrer to appellants' petition, because, no matter how erroneous a judgment may be, it cannot be attacked in a collateral proceeding such as this. *Sorrell, etc., v. Samuels* (Ky.) 49 S. W. 762; *Derr v. Wilson*, 84 Ky. 14; *Preston, etc., v. Breckinridge, etc.*, 86 Ky. 619, 6 S. W. 641; *Stevenson v. Flournoy, etc.*, 89 Ky. 561, 13 S. W. 210; *Prince v. Antle*, 90 Ky. 138, 13 S. W. 436; *De Bard v. Gatewood*, 4 Ky. Law Rep. 280; *Bridgeford v. Fogg* (Ky.) 14 S. W. 600; *Freeman on Judgments*, sec. 135. If it does set up a distinct cause of action, the judgment is void for want of process, and the court erred in sustaining the demurrer to appellants' petition. *Cecil v. Sowards*, 10 Bush, 96; *McGrath v. Baiser*, 6 B. Mon. 141; *Rutledge v. Van Meter*, 8 Bush, 354; *Joyes v. Hamilton*, 10 Bush, 544; *Dameron v. Osenton*, 6 Ky. Law Rep. 218; *Kentucky Electric Institute v. Gaines* (Ky.) 1 S. W. 444.

Appellants and appellee were all owners of undivided fifths in the tract of land in question, subject to the homestead right of B. M. Mason and Cleveland Mason. Neither of them could enter, or in any wise occupy, use, or enjoy, said land, until the homestead interest had ceased, without the consent of B. M. Mason and Cleveland Mason. In the original petition, appellee sought to have the court adjudge that he owned one-fifth interest in B. M. Mason's homestead interest in said tract of land by contract with her. With this question the appellants had nothing to do. B. M. Mason could sell or dispose of any part of her homestead interest in said land that she chose, to appellee or to any one else. Appellants had no cause to complain if, as between B. M. Mason and appellee, the court held that appellee was the owner of one-fifth of the homestead right of B. M. Mason.

By the amended petition the appellee sought to have the homestead right of B. M. Mason and Cleveland Mason contracted so as to give them the enjoyment of a smaller number of acres, alleging that the original number of acres set aside for the homestead was worth more than \$1,000. If this was so adjudged, appellants were deeply interested in the outcome; for, if the court should relieve any number of acres of the tract of land from the burden of the homestead interest as a matter of right and law, then instantly all the other remaindermen were jointly interested in it with appellee, and the court had no more power to deprive appellants of this interest, without due process of law, than to deprive them of their whole interest in the land in question. This was a separate and distinct cause of action, based upon a different principle from that set up in the original petition, and appellants should have been served with process before a judgment was awarded against them, and in default thereof said judgment is void.

The question of the power of the court to contract the homestead right so that it shall rest upon a fewer number of acres of land than was originally set apart to support it is not before us upon this appeal, and it is therefore not decided. Wherefore the case is reversed, with directions to vacate the judgment in the case of W. F. Slayden against B. M. Mason, etc., rendered at the November term, 1901, of the Graves circuit court, and hold the same for naught, and for further proceedings not inconsistent with this opinion.

CLARKE v. LEXINGTON STOVEWORKS.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

CORPORATIONS—EVIDENCE OF AGENCY—STOCK SUBSCRIPTIONS—CREDITS.

1. On the issue as to whether a third party, in taking defendant's note, secured by a paid-up policy, and agreeing to raise money thereon to be applied on defendant's stock subscription in plaintiff corporation, was acting as plaintiff's agent, the minutes of plaintiff's board of directors and its articles of incorporation, referring to him as "general manager," and letters written by him to the insurance company with reference to the policy, and defendant's own testimony with respect to his agency, were sufficient to take the case to the jury.

2. It was error to refuse to permit defendant to testify as to what the third party's duties were, as general manager; it appearing that defendant was himself at one time president of the corporation, and he having testified that the third party's duties as general manager had never been defined by resolution.

3. Where the agent of a corporation takes the note of a stockholder, secured by a paid-up policy, agreeing to raise money thereon, and apply the same on his stock subscription, and afterwards places the note and policy in the hands of an irresponsible party, who either loses them, or appropriates to his own use the money realized therefrom, the stockholder will nevertheless be entitled to the credit on his subscription.

4. A note secured by a paid-up policy is the equivalent of money, within Ky. St. § 568, which provides that "no corporation shall issue stock or bonds except for an equivalent in money paid or labor done."

Appeal from circuit court, Fayette county. "Not to be officially reported."

Action by the Lexington Stoveworks against George Clarke. Judgment for plaintiff in accordance with a peremptory instruction by the court, and defendant appeals. Reversed.

Geo. C. Webb and Webb & Farrell, for appellant. A. M. Baker, for appellee.

SETTLE, J. Appellee, Lexington Stoveworks, is a corporation engaged in the business of manufacturing and selling stoves in the city of Lexington, this state. Appellant, George Clarke, subscribed for 25 shares, \$100 per share, of its capital stock, on which he paid, in obedience to the calls therefor, as much as \$980; but, failing to pay the remainder due on the stock, suit was instituted against him by appellee in the Fayette circuit court for the sum of \$1,519.50, which was alleged to be the balance due of the amount subscribed by him; and for this sum personal judgment was asked against appellant, in addition to which appellee claimed a lien on his stock, which it sought to enforce. Appellant filed an answer, to which a demurrer was filed and sustained. An amended answer was then filed, and a demurrer sustained to the answer as amended, whereupon a second amendment was filed to the answer, and a demurrer was again filed to the answer as amended, but overruled. The answer, as thus amended, admits the subscription of \$2,500 to the capital stock of appellee by appellant, and the payment of \$980 thereof, but denies that appellant owes the \$1,519.50 balance sued for, and avers that he is entitled to further credits of \$700 and \$460, respectively, which appellee had agreed to allow him, but failed to do so; that after payment of the \$980, and when demand was made for \$875 of the \$1,519.50 still owing by appellant, he, being unable to raise the money to pay it, advised one Snyder, appellant's general manager, who was collecting sums due on subscriptions to its capital stock, that he owned a paid-up policy of \$2,500 in the Mutual Life Insurance Company of New York, payable to his estate at his death, which then had a loan value of \$700, and a cash surrender value of \$1,160, and that by agreement between himself and Snyder, as appellant's general manager, the latter took possession of the policy, with an assignment thereof signed by appellant in blank, and also took of him a note for \$700, which was signed and indorsed by appellant, and made payable to his order; and Snyder agreed, further, to negotiate for him a loan of \$700 on the note and policy, which sum was to be applied as a credit on the \$875 then due on appellant's stock. The answer further avers

that Snyder, as such general manager, sent the note and mortgage to a man in Philadelphia, Pa., or to some other person, who procured the money thereon, or still held the note and policy, neither of which was ever returned to him (appellant), and that, by the acts of Snyder as general manager, he had been deprived of the policy, and by reason thereof suffered the loss not only of the \$700, its loan value, but also the further sum of \$460, which, together with the \$700, constituted the cash surrender value thereof. Appellant asks credit for these sums on the amount due on his stock subscription to appellee. After the filing of the reply, which denied all of the averments of the answer, the case was tried, by order of the lower court, before a jury, on the issues of fact raised by the pleadings; and upon the conclusion of appellant's proof the jury, under a peremptory instruction from the court, found for the appellee, whereupon judgment was rendered for appellee for the full amount claimed by it, with costs, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal.

Upon the trial, appellant and two other witnesses testified in his behalf, and in addition the minutes of a number of meetings of appellee's board of directors were read in evidence. The following facts were substantially proved on the trial: (1) That appellant in May, 1896, was owing appellee \$875 of his stock subscription, and that Snyder, as an officer of appellee company, was insisting upon its payment; (2) that appellant was then the owner and in possession of a paid-up policy of insurance in the Mutual Life Insurance Company of New York, of \$2,500, which had a loan value of \$700, and a cash surrender value of \$1,160, which policy was delivered to Snyder; (3) that Snyder made an arrangement with appellant whereby money was to be raised on the policy, and for that purpose he caused him to execute his note payable to himself, and indorsed by him, and to execute an assignment of the policy as collateral security for the note, and that the note was also delivered to Snyder with the policy; (4) that Snyder took the note and policy, and disposed of them to some third party, and thereafter wrote letters in which he set up a claim to the note and policy, or their proceeds, for appellee, and that he never returned either the note or policy to appellant, and the latter has never received credit on appellee's claim against him for either the note or policy, and the note is still out against him.

In determining whether or not the lower court erred in giving the peremptory instruction, it will be necessary to ascertain whether Snyder was acting as agent of appellee in the transaction with appellant in regard to the note and policy, and, if so, whether he was authorized to enter into the arrangement that was made with him. A corpora-

tion can only act through its officers or agents, and it will be bound by their acts, if performed within the apparent scope of the agency. It was clearly shown by the minutes of appellee's board of directors that Snyder was its general manager; that he not only acted for appellee in collecting its subscriptions of stock, but also in the sale of stock, for he disposed of some of its stock to one McDonald, and at one time, as shown by the minutes, he reported that all stock had been sold, but some certificates had not been issued because not fully paid for. The minutes show that at another time Snyder, as general manager, secretary, and treasurer, made a verbal report to the directors that "the company had made money during the past year, but he was not in a position to say how much; he had not finished taking stock," etc. In addition, the articles of incorporation, by which appellee received its corporate being, provide that "Otis Snyder shall be general manager of said corporation, and perform the duties thereof." We also find that he wrote the Mutual Life Insurance Company of New York in regard to appellant's insurance policy, using in doing so a letter head of appellee; and he likewise wrote a letter to Biscoe Hindman, state agent of the insurance company, in which letter he said: "We hold a claim of \$700 against the policy No. 737,455, issued on the life of George Clarke, of this city. This policy was sent to Philadelphia, Pa., to negotiate a loan of \$700. We wish to notify you that we have not released our claim to said policy. Very truly, Lexington Stove Works, by O. W. Snyder, Sec. & Treas." Still another letter was written by Snyder to the insurance company, saying: "Please take notice that the only valid claim against the policy of George Clarke, No. 737,455, is the one I have. Very truly, O. W. Snyder, of Lexington Stove Works." It is also shown by the evidence that Snyder was practically in charge of all of appellee's business. Appellant testified fully as to the agency of Snyder, and, in view of the many evidences furnished by the record of his agency, we are unable to approve the action of the lower court in granting the peremptory instruction. We think, too, that the lower court erred in refusing to permit appellant to testify as to what were the duties of Snyder as general manager. Appellant was himself at one time president of appellee company, and he testified that Snyder's duties as general manager had never been defined by resolution of appellee's board of directors. It was therefore proper to prove by parol evidence the nature and extent of those duties.

So we conclude that there was evidence to go to the jury which, in the absence of anything to the contrary, would have authorized them to find for appellant. Indeed, the evidence introduced by appellant, on the whole, strongly conduces to show that Snyder was

authorized, as agent of appellee, to take such steps as were necessary to collect the sum owing by appellant, and, furthermore, that as such agent he received the note and policy from him, and placed them in the hands of an irresponsible party, who either lost them, or appropriated to his own use the money realized on them. So, after all, it may be inferred from the facts adduced upon the trial in the lower court that the note and policy were lost to appellant by the negligence of appellee's general manager; and, if so, as they were left in his hands to raise money for appellant which was to be credited on his indebtedness to appellee, and were undoubtedly good for the amount to be realized, appellant ought not to lose the credit through the negligence of the agent selected by appellee to transact such business. "If officers of the corporation openly exercised a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. * * *" *Bank of U. S. v. Dandridge*, 12 Wheat. 65, 6 L. Ed. 552; *Mahoney Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Story on Agency*, 758; *Baker v. Kansas City, etc., R. R. Co.* (Mo. Sup.) 3 S. W. 489; *Whitaker v. Kilroy* (Mich.) 38 N. W. 607; *Ceeder v. Loud & Sons' Lumber Co.* (Mich.) 49 N. W. 575, 24 Am. St. Rep. 134.

It is contended by counsel for appellee that as section 568, Ky. St. (the same as section 193 of our Constitution), provides that "no corporation shall issue stock or bonds except for an equivalent in money paid, or labor done," the taking of the note and policy by its general manager could not have operated as a payment on appellee's stock. The note, secured as it was by the policy, was as good as a bill of exchange. It was therefore the equivalent of money, and its acceptance by appellee would have been a payment, in contemplation of the statute supra. We do not understand, however, that the note was accepted by appellee's manager, Snyder, as a payment, but it was taken to be negotiated or sold by him for the accommodation of appellant, and the benefit of appellee, and it was his duty to use reasonable care to obtain the money on it. The money would undoubtedly have been obtained on it, but for the negligence of appellee's agent in putting it into the hands of an unreliable man.

We think it would be inequitable to permit appellee to escape liability for the negligent act of its agent in permitting the loss of the note and policy, upon the facts presented by the record; and the judgment of the lower court is therefore reversed, with directions to that court to set aside the verdict of the jury, as well as the judgment rendered thereon, and grant appellant a new trial.

MOONEY v. ANCIENT ORDER OF UNITED WORKMEN, GRAND LODGE OF KENTUCKY.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

INSURANCE—MUTUAL BENEFIT CERTIFICATES—INCORPORATION OF BY-LAWS—INSANITY—SUICIDE.

1. Ky. St. § 679, requires that the application, charter, and by-laws of an insurance company doing business in the state, or a copy thereof, shall be attached to the policy or certificate, before they can be treated as a part of the contract. A certificate issued by a mutual benefit association contained no stipulation as to suicide, but declared that it was subject to the by-laws of the order, which were not made a part of the certificate. The only provision in the by-laws on the subject of suicide was in the provisions prescribing the form of application for membership in the association. But the application signed by the insured was on a different form, and contained no stipulation as to suicide. *Held*, that the by-law relating to suicide could not be considered as a part of the certificate, so as to enable the insurer to make a defense based thereon.

2. An insured in a mutual benefit certificate, containing no stipulation as to suicide, committed suicide. He was about 22 years of age. His father had died four months before. He had no reason to complain of life. At the death of his father he acted singularly, and continued to so act from time to time. Some of his friends before he killed himself thought him insane. His conduct on the night before his death and at the time of the suicide tended to sustain this conclusion. *Held*, that the question whether he was sane or insane at the time of the suicide was for the jury.

3. A mutual benefit certificate, payable to a designated beneficiary, and which is silent on the subject of suicide, becomes void if the insured commits suicide when sane.

4. The certificate does not become void if the insured commits suicide when insane.

5. Insured was insane at the time of committing suicide if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not sufficient will power to govern his actions by reason of some insane impulse which he could not control.

Appeal from circuit court, Webster county.

"To be officially reported."

Action on a benefit certificate by Sarah Jane Mooney against the Ancient Order of United Workmen, Grand Lodge of Kentucky. From a judgment for defendant, plaintiff appeals. Reversed.

Pratt, Mahan & Waddill, for appellant. Yeaman & Yeaman, for appellee.

HOBSON, J. Appellee, the Ancient Order of United Workmen, is a corporation created by the laws of Kentucky. It consists of a supreme lodge and subordinate lodges. A beneficiary fund is set apart for the benefit of the families or heirs at law of deceased members. Benefit certificates are issued to the members, and they have the right of naming their beneficiaries. It is a fraternal association, governed by the lodge system under the supervision of a supreme lodge, which pays no commission and employs no agents, except in the

¶ 3. See Insurance, vol. 22, Cent. Dig. § 1864.

organisation of local subordinate lodges and supervising their work. John G. Mooney held a certificate in the order, and while in regular standing shot himself on March 2, 1900. His mother was named as his beneficiary, and sought in this action to recover of the order on the benefit certificate. The defendant resisted recovery on the ground that the assured while sane voluntarily took his own life, and at the conclusion of the evidence the court peremptorily instructed the jury to find for the defendant. The certificate sued on is in these words: "This certificate, issued by the Grand Lodge of the Ancient Order of United Workmen, of Kentucky, witnesseth: That Brother John G. Mooney, a workman degree member of John L. Dorsey Lodge, No. 98, of said order, located at Dixon, in the state of Kentucky, is entitled to all the rights, benefits, and privileges of membership in the Ancient Order of United Workmen, and to designate the beneficiary to whom the sum of two thousand dollars of the beneficiary fund of the order shall, at his death, be paid. This certificate is issued subject to, and is to be construed by, the laws of the order. He designates, as beneficiary under the terms hereof, Sarah Jane Mooney, bearing to him the relation of mother. In witness whereof the Grand Lodge has caused this to be signed by its Grand Master Workman and Grand Recorder, and the seal thereof to be attached this 29th day of November, 1899. John W. Baker, Grand Master Workman. J. G. Walter, Grand Recorder." It will be observed that there is nothing in the certificate in regard to suicide, or providing that the company shall not be liable if the assured killed himself. It was, however, pleaded by the defendant that this was stipulated in the laws of the order, and that by the terms of the certificate it is to be construed and controlled by these laws. The only thing in the laws of the order on the subject is in section 8, article 10, of the by-laws, which, among other things, prescribes a form of application to be used by applicants for membership. In this form so prescribed, these words are used: "I further agree that if, within two years after the date of my taking or receiving the workman degree, my death should occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, or after a judicial declaration of insanity, then the only sum which shall be paid, or which is payable, to my beneficiaries named in my beneficiary certificate, shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership." But the application which the deceased in fact signed was on a different form, and was in these words: "November 29th, 1899. To the Grand Lodge of Kentucky: I, John G. Mooney, having made application for the workman degree in John L. Dorsey Lodge, No. —, Ancient Order of United Workmen, state of Kentucky, do hereby agree that compliance

on my part with all the laws, regulations, and requirements which are or may be enacted by said order is the express condition upon which I am to be entitled to have and enjoy all the rights, benefits, and privileges of said order. I certify that the answers made by me to the questions propounded by the medical examiner of this lodge, which are attached to this application, and form a part thereof, are true. I further agree that the beneficiary certificate to be issued hereon shall have no binding force whatever until I shall have taken the workman degree of said order, and until my medical examination has been approved by the Supreme or Grand Medical Examiner, as the case may be. I hereby authorize and direct that the amount to which my beneficiaries may be entitled, to wit, \$2,000.00 of the beneficiary fund of the order, shall, at my death, be paid to Mrs. Sarah Jane Mooney, bearing relation to me of mother."

It would seem from the evidence that the by-law providing for the form of application above quoted was of recent adoption, and that forms of application made out according to it had not been sent out to the subordinate lodge at the time the deceased joined. The proof on this subject is not clear; but, however it may be, he in fact used the old form, and, so far as the proof shows, knew nothing of the other form. We are therefore of opinion that his contract cannot be tested or in any way affected by a mere form of application which had been ordained by the Grand Lodge, but which was not in fact used in his case. In the Supreme Commandery, of the United Order of the Golden Cross v. Hughes (Ky.) 70 S. W. 405, it was held that section 679 of the Kentucky Statutes is applicable to societies such as appellee, and that the application for the certificate or the by-laws, or other rules of the corporation, unless attached to and accompanying the certificate, cannot be received in evidence or considered a part of the contract in any controversy between the parties interested in the certificate. As the by-law in question was not made a part of the certificate or attached to it, it cannot be considered, and the defense to the action based on this by-law cannot be maintained. The peremptory instruction of the circuit court to the jury to find for the defendant by reason of the by-law was, therefore, erroneous.

There being nothing in the certificate in regard to suicide, the question remains, is it a defense to the action that the deceased while sane voluntarily killed himself? The proof shows that the deceased was about 22 years old; his father had died four months before, leaving the deceased, his mother, and a younger brother surviving him; the deceased had been made postmaster in the room of his father at the town of Dixon, Webster county. He had no other insurance on his life. His health was good. So far as the evidence goes, he had no reason to complain of life. At the death of his father

he had acted very singularly, and this he had kept up from time to time since. Not a few of his friends before he shot himself thought him of unsound mind. His conduct on the night before his death and at the time of the shooting tended to sustain this conclusion, and there was sufficient evidence to go to the jury on the question as to whether he was sane or insane at the time. The rule as to suicide where the policy is silent on the subject is thus well stated in 19 Amer. & Eng. Ency. of Law, page 73: "If the insured in a contract of life insurance, taken out for the benefit of his estate, or payable to a beneficiary the designation of whom may be changed at the option of the insured with the consent of the insurer, commits suicide, the policy is void if the insured was sane when he took his own life, and this for two reasons: In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural ordinary course of events. It is upon these chances that the premium is calculated and the contract is founded; hence the suicide of the insured operates as a fraud upon the insurer, and especially is this so when the insurance is taken out in contemplation of the act. In the second place, the enforcement of the contract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy, in that it tempted or encouraged the insured to commit suicide, and it is obvious that the court will not imply a condition which if expressed in the contract would render it void. But when the policy is made payable to a nominated beneficiary, and contains no stipulation that it shall be void in case of the death of the insured by suicide, it may be enforced, notwithstanding the insured dies by his own hand, unless, perhaps, where the policy was taken out in contemplation of suicide." See also, to this effect, *Hartman v. Keystone Mutual Life Insurance Co.*, 21 Pa. 466; *Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Knights Golden Rule v. Ainsworth*, 46 Am. Rep. 332; *Miss, Life Insurance*, § 242; note to *Breasted v. Farmers' Loan & Trust Co.*, 59 Am. Dec. 487.

It is earnestly insisted that if the insured, when he fired the fatal shot, had sufficient mental power to know that it would take his life, and fired the shot with that intention, there can be no recovery. We are referred to authorities so holding under certain policies containing stipulations as to suicide when insane, but we do not think this rule applicable to a case where the policy is entirely silent. The only reason that the death

of the insured by his own hands is allowed to defeat the policy in such a case is, in the end, that it is a fraud on the company. But there can be no fraud by one who is insane. Those who issue such policies know that men are liable to become insane, and that insane persons at times commit suicide. If they wish to protect themselves from this risk, they should so provide in their policies. Where the policy is silent, we are unwilling to go beyond the rule above laid down exempting the company from responsibility where the insured voluntarily kills himself while sane. For the contract of insurance must be treated like any other contract, and the act of an insane person is not a defense to actions on any other contract, so far as we know. Under the evidence the court should have submitted to the jury the question whether the assured voluntarily killed himself while sane. We intimate no opinion as to what should be the rule where the policy has, under the terms of the policy, become incontestable. The deceased was insane at the time of the shooting, if he was then without sufficient reason to know what he was doing, or to distinguish right from wrong, or if he had not then sufficient will power to govern his actions, by reason of some insane impulse (the result of mental unsoundness) which he could not resist or control.

Judgment reversed, and cause remanded for a new trial.

RIDDLE v. FANNIN.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

LUNATIC—RIGHT OF FAMILY TO PROPERTY—ACTION TO ENFORCE—PARTIES.

1. A lunatic is not a necessary party to a suit against his committee to enforce the right of the lunatic's wife and family, under Ky. St. § 2150, to hold such of his property as is exempt and indispensably necessary for their maintenance.

Appeal from circuit court, Boyd county. "Not to be officially reported."

Proceeding by Carrie Fannin against John Riddle. Demurrers to the petition were overruled, and defendant appeals. Affirmed.

T. R. Brown, for appellant. R. S. Dinkle and C. L. Williams, for appellee.

BARKER, J. The appellee, Carrie Fannin, filed a petition in the Boyd circuit court, setting up the fact that she was the lawful wife of Fred Fannin, who had theretofore been adjudged a lunatic by the county court of Boyd county, and who was then in confinement in the lunatic asylum at Lexington, Ky.; that on the 27th day of October, 1901, the appellant, John Riddle, was by the Boyd county court duly appointed committee of the said Fred Fannin, and thus, as such, had given bond, and qualified according to law. She states that her husband owned a lot of personal property, consisting of about 400 bushels of corn, valued at \$150; one buggy,

worth \$60; one saddle, worth \$5; and one heifer, valued at \$20—making in all \$235 worth of personal property, which was not enough to satisfy her exemption under the law; that her said husband owned also a lot of land in Boyd county, Ky., which is described by metes and bounds in her petition; that said land was worth less than \$1000, and that it is subject to a mortgage in the sum of \$250, held by one P. S. Fannin. She states that the appellant John Riddle, as committee of her husband, Fred Fannin, has taken possession of said personalty and said real property, and is proceeding to sell and dispose of same; wherefore she prays that the estate of her husband be settled, and the cause be referred to the master commissioner to hear proof as to the value of said estate, and what property is exempt to appellee by law, and the same be set aside to her as her exemption. A special demurrer was filed to this petition, because the husband, Fred Fannin, was not made a party; and a general demurrer was filed, because the petition did not state facts sufficient to constitute a cause of action. The court overruled both demurrers, and of this the committee is now complaining on appeal.

When Fred Fannin was adjudged a lunatic, he left his wife in his homestead, with a few articles of personalty described in the petition. All these were clearly exempt from the demands of his creditors—if he had any; he did not lose his rights of exemption in this property, by reason of being insane; nor did the misfortune of losing the society and support of her husband, by the affliction which happened to him, deprive the wife of her right to occupy his homestead, and use and enjoy the little personal property left therein. With this, the committee had nothing whatever to do, as he, for the creditors of Fred Fannin, would only be authorized to sell such property of the lunatic as was not exempt by law.

We do not think Fred Fannin was a necessary party for the adjudication of the matters at issue between the committee and the wife. The wife is making no claim adverse to her husband, nor is she seeking to deprive him of his title to any of same; all she is asking is the right of holding on to his property for him. The homestead is still his homestead, and the property is still his property. The fact that he is necessarily confined in the lunatic asylum leaves his homestead rights, and his rights to the personalty in question, just as they were before his affliction. Should he be ever so fortunate as to recover his sanity, the homestead will be there for him, as well, also, as the right to any such part of the personalty as may not be necessarily used up or worn out. We think the right of the lunatic's wife and family to hold such of his property as is exempt by law from his creditors, and which is indispensably necessary for their maintenance, is clearly provided for in section

2150 of the Kentucky Statutes, and it is so held in the case of the German National Bank v. Engeln's Committee, 14 Bush, 708.

We have not considered this case from a technical point of view, but have regarded it as an amicable proceeding between the committee of the lunatic, and the wife, in which the former, as conscientious trustee, is rather seeking to know his duty, than to win a victory on the abstract technicalities of the law. For this reason, we have looked only to the merits of the case, which we think are clearly with appellee. Wherefore the case is affirmed.

DUGAN'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. Feb. 24, 1908.)

RAILROADS—NEGLIGENCE—PERSON ASLEEP ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Plaintiff's intestate, who was somewhat intoxicated, went upon the track of defendant railway company upon a trestle where the track crossed above the roadway, and went to sleep, and was killed by a train at about 11 o'clock at night. Held that, as deceased was upon the trestle, and not upon the highway, defendant's servants would not, in the exercise of ordinary care, be expected to discover him in time to avoid killing him, and hence deceased's contributory negligence precluded recovery.

Appeal from circuit court, Mason county. "Not to be officially reported."

Action by William Dugan's administrator against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. Burgess Taylor and J. M. Collins, for appellant. E. L. Worthington, J. G. Wadsworth, and W. H. Wadsworth, for appellee.

HOBSON, J. Appellant filed this suit to recover for the loss of the life of his intestate, and at the conclusion of the evidence the court instructed the jury peremptorily to find for the defendant. The proof tended to show these facts: The track of the railway company runs along Front street, in Maysville, Ky. This street fronts on the Ohio river. The railroad track is laid near the north side of the street, and about four feet from the steep embankment leading down to the river. The railroad track, at the point where the deceased was killed, is built on a trestle or bridge, as it is called by the witnesses, and underneath this trestle runs the roadway leading to the boat landing. About half past 10 o'clock at night on the 13th of August the deceased went out and sat on this trestle. While there, a train came by about 11 o'clock, running at rapid speed, and killed him. He had dropped to sleep, and so did not notice the approaching train. No one on the train seems to have been aware of his presence on the trestle. He had been drinking some, and it is con-

ceded that he was guilty of contributory negligence, but it is earnestly argued that the place where he was, near the intersection of Market and Front streets, was much used by the people of the city, and that by reason of this use the duty was imposed on those operating the trains to keep a reasonable lookout, and that by the exercise of ordinary care, if a lookout had been kept, his danger would have been perceived, and the injury averted, as the track was straight for nearly half a mile as the train approached him. The cases of *Gunn v. Felton* (Ky.) 57 S. W. 15, and *C. & O. Railway v. Keelin's Adm'r* (Ky.) 62 S. W. 261, are relied on as establishing the rule that, where the presence of the deceased on the track might, by the exercise of ordinary care, have been discovered in time to avoid killing him, the fact that he was guilty of contributory negligence will not preclude a recovery. But those cases have no application to the one before us. The rule they declare only applies where those in charge of the train owe a duty to the deceased, and where, by the exercise of this duty, notwithstanding his want of care, and after it had placed him in danger, the injury might have been averted. If the intestate had been in a proper use of the street, as in passing along it or across it, it would have been incumbent on those in charge of the train in running along the highway to exercise proper care to avoid injury to others also properly on the highway. But that is not the case we have. The deceased left the highway, and got upon the railroad trestle, which was elevated above the highway, and went to sleep up there, at a late hour of the night. Those in charge of the train were not required to anticipate the presence of persons sleeping on the trestle at that time of night, and the deceased's own gross negligence was the proximate cause of his injury. If those in charge of the train had discovered the perilous position of intestate, and could, after discovering it, by the exercise of proper care, have avoided the injury to him, the defendant would be liable; but it is not liable simply because they failed to discover him asleep on the trestle. *L. & N. Railroad v. Kellem's Adm'r* (Ky.) 21 S. W. 230; *Embry v. L. & N. Railroad* (Ky.) 36 S. W. 1123; *Lyon's Adm'r v. Illinois Central Railroad* (Ky.) 59 S. W. 507.

Judgment affirmed.

WILLIAMSON v. DILS.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

SPECIFIC PERFORMANCE—ENFORCEMENT INVOLVING HARDSHIP.

1. A contract for the sale of an undivided interest in land provided that the land was to be surveyed by the vendee at his expense; that, when the amount thereof was ascertained, the vendee should pay a certain price per acre

for the vendor's undivided interest, and the vendor should make a quitclaim deed. The vendee attempted to survey the land, but his surveyors were prevented by force from doing so; the vendee being advised that he would be in great danger of being killed if he went on the premises. *Held*, that as the contract could not be performed until the number of acres was ascertained by survey, and as this could not be done without great hardship to the vendee, specific performance would not be enforced.

Appeal from circuit court, Pike county.

"To be officially reported."

Suit by Ann Dils, as executrix of Col. John Dils, against W. J. Williamson. From a decree for plaintiff, defendant appeals. Reversed.

Hager & Stewart, W. S. Harkins, and R. T. W. Duke, Jr., for appellant. James Goble and Ratliff & Ratliff, for appellee.

PAYNTER, J. On December 12, 1891, the appellant, Williamson, and Col. John Dils entered into a contract by which the appellee sold to appellant an undivided one-third interest in what is known as the "Williamson-Dils Survey," in Pike county, Ky., supposed to contain within its exterior boundaries some thirty-odd thousand acres. So much of the contract as is necessary for the consideration of this case reads as follows: "It being the one-third interest in the Williamson-Dils and Joe Hall tract of land, estimated to contain 18,000 acres, more or less, which land lies on the waters of Knox and Peter creeks and Tug river, in Pike county, Ky. This land is to be surveyed by party of the second part, and at his expense, and when the amount of said land is ascertained by survey, deducting the proper exclusions, then the party of the second part [Williamson] is to pay party of the first part two (\$2) per acre for party of the first part's one-third interest in said lands. Said survey shall be completed by the first day of April, 1892, at which time the purchase money shall be paid by party of the second part, and deed of quitclaim, free of dower, shall be made by party of the first part; but in the event that said survey is not at that date completed, but is well under way, and the party of the second part makes to the party of the first part a good, substantial payment on said purchase money, then the party of the second part shall have a further reasonable time to complete said survey, at which time the balance of the purchase money shall be paid and deed made as above stated." It will be observed that the parties estimated that Dils had a one-third interest in 18,000 acres of land, more or less. It was a sale by the acre, and the contract price was \$2 per acre. The parties understood that all "proper exclusions" should be deducted. It was contemplated that, in order to ascertain the number of acres in which Dils had an interest, a survey was necessary, which was to be made at the expense of the appellant. It was to be completed by April 1, 1892, but, if not done, then, upon a good, substantial payment on the

purchase money, further reasonable time to complete the contract was to be given the appellant. After the quantity of land was ascertained for which Williamson was to pay, Dils was to make him a quitclaim deed. Before and after April 1, 1892, Williamson had two or three corps of surveyors in the field, with a view of complying with his contract, but being unable to complete it in March, 1892, he gave Dils notice that it could not be done, and made what he regarded as a substantial payment on the purchase money. The survey was never completed. Dils instituted this suit for specific performance of the contract, and prayed that a survey might be made at the expense of the appellant, to ascertain the number of acres for which he agreed to pay. Among other things, it was averred in the answer that at the date of the contract it was not known by either Williamson or Dils to what extent the lands embraced in the Williamson-Dils patent had been entered, surveyed, and patented prior to the 24th day of June, 1872, the date of the Williamson-Dils patent; that no survey of the land excepted from the grant had ever been made before or after that patent had been issued, and for this reason the provision was inserted in the contract for the ascertainment of the number of acres for which Williamson should pay; and that the sale and purchase would depend upon such survey. It is also averred in the answer that appellant undertook by means of his surveying parties to prosecute the work with diligence, to ascertain the number of acres for which he should pay; that, without fault or procurement upon his part, persons residing within the exterior lines of the patent, in actual possession, and claiming a title thereto adversely to the Williamson-Dils title, were hostile and threatening, and by threats and hostile demonstrations by force and with arms alarmed, intimidated, and drove the surveying parties from the land; that that condition prevailed until the answer was filed in this action; and that, by reason of such threats and demonstrations by the residents in possession, it was impossible to secure a survey of the land, to ascertain the acreage in which Dils had an interest, and for which appellant was to pay under the terms of the contract. It is further averred in the answer that more than half of the land was covered by prior surveys, and that about 7,000 acres of it were held under junior patents, under which the patentees had taken possession, and were then claiming the land. There were other averments in the answer, which are not necessary to be stated here.

The testimony offered by the appellant conduces to prove that he undertook, in good faith, to have the survey made; that he prosecuted it with reasonable diligence; that he was engaged for a period of about six months in his efforts to make a survey of the land as contemplated by the contract; that the parties living within the boundaries were hostile to his claim, and by threats and

intimidation prevented the surveyors from completing the work; and that these threats and demonstrations of force compelled his surveying parties to quit the work, and for that reason did not complete it. Under such circumstances, should the court decree a specific performance of the contract? It is a rule in equity that specific execution of contracts is not a matter of absolute right in either party, but upon the reasonable discretion of the court, and, unless it is equitable to do so, courts will not adjudge it. *Cocanougher v. Green*, 93 Ky. 519, 20 S. W. 542; *Woollums v. Horsley*, 93 Ky. 582, 20 S. W. 781. It is evident that the parties to this contract did not contemplate that such an obstacle would confront appellant in making the survey as did when he attempted to make it. Had the parties known that it would probably result in loss of life or bloodshed to ascertain the number of acres which the appellant purchased from Dils, it is certain that they would never have entered into the contract; hence we say that neither of the parties had in contemplation such a condition of affairs as arose. The appellant was advised by his friends not to go upon the land, as he would be in great danger of losing his life if he did so. He was not required to make such a sacrifice to carry out the undertaking which he had assumed. Neither could he be held responsible because his undertaking was rendered impossible by reason of a threatened danger to those to whom he was compelled to look for the execution of the work. But the plaintiff evidently realized the situation, because in his petition he asked that the land be surveyed at the expense of the appellant, but he seems never to have moved the court to comply with the prayer of his petition by making an order of survey in the case. The appellant did not do it, because his surveying parties had spent almost six months in the field, and had failed to accomplish it. It is suggested that the court could have made an order of survey, and called upon the officers of the law to protect the surveying parties. Neither side seemed to be willing to venture such an effort, as no motion was made for an order of survey. When the appellant did not accomplish it in the effort which he made, we are of the opinion that he did all which good faith required him to do to comply with the provisions of the contract, which obligated him to make a survey of the land at his expense. Specific performance will not be decreed if the contract and situation of the parties be such that the remedy of specific performance will be harsh or oppressive. *Pomeroy, Equity Jurisprudence*, section 1405. In explanation of this doctrine in note 2 to that section it is said: "This rule generally operates in favor of defendant, but may be invoked by a plaintiff when defendant demands the remedy by counterclaim or cross-complaint. The oppression or hardship may result from uncon-

scionable provisions of the contract itself, or it may result from the situation of the parties, unconnected with the terms of the contract, or with the circumstances of its negotiation and execution; that is, from external facts or events or circumstances which control or affect the situation of the defendant." The resistance made by occupying claimants to a survey of the land is a circumstance which so affects the appellant that he could not perform that part of the contract which required him to have the land surveyed. If he could not do so in the usual and peaceable way, the court should not decree that he should have done so.

It is urged by counsel for appellee that, as Dils was only required to make a quitclaim deed to Williamson for his interest in the land, therefore he was compelled to accept whatever title Dils had. The parties agreed that the actual number of acres in which Dils had an interest should be ascertained before Williamson was required to pay for the land or accept any kind of a deed. As we have said, the sale was by the acre, and the appellant encountered the same difficulty in the execution of the survey as he would have encountered had the contract required Dils to make a deed with covenants of general warranty. From our view of the case, the character of the deed to be made has nothing to do with it. While Williamson was to accept a quitclaim deed, Dils was never in a condition to tender it to him until the number of acres for which he was required to pay had been ascertained. It would be harsh and oppressive to decree specific performance under the circumstances of this case. The court below decreed specific performance, but, in order to do so, was compelled to practically guess at the quantity of land for which the appellant should pay. The contract of the parties did not contemplate that a court should be required to do that, in order to ascertain the number of acres for which the appellant should pay the vendor. We are of the opinion that the contract should be rescinded, and the money which Williamson has paid on the purchase money should be restored to him, but not to draw interest until the mandate is filed below.

Judgment is reversed for proceedings consistent with this opinion.

MOORE et al. v. METZ.

(Court of Appeals of Kentucky. Feb. 24, 1903.)

INFANTS—LIABILITY FOR SALES TO MOTHER AND GUARDIAN.

1. Where a merchant makes sales to a woman, charging to her individually all the articles, some of which are for herself, some for her father and mother, and some for her children, of whom she is guardian, and payments are made thereon, all from the income of the farm belonging to the infants, in excess of the amount of the articles alleged to have been bought for the benefit of the infants, recovery

cannot be had against them on the note given by their mother, as their guardian, in settlement of the balance of the account.

Appeal from circuit court, Todd county.

"Not to be officially reported."

Action by J. Metz against Katie Moore and another. Judgment for plaintiff. Defendants appeal. Reversed.

S. W. Forgy, for appellants. W. S. Pryor and B. B. Petrie, for appellee.

HOBSON, J. Katie and Mattie Moore owned a farm in Todd county, devised to them by their grandfather. They were infants of tender years, and their mother, Ida Moore, qualified as their guardian. On August 17, 1896, she executed to appellee, J. Metz, the following note: "One day after date I promise to pay to the order of J. Metz four hundred and sixty-nine dollars and $\frac{22}{100}$ at six per cent. interest from date until paid, for value received in merchandise which was necessary for the use and benefit of my children. Ida Moore, Guardian for Katie and Mattie Moore." Metz filed this suit on the note, alleging that W. B. Cocke was her surety; that he and she were insolvent; that he furnished the goods for which the note was given, at her request, for the children, and that the same was necessary for them—consisting of shoes, clothing, and the like; that the only estate of the wards was the land; and that the guardian spent the income from the land as fast as it accrued. He attached the rent of the land, \$300, and on final hearing the court subjected the rent to the payment of the debt. He filed with his petition an itemized account of the goods sold for the use of the wards. All the allegations of the petition were denied by the answer. The proof shows that Ida Moore, with her two children, who were quite young, moved to the land soon after it was devised to them, and made her home there; her father and mother also living with her. The father, W. B. Cocke, died some years ago, insolvent. The guardian has never made a settlement of her accounts, and is also insolvent. They all lived on the land as one family for many years, and were all supported out of the products of the place. The guardian kept no accounts, and her father seems to have conducted the farming operations. The account with Metz is of many years' standing. It appears to have been opened previous to the year 1885, but seems to have been settled down to February 18, 1890. At least, the books produced on the trial begin the account at that date, and no balance is brought over, although it appears from the evidence that the account is much older than that. The account is entered on the book in these words: "Mrs. Ida Moore debtor." Things that were bought for Mrs. Moore personally, or for her father or mother, or the servants, or for family supplies, are all en-

tered on this account, as well as things bought for the two girls, without any distinction. From February 18, 1890, to August 3, 1891, the account foots up \$175.65. There is a credit of \$50 cash, followed by this entry: "August 27th, settled by note four months after date." On September 2d the account begins again, and runs along until January 23, 1894, when the amount of it footed up \$457.11. There were cash credits on the book for \$240, leaving a balance of \$217.11, which is followed by this entry: "Settled by note one day after date." Neither of these notes is produced, nor is it explained what has become of them. The account begins again on April 30th, and runs until March 23, 1896, when it footed up \$354.21, and there were credits for cash \$157. Underneath this entry are these words: "Settled by note as guardian for Kate and Mattie Moore." This is the first thing on the books as to the guardianship, or as to the account being against the infants. In addition to the credits we have named, which appear on the books, receipts are filed for other payments, which Metz says were applied by him to the payment of the other parts of the account not got for the infants. From an inspection of the books and the itemized account filed with the petition, it is reasonably clear that this account was made out by going over the books, and selecting such items as seemed to be for the use of the wards, although there is nothing on the books themselves to show for whom the goods were bought, and they are all charged, like the other items, to Ida C. Moore. The credits paid on the account, first and last, amount to more than the amount which it is charged was got for the benefit of the infants. Mrs. Moore testifies that she had no conversation with Metz in regard to her children's estate, and denies that any part of the account was sold on her credit as guardian. But however this may be, it is apparent from the account itself that no distinction was made between the things got for the wards and those got for other purposes. It is also reasonably clear that the account previous to 1890, which presumably was against Mrs. Moore, has been settled. The payments made since then were all made from the produce of the farm of the wards. The guardian has not settled her accounts. We cannot tell, therefore, how she stands with her wards. The goods sued for were all charged to her individually, and not as guardian. The money that has been paid upon the account was evidently the money of the wards, or derived from their estate, for the guardian had no other resources. Their money has therefore paid for as much of the account as they received the benefit of, so far as the proof shows. Under the evidence, we do not think Mrs. Moore was warranted in giving, as guardian, the note sued on, or that it ought to be enforced against the wards, as a lia-

bility of their estate. The bill of particulars filed by appellee foots up a considerably smaller amount than that named in the note, and we cannot believe the note was executed to close this up. On the contrary, it would appear to have been prepared since the note was given for the purpose of sustaining the note. Under all the evidence, and an inspection of the books themselves, our conclusion is that the note was given for the entire balance owing by Mrs. Moore on the account, counting in what was unpaid on the notes previously executed; and it therefore represented her debt, and not the debt of the wards.

Judgment reversed, with directions to discharge the attachment and dismiss the petition.

CITY OF UNIONTOWN v. BERRY et al.
(Court of Appeals of Kentucky. Feb. 19, 1903.)

DEDICATION—STREETS ALONG NAVIGABLE RIVER—LAND BETWEEN STREET AND LOW-WATER MARK—RECOVERY OF LAND—ESTOPPEL—PAYMENT OF TAXES—USE AND OCCUPATION.

1. Where the owners of land adjoining a navigable river platted the same into city lots, and dedicated the streets on the plat to an incorporated village, and the boundary of the village included all the land to low-water mark, it will be presumed that the owners intended to dedicate to the public all the land lying between a street running along the river bank and the river.

2. Where a map of a city addition adjoining a navigable river showed that the north line of W. street, running along the river bank, terminated at a point opposite the projection of a cross-street running at right angles with W. street extended, such map showed an intention on the part of the proprietors to terminate W. street at that point, and to reserve to themselves the land lying beyond such point of termination.

3. Where a city had no authority to sell a strip of land dedicated for public use, between a street and a navigable river, it could not be estopped from claiming title thereto by reason of the fact that it assessed taxes thereon, which were paid by defendants as alleged owners.

4. The fact that a village assessor assessed taxes on land belonging to the village knowingly or by unauthorized inadvertence, and that such taxes were paid by defendants, could not estop the town from claiming title to the property.

5. Where, in an action by a city to recover land dedicated for a street, it was shown that the land was useful only for agricultural purposes, and that such use was worth \$2.50 per acre per year, but there was no evidence that the city had sustained any damage by the use of the land, the city was not entitled to recover therefor.

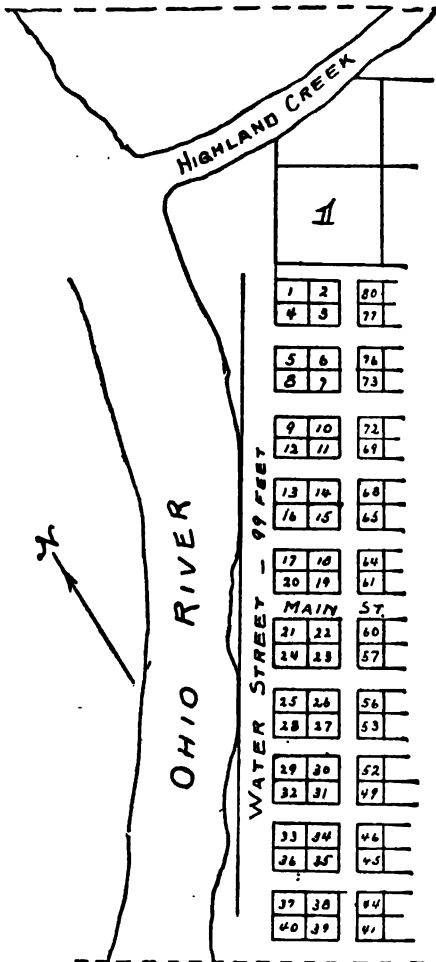
Appeal from circuit court, Union county.
"Not to be officially reported."

Action by the city of Uniontown against H. E. Berry and others to quiet title to land. From a judgment in favor of plaintiff for a part only of the relief demanded, plaintiff appeals. Affirmed.

¶ 3. See Estoppel, vol. 19, Cent. Dig. § 153.

H. X. Morton, for appellant. Allen & Hughes and P. B. Miller, for appellees.

O'REAR, J. Prior to 1819, Berry and Casey were the owners of a grant of land lying on the Ohio river, and including the present site of the city of Uniontown, appellant herein. They subdivided a portion of it into town lots, platting according to a map which they caused to be filed in the clerk's office of Union county. A sufficient portion of the plat so filed is inserted here to illustrate the proposition decided:



Note. In the treatment of this map it will be assumed that the Ohio river lies directly to the north of the town as platted, and that the streets of the town are projected upon due north and south and east and west lines. As a matter of fact, however, it appears that the river runs a southwest course in front of the town.

In 1819 an act of the General Assembly of Kentucky incorporated the town of Francesburg, which was the name given to the town site just mentioned. The lots in the town are designated as "inlots" and "outlots," the inlots containing half an acre each and the outlots about four acres each, except those

next to Highland creek, which are of irregular form. Highland creek at that time must be assumed to be fairly represented upon the map above referred to, though it appears now to have so changed its location by the gradual washing away of its banks and changing of its bed as to be some distance further toward the west. Just below and to the west of Francesburg another village was established, which was incorporated in 1839 under the name of Locust Port. These two villages or towns were incorporated by the Legislature by an act of February 12, 1840, as one municipality under the name of Uniontown. It has continued its corporate existence in fact and under this name until the present time, being classified under the provisions of the Constitution as a city of the fifth class. At the time of the original laying out of the town of Francesburg the northern line of Water street, as shown on the plat, ran next to the Ohio river, and so close to that river that at some points the edge of the street was at the river bank. The bank of the river, however, was irregular in its conformation, leaving spaces of land between the northern edge of Water street as shown on the plat and the bank of the river. During the last 40 or 50 years there has been a gradual and constant recession of the river, and corresponding accretion to its southern bank, until now there is a tract of some 50 or 60 acres of land lying north of Water street, and between that and low-water mark at the southern bank of the river. This litigation is between the city of Uniontown and certain of the descendants and vendees of Berry and Casey, claiming this strip of land.

The contention of appellees is that the town took only the lands embraced within the lines shown on the plat as streets, and that, as Water street is bounded by two lateral lines, one on each its north and south side, a purpose was shown on the part of the dedicators to reserve to themselves all other lands not included in that expressly shown to have been set apart as streets and highways. On the other hand, it is the contention of the city that the dedicators, Casey and Berry, by platting this land into a town site, and offering its lots for sale to the public, and selling them to numerous persons, and procuring the town to be established and incorporated as a municipality, thereby dedicated not only those strips of land shown to be streets, but dedicated all the land lying between the south side of Water street and the Ohio river as public property for the use and enjoyment of the public, and especially of the municipality. A question so nearly identical with the one here involved was presented and decided by this court in the case of Rowan's Exrs. v. The Town of Portland, etc., 8 B. Mon. 232, that we do not deem it necessary to enter again upon an examination of the reasons and authorities control-

ding the decision. In that case a plat had been filed in nearly every particular similar to the one here involved. It was shown that the proprietor of the town site, who dedicated the streets and alleys and public ways to public use by platting the same and offering them to the public and selling them, had left a narrow strip of land between the northern edge of the street fronting on the river and low-water mark of the river, and had drawn the northern line of this street on the plat as a continuous line, as in this case. The court said: "We come to the inquiry whether, upon the face of the map or plan of the town of Portland, the slip or space between water and front streets and the river is designated as having been intended and appropriated for public use. * * * That the town extended to the Ohio river, leaving no space between the town and the water, is a position which, in our opinion, does not admit of question. There is no line dividing or separating the town from the river. And, if there were, it should rather be presumed that the space between such line and the river was thus discriminated for the purpose of showing that it was intended for some use of the town different from that of the ordinary streets and public grounds than that a town located upon the bank of such a river, and at a point selected for its commercial advantages, should be wholly shut out from free and common access to the river. The unreasonableness of this latter presumption has been more than once declared by this court, and the fact that a town is laid off upon the bank of a navigable river has been held to be sufficient evidence of its extending to the water, unless a contrary intention is manifestly indicated. * * * We are of opinion that the fair and necessary inference from the face of the map is that the entire slip along the whole front of the town (with the exception before referred to) was left open for the public use, and was intended to be and remain a common or public ground, affording free access from all parts of the town to all parts of the river in front of it; and that this access was given, not merely for the use of the water for ordinary domestic purposes, but for the use of the river as a great highway of commerce, and for the enjoyment and security of all the advantages which the location of the town upon such a river, and at a point eligible for the anchoring or mooring of vessels and for the deposit and landing or shipment of merchandise, was calculated to afford." The court held in that case that the unbroken line used to designate the northern limit of the street fronting on the river "could not have been intended to indicate the unprofitable and vexatious right in the proprietor to build a straight wall or fence along the northern side of Water street, which, without inclosing any ground, would merely obstruct the direct access from that part of the street

to the river." We conclude, upon the authority of that case, and the numerous decisions of this and other courts referred to therein, that the proprietors dedicated to the town of Francesburg, for the use of the public, not only the strips of ground between the lines designating the streets and alleys, but also that narrow strip of land lying to the north of the line marking the north side of Water street and between that north line and the river. It will be observed that upon the original plat the north line of Water street extended only to the east edge of the cross street projected and running south between outlot No. 1 and inlots Nos. 1 and 2. The present name of that street is Dewey. The circuit court adjudged this case in favor of the city as to all of the land lying west of an extension of the east line of Dewey street to the Ohio river. All the land lying east of that extension the court held not to have been dedicated by the proprietors to any public use. In both these particulars we concur with the judgment of the chancellor. The stopping of the north line of Water street at its eastern limit, as shown upon the map, indicates a purpose on the part of the proprietors, in our opinion, to terminate that street at that point, and to reserve to themselves the land lying east of that point.

Another question presented by appellee Berry, from whom a part of the land adjudged the city was taken, is that the city authorities assessed this property to him for taxation, and that he paid taxes thereon to it. It is not clearly shown what taxes were paid, or for what years, but it is apparent that such as were paid was brought about by the act of appellee and the other taxpayers, and that the governing body of the town, its council, was not apprised of the fact that this public property was included in the private tax lists of some of its citizens from whom it was exacting taxes. The attempt to estop the city by an act of this kind must be unavailing for the following reasons: Before one can be estopped, it must have been competent for such one to have done the thing claimed to be established through the doctrine of estoppel. It would not have been competent for the city to have sold this strip of land to appellee for the consideration claimed to have been paid in the way of taxes, or for any other consideration, without express legislative authority from the state. What it could not do directly appellant cannot be held to have been done by indirection. Furthermore, even if the town could have sold and conveyed this strip of public property in question, it must have been done by some one having authority to do so. It cannot be said that the town assessor had such authority, and, as he is the only person who is shown to have had any knowledge of the alleged assessment of the property in question, it cannot be allowed that his knowledge and

unauthorized inadvertence could confer a title which could not have been done by his direct act having such an object in view. *Alves' Ex'rs v. Town of Henderson*, 16 B. Mon. 168.

Appellant complains that, although it was given judgment against appellee Berry for a part of the land claimed in the petition, that it was not adjudged damages for a substantial sum for his unlawful detention of the property for a number of years. The record discloses that the property was used, and at the time useful only, for agricultural purposes, and that its rental value was about \$2.50 per acre per annum. We are of the opinion, however, that the court properly denied appellant damages in this case from the fact that it was not shown that appellant had sustained any damage. It is not sufficient in an action for damages to show that the defendant has made something by his unlawful act, but it must be shown that the plaintiff has lost something. The value of being deprived of the use of the strip of ground in question by the public was not shown in the record. It was not material what the property was worth as agricultural lands, because appellant could not itself have engaged in agricultural pursuits under its charter, nor could it have leased its public highways for such purpose.

The judgment is affirmed.

**SANDY RIVER CANNEL COAL CO. v.
WHITE HOUSE CANNEL COAL CO.**

(Court of Appeals of Kentucky. Feb. 13, 1908.)

DEEDS—CONFLICTING GRANTS—RESERVATIONS—SUBSEQUENT PATENT TO GRANTER—EFFECT.

1. Where, in a description of land in a deed by metes and bounds, the boundaries overlap a former grant by the same grantor, the former grant will prevail.

2. Where the owner in fee of land by patent from the government conveys to a third party, the latter cannot, by obtaining a new patent, destroy a reservation in the deed of roads and mineral rights.

Appeal from circuit court, Johnson county.

"Not to be officially reported."

Action to quiet title by the White House Cannel Coal Company against the Sandy River Cannel Coal Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. S. Harkins and Jno. P. Wells, for appellant. Hager & Stewart, for appellee.

SETTLE, J. Appellant and appellee own adjoining lands and valuable mineral rights in Johnson county, and both are engaged in the business of mining coal. This action was instituted by appellee in the circuit court of Johnson county to quiet its title to certain mines, mineral rights, and a roadway to Big Sandy river. The petition and amendments thereto charge, in substance, that appellee

owns and is in actual possession of certain lands therein described, the mines and minerals under a certain other boundary, the surface of which is owned by appellant, and that it (appellee) also owns a roadway leading therefrom to the river. It is further averred by appellee that appellant is interfering with its possession of, and is claiming to own, its lands, minerals, and roadway mentioned, giving it out in public speeches that this property is owned by it (appellant), and that appellee is unable to make a valid deed thereto. It is also averred that appellant is engaged in mining on its land, and removing coal therefrom, by means of an entry made upon appellant's own land, and is threatening to further mine and remove appellee's coal. An injunction was obtained by appellee to restrain appellant from further acts of trespass to its property. The answer traverses the allegations of the petition as amended, and sets up a claim of title in appellant to the lands, mines, minerals, and roadway in controversy. Upon the issues thus formed proof was taken on both sides, and the trial resulted in a judgment in favor of appellee, which was declared to be the owner of the land and road in controversy. Appellant was perpetually enjoined from the further mining of coal thereon, and the cause was referred to the master commissioner to take proof, and report the quantity and value of coal mined or removed from appellee's land by appellant. Appellant complains of that judgment; hence this appeal.

The land in dispute is situated in the valley of White House creek, and on the White House side of the dividing ridge that separates White House creek from Lick creek. These two creeks flow into the Levisa Fork of the Big Sandy river, and on the east side thereof, some eight or ten miles below the town of Paintsville. One John Stafford, who died in 1865, formerly owned a large boundary of land on each side of the river, including the land in controversy. Stafford had several children, one of whom—Callista—married first a man by the name of Wilson, who soon died, after which she married a man by the name of Ash. Stafford, by deed of March 18, 1861, conveyed to his daughter, Callista Wilson, or Ash, a large tract of land, nearly all of which was on the Lick creek side of the dividing ridge between Lick and White House creeks. Appellee owns nearly all of the Callista Wilson land, but a part thereof belongs to appellant. The easterly line of the Callista Wilson tract is shown on the map in the record as the red line running from a point near the bottom of the map to a point marked "maple" on Big Sandy river just below the mouth of Lick creek. The land included in the deed lies on the west side of this line. As the minerals in controversy lie upon the east side of this line, its correct location is one of the points at issue in this case. If appellant's contention is sus-

tained, the line would run from the point indicated near the bottom of the map to a point on the bank of Big Sandy river 34 poles below the mouth of Lick creek. We think, however, that this line was correctly fixed by the lower court, and, as laid down on the map, is, after allowing the proper variation, north, $6\frac{1}{2}$ east, running to a point just below the mouth of Lick creek as indicated on the map. The line in question passes through the mines as shown upon the map, and all the coal that was removed by appellant from the land on the right or east of this line as indicated was taken from the land adjudged to appellee by the lower court. On March 25, 1865, Stafford, by deed, conveyed to Gabe Brown, his former slave, whom he had theretofore voluntarily emancipated, a tract of land, the boundary of which began at the mouth of White House creek; thence running up the river to the upper end of the cliff, from which it passes to the top of the dividing ridge between White House and Lick creeks, and following the top of the ridge around a certain hollow; thence down the point on the upper side of the hollow to White House creek a short distance below Gibson Branch, shown upon the map; thence down White House creek to the beginning. But by the terms of the deed the grantor reserved to himself the mines, minerals, and road to the river, in controversy in this case. It appears that the description as given of the boundary of Gabe Brown's deed makes the line following the top of the ridge between the creeks lap in some places over upon the land previously conveyed by Stafford to his daughter, Calista Wilson, but Brown does not by that means become entitled to any part of her land that may fall within his line, as hers is the older deed and title. It is conceded by appellee that appellant is the owner of the surface of the lands in controversy. So the only question to be considered is as to the ownership of the mines and minerals contained therein.

Stafford seems to have secured many patents for lands, and the one for 50 acres bearing date July 22, 1833, copied into the record, covers all the mines and minerals in controversy herein. It is, we think, well established by the evidence that Stafford was at the time of the conveyance from him to Brown, in 1865, the owner in fee of the land on which the mines and minerals in

controversy are situated, and there is no doubt whatever of his having reserved the mines, minerals, and road in the deed executed to Brown. We are of opinion, too, that the mines, minerals, and roadway passed by the subsequent deeds of conveyance from Stafford, his vendees successively, and children, to appellee; and, besides, the construction placed upon the deeds by the parties shows that such was the intention of all the grantors, beginning with Stafford himself. If it be true, as contended by appellant, that Stafford, in the deed to King, never parted with his title to the mines and minerals, appellee nevertheless derived title thereto from the heirs at law of Stafford, who conveyed to it their title, either directly or through intermediate parties. We are unable to see how Gabe Brown acquired by the patent from the commonwealth covering the land he got of Stafford any better title than he had already received thereto by the deed from Stafford; and as the deed reserved to Stafford all mines and minerals on the land, as well as the road to the river, it was accepted by Brown with knowledge of that reservation. We are likewise unable to see how the patent procured by him can destroy, or otherwise remove, the reservation. Appellant claims title to the mines and minerals in controversy under the Gabe Brown patent, and yet Brown testifies in his deposition that he never got a patent to the land; but in this he is certainly mistaken, and he also says that he got the patent to annoy King, appellee's vendor, and the immediate vendee of Stafford. It is not disclosed by the record that Brown ever claimed the property in controversy. In fact, in his deposition he disclaims ownership thereof. Brown will not be permitted to disavow his vendor's title, and appellant, claiming under Brown, is in no better position to do so than he.

We are also of opinion that the several deeds under which appellee claims title to the mines, minerals, and road in dispute contain a sufficient description of the interest and estate they purport to convey, and, taken altogether, they present a reasonably well connected chain of title from Stafford to appellee.

Upon the facts presented by the record, the chancellor was authorized to render the judgment appealed from, and the same is therefore affirmed.

WALL et al. v. DIMMITT et al.

(Court of Appeals of Kentucky. Feb. 24, 1906.)

WILLS—UNDUE INFLUENCE—EVIDENCE—DECLARATIONS OF DEVISEE—PRACTICE.

1. Statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct evidence of undue influence, but are only admissible to show the mental condition of the testator at the time of making the will, and his susceptibility to the influences by which he was surrounded at the time.

2. In a will contest by heirs who alleged that the will was procured by the undue influence of testatrix's husband, evidence that the husband had stated that he would see that testaments received no part of the wife's estate was admissible.

3. Where a finding that a will was procured by undue influence was found on appeal to be unsupported by the evidence, but it was also decided that certain evidence which might have formed a basis for the finding was erroneously excluded, the case cannot be remanded with an order to probate the will, but must be remanded for a new trial.

4. Where a husband was a beneficiary under his wife's will, the fact that, as tenant by curtesy, he would have taken the same interest that he took as devisee, did not render his declarations bearing on the question of undue influence inadmissible as against his co-devisees.

5. In a will contest by a disinherited heir of testatrix, in which it was alleged that testatrix's husband exercised undue influence to procure the will, questions to the husband as to whether he had ever said to his wife that one of the contesting heirs was a spendthrift, who would dissipate the property, and for her to see the matter was fixed in such a way that he could not get any part of it, were improperly excluded.

Appeal from circuit court, Mason county.
"To be officially reported."

Proceedings by A. H. Wall and others to prove the will of Elizabeth A. Wall, deceased, in which Lydia E. Dimmitt and others contested the validity of the will. From a judgment refusing to probate the will, proponents appeal. Reversed.

G. S. Wall, E. L. Worthington, and L. Apperson, for appellants. Sallee & Sallee and Wm. D. Cochran, for appellees.

BURNAM, C. J. This is an appeal from a judgment of the Mason circuit court, rendered pursuant to a verdict of a jury, refusing to probate as the last will of Elizabeth A. Wall a testamentary paper duly executed by her on October 31, 1896. The will was assailed in the court below on the ground that it was procured by the undue influence of the husband and son of testatrix. Mrs. Wall was at the date of its execution 80 years of age, and her husband was then 88 years old. She died about 18 months later, leaving surviving her, as her heirs at law, her husband, Dr. A. H. Wall; her daughters, Mrs. Lydia E. Dimmitt, who had one child, and Mrs. Mary W. Apperson, who had two children; and a son, Garrett S. Wall, who had three children. Her entire estate con-

sisted of a tract of about 450 acres of very valuable land, conceded to be worth in the neighborhood of about \$100 an acre. Prior to the making of the will, testatrix and her husband had advanced to each of their children about \$18,000. For many years prior to her death her son, G. S. Wall, and his family, had lived with testatrix in her residence in Maysville, Ky. Her relations with each of her children were most cordial, frank, and affectionate. In the latter part of the year 1891, Mrs. Wall made a will by which she gave one-third of her 450 acres of land to her son in fee, one-third to Mrs. Apperson in fee, and the remaining third to Mrs. Dimmitt for life, with remainder to her son Hal Dimmitt, and, in case he died without children, then to revert to Garrett Wall and Mary W. Apperson and their children. Hal Dimmitt was at that time, and so continued, a married man, with one child. The will of 1891 was retained by Garrett S. Wall, and was in his custody until two days before the making of the will of October 31, 1896. In the will of 1896, testatrix changed the devise to her daughter, Mrs. Lydia E. Dimmitt, so as to give to Mrs. Dimmitt one-third of the 450 acres for life, and then provided that at her death her executor, named in the will, should sell and convey this tract of land to the highest bidder, and divide the proceeds equally between her six grandchildren, share and share alike. It appears from the testimony that the provisions of the first will were well known by all the family of the deceased, but that the existence of the second will was not known to Mrs. Dimmitt until after the death of her mother, although she testifies that their relations continued to be of the most affectionate character, and that she assisted in nursing her for several weeks immediately preceding her death. Mrs. Dimmitt testified upon the trial before the jury: That, a short time before the execution of the will of 1891, her mother said to her that her father desired her to make a will, and to leave to her only a life estate in one-third of the land, and that at her death it should go to her brother and sister, to which she objected, and that her mother replied that it would be unjust, and she would not make such a will, but would make a will giving the land to witness and her son Hal Dimmitt during their lives, and at the death of both to her grandson, son of Hal Dimmitt. That subsequently she frequently talked with her mother about this will, and was assured by her that the will had been written as she promised. That she never heard of the execution of the last will until some time after the death of her mother, when she wrote to her brother concerning the probate of the first will. That, in response to this letter, Garrett Wall, for the first time, informed her by letter of the will of 1896, in which he assured her that he had

nothing to do with it, except to write it. By the same mail, Mrs. Dimmitt received the following letter from her father: "Maysville, Ky., May 7, 1898. My dear daughter: I have read the letter to your brother. I will now answer it. I do know what she did in the provision of the land was after many weeks reflection, all caused by your prodigal son, who you cannot trust with money or any thing he can sell to bring money. You have one third interest during live or its income. As to the Drs. thinking it a reflection on him, I have no idea it ever entered her mind. As she certainly had the highest regard and love for him. I am interested in her will and will certainly have it probated. We each had a will, and had I died first every thing was left to her and vice versa. I will be disappointed if she hasn't left every thing to me. I have done through life what I thought due to my children and shall die so. I am going to do the best I can for you all whilst I live and try to part in peace. Much Love affectionately yours father Alex H. Wall." That after the reception of this letter she went to see her father, and he began the conversation by saying: "Daughter, you cannot break your mother's will; it is no use trying; and don't reproach your brother. I am the one to blame. Blame me with the whole thing." She also testified that her father had a very strong will, and that her mother was gentle and yielding, and had always been delicate, and during the last two or three years of her life had failed perceptibly. G. S. Wall testified that he had written both wills at the instance of his mother, and had always retained them in his possession; that, when he prepared the last will, his mother, after giving Mrs. Dimmitt a life estate in one-third the land, directed that at her death it should be sold, and one-half the proceeds should go to Mrs. Apperson's children, and one-half to his children, but that at his suggestion his mother changed and directed that the land should be sold, and the proceeds divided equally among her six grandchildren, so that his children would get three-sixths, Mrs. Apperson's two-sixths, and Hal Dimmitt one-sixth. This was substantially the only testimony which was admitted upon the trial which tends, even under the contention of appellee, to establish undue influence in the procurement of the will.

The law is well settled in this state, and is abundantly supported by the text-writers and decisions of other states, that the statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct and substantive evidence of undue influence, or to show that the will was procured thereby, but are admissible to show the mental condition of testator at the time of the making of the will, and her susceptibility to influences by which she was surrounded at the

time. See Jones on Evidence, secs. 402-493; Wharton on Evidence, sec. 1010; notes to *In re Hess' Will* (Minn.) 51 N. W. 614, 31 Am. St. Rep. 690; Bigelow's notes to *Jarman on Wills*, 71; *Underhill on Wills*, sec. 161; *Williams on Executors* (1st Ed.) 64; *Goodbar v. Liddikey* (Ind. Sup.) 85 N. E. 691, 43 Am. St. Rep. 301; *Milton v. Hunter*, 76 Ky. 163. And when we eliminate the declarations of testatrix, testified to by Mrs. Dimmitt, there is very little evidence left in the record bearing upon the question of undue influence—certainly not sufficient to authorize the conclusion that the will was the result thereof. We are therefore of the opinion that the verdict, upon the case as presented by the record, is palpably against the weight of evidence, and for this reason the judgment must be reversed. But in view of the fact that the trial court excluded from the consideration of the jury the testimony of Dr. Alex Hunter, Con Gullfolle, and William C. Johnson as to the declarations made to them by Dr. A. H. Wall, to the effect that he would see that his grandson Hal Dimmitt received no part of the Wall estate, and which, in our opinion, was entirely competent, and would have furnished some basis for the verdict of the jury, if it had been admitted, we would not be justified, therefore, in remanding the case with an order to probate the will. In *Broadus' Devisees v. Broadus' Heirs*, 73 Ky. 299, it was held that the General Statutes required that this court should, on appeal, give the same effect to the verdict of the jury in a will case as is given in other civil cases, and repealed that part of section 519 of the Civil Code of Practice which provides that the Court of Appeals should in such cases try both the law and facts, and that a new trial would be awarded on the reversal of a will case, except in those cases where there was no evidence to sustain the verdict. In that case it was held that there was no evidence, and the will was ordered to probate. And it has been followed in two or three instances where the court found that there was no evidence to sustain the verdict. But ordinarily the same rule of practice obtains in will cases as in other jury trials. And this case will have to go back for a new trial before a jury, and we are of the opinion that it was competent for contestants to prove acts and declarations of Dr. Wall which tended to support their contention that he had unduly influenced his wife in the execution of the will. He is a beneficiary under the will, and was active in its probate, and the appeal from the judgment of the trial court is prosecuted in his name. The fact that, as a tenant by curtesy, he would have taken substantially the same interest in the estate of his wife as came to him as devisee under the will, cannot change the well-established rule in this state that admissions and declarations of a legatee or

devisee under a will are competent not only against himself, but also as to the interest of his co-legatees or devisees thereunder. This question was fully considered by this court in *Beall v. Cunningham*, 40 Ky. 399, *Rogers v. Rogers*, 41 Ky. 324, and in *Milton v. Hunter*, etc., 76 Ky. 163; and in the very recent case of *Gibson, etc., v. Sutton, etc.*, 70 S. W. 188, this court said: "We do not feel at liberty at this late day to disregard decisions which have been generally acquiesced in by the profession as sound, because not in accord with the rule of other states."

The trial court also erred in sustaining an objection to the following questions which were propounded to the appellant Dr. A. H. Wall by contestants: "Q. Did you ever say to your wife that Hal was misbehaving in such a way?" "Q. Did you ever say anything to your wife about his being a spend-thrift, and that he would spend the property or dissipate it, and for her to see the matter was fixed in such a way that he would not in any contingency get any part of her property?"

For reasons indicated, the judgment is reversed, and cause remanded for a new trial not inconsistent with this opinion.

GLOVER et al. v. CHECK et al.

(Court of Appeals of Kentucky. Feb. 26, 1903.)

EXECUTORS—EXTRAORDINARY COMPENSATION—APPORTIONMENT—PROOF.

1. Where a special allowance is made to executors for extraordinary services, such compensation should be apportioned among the different executors in proportion to the extra services rendered by them, but where no showing has been made in the trial court as to what services were rendered by any of the individual executors, the Court of Appeals cannot apportion an extra allowance, but must remand the cause in order that the relative value of the services rendered by the different executors can be determined by proper pleadings and proof.

"Not to be officially reported."

Extension of opinion on petition for rehearing.

For former opinion, see 71 S. W. 438.

Helm, Bruce & Helm and Caruth, Chatterton & Blitz, for appellants. Albert S. Brandels, for appellee Check. J. C. Poston, for appellee Cross.

BURNAM, C. J. In the petition for rehearing filed in this case by Geo. W. Check, it is claimed that all the extraordinary services to the estate of decedent, for the allowance in excess of \$2,639.85, upon money handled by the executors jointly, were exclusively rendered by him, and that he alone is entitled to such extra allowance; and in support of his contention cites the 17 Am. & En. En. of Law (2d Ed.) 633, where the question of special compensation for extra services of the character rendered in this case

was discussed, and the author says: "When special compensation is allowed for extra services by an executor or administrator, as may be done in some jurisdictions, the amount belongs of course to the representative by whom the extra services were rendered." We think this is a sound and just rule, but are unable to apply it in this case, for the reason that no such question was made in the trial court, and the case had not been prepared with the view of showing what proportion of the extra services were rendered by the individual executors. That this matter may be fairly determined, and the relative rights of the executors to the allowance for extraordinary services determined, upon the return of the case to the lower court, they should be allowed to present their claim with reference to this fund by proper pleadings, and to take proof thereunder, and have the matter determined. To this extent the opinion heretofore rendered is extended.

ILLINOIS CENT. R. CO. v. MATTHEWS.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

CARRIERS—BAGGAGE—WHAT CONSTITUTES—ACTION FOR DAMAGES—PARTIES.

1. Under Ky. St. § 783, providing that every company shall check every parcel of "baggage" taken for transportation, a company is only liable as a carrier for what the passenger takes with him for his own personal use and convenience, unless the company by contract, express or implied, has accepted other articles as baggage.

2. The paying of overweight charges on baggage is not of itself such notice to the company that the trunk contains merchandise, or other articles than the passenger's ordinary baggage, as will render the company liable as a carrier for such articles.

3. Where a traveler is not the owner of goods which he checks as baggage, but is liable to such owner for any loss or damage to them, he may be treated as their owner for the purposes of an action against the carrier for damage to such goods in its hands.

Appeal from circuit court, Hickman county.

"To be officially reported."

Action by W. E. Matthews against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

N. P. Moss, Pirtle & Trabue, and J. M. Dickinson, for appellant. J. W. Bennett, for appellee.

O'REAR, J. Appellee was a traveling salesman or drummer for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allow-

¶ 1. See Carriers, vol. 8, Cent. Dig. §§ 1530, 1531, 1533.

ed as free baggage to one passenger, and appellee was required and did pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental goods—steel instruments, presumably. These goods were used not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers, if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession it got wet, and the instruments were damaged by rust, it is claimed, to the extent of about \$500. There was evidence for appellee that when the trunk was being loaded on the train the person handling it (whether a porter, roustabout, or baggage master, or whether connected with the railroad he did not know) remarked as to its extraordinary weight, and that appellee replied that it contained dental instruments. For appellant, its baggage master at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof. On this state of case the court gave the jury the following instructions: "No. 1. The court instructs the jury that if they believe from the evidence the defendant, while the plaintiffs' trunks were in its custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein sustained by reason of such injury, not exceeding the sum set out therefor in the petition. No. 2. If the jury believe from the evidence the plaintiffs' trunk, while in the custody and care of the defendant, was bursted or torn in handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition." Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as baggage on the passenger cars by defendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find." From a verdict and judgment in favor of appellee for \$531.50 damages, this appeal is prosecuted.

The first instruction given to the jury assumes as a matter of law that the common carrier is accountable, under its liability as carrier, for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this state on the subject of baggage is that found in section 783, Ky. St., as follows: "Every company shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop, or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same." We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and which he has committed to the care of the carrier. Generally, the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but may include a number of other articles, which may not unreasonably be designed for his pleasure, business, or convenience upon the journey which he is prosecuting. "In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong." *Oakes v. N. P. R. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. Story on Bailments, sec. 499, thus states it: "By 'baggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." *Bomar v. Maxwell*, 9 Humph. 624, 51 Am. Dec. 682; *Macrow v. Great Western Ry. Co.* L. R. 6 Q. B. 612. *Rorer on Railroads*, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term 'baggage.' This depends much on the condition, habits, and circumstances of life of the passenger. Ordinarily, it includes a

trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; * * * but not money in larger amount than for necessary expenses, nor articles of merchandise or of virtu. * * * As, ordinarily, only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe-keeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels, not properly classed as baggage, or plate, or merchandise, bonds, or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which, by common prudence, would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident of the passenger's contract for passage. The common-law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may, of course, vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage, with knowledge of its contents. *Hutchinson on Carriers*, sec. 685 (1st Ed.); *Texas, etc., R. R. Co. v. Capps*, 2 Willson, Civ. Cas. Ct. App. § 33; *Jacobs v. Tutt* (C. C.) 33 Fed. 412; *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.* (C. C.) 39 Fed. 417; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587. The fact that the passenger paid for the extra weight of the trunk does not vary the rule; for, if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not no-

tice that the package contains anything besides the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage. *Haines v. Chicago, etc., Ry.*, 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; *Michigan Central R. R. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248. If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. *Story on Bailments* (9th Ed.) sec. 565. In the event of loss of or damage to such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in case of a bailee without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent charged with the duty of receiving and checking baggage over its lines knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger; that is, knew that they contained merchandise or other articles than the traveler's wearing apparel. *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208; *Brown v. Camden, etc., Ry. Co.*, 83 Pa. 316.

While it is true that a carrier cannot be made liable for the goods of another than the passenger or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee he had such an interest in them, by reason of his being responsible to them for their loss or damage, and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger. We therefore conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

UNITED LAUNDRY CO. v. STEELE.

(Court of Appeals of Kentucky. March 6, 1908.)

SERVANT'S PERSONAL INJURIES—ASSUMPTION OF RISK—PLEADING—INSTRUCTIONS.

1. Plaintiff had her hand crushed in a mangle, which originally had a metal guard to prevent the operator's hands from being drawn in to the rollers. This guard was removed, and the roller was substituted; plaintiff being instructed that, if she accidentally got her hand under it, it would rise up and stop. While working on the right-hand side of the machine, the plaintiff caught her hand under the roller, and it stopped, as she had been instructed it would; but when she was injured she was working on the other side of the machine, where the roller was not so arranged as to stop if the operator's hand was caught in it. Plaintiff had never been told of this fact. *Held*, that she was not charged, as a matter of law, with notice of the difference in the action of the roller on the two sides of the machine.

2. Where the petition in an action by a servant for personal injuries alleged that they were received because of the dangerous and insecure condition of a machine, and the evidence showed that the condition complained of was in reality a fault in the construction of the machine, a charge that if there was a defect in the construction and arrangement of the machine, by reason of which plaintiff was injured while in the exercise of ordinary care, she was entitled to recover, was warranted by the pleadings.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Julia Steele against the United Laundry Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred Forcht, Jr., and W. H. Field, for appellant. Matt O. Doherty, for appellee.

HOBSON, J. On March 23, 1900, appellee Julia Steele, who is about 24 years of age, while operating in appellant's laundry what is known as a "mangle machine," had her hand caught and drawn between the rollers, severely crushing and burning it, in consequence of which her hand was painfully injured. She suffered much pain, and the hand is, to some extent, permanently disabled. The mangle machine consists of large rollers heated by steam, through which the clothes are passed and ironed. It is about nine feet wide, and is fed by two girls, who put the clothes in; there being two other girls to receive them as they come out. Appellee and another girl were feeding the machine. As originally constructed, there was a piece of iron fixed on the platform across which the clothes pass when fed into the machine, which served as a guard to keep the girls from getting their fingers in between the rollers, or getting them burned. In January, 1900, this metal guard was taken off, and what is called a "guard roller" was put on. The girls were instructed that the guard roller was for their protection, and that, if they got their hands under it, it would rise up and stop, and in this way would keep their hands from getting to the large rollers; the guard roller being placed on the platform,

and just in front of the other rollers. Appellee worked on the right side of the machine, and while working there got her hand under the guard roller. It was raised up and stopped, as she was told it would do, and she got her hand out without trouble. But on the day in question she was working on the left side of the machine, which, as said, was nine feet wide. A piece of cloth that she was ironing would not enter the machine. She pushed it up the second time, and it failed to enter. She then caught it near the end, and, pressing her hands up near the roller, started it under the guard roller, and her hand was drawn under with the cloth. The roller was raised up as before, but did not stop. Instead, it continued to revolve, and drew her hand under it against the large roller, whereby she received the injury complained of. The cause of this was that the roller at one end fitted in a socket, and at the other end in a cogwheel, and when raised up on the right-hand side it stopped revolving, but when raised on the left it continued to revolve. Appellee was ignorant of this difference, and supposed it was as safe on one side as the other. She had not been informed that there was any difference, and this seems to have been her first experience to the effect that there was a difference. The instructions she had received were simply that the roller would rise up and stop if they got one of their hands under it, and she appears to have relied on this.

It is insisted that the court should have peremptorily instructed the jury to find for the defendant, and the cases of *O'Hare v. Keeler* (Sup.) 48 N. Y. Supp. 376; *Day v. Achron* (R. I.) 50 Atl. 654; *Jones v. Roberts*, 57 Ill. App. 56; *Walsh v. Commercial Steam Laundry* (Super. N. Y.) 31 N. Y. Supp. 833; and *Pratt v. Prouty*, 153 Mass. 333, 26 N. E. 1002—are relied on. But this case differs from any of those cited. Here the metal guard which was fixed on the platform, as the machine was originally constructed, was taken off after appellee entered the service, and the guard roller was substituted for it, upon the assurance to her that if her fingers got under the guard roller it would be raised up and would stop. This was true on the right side of the machine, and made the guard roller an ample protection on that side; but it was not true on the left side of the machine, and she was not informed of the difference. On the contrary, she was misled by the assurance given, as, from what was told her, she had a right to expect it to act alike on both sides. Instead of this, on the left side the roller, when raised up, would continue to revolve, and draw the hand under. We see nothing in the evidence to charge appellee, as a matter of law, with notice of this difference in the action of the roller on the two sides of the machine; and, under the evidence, this was a question properly submitted to the jury.

It was charged in the petition that appel-

lee's injuries were received "by reason and because of the dangerous, defective, and insecure condition of the said machine, and of the appliances connected therewith." The court instructed the jury that if "there was a defect in the construction or arrangement of the machine, and by reason thereof there was danger attendant upon the operation of the machine, which was known, or by the exercise of ordinary care could have been known, to the defendant, or its officers or agents, or any of them, superior in authority to the plaintiff, and said defect and danger were unknown to the plaintiff, or by the exercise of ordinary care could not have been known to her, and she had not equal means of knowledge of said defect and danger with the defendant, or its officer or agents, or any of them superior in authority to her, and, by reason of such defect and danger, plaintiff was injured," she could recover, unless guilty of contributory negligence. It is complained that this instruction was not warranted by the allegations of the petition, and that under the pleadings the court should not have submitted to the jury whether there was a defect in the construction or arrangement of the machine. The charge in the petition was substantially that the machine was in a dangerous, defective, and insecure condition. Whether this defect was in the construction or arrangement of the machine, or otherwise, was not shown in the petition. The instruction of the court simply narrowed the general charge of the petition, submitting to the jury the alleged defect in the machine which the evidence for the plaintiff tended to establish. It was aptly averred in the petition that the defective condition of the machine was well known to the defendant and unknown to the plaintiff, and that prior to her injury she had been assured by it that the machine and appliances were in perfect order and condition, and that she relied upon this assurance. The case appears to have been tried on the merits. The defendant seems to have understood precisely what was claimed by the plaintiff, and was in no manner misled. Both sides got their case fairly before the jury on the merits. The verdict of the jury is not excessive or against the weight of the evidence.

Judgment affirmed.

SWINCHER v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 5, 1903.)

CARRYING CONCEALED WEAPON—INTENT—CONSTITUTIONAL LAW—PRIVATE POLICE AND DETECTIVE AGENCY.

1. Under Ky. St. § 1309, providing that whoever carries concealed a deadly weapon shall be punished, it is no defense that one thought he had a right under a certain statute to carry a pistol, and would have had, had the statute been constitutional.

2. Under Const. § 23, prohibiting the creation of any office, appointment to which shall be for more than a term of years; section 3, provid-

ing that no grant of exclusive separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; section 234, providing that all civil officers of the state at large shall reside in the state, and all officers of districts, counties, cities, or towns shall reside therein—Act March 3, 1884, incorporating a private police and detective agency, and providing that members thereof giving a bond and taking an oath to faithfully perform the duties of their office shall have authority to arrest and imprison, and requiring no public service, and no qualification except ability to read and write English, and putting no limit on the time a member may discharge such powers, is unconstitutional.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

George Swincher was convicted of carrying concealed a deadly weapon, and appeals. Affirmed.

Field & Forcht and Kohn, Baird & Spindle, for appellant. C. J. Pratt and M. R. Todd, for the Commonwealth.

NUNN, J. The appellant was tried in the Jefferson circuit court, criminal division, on November 29, 1902, and was convicted, and fined \$50, and sentenced to jail for the term of 10 days, for the offense of carrying concealed on his person a deadly weapon. Appellant admitted that he carried concealed on his person the pistol, but claims that he was erroneously convicted, for two reasons: First. He claims that he ought not to have been found guilty, because at the time he carried the pistol and was arrested he was engaged in his duties as a private policeman, acting under appointment of the county judge of Jefferson county, Ky., and was a member of the Louisville Merchants' Private Police & Detective Agency, incorporated under the act of the General Assembly approved March 3, 1884. Second. That, if the court should decide that the act of the General Assembly referred to is unconstitutional, he in good faith believed it to be constitutional, and that he was justified by reason thereof in carrying the pistol; that he did not have any intention to violate the law, but, on the contrary, believed that he was performing his legal duty, and for these reasons he ought to have been acquitted.

For answer to the second proposition, it is sufficient to say that section 1309 of the Kentucky Statutes does not say whoever shall intentionally or willfully, and with intention to violate the law, carry concealed a deadly weapon, shall be punished, but says that whoever carries concealed a deadly weapon shall be punished as therein stated. Under that section, the good intent or the bad intent of the party carrying the weapon is immaterial, except to be presented to the jury or the court to mitigate or increase the punishment.

By section 1313, Ky. St., policemen of cities, when in discharge of their official duties, may carry concealed deadly weapons; and,

if the act of the General Assembly of 1884 is constitutional, appellant ought to have been acquitted; otherwise, the judgment of the lower court should be affirmed. This court is of the opinion that said act is unconstitutional, for these reasons: Under the charter of this corporation, the members thereof shall give a bond before the county court clerk, to be approved by the judge of the county court, and take an oath to faithfully perform the duties of their office; and a certificate of this qualification, it is provided, shall be sufficient evidence of the authority of the members of this association to make arrests and imprison persons, not only in the city of Louisville, but in any part of the state, and to register the prisoners with the jailer or prison-house keeper, and to report the fact within a reasonable time thereafter, and the names of the persons arrested, charge against them, and the name of the arresting officer; and a warrant is not required. The only qualification by this act required of a member, to authorize him to exercise these unusual powers, is that he shall be able to read and write the English language intelligently. There is but one disqualification, and that is that he shall not be a person who has been convicted of a felony and not pardoned. He may have been convicted of a felony, but if pardoned he may be a member of this association. He is not required to be a resident of the city, county, or state; nor is he required to be 21 years of age, or a citizen of the United States, but may be an alien, owing no allegiance to either the United States or the commonwealth of Kentucky. Moral character is not a requisite. There is no limit on the time a member of this organization shall discharge the powers attempted to be given him. For all the act provides to the contrary, he may hold his position for life. There is no limitation, even, that he shall hold his position during good behavior. In our opinion, the Legislature could not constitutionally grant such extraordinary powers to private citizens as is here attempted. Section 23 of the present Constitution is substantially the same as that contained in the Bill of Rights of the former Constitution, and prohibits the legislature from creating any office, the appointment of which shall be for a longer time than a term of years. Section 3 of the Constitution provides that no grant of exclusive separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. Under the charter referred to, the members thereof render no public service, and they were incorporated exclusively for private gain. And they are certainly granted by said charter extraordinary exclusive privileges. Under section 234 of the Constitution, it is provided that all civil officers of the state at large shall reside within the state, and all district, county, city, or town officers shall reside within their respective districts, counties, cities, or towns,

and shall keep their offices at such places therein as may be required by law.

For these reasons, the judgment of the lower court is affirmed.

SPALDING v. HILL.

(Court of Appeals of Kentucky. March 3, 1903.)

PROSECUTING ATTORNEYS — FINES — COMMISSION — TERM OF OFFICE — EXPIRATION — AGREEMENT TO COMPROMISE PROSECUTIONS — VALIDITY.

1. Ky. St. § 133, provides that in all prosecutions in the circuit court, when the county attorney is present and assists, he shall receive from the state treasurer 25 per cent. of all judgments rendered in favor of the commonwealth. *Held*, that such section referred to the county attorney who assisted in the prosecution when the judgment was rendered, only, and did not entitle a county attorney to an allowance where his term of office expired before the rendition of judgment, though he assisted at the trial.

2. Where, after a successful prosecution of two indictments against a railroad company, it was agreed between the commonwealth's attorney and defendant's attorney that an appeal should be taken, and if the judgment should be affirmed the railroad would consent to a fine in each of 3 of 12 remaining indictments, and that the remaining 9 indictments should be dismissed, such agreement was not binding either on the attorneys or on the court; and whether it should be acted on, on affirmance of the judgment appealed from, was within the trial court's discretion.

Appeal from circuit court, Marion county. "To be officially reported."

Action by Ben Spalding against C. S. Hill to recover a portion of a percentage on certain judgments in suits instituted while plaintiff was county attorney. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. P. Thompson and S. A. Russell, for appellant. H. W. Rives, for appellee.

NUNN, J. Ben Spalding was the county attorney of Marion county from January, 1898, to the 6th day of January, 1902, on which date appellee, C. S. Hill, succeeded him in said office. During the term of appellant's office the grand jury of Marion county returned 14 indictments against the Louisville & Nashville Railroad Company, and two of said indictments were tried before a jury; the verdict being a fine of \$300 in one case, and \$350 in the other. The railroad's counsel, desiring to appeal from the judgment to test the liability of said railroad, made a private agreement with the commonwealth's attorney, W. H. Sweeney, that the remaining indictments be fled away, and, in the event the judgment in the two cases mentioned were affirmed on appeal, then, in such event, the railroad company would consent to a fine of \$400 in each of three of the other cases; the other nine to be dismissed.

¶ 1. See District and Prosecuting Attorneys, vol. 17, Cent. Dig. § 20.

Some time in the latter part of the year 1901 the judgments in the two cases were affirmed. The commonwealth's attorney had the 12 cases reinstated on the docket, and at the January term, 1902, and after the appellee, Hill, had been inducted into office, a judgment of \$400 in each of the 3 cases was rendered against the railroad company, and the 9 remaining cases were dismissed. The issue between these parties is as to who is entitled to the 25 per cent. allowed to the county attorney, of said last three judgments; each of them claiming that they were present and assisting in the obtaining of the judgments. The appellant filed his petition, claiming the \$300, and asked the court to enjoin the Auditor of the State from paying, and the appellee, Hill, from receiving, the sum. The lower court refused to grant the injunction, and dismissed appellant's petition, and the appellant is here on appeal.

Appellant claims that he aided and assisted in getting up the evidence upon which the grand jury returned the indictments; that he was present and consented to the agreement between the commonwealth's attorney and the railroad's attorney, and that, by reason of the private agreement between the commonwealth's attorney and the railroad's attorney, the liability of the railroad was fixed upon a contingency dependent upon the result of the appeal from the two first judgments; and that the judgments were affirmed during his term of office, which, he claims, fixed the liability of the railroad to pay the \$1,200 (which by the agreement it had promised to pay), although the judgments were not rendered thereon during his term of office.

Section 133 of the Kentucky Statutes provides: "In all prosecutions in the circuit court when the county attorney is present and assists in the prosecution, he shall receive from the State Treasurer 25% of all judgments rendered in favor of the commonwealth," etc. It is plain that it was contemplated by the statutes that the county attorney that was present and assisting in the prosecution at the time of the rendition of the judgment was entitled to the per cent. allowed by the statute. To construe the statute otherwise would bring about endless confusion and litigation, and every outgoing county attorney would claim and demand a part of the 25 per cent. on each judgment on prosecutions originating during his term of office, to the extent of his labor and service rendered therein. The agreement made by the commonwealth's attorney and the attorney for the railroad was not binding upon either, and certainly was not binding upon the court. The court or either of the parties could have ignored it, and it did not fix the liability of the railroad company in the event the appeals were affirmed. It could have pleaded "Not guilty," and have had a trial by the court or jury, in each or

all of the 12 indictments. And the commonwealth's attorney could have forced the railroad to have tried all the cases, and it was within the discretion of the court to render the judgments in accordance with said agreement, as it did, or refuse.

Perceiving no error, the judgment of the lower court is affirmed.

JACOBS' ADM'R v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 4, 1903.)

RAILROADS — NEGLIGENCE — COLLISION — RIDING TRICYCLE ON TRACK—EVIDENCE—GROSS NEGLIGENCE.

1. Those operating a railroad train are not required to be on the lookout at a remote point on the track for an employé of the road riding on the track on a tricycle with the consent of his foreman.

2. An employé of a railroad, riding on the track on a tricycle with the consent of his foreman, is required to keep a lookout for trains.

3. Where an employé of a railroad, while riding on the track on a tricycle with the consent of his foreman, was killed by colliding with a train, and there was at the time a dense fog, and he knew the time of the train and that it was due, he was guilty of gross negligence.

Appeal from circuit court, Greenup county. "Not to be officially reported."

Action by Andrew J. Jacobs' administrator against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. T. Cole, A. E. Cole & Son, and J. B. Bennett, for appellant. W. H. Wadsworth, for appellee.

HOBSON, J. Appellant's intestate, while riding on a tricycle on appellee's road in company with Crit Dillas, was instantly killed by a collision with one of its passenger trains, running on its regular schedule time. The facts of the case are set out in the opinion filed at this term in the case of Crit Dillas' Administrator v. Chesapeake & Ohio Railway Company, 71 S. W. 492, and for the reasons given in that opinion the judgment herein must be affirmed. If it be conceded that the intestate was in the service of appellee in its shops at Russell, and was using the tricycle, with the consent of the foreman, for the purpose of going from his home to his place of work, the merits of the case are not affected; for in so using the track it was incumbent on him to keep out of the way of the train, and the trainmen were not required to be on the lookout for him at the remote point on the track where the collision occurred. There is nothing in the evidence to indicate that any precaution could have averted the catastrophe after his perilous position was discovered. He knew the time of the train, and knew that it was due; and

¶ 2. See Master and Servant, vol. 34, Cent. Dig. § 741.

in running on its time through dense fog, when either he did not or could not maintain a proper lookout ahead for the approaching train, he was guilty of gross negligence, which was the proximate cause of his death. Judgment affirmed.

PAYNTER, J., not sitting.

TAYLOR v. KING et al.

(Court of Appeals of Kentucky. March 4, 1903.)

APPEAL—FINDINGS—EVIDENCE—WEIGHT—REVIEW.

1. The rule that a judgment will not be reversed unless flagrantly against the weight of the evidence does not apply to suits in equity.

2. Where the evidence in a suit in equity leaves the mind of the appellate court in doubt, weight will be given the finding of the chancellor.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Suit by A. P. Taylor against J. I. King and others. From a decree for defendants, complainant appeals. Affirmed.

W. A. Lee, for appellant. Lindsay & Botts, for appellees.

PAYNTER, J. This is a suit in equity. The appellant sought to set aside as fraudulent a deed which the appellant made to his son, Walter, for a lot in Balls Landing, Owen county, Ky. The question involved is one of fact. The rule in equity is not, as supposed by counsel for appellees, that a judgment will not be reversed unless flagrantly against the evidence. That rule applies alone to common-law actions with respect to verdicts of juries, etc. If the evidence in an equity suit leaves the mind of this court in doubt as to whether the judgment of the lower court is correct, then this court gives some weight to the finding of the chancellor on the question of fact. Without detailing the facts as they appear from the testimony, it is sufficient to say that we are of the opinion that the judgment of the court below is in accordance with the evidence.

Judgment is affirmed.

FURNISH v. SATTERWHITE et al.

(Court of Appeals of Kentucky. Feb. 20, 1903.)

ASYLUMS—INSURANCE—AUTHORITY TO MAKE—SUPERINTENDENT—CERTIFYING PREMIUMS TO AUDITOR.

1. Ky. St. § 224, provides that the boards of commissioners of charitable institutions shall keep the building and furniture insured, and the amount of the premiums to be certified to the State Auditor, who shall draw a warrant, etc. Section 230 provides that the steward of each institution, by the direction of the superintendent, shall purchase all needed supplies of every description. Section 233 requires the steward to make monthly reports to the superintendent of his acts, the condition of the farms,

and of the stock, etc., and in the statutory form for this report are contained items representing certain fixed charges with which the steward has nothing to do, such as "insurance," "pay roll," etc. Held, that it was the duty of the board of commissioners to contract for insurance for a state insane asylum, and of the superintendent to certify the amount of premiums to the State Auditor.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Mandamus by T. P. Satterwhite and others, as commissioners of the Central Kentucky Asylum for the Insane, against J. G. Furnish, superintendent of the institution. From a judgment for plaintiffs, defendant appeals. Affirmed.

Dallam & Gordon, for appellant. Carroll & Carroll, for appellees.

BARKER, J. This action was instituted in the Jefferson circuit court, chancery branch, Second division, by the appellees, who are the commissioners of Central Kentucky Asylum for the Insane, against the appellant, who is the superintendent of said institution, for the purpose of obtaining a writ of mandamus requiring him to join with the president of the board of commissioners of said institution in certifying to the Auditor of Public Accounts the amount of the premiums due on certain contracts of insurance effected by the board of commissioners upon the buildings and furniture of said institution. The appellees, who were plaintiffs below, in their petition state that in pursuance of section 224 of the Kentucky Statutes they have effected contracts of insurance upon the buildings and furniture of the institution of which they have charge, insuring them against loss by fire; that appellee T. P. Satterwhite, who is president of the board of commissioners of said institution, has certified to the Auditor of Public Accounts of the state of Kentucky the amount of the premiums due on such insurance, but the defendant J. G. Furnish, who is superintendent of said institution, has failed and refused to certify the amount of said premiums to the auditor; and they further state that because of his failure to certify the amount of said premiums no warrant has been issued by the auditor in payment of said premiums, and that the certification of the defendant is necessary to secure said warrant, and that, unless said certification is obtained, and said warrant issued, the policies of insurance on the buildings and furniture of said asylum will be canceled, and said property left unprotected from loss by fire. After the filing of this petition, the appellant filed a general demurrer to the same, and, without waiving said demurrer, filed his answer, consisting of three paragraphs. The answer of appellant admits that the commissioners had obtained the insurance on the buildings and furniture as set out in the petition, and that he has been requested to certify the amount of the

premiums due for same, and has refused so to do. He denies, however, that it is his duty to certify the premiums on insurance effected by the board of commissioners, claiming that it is the duty of the steward of said institution, one Samuel Fulton, under the direction of the appellant, to effect said insurance, and pleads and relies upon the fact that it has been the custom at the said institution for the board of commissioners to authorize the steward to purchase insurance, as well as other supplies, and that on a former occasion, to wit, the 12th day of January, 1901, the board of commissioners passed a resolution directing said Fulton, the steward of said institution, to purchase insurance of \$50,000, which said Fulton did, and his action was afterwards approved by the said board. The learned chancellor below overruled defendant's demurrer to the petition, sustained appellees' demurrer to all the paragraphs of appellant's answer, and awarded, as a final judgment on the pleadings, a writ of mandamus against the appellant as prayed for in the petition, directing and commanding him to certify to the Auditor of Public Accounts the amount of the premiums on the policies of insurance on the buildings and furniture of Central Kentucky Asylum for the Insane, which had been placed by the appellees, as commissioners of said institution.

A writ of mandamus, as defined by section 477 of the Civil Code, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act or omit to do an act the performance or omission of which is enjoined by law. The appellant is a ministerial officer of the commonwealth of Kentucky, having charge of one of its charitable institutions. The question of the correctness of the judgment rendered by the court below depends upon whether or not it was the duty of appellant to make the certification which he admits he has refused to perform. Section 224 of the Kentucky Statutes provides as follows: "The board of commissioners of each institution (charitable institutions) shall keep the buildings and furniture of the institution constantly insured, and the amount of the premiums on such insurance shall be certified to the auditor by the superintendent, and president of the board of commissioners, and thereupon the auditor shall draw his warrant for the amount upon the state treasury, payable to the superintendent." It is very difficult to understand how language could make more plain, than does this section, that it is the duty of the board of commissioners of the institution in question to keep the buildings and furniture of the institution insured, and that it is the duty of the appellant to make the certification therein required. Appellant, however, contends that the procurement of the insurance in question is governed by section 230 of the Kentucky Statutes, which is as follows: "The

steward of each institution, by direction of the superintendent, shall purchase and furnish to the institution all needed supplies, of every description, and shall consult him as to the character, quantity and quality of all such supplies. They shall be bought where they can be bought cheapest, due regard being paid to quality as well as price. He shall not draw on the treasurer for money to pay for such supplies, in whole or in part, but shall cause itemized accounts of the same to be made, in the name of the sellers against the institution, setting forth separately the date of purchase and the name and price of each article purchased, and shall present the accounts, endorsed by the superintendent, to the board of commissioners for allowance; and he shall carefully enter in a book kept for that purpose the number, dates and amounts of warrants issued by the president for the payment of the accounts for supplies purchased by him, and the name of the persons in whose favor they are made." It is seriously contended by appellant that the insurance provided for by section 224 comes under the head of supplies which the steward is required to purchase by the terms of section 230, and the construction thus contended for is thought to be aided by the fact that section 233 requires the steward to make monthly reports to the superintendent of his acts and doings, and the condition of the farms and gardens and the number and character and condition of the stock under his care and control, and that in the statutory form for this monthly report is contained the item, among other things, "insurance." An analysis of section 230 shows that all of the supplies mentioned therein to be purchased by the steward under the direction of the superintendent are such as are to be paid for after the accounts are allowed by the commissioners, out of the treasury of the institution; whereas the premiums for the insurance provided for by section 224 are to be paid by warrant of the auditor upon the state treasury. Nor does the fact that the printed form of the steward's monthly report contains the item "insurance" add any weight to appellant's argument. This report is intended to show the total monthly expenditures of the institution, and as the greater part of this monthly expenditure is made up of items which the steward is required to purchase, as a matter of convenient bookkeeping, it is also required to show certain fixed charges with which the steward has nothing to do. For instance, the first item on said form is the pay roll, showing the salaries of all the officers and wages of all the employes. It will not be contended that these salaries are supplies to be purchased by the steward, within the meaning of section 230, because with the salaries of the officers and assistants he has nothing whatever to do. They are regulated and provided for by section 240 of the Kentucky Statutes. And yet this item is re-

quired to appear in his monthly report, just as the item of insurance is required to appear there. We do not think, however, that it needs any further argument to demonstrate that the learned chancellor below was correct in all the orders and the judgment entered by him in this case.

We freely admit the principle of law so earnestly contended for by counsel for appellant that it is the duty of the court to give force and effect to every provision of a statute, except in cases of absolute and irreconcilable incongruity; and this plain and irreconcilable incongruity would clearly arise if this court should abrogate the plain letter of the law as contained in section 224 by giving the construction contended for by appellant to section 230—a construction not only clearly and unmistakably irreconcilable and incongruous to the plain letter of section 224, but equally irreconcilable and incongruous to the plain letter of section 230. By giving the construction contended for by appellees to the two sections in question, every word in each can be enforced without the slightest incongruity. The fact that the board of commissioners may have heretofore ordered the steward to effect the insurance on the buildings and furniture of their institution, and afterwards ratified his action in the premises, not only does not militate against the construction contended for by appellees, but very plainly militates against the construction contended for by appellant. If it had been the duty of the steward to effect insurance under the superintendency of appellant, there would have been no need for any order or request upon the part of appellees for him to perform said duty; and the fact that he took orders from appellees as to his duty concerning the insurance in question at least tends to show that he did not consider it an independent duty on his part to effect the insurance.

As the judgment of the learned chancellor below is entirely in harmony with the views herein expressed, it is hereby affirmed.

LOUISVILLE & N. R. CO. v. GORDAN.

(Court of Appeals of Kentucky. March 3, 1903.)

SERVANT — INJURIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — MEASURE OF DAMAGES — INSTRUCTIONS.

1. Whether or not the engineer of a freight train, in failing to give the other employes on the train warning as required by the rules of the company, by blowing the whistle before increasing speed, was guilty of gross negligence, held, under the evidence, to be a question for the jury.

2. An instruction defining the measure of damages for personal injuries as the difference between the earning capacity of plaintiff before the injury and afterwards was properly refused, in that it failed to take into account mental and physical suffering as an element of damages, as required by an instruction previously given.

3. An instruction that in fixing damages for personal injuries the jury could consider the

probable duration of plaintiff's life, "in view of the nature and character of the business in which he was engaged"—the evidence having shown that the railroad business, in which plaintiff was engaged, was more hazardous than ordinary avocations—was properly refused, especially where there was no evidence that plaintiff intended to pursue railroading permanently.

4. Whether or not a brakeman of a freight train was guilty of contributory negligence in standing near the middle of the car, instead of at the brake on the front end, was a question for the jury.

Appeal from circuit court, Logan county. "Not to be officially reported."

Action for personal injuries by H. W. Gordan against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. & J. C. Browder and Edward W. Hines, for appellant. B. F. Proctor and Guy H. Herdman, for appellee.

BURNAM, C. J. The appellee, H. W. Gordan, while in the service of the appellant, the Louisville & Nashville Railroad Company, as a brakeman on one of its freight trains on the Henderson Division, near Crofton, was thrown from the top of a freight car, and his leg run over, crushing it so badly as to require amputation, which he alleges was due to the gross negligence of defendant's servants in operating the train. The train consisted of an engine and tender, 26 freight cars, and a caboose; some of the cars being loaded, and others being empty. The first 12 freight cars, next to the engine and tender, were equipped with air brakes, while the balance of the cars were provided with only the old-fashioned hand brakes. The crew of the train consisted of an engineer, fireman, conductor, front and middle brakeman, and the appellee, Gordan, who was rear brakeman and flagman of the train. The train was going south on a down grade as it approached the station (Crofton), and the appellee, Gordan, was standing on the top of a flat car, immediately in front of the caboose.

Upon the trial the plaintiff introduced proof conducing to show that the rules of the railroad company required the engineer in charge of a freight train, when he approached an order station, to slow up and have his engine under such control that he could stop if necessary, and to ask for orders by four sharp blasts from his whistle. If the station agent had orders for the train, he answered the signal by the display of a red light, which was notice that the train must stop at the station. If he had no orders, it was his duty to display a white light. It was then the duty of the engineer, as a warning to the other employes upon the train, to give two sharp blasts of the whistle before increasing his speed. The particular negligence complained of in this case is that the engineer failed to give the warning of two blasts of his whistle after the display of the

white light by the station agent, but immediately started forward with a tremendous jerk. The substance of appellee's testimony as to how the accident occurred is as follows: He says that when the train left Peterboro Hill, about three-fourths of a mile from Crofton, the engineer blew four blasts of his whistle for orders, but received none; that he then proceeded a little farther, and decreased the speed, when he gave the signal again for orders; that in response thereto the station agent gave the white signal, that they had no orders for the train; that as soon as the white light was shown at the station, without giving the regulation warning of two blasts, the engineer opened the steam throttle, and the engine jumped forward, jerking the slack out of the train with great violence, and throwing him from his feet to the top of the car, from which he rolled off to the track below, and the train passed over his leg, crushing it badly; that it was during the night, and that he was compelled to crawl about a half mile, to the nearest house, dragging his crushed leg behind him; that it was amputated that night, and the next morning he was taken to Nashville, where he was confined for several months, and a second amputation performed, as the first one was improperly done. A number of witnesses were introduced as experts, who testified that the slack in a train containing 26 cars, equipped with the old-fashioned brakes, would be about six feet, and that proper railroading required that this slack should be taken up very gradually, and that, if this course was pursued, little or no jerking of the train resulted, but that, if the train was suddenly started, the necessary result—particularly towards the end of the train—would be a violent jerk. The appellee's testimony as to the manner in which the engineer started forward after receiving notice that it was not necessary for him to stop at Crofton is corroborated largely by every man on the train except the engineer. The conductor, Smiley, testified that he was in the cab of the locomotive with the engineer, and that he felt the engine jump forward to such an extent that he fell backwards, and that a jerk that would be felt by a man in the cab would be very severe on the back part of the train. Whether this testimony and other facts developed on the trial sustained the charge of gross negligence was peculiarly the province of the jury to determine, and we think the court properly overruled the motion for a peremptory instruction.

Appellee was at the time of the injury 33 years of age and in good health, and in the progress of the trial his counsel introduced an experienced life insurance agent for the purpose of establishing approximately his expectancy of life from the American Tables of Mortality. And after the court had given the usual and approved instruction in cases of this character, the appellant asked the

court to instruct the jury "that if they should believe from the evidence that plaintiff had sustained actual damage by reason of, or as the direct result of, gross negligence of the defendant's engineer in charge of and operating said engine on the occasion in controversy, they had the right, in fixing such damages, if any, to take in consideration the probable duration of his life, in view of the nature and character of the business in which he was engaged at the time of the injury, as shown by the evidence, and also the extent, if any, to which his earning capacity had been diminished or impaired by reason of such injury, and the measure of damage, if any, was the difference, if any, between the earning capacity of plaintiff before the injury and his earning capacity after the injury." The court had previously, in instruction No. 2, defined "compensatory damages," as used in the instruction, to mean "such sum of money as will barely and reasonably compensate the plaintiff for mental and physical suffering, and permanent impairment of his ability to labor and earn money, as were the direct and natural result of defendant's gross negligence, if any, as set out in instruction No. 1." We think the court properly refused the instruction asked by appellant. It was contradictory to the instruction already given, in leaving out mental and physical suffering as an element of damage. And it was also objectionable as it called the attention of the jury to this particular fact in the testimony. Appellant was permitted to prove that the employment in which appellee was engaged was more hazardous to life than ordinary avocations in which men engaged, and this fact was before the jury for their consideration. Besides, there is nothing in the evidence to show that appellee intended permanently to pursue the business of railroading. He might, and in all probability would, in course of time, have sought other employment. In fact, more than half of the witnesses who had testified in this case had formerly been in the railroad service, and had abandoned it for less precarious employment in other pursuits. We therefore conclude that the court did not err in refusing the instruction offered by appellant on this point.

It is also claimed that the appellee was guilty of such contributory negligence as precluded recovery, for the reason that he was standing near the middle of the car, instead of at the brake on the front end of the car. There seems to be no testimony to support this contention. The only witness who testified on the point testified that appellee was in his proper place. Besides, this is a question for the jury, and was fairly submitted to them by the instructions.

Whilst the verdict in this case is large, this court had in other cases refused to reverse judgments equal in amount for similar injuries on the ground that they were excessive.

Upon the whole case, we perceive no error prejudicial to the substantial rights of the defendant, and the judgment must be affirmed.

MANHEIMER v. HENDERSON BUILDING & LOAN ASS'N'S ASSIGNEE.

(Court of Appeals of Kentucky. March 3, 1908.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—STOCKHOLDERS—CREDITORS.

1. The fact that a stockholder in an insolvent building and loan association paid in advance all premiums and dues assessed on her stock, or that she gave notice of withdrawal before the assignment, could not alter the relation of the parties as fixed by the law; nor could the fact that her claim had been merged into a judgment change her status as a stockholder, or give her preference over other stockholders, but the only effect of such judgment was to fix definitely the amount on which she would be entitled to receive her pro rata after the debts were paid.

2. Where a stockholder in an insolvent building and loan association did not actually loan it any money, the fact that the amount due on her stock remained in the hands of the association, after demand made for its payment, and until the assignment, did not make it a borrower of the money so as to entitle her to a preference over other stockholders, but she remained a stockholder only.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Theresa Manheimer against the Henderson Building & Loan Association's Assignee. Judgment for defendant, and plaintiff appeals. Affirmed.

Yeaman & Yeaman and J. M. Hartfield, for appellant. M. Merritt, for appellee.

SETTLE, J. On April 25, 1901, the Henderson Building & Loan Association, of Henderson, Ky., being insolvent, executed a deed of assignment to the appellee, C. G. Henson, whereby all of its property of whatsoever kind was conveyed to him, in trust for the payment of its debts; and the assignee thereafter, on April 26, 1901, instituted suit in the Henderson circuit court for a settlement of the trust. The appellant, Theresa Manheimer, owned eight shares of the stock of the association mentioned, of \$100 per share, upon which she had paid to the association prior to February, 1901, the entire amount due thereon. On April 26, 1901—the same day on which appellee, as assignee of the association, filed his suit for a settlement of its affairs—appellant brought suit in the same court against the association for the sum and interest alleged to be due her on her stock, and which it was claimed by her the association had recognized as due, and promised to pay. At the May term, 1901, of the court, she obtained a judgment against the association for the sum of \$800 as due on her stock, with interest from February 28, 1901,

and costs. In the meantime the assignee in his suit for a settlement had procured an order referring his case to the master commissioner for a report as to the indebtedness of the association, and appellant, among others, filed her claim with the commissioner, which was in the form of a copy of the judgment obtained by her, accompanied by this statement: "Claimant filed this claim as borrowed money by the association, and not on account of shareholder; the within money being borrowed by the said association." Later the commissioner filed his report, wherein appellant's claim was allowed, not as that of a creditor, but a stockholder. Appellant filed exceptions to so much of the report as refused to recognize her as a creditor, and her exceptions were, at the January term, 1902, of the court, overruled, it being adjudged by the lower court that appellant "stand in the same attitude as other stockholders of said association until its indebtedness is paid," and from that judgment she prosecutes this appeal.

We find, therefore, that the only question submitted for the decision of this court is whether the appellant is a creditor or stockholder of the Henderson Building & Loan Association. Unfortunately for appellant's contention, the question involved has been too frequently settled by former adjudications of this court to admit of further controversy. The most recent deliverance of this court on the question is found in the case of Vinton v. Nat. Building & Loan Association (Ky.) 66 S. W. 510, in which it was held that a stockholder in a building and loan company is not entitled to credits for stock payments made, or to the withdrawal value of the stock, where same remained with the company unsettled at the time the company became insolvent. In stating the reasons for the rule mentioned, the court, in the case supra, say: "In insolvent concerns it is to be assumed that there has been an impairment of the capital stock, growing out of losses in the conduct of the business, and the value of the stock can be determined only when the losses are ascertained, and the funds ready for distribution; and we are of opinion that the mere date of an application for withdrawal of stock presents no bar to the right of other stockholders to insist, through the assignee or the receiver, upon the subjection of payments to stock account to the payment of proportionate amounts of the losses and expenses of the concern. To hold otherwise would be to lend the aid of the courts to the placing of a disproportionate part of this burden upon the borrowing member, the class for whose benefit the law is supposed to have been designed, and who, as their stock is in pledge to the association, cannot apply for its withdrawal. So long as the stock payments remain in the hands of the association, no matter what the date of the application for withdrawal, they remain subject to this burden." In Reddick v. Unit-

* 1. See Building and Loan Associations, vol. 8, Cent. Dig. § 88.

ed States B. & L. Association (Ky.) 49 S. W. 1075, it was held that a member of a building and loan association, by giving notice of withdrawal of his stock before assignment made for the benefit of creditors of the association, did not, under the law governing such associations, acquire a priority in the distribution of the assets of the association. The following additional authorities will be found to fully sustain the doctrine announced by the cases supra, viz.: *Forwood v. Eubank, Assignee* (Ky.) 50 S. W. 255; *Sumrall v. Commercial Building Trust's Assignee* (Ky.) 50 S. W. 69, 44 L. R. A. 659; *Cook on Stock and Stockholders*, section 12. The uniform rule, as declared in all of the foregoing authorities, is that, after the assignment of a building and loan association, all stockholders are upon an equal footing. The fact that appellant paid in advance all premiums and dues assessed upon her stock, or that she gave notice of withdrawal before the assignment, cannot alter the relationship of the parties as fixed by the law; nor does the fact that her claim has been merged into a judgment change her status as a stockholder, or give her preference over other stockholders. The only effect of the judgment was to fix definitely the amount upon which she will be entitled to receive her pro rata after the debts of the association are paid. It is not claimed by the appellant that she actually loaned the association any money, and the fact that the amount due on her stock remained in the hands of the association after demand had been made for its payment, and until the assignment, did not make it a borrower of the money. Therefore the written statement accompanying the claim filed by her with the commissioner, in which the association was denominated a borrower of her money, inaccurately expressed the relationship of the parties. She still remained and was only a stockholder; nothing more.

We are of the opinion that the lower court did not err in overruling appellant's exceptions to the commissioner's report, and the judgment is therefore affirmed.

CITY OF CAMPBELLSBURG v. ODEWALT.

(Court of Appeals of Kentucky. Feb. 20, 1903.)

INTOXICATING LIQUORS—WRONGFUL SALES—POSSESSOR OF PREMISES—LIABILITY—CITY ORDINANCE—VALIDITY—BILL OF RIGHTS.

1. A city ordinance provided that any person in possession of premises in the city on which liquor is sold, disposed of, obtained, or furnished, in violation or evasion of law, by any trick or method whatever, on conviction shall be fined, etc., for each time such liquor is sold, disposed of, or furnished in violation or evasion of law. *Held*, that since such ordinance makes the person in possession of premises responsible for an act not committed by him and which he had no intention to commit, and to a prosecution for which he could make no defense, it was in violation of Bill of Rights, § 2, prohibiting

the exercise of absolute or arbitrary power over the liberty and property of citizens.

Hobson, O'Rear, and Settle, JJ., dissenting.

Appeal from circuit court, Taylor county "Not to be officially reported."

Action by the city of Campbellsburg against Jacob Odewalt to recover a fine for violation of city ordinance. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

H. W. Rives and H. O. Wood, for appellant.

PAYNTER, J. The appellee was arrested under a warrant which charged that "on the 22d day of September, 1900, in the county aforesaid, the said Jacob Odewalt was there and then in possession of premises on which liquor was sold to one Thomas G. Newton, contrary to the form of the statute in such cases made and provided." It was based upon an ordinance which reads as follows: "Be it enacted by the board of council for the city of Campbellsville, Ky.: That any person in possession of the premises in the city of Campbellsville, Ky., on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law by any trick or method whatever on conviction shall be fined not less than twenty dollars (\$20.00) nor more than one hundred dollars (\$100.00) for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law is a separate offense." The ordinance does not denounce a penalty for selling liquor in violation of law. The warrant was obtained upon the affidavit of Thos. G. Newton, the party to whom it is alleged the liquor was unlawfully sold. It does not charge the appellee with selling liquor, but the charge is that "said Jacob Odewalt was then and there in possession of the premises on which the liquor was sold." The evidence offered is to the effect that Newton, in a back room of the appellee's store, bought from an unknown party some whisky and beer. There was no evidence showing that the party from whom Newton bought it had any connection whatever with the appellee in a business way or otherwise, or that the appellee even knew him, or that he had ever been in the store previous to or since that time. The court below gave a peremptory instruction to the jury to find for the appellee, which was accordingly done. The case is not briefed by counsel for appellee, but in the brief for appellant it is stated that the court sustained the motion for peremptory instruction upon the ground that the ordinance in question was unconstitutional. This is a most unusual ordinance. It makes the party in possession of the premises responsible for an act that he never had an intention to commit; for an act that he did not do himself; for an act that might have been done by another, not in his presence, but without his knowledge or consent. No presumption of innocence

can be indulged; no defense can be made to the prosecution, although he may not have had an intention to commit the offense, although he never was guilty of an act in violation of law, and although he had no knowledge that others were engaged in the violation of law upon his premises. Under this ordinance parties could enter upon the yard of a citizen at midnight, when he was asleep, sell liquor in violation of law, and in consequence of which a fine could be imposed upon the party in possession of the premises. A practical illustration of what might be done under the ordinance is furnished by this case. Newton testified that he bought it from a party unknown to him. He then swore out a warrant for the appellee. Appellee cannot contradict Newton, because he falls to give the name of the alleged seller. If the ordinance is valid, appellee must suffer the imposition of the fine with practically a denial of the right to defend himself against the charge. If a legislature or common council of a municipality can enact such a law as this, and it is valid, they could enact a law which would compel an occupant of premises to pay all kinds of fines and submit to all kinds of imprisonment for all kinds of offenses which might be committed upon his premises without his knowledge or consent. While a zeal to punish persons who sell liquor in violation of law is commendable, yet it must be confined to the enactment and enforcement of laws which do not arbitrarily deprive citizens of their liberty and property. Section 2 of the Bill of Rights reads as follows: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." We cannot conceive of a greater attempt at the exercise of arbitrary power than in the enactment of the ordinance in question. Under that ordinance a citizen's liberty and property can be taken, although he has done no act in violation of law, or even had an intention to do so. The exercise of the same arbitrary power might deprive a citizen of his life, because, if this ordinance is valid, a law might be enacted of the same character that would deprive one of his life, although he was not present, and although he did not commit a wrongful act, or have any knowledge that one was about to be committed. The ordinance in question is quite different from one which would impose a fine upon one in possession of premises for suffering or permitting liquor to be sold thereon. To interpolate words to describe that offense would be, in effect, adopting a new ordinance. The offense under such an ordinance would not be for being in possession of premises upon which the wrongful act was committed, but for the act of suffering or permitting the wrongful act of another to take place on his premises. Such an ordinance would denounce a penalty for an act which the ordinance declared

to be wrong, while the ordinance in question in effect makes one guilty of the wrongful act of another. Our opinion is that the ordinance in question is unconstitutional.

It is suggested that the peremptory instruction should not have gone, as the proof tended to show that appellee was in possession when the selling took place, and therefore the burden shifted to him to show that he had no knowledge of it. The ordinance was not enacted as a rule of evidence, and to determine its effect, but to define an offense. If it were proper to interpret the ordinance in question as we would one that complied with the constitutional requirements, then the peremptory instruction should have gone, because the evidence detailing the circumstances under which it was sold would rebut the charge that he suffered and permitted it to be sold. Bishop on Statutory Crimes, section 132, reads as follows: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not. Hence what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability." It is suggested that to follow the doctrine of this section would lead us to hold the ordinance valid. It is difficult to see what this has to do with the case under consideration. The first part of it is to the effect that at common law it was essential to show the intent of the alleged offender, and that statutes do not generally make a criminal offense, unless the offender's intent concurs with his act. To enforce the ordinance in question it is necessary to interpolate words describing an act for which a party may be prosecuted, as well as an intention to commit it. In the next clause of the section it is stated that, where an act is the result of "overwhelming necessity," it is construed as not violating a statute, however contrary to its general terms. This is not a case for the application of such a principle, because it is not contended that any act was done in this case as the result of "overwhelming necessity." Again, the section says, "And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime." We are wholly unable to see the remotest application that this principle has to the case under consideration. There

is no evidence here that the appellee was led to do an act as the result of a mistake of facts.

It is suggested that certain rules of interpretation, if followed, would lead to the holding of the ordinance in question as valid. One of these rules is that every statute ought to be expounded not according to the letter, but according to the meaning; and another is that every interpretation which leads to an absurdity ought to be rejected; and, again, that a law ought to be interpreted in such manner as that it may have effect, and not be vain and illusive. There is no occasion for the application of the first rule of interpretation mentioned, because we have interpreted the statute according to its letter and spirit, and condemn it because in its spirit and letter it is violative of the Constitution. This is no occasion for the application of the second rule, because the interpretation we have given the ordinance does not lead to an absurdity. If it is enforced according to the word and spirit, it would be neither vain nor illusive, but it would be so drastic and effective as to deprive the citizen of his liberty and property. Again, it has been suggested that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit, of a statute, is not embraced by it. This is not a case for the application of that rule, because the party was in possession of the premises when the sale took place, and, if it is an offense, it is not only within the letter, but within the spirit, of the ordinance. Section 460, Ky. St., provides that "all words and phrases shall be construed and understood according to the common and approved usage of language." There is no question as to the words and spirit of the ordinance. No word is used of doubtful import, and no phrase is employed of uncertain meaning.

The logic of those who oppose the views herein expressed is to have the court enact an ordinance that would not be subject to a constitutional objection, give it a retroactive effect, and declare the appellee has violated it. The business of the court is to interpret, not enact, laws.

The judgment is affirmed.

HOBSON, J. (dissenting). The by-law before us in this case is taken from section 2572, Ky. St., which is in these words: "The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law by any trick or method whatever on conviction shall be fined not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished or disposed of." The by-law, merely following the statute, is not void, unless the

statute is also invalid; for it cannot, of course, be maintained that the town authorities could not make a by-law similar to the statute, to secure its better enforcement. It is said that the language used is broad enough to make the owner of the premises guilty criminally if a tramp walking by should step off the highway and sell whisky on his land, and other similar illustrations are given. But the statute requires no such rigorous construction. It will be observed that the statute uses the words, "in violation or evasion of law"; also the words, "under this act." The act was approved February 24, 1894, and is entitled "An act to punish the violation and evasion of the laws of this commonwealth in relation to the regulation of the sale of spirituous, vinous or malt liquors." See Acts 1894, p. 33. Every section of the act strikes at tricks, subterfuges, or devices for the evasion of the laws against liquor selling. The Legislature knew that in local option communities blind tigers were frequently run by irresponsible persons, here to-day and gone to-morrow; while the owner of the property could be more easily found; and the purpose was to prevent the evasion of the law. The statute was aimed at those who evaded the law, and not at those whose premises might be used for a moment by some tramp without their knowledge. This construction not only harmonizes the section quoted with the general intent of the act as shown by its title and other provisions, but is in accord with the principles of common law. In Bishop on Statutory Crimes, section 132, it is said: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not. Hence what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability." In *Bailey v. Commonwealth*, 74 Ky. 691, this court said: "Words in a statute were always to be understood according to the approved use of language. But there are other rules of construction of equal dignity and importance, which must not be overlooked, and which, although not incorporated in our Statutes, are as binding upon the court as if embodied in it. One of these rules is that every statute ought to be expounded, not according to the letter, but according to the meaning; and another, that every interpretation that leads to an absurdity ought to be rejected; and still another, that a law ought to be interpreted in such manner as that it may have

effect, and not be found vain and illusive." Following this principle, it has been held that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit, of a statute, is not embraced by it. *Brown v. Thompson*, 77 Ky. 538, 29 Am. Rep. 418. And to sustain a statute, and give it effect, the court read the statute as though the word "width" was the word "depth." *Bird v. Commissioners*, 95 Ky. 195, 24 S. W. 118. The case before us does not require us to go further than the common-law rule quoted above from *Bishop on Statutory Crimes*. The Legislature had in mind evasions of the liquor laws, and was aiming to punish those who evaded them. Where the liquor is sold on the premises of another, without his knowledge or consent, or under circumstances beyond his control, or not reasonably to be anticipated by him, he is not to be punished. This gives the statute a fair effect. It remedies the evils the Legislature had in mind, and it is the duty of the court, if it can do so, to enforce the legislative will, and not render the statute vain and illusive. By section 1130, Ky. St., a person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, and if convicted a third time, during his life. Yet under this statute it was held that the increased penalties only applied to offenses committed after the former conviction. *Brown v. Commonwealth*, 100 Ky. 127, 37 S. W. 496. In holding this the court had only to guide it the legislative intent, without any expressions in the statute indicating it. The case here is much stronger, for the phraseology of the statute, as well as its title, shows that the Legislature was aiming at only evasions of the law. It has been held a violation of the statute to carry a pistol concealed in a valise; but if a person, walking with a friend, carried his valise for him, not knowing there was a pistol in it, he would clearly not come within the purpose of the statute against carrying concealed deadly weapons. Similar illustrations may be given as to nearly all the statutes declaring certain specific acts misdemeanors. To say that the principle stated by *Bishop* applies to acts done by the defendant, but not to a case like this, is to ignore the principle on which the rule rests; which is that there is at common law no criminality where the defendant acts innocently, and there is no fault on his part, actual or constructive.

The evidence in this case proved the facts set out in the statute, and therefore made out a prima facie case against the defendant. It was one of those cases within the letter, but not within the spirit, of the statute, as above indicated. The burden of proof was on the defendant to show it, and the court should not, therefore, have instructed the jury peremptorily to find for the defendant. In *Bishop on Statutory*

Crimes, section 1022, it is said: "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege, or the government's evidence show, that he knew the facts. His being misled concerning it is matter for him to set up in defense and prove." A number of authorities from other states are cited in support of this principle, and there are many familiar illustrations of it. A mistake of the person or ignorance of a subsisting marriage will, under some circumstances, be a defense to an indictment for adultery; but such things need not be anticipated by the state, and must be shown by the defendant. The same is true of the crime of incest, where the defendant may show ignorance of the relationship in defense. There being no proof here rebutting the prima facie case made out by the state, the court should, in my judgment, have submitted it to the jury. The question is not, therefore, presented how far the Legislature, in the exercise of the police power, may, by small and reasonable penalties, provide for those things which tend to the repression of violations of law, as, in its discretion, the exigencies of the case require. See *Purnell v. Mann*, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264. Of course, it is conceded that excessive fines and cruel punishment cannot be inflicted. Const. § 17. I therefore dissent from the judgment of the court.

O'REAR, J., concurs in this dissent. SETTLE, J., concurs in so much of it as construes the statute to cover only evasions of the law, but is of the opinion that the burden of proof in such cases as this is upon the commonwealth to show that the sale of spirituous liquor was made with the knowledge or acquiescence of the defendant; and, that fact not having been shown on the trial, the lower court did not err in granting the peremptory instruction in his favor.

BLEWETT v. SPRAGUE et al.

(Court of Appeals of Kentucky. March 4, 1903.)

ATTACHMENT—GROUNDS FOR ISSUING—FRAUDULENT DISPOSITION OF PROPERTY.

1. Testimony that B., against whom A. had instituted a suit for damages, had told a third party, a few days before A. sued out his writ of attachment, that he was in trouble, and wanted to dispose of his property, etc., together with B.'s admission that, if he could have sold the property and got the money for it, he would not have paid A. anything, as he did not consider his claim a just one, showed that B. was endeavoring to defeat any judgment which might be obtained against him, and warranted the issuing of the attachment.

Appeal from circuit court, Marshall county.
"Not to be officially reported."

Action by the commonwealth against John A. Sprague and others. Judgment rendered fixing the rights of the various parties, and, among other things, discharging an attach-

ment levied on the land of Sprague by V. H. Blewett, and the latter appeals. Reversed.

Greer & Reed, Reed Greer, and Oliver & Reed, for appellant.

BURNAM, C. J. On the 22d day of July, 1899, the appellant, Vernon H. Blewett, sued the appellee J. A. Sprague in the Marshall circuit court, for \$2,000 damages for maliciously cutting him with a knife. On the 2d day of August an attachment issued on the amended petition of the plaintiff against the property of the defendant on the ground that he was about to sell and dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditors, and especially the appellant, which was on the same day levied by the sheriff of Marshall county upon a tract of land belonging to the defendant. This suit was terminated in a judgment in favor of the plaintiff for \$250. The grand jury of Marshall county in the meantime indicted the defendant Sprague for maliciously cutting and wounding the plaintiff with the intent to kill him. This prosecution resulted in a verdict and judgment against the defendant for \$500. On the 3d day of August, 1899, Sprague and wife executed a mortgage to W. S. Bishop and John K. Hendricks upon the same tract of land to secure the payment to them of fees amounting to \$300, and on the 20th day of March, 1900, they executed to the same parties a second mortgage upon the same tract of land to protect them, as his securities upon an appeal bond superseding the \$500 judgment assessed against him in the commonwealth proceeding, with interest and cost. The judgment in the commonwealth case was affirmed by this court on the 1st day of September, 1900. See 58 S. W. 430. After the mandate of this court was filed in the Marshall circuit court, a suit was instituted in the name of the commonwealth against the appellant, Sprague and wife, and W. S. Bishop and John K. Hendricks, setting out the facts recited above, and asking that it be subrogated to the rights and interest of Bishop and Hendricks in the mortgage made to them, and for a sale of enough of the land to pay their judgment. The defendants Bishop and Hendricks filed an answer, in which they concur in the prayer of the petition, and ask that the land be sold to pay not only the debt due the commonwealth, but also their fees of \$300. In this proceeding the appellant, Blewett, also set up his judgment in the damage suit, and claimed a prior lien upon the land by reason of the levy of his attachment. Upon the trial of these actions the commonwealth and the assignee of Bishop and Hendricks were adjudged liens on the land, and a judgment entered for its sale. But the trial court discharged the attachment of the appellant, Blewett, and held that he had no lien by virtue thereof, and Blewett appeals.

The only question involved upon the appeal is the judgment of the circuit court dischar-

ging appellant's attachment. Upon the trial of this question L. W. Craig testified that on July 28th the appellee Sprague came to his house, and told him that he had gotten into trouble, and he wanted to sell out, and leave the country; and promised him that, if he would find a purchaser for his land and crops, he would pay him well for it; and that on the 2d day of August, 1899, he tried to sell the land and crops to various parties under this employment. And N. E. Williams testified that on the 2d day of August, 1899—the same day on which the attachment was sued out—Craig proposed to sell him the land and all the crops belonging to the appellee for \$2,200, representing that he could sell the farm for \$2,000, and the crops were worth \$500, and that they would divide the profits. Substantially the same facts were testified to by Walters and Palmer, and the defendant Sprague admits that, if he could have sold his land and got the money for it, he would not have paid the plaintiff anything, unless he had been compelled to at the end of the law, as he did not consider his claim a just one. In our opinion, this testimony clearly shows that defendant had determined to sell and dispose of his property, and was endeavoring to do so prior to the issuing of the attachment for the express purpose of defeating any judgment which might be recovered against him in the suit which had been instituted by the appellant. The mortgages to Bishop and Hendricks were made subsequent to his attachment, and to the extent that they covered property liable to execution were subordinate to appellant's lien, acquired by virtue of the levy of his attachment. The mortgage to Bishop and Hendricks covered the homestead, and appellant acquired no lien upon it by the levy of his attachment, and was not, therefore, prejudiced by the judgment in so far as the state was adjudged a lien thereon, but had a prior lien upon the land levied on in excess of the homestead.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

STOREY et al. v. FIRST NAT. BANK OF LOUISVILLE et al.

(Court of Appeals of Kentucky. Feb. 27, 1903.)

WITNESSES—COMPETENCY—HANDWRITING—COMPARISON—INCONSISTENT PLEAS.

1. Pleas of non est factum and no consideration for the notes sued on are not inconsistent.

2. Civ. Code Prac. § 606, subd. 2, providing that no person shall testify for himself concerning any transaction with one who is dead, precludes a stockholder in a corporation from testifying relative to transactions between the corporation and a decedent.

3. Where appellees had sufficient opportunity to investigate the genuineness of the signatures produced by appellants for comparison with a disputed signature, it was unnecessary for appellants to prove their genuineness to the satis-

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 1505.

faction of the court, as required by Civ. Code Prac. § 604, as amended in 1886.

4. It was unnecessary for appellants to give the notice of the intended production of the signatures required by the statute.

Appeal from circuit court, Fleming county.
"Not to be officially reported."

Action by Newton Storey, executor, against the First National Bank of Louisville, the Louisville Banking Company, and others. Judgment in favor of the defendants named, and Ben Storey and others appeal. Reversed.

J. D. Pumphrey and B. S. Grannis, for appellants. Barnett & Barnett, for appellees.

NUNN, J. In the year 1898, Meshack Storey, a citizen of the county of Fleming, in this state, died testate, and named Newton Storey as his executor. It appears that Meshack Storey had considerable property, and owed many debts, at the time of his death. His executor, Newton Storey, filed an action in the Fleming circuit court for the purpose of settling his estate, making the heirs and many of his creditors defendants. The appellees the First National Bank of Louisville and the Louisville Banking Company of Louisville, Ky., filed their separate answers, making them their cross-petitions against the executor. The executor filed reply to these separate answers and cross-petitions, and pleaded non est factum and no consideration to each and all the notes set up in appellees' pleadings. Appellees contend that these pleas are inconsistent, but this court has decided in several cases that they are not inconsistent. On motion of appellants, the lower court directed an issue out of chancery. A jury was impaneled, the evidence heard, and the court, upon motion of appellees, gave the jury a peremptory instruction to find for them. The jury returned a verdict in accordance with said instruction, and judgment was rendered thereon. The appellants filed reasons and made a motion for a new trial. The court overruled same, appellants taking all proper exceptions, and the case is here on appeal.

It will only be necessary for this court to consider a few of the alleged errors of the lower court. It is contended first by appellants that the lower court erred in permitting Theodore Harris, president of the appellee the Louisville Banking Company, to testify to verbal conversations had by him with the deceased, Meshack Storey, with reference to the transactions concerning the notes in this litigation, and to like conversations detailed by other witnesses representing the appellees. In this we concur, provided the witnesses were stockholders in the appellee corporations. Subsection 2 of section 606 of the Civil Code of Practice is as follows: "No person shall testify for himself concerning any verbal statement of or any transaction with or any act done or omitted to be done by one who is dead when the testimony is offered to be given." A stockholder has a

pecuniary interest in the corporation, and would be testifying in his own interest, as much so as a member of a partnership would be. It was certainly not the intention of the Legislature to make a distinction in favor of those owning stock in a corporation. There is equally as much reason for their being prohibited from giving such testimony as any one else. In the case of Apperson's Executor v. The Bank of Kentucky (Ky.) 10 S. W. 803, this court, in construing the above section of the Code, said: "While we do not think it was intended to limit the operation of that section to the testimony of a person a party to and directly interested in the result of the suit with the representative of one who is dead, yet, to render such testimony incompetent, it must appear that it will have the effect to directly or indirectly benefit the person giving it pecuniarily." In the case of Bayless Stove Co. v. McCarthy's Assignees, 15 Ky. Law Rep. 366, an opinion by Judge Barbour of the superior court, that court said, in discussing the competency of the witnesses Bayless and Fennell, who were stockholders in the corporation: "To allow parties having the interest that Bayless and Fennell have in the result of this case to testify, under the circumstances stated, would establish a rule which would operate as an unjust and unreasonable discrimination in favor of parties doing business under articles of incorporation, and we do not think that the letter or the spirit of the section of the Code quoted either demands or permits it."

The appellants complain that the court erred to their prejudice in refusing to allow them to read to the jury the depositions of J. L. Rombach and A. E. Burnett. There is nothing in the record to show why the court rejected said evidence. Rombach testified that he was a photographer, and had made photographs of and enlarged several signatures of Meshack Storey, which were agreed by the parties to be genuine; and also photographed and enlarged the signatures in dispute in this action, and placed them on the charts numbered 15, 16, 17, and 18. We are of the opinion that Burnett showed himself qualified to testify as an expert, and the court should have permitted his deposition to be read to the jury; and the charts should have been permitted to be used to elucidate his answers to questions, as well as other witnesses who referred to them. In the case of Fee, etc., v. Taylor, 83 Ky. 263, the court said: "The civil and ecclesiastical law permitted the testimony of experts as to handwriting by comparison. The rule in this country varies in the different states. In some of them comparison is allowable between the writing in question and any other writing shown to be genuine, whether it be already in the case or not; while in others it is only permitted as between the disputed paper and one already in the case, and relevant to it. Under the rule as adopted in this

state, however, the last exception *supra*, and which allows comparison by the jury, with or without the aid of experts, is not recognized; the reason, doubtless, being that no necessity exists for it when witnesses are at hand who know the handwriting. * * * But we must not be understood as holding that an expert may not testify as to differences in the letters or words, or speak of other facts as they appear to him upon the face of the writing." This opinion of the court was rendered in 1885, before the present Civil Code of Practice was amended in 1886, which amendment changed the rule. Under section 604 of the Code, as amended, upon the genuineness of the handwriting of a person, other handwritings of such person may be introduced for the purpose of comparison by witnesses with the writing in dispute; but the writings produced shall be proven to the court or the judge thereof to be the genuine signature of the person represented, and that they were written by the person before any controversy arose as to the genuineness of the writing in dispute. And notice should be given to the opposite party of the intention to produce such signatures. In this case the parties selected and agreed on a list of genuine signatures of Meshack Storey, and they were produced at the taking of the depositions of the witnesses, some months previous to the trial. The appellees had sufficient opportunity to investigate the genuineness of said signatures, even though they had not agreed to their genuineness, which made it unnecessary to prove their genuineness to the satisfaction of the court, and was a waiver of the notice of their intended production. To this effect is *Birchett v. Bank* (Ky.) 67 S. W. 371.

As this case will have to be retried, we refrain from discussing or expressing any opinion as to the weight or credit that should be given to the evidence produced on the trial. The court erred in giving the peremptory instruction.

Perceiving no other errors, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with this opinion.

GIVENS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Feb. 27, 1903.)

RAILROADS—INJURY TO CHILD—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EVIDENCE—IMPLIED ADMISSION.

1. Evidence examined in an action against a railroad for personal injuries, and held to justify a finding that the injuries resulted from plaintiff's contributory negligence, either in jumping on or off a train while in motion, or in sitting on a cross-tie while the train was approaching.

2. If the engineer or fireman on a railroad train sees a boy sitting on a tie, he has the right to assume that he will get out of the way in time to avoid injury; and if the boy stumbles and falls in so doing, when it is too late to stop the train, injuries resulting to him cannot be charged to the railroad company.

3. Evidence in an action against a railroad for injuries to a boy seven years of age, showing that he is intelligent, that he has lived in proximity to the railroad, and was at the time of his injury acquainted with the movements of trains, and apprehensive of danger from them, is sufficient to show him capable of contributory negligence.

4. An instruction, in an action against a railroad for personal injuries, that if plaintiff was seated at the end of a cross-tie while the train was approaching him, and those in charge of the train saw or should have seen him in time to have stopped the train before reaching him, but failed to do so, they should find for plaintiff, but if he was hurt while attempting to jump on or off the train while in motion they should find for defendant, though inaptly expressed, is not improper or prejudicial to plaintiff.

5. Refusal to give instructions which might properly have been given was not prejudicial when those given properly presented the only issues necessary to be determined by the jury.

6. In an action against a railroad for personal injuries, a declaration of plaintiff's brother, made immediately after plaintiff reached home after receiving his injuries, "Ah, ha! This is what you get from jumping on and off the train," to which plaintiff made no reply, was properly admitted in evidence as an implied admission.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by Edward Givens, by his father, as next friend, against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

N. B. Hays, for appellant. C. W. Metcalf, J. W. Alcorn, and E. W. Hines, for appellee.

SETTLE, J. This action was instituted in the name of the appellant, Edward Givens, by his father, as next friend, to recover damages for the loss of his foot, which was run over by the wheels of one of appellant's cars, and so mashed as to render its amputation necessary. The petition sets forth with unnecessary particularity the acts of negligence complained of in the following language, viz: "Plaintiff says, at the time of receiving the injuries he was on the main line of defendant's road, and the train was going south on said track, when plaintiff left said main line and got on a siding or track running to the mines; that the defendant switched said train and engine just north of plaintiff on the line which plaintiff had moved to, and in plain view of plaintiff, and, without giving any warning by sounding the whistle or otherwise, negligently and carelessly struck plaintiff, bruising his leg as above stated." The answer not only traverses the averments of the petition, but, in addition, pleads contributory negligence, averring that appellant's injury was caused by his improper attempt to jump on the train while in motion. The reply simply denies the affirmative allegations of the answer. The trial resulted in a verdict for appellee, and, a new trial having been refused by the court, appellant brought the case to this court by appeal.

We deem it unnecessary to go into a detailed statement of the evidence, but think it sufficient to say that the evidence introduced by appellant conduces to show that as appellee's train which runs from Middlesboro to Mingo was leaving the former place, appellant, who was then a boy seven years of age, ran from the main track 40 feet to the belt line track, where he seated himself on the left-hand side of a cross-tie of the track, and when so seated that his back was toward the train; that he knew, before crossing over and taking his seat, that the train was in motion, but he heard no signal from either its bell or whistle as it approached. He did, however, give his attention to the train when it got near him, and when it came within 10 feet of him he jumped up to get out of its way, but in doing so struck his "sore" toe against a cinder about a foot from the end of the cross-ties and outside of the track, which caused him to stumble and fall, in doing which his foot and leg fell across the rail, and the foot was crushed by the wheels of the passing train. Upon the other hand, appellee's evidence was to the effect that appellant was not on the cross-tie or track in front of the engine, but that he and two other boys ran up to the side of the train while in motion, and jumped, or attempted to do so, upon the side of a car, but fell, and his foot was thereby caught and crushed. Two witnesses—Logsdon and Wood—testified that appellant told them he was walking or running along by the side of the train when hurt. Logsdon carried him home immediately after he was injured, and upon reaching there appellant's brother said to him, "Ah, ha! This is what you get for jumping on and off the train. You know Pa and Ma have been telling you not to do that;" and that appellant made no reply to this statement of his brother. Shumate, fireman on the engine at the time of the accident, says he was looking out on the track in front of the engine, and saw no boy on the track, but saw some boys running towards the train. Appellant was asked on the trial, "Why did you sit down on the end of the tie on the track that leads to Mingo?" to which he answered: "I was tired. I thought the train was going on the main track, and sat down, and paid no attention to it." The evidence shows that the train was moving at the rate of four or five miles an hour, and that the noise of the cars and the engine could be heard at a distance of four or five hundred yards. So it seems to be reasonably apparent from the evidence that the boy's injury resulted from his own negligence; and, even if we were disinclined to believe the disinterested witnesses who say they saw him jumping on or swinging to the train, the boy's own statement shows that he saw the train when in 10 feet of him, and that he at once got off the tie and on his feet, and would have escaped injury but for

stumping his "sore" toe on a cinder, which caused him to fall in such a way as to throw his foot over the rail, where it was caught by the wheel. Besides, if the engineer or fireman on the train saw him sitting on the tie, they had the right to assume that he would get out of the way of the approaching train in time to avoid injury; and the boy, in leaving the place where he was seated, did the very thing that the engineer had the right to expect of him, and, having gotten up and started away from the place of danger, the engineer had no reason to know, and could not have anticipated, that he would strike his toe against a cinder, and by reason thereof fall with his foot on the track; nor would it have been possible to stop the train, after the fall, in time to have prevented the injuries. We are aware of the rule so repeatedly announced by this and other courts of last resort that no presumption of negligence is to be indulged as against a child of tender years; but this boy seems to be intelligent, and, besides, it is shown by the evidence that he lives in close proximity to the railroad, and was at the time of receiving the injury familiar with the movements of the train on appellee's road. We think it does no violence to his youth to say that he was possessed of sufficient discretion to know the danger in which he voluntarily placed himself by taking a seat on the cross-tie near a moving train; and, indeed, he manifested his appreciation of the danger by trying to get out of the way of the train as it approached him, which he would have succeeded in doing but for striking his toe against the cinder. So, upon all of the evidence, we are unable to say that the verdict of the jury was unauthorized.

The alleged errors in reference to the giving and refusing of instructions might, and perhaps should, be refused consideration, because the instructions are not properly incorporated in the bill of exceptions; but we have, nevertheless, considered them, and find that, though inaptly expressed, they were not improper or prejudicial to the appellant. They told the jury, in substance, that if they believed from the evidence that if the appellant, Edward Givens, was seated on the end of the cross-tie while appellee's engine was approaching, and that those in charge of the train saw, or by the exercise of reasonable care ought to have seen, him, in time to have stopped the train before the engine reached him, but failed to do so, they should find for appellant. But upon the other hand, if they believed from the evidence that he was hurt from having his foot caught under a wheel of the train while he was attempting to jump on or off the train while in motion, they should find for appellee. While one, or perhaps more, of the instructions asked for by appellant and refused by the court might with propriety have been given, we do not think the refusal of the court to give

them was prejudicial to appellant, as these given presented the only issues of fact necessary to be determined by the jury.

Counsel for appellant complain of the action of the lower court in admitting as evidence the declarations of appellant's brother, made to him when he reached home just after receiving his injuries. The brother said, "Ah, ha! This is what you get from jumping on and off the train. You know that Pa and Ma have been telling you not to do that"—to which appellant made no reply. We would ordinarily attach very little importance to the silence of appellant under such circumstances, as he was doubtless suffering greatly from the wounded condition of his foot; but the statements of the brother were of a character to call for some explanation or protest, and the failure of the appellant to reply would seem to indicate that he was unable to deny the charge made by the brother. In order to affect a party with the statements of others, made in his presence or hearing, concerning any act or declaration of his, and the truth of which he impliedly admits by a failure to deny it, the statement must have been made under such circumstances as would reasonably or naturally call for some reply from any person similarly situated. 1st Greenleaf on Evidence, section 197. In view of the rule stated, and the testimony of several of the witnesses that they saw him swinging on the train when injured, we are of the opinion that the lower court did not err in admitting the evidence in question.

Finding no error in the record prejudicial to the appellant, the judgment of the lower court is affirmed.

BOHANNAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 8, 1903.)

MANSLAUGHTER — CHANGE OF VENUE — EVIDENCE — SUFFICIENCY.

1. Under Ky. St. § 1110, providing that on application for change of venue the court shall hear all the witnesses, and from the evidence determine whether the applicant is entitled to the change, where one accused of manslaughter set up that prior to the homicide an election had taken place in the county, at which he had opposed the successful candidates for county judge, sheriff, etc., and thereby incurred their enmity, but the officers mentioned all testified that they had not prosecuted defendant, and did not intend to prosecute him, and had no prejudice against him, and did not know how he voted, and it did not appear that they undertook to influence the jury in any way, it was not an abuse of discretion to deny a change of venue.

2. Evidence examined, and held to sustain defendant's conviction of manslaughter.

Appeal from circuit court. Breathitt county.

"Not to be officially reported."

Bud Bohannan was convicted of manslaughter, and appeals. Affirmed.

Pollard & Redwine, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

BURNAM, C. J. Appellant was indicted by the grand jury of Breathitt county on the 4th day of March, 1902, for the murder of Elkana Smith. A general demurrer was properly sustained to this indictment because it failed to allege that the killing was done with "malice aforethought." The case was resubmitted to the grand jury, who on the 3d day of June, 1902, returned another indictment for murder, in which no defect in form or substance is suggested. A trial under this indictment resulted in the defendant's conviction for manslaughter, and a sentence to confinement in the penitentiary for a term of fifteen years. From the judgment on this verdict of the jury the defendant has appealed to this court.

The first error complained of that it is necessary to notice is an order of the trial court overruling his application for a change of venue. In his petition he says "that just previous to the killing an election had been held in Breathitt county, which was very bitter and exciting between the candidates and their friends, and engendered a great deal of ill will and personal strife, and that at this election the county judge, James Hargis, the sheriff, Ed Callahan, the superintendent of schools, H. P. Noble, and the jailer, William Spencer, were elected; that they are very influential men, and, with those who are closely and intimately connected with them in business, control at least one-half the business interest of Breathitt county; that they will use their influence, as he believes, with their employes and men under their control, and the jurors of the court, to convict him, although he may be and is proven innocent of the charge against him; that E. Callahan, the sheriff, and James Hargis, the county judge, have, he believes, entire control of the juries of Breathitt county, and can convict or acquit a person charged with crime at their pleasure; that he opposed and voted against all of the above-named candidates and officers, and in consequence thereof had incurred their prejudice; that the brothers of the deceased are influential men, who supported the aforesaid county officers, and they have so molded the sentiment of Breathitt county against him that it would be impossible for him to get a fair and impartial trial of the case in Breathitt county." Accompanying his petition were filed the affidavits of six persons who say, in substance, that they are acquainted with the state of public opinion in Breathitt county with reference to the defendant, and that, owing to the influences and circumstances surrounding the case, they did not believe that the defendant could get a fair and impartial trial in Breathitt county. The attorney for the commonwealth

examined orally at the bar each of the persons who made the accompanying affidavits as to the facts and circumstances on which they based their belief that the defendant could not obtain a fair and impartial trial in Breathitt county, and each one of them testified that their opinion was based upon the fact, as they understood it, that the county judge, Hargis, and the sheriff, Callahan, would use their influence in the county to procure the conviction of the defendant, and each one of them expressed the opinion that, if these persons should take no interest in the trial, they knew of no reason why the defendant could not have a fair trial. The attorney for the commonwealth then called Hargis, Callahan, Noble, and Spencer in rebuttal, and each of them testified that they had not prosecuted and were not going to prosecute the defendant; that they had no interest in the trial, one way or the other, and that they had no feelings or prejudice against the defendant, that they did not know how he voted in the election. On this testimony the circuit judge overruled the motion for a change of venue. Section 1110 of the Kentucky Statutes, after providing for an application for a change of venue by the defendant, says: "The court shall on said motion hear all the witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue." It does not appear to us from this testimony that the trial court abused its discretion in refusing the change of venue. There is nothing in the record to show that any corrupt or improper influences were brought to bear to secure the conviction of the defendant. Nor does it appear that either of the officers from whose influence the appellant apprehended danger to himself undertook at any stage of the trial to influence the jury in their finding. We are not willing to believe, on such testimony, that persons occupying important official positions would be so lost to decency and propriety as to prostitute the power and influence which come to them by reason of their positions to gratify a mere private malice or prejudice against the defendant.

Appellant also complains that there was no testimony to support the verdict of the jury. We cannot concur in this conclusion. The testimony shows that there had been bad blood between the defendant and the deceased for several years, which had on several occasions culminated in violent threats and attempted violence. And the witness Maloney, who seems to have witnessed the entire transaction, testified that the killing occurred near the boiler of a sawmill of which he was the engineer; that the deceased was standing on his left, in front of the boiler, when the defendant came up, on his right, and asked him to take a chance in the raffle of a shotgun; that, as he was stooping down to open the door of the

ash box, he saw the defendant suddenly draw a pistol; that he turned his head towards the deceased, and saw him with his pistol in his hands; that the deceased started to go by the defendant, as though he was trying to get out, and, just after the deceased passed, the defendant shot him, and that several shots followed in quick succession; that the deceased then turned and ran, and that the defendant fired at him several times; that the deceased was wounded in the right hip and in one of his arms, and that the last shot passed through his head, killing him instantly; that only one chamber was loaded, when the fight began, in the deceased's pistol, and he fired that one shot. Whilst there is a great deal of testimony in the record conducing to show that defendant had the right to believe from previous threats and demonstrations that the deceased would attack him, it certainly cannot be claimed that there was no testimony to authorize the submission of this case to the jury, and it is only where there is no evidence that we would be authorized to reverse the judgment of a trial court in a criminal case on this ground.

No complaint is made of the instructions, and no error is pointed out in the admission or rejection of testimony, and we are therefore of the opinion that we would not be authorized in disturbing the judgment. Judgment affirmed.

COMMONWEALTH v. LYON.

(Court of Appeals of Kentucky. Feb. 24, 1906.)

STATES—VALIDITY OF SPECIAL ACT AUTHORIZING SUIT AGAINST—SUFFICIENCY OF JOINT RESOLUTION—UNLIQUIDATED CLAIM—INTEREST.

1. A joint resolution authorizing certain claimants of the commonwealth to sue it in a named court is just as effective as a law passed under Const. § 231, empowering the General Assembly to direct, by law, in what manner and in what courts suits may be brought against the commonwealth.

2. Const. § 59, prohibiting the General Assembly from passing local or special acts concerning certain subjects, is not violated by a joint resolution authorizing certain claimants to sue the commonwealth in a named court.

3. Since it is within the discretion of the court to allow interest on an unliquidated claim, the court has the same discretion in suits brought against the commonwealth by its consent.

O'Rear, J., dissenting.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by H. B. Lyon against the commonwealth of Kentucky. Judgment for plaintiff, and defendant appeals. Affirmed.

C. J. Pratt, Atty. Gen., for the Commonwealth. T. L. Edelen, for appellee.

PAYNTER, J. H. B. Lyon instituted this action against the commonwealth of Kentucky to recover for certain services alleged

to have been performed with reference to the construction of the branch prison at Eddyville, Ky. It is based upon a joint resolution (approved by the governor) which reads as follows:

"Whereas, W. Carpenter, H. B. Lyon and J. M. Thomas have rendered certain services to the state of Kentucky in the construction of the branch prison at Eddyville, Kentucky, for which they have not been paid: Now, therefore, be it resolved by the General Assembly of the commonwealth of Kentucky:

"Section 1. That said W. Carpenter, H. B. Lyon and J. M. Thomas or their heirs or personal representatives, if any of said parties be deceased, be and they are hereby authorized to institute suit for payment of said services against this commonwealth in the Franklin circuit court."

It is insisted: (1) That the resolution did not authorize the plaintiff to sue the state, because it was not adopted pursuant to section 231 of the Constitution, which reads as follows: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the commonwealth." (2) That it is violative of section 59 of the Constitution, which provides that the General Assembly shall not pass local or special acts concerning certain subjects. (3) The court erred in allowing interest upon the judgment.

The first and second questions have been passed upon in the case of *Commonwealth v. Haly, etc.*, 106 Ky. 719, 51 S. W. 430. The same constitutional questions were raised in that case as in this. On the first question the court said: "While, therefore, the voluntary grant to these appellees by the joint resolution is not an attempted compliance with the provisions of section 231, and is not, therefore, a law, within the meaning of that section, it is nevertheless an effective consent of the sovereign to subject itself to the jurisdiction of the Franklin circuit court in the particular matter involved." The legislative department of the government, with the approval of the chief executive, has consented that the sovereign might be sued. It is just as effective as if a law had been enacted, and we are of the opinion that the appellee was authorized to maintain the action under the joint resolution in question. In the same case the court passed upon the question as to whether such a resolution was violative of section 59 of the Constitution, and the court there decided that it was not. We will not again state the reasons for the court's conclusion.

On the third question it is sufficient to say that interest is not allowable, as a matter of law, upon an unliquidated claim. Its allowance or disallowance is left to the discretion of the court or jury, to be exercised according to the circumstances of the case. *Henderson Cotton Mfg. Co. v. Lowell Machine Shops*, 86 Ky. 668, 7 S. W. 142; *Mor-*

ford v. Ambrose, 3 J. J. Marsh. 688. When the Legislature gave its consent that the sovereign might be sued, it left it to the court to determine what, if any, recovery should be had, and the same discretion existed with reference to interest as in other cases. The only difference between the sovereign and an individual is that it requires the sovereign's consent to be sued, but, when that consent has been obtained, then the court has the right to determine the question of interest as it would have in a suit of one citizen against another.

Judgment is affirmed.

●REAR, J., dissents.

SHOUSE v. TAYLOR et al.

(Court of Appeals of Kentucky. March 4, 1903.)

QUIETING TITLE—CANCELLATION OF MORTGAGES—VENUE.

1. Ky. St. § 11, providing that any person having both the legal title and possession of lands may sue, in equity, in the county where the lands, or some part of them, may lie, any person setting up claims thereto, etc., does not authorize a suit to quiet title against mortgages executed by the plaintiff himself, on the ground that they were procured by fraud, to be brought in the county where the land lies, but the action is a transitory one, to be brought in the county of defendant's residence.

Appeal from circuit court, Shelby county.

"To be officially reported."

Action by E. L. Shouse against A. P. Taylor and another. Demurrer to the jurisdiction of the court sustained, and plaintiff appeals. Affirmed.

J. C. Beckham & Son and O'Neal & O'Neal, for appellant.

BURNAM, C. J. The appellant, E. L. Shouse, brought this suit in equity, under section 11 of the Kentucky Statutes, to quiet his title to a tract of land. The petition alleges that on the 28th day of November, 1900, he gave his promissory note to the defendants, A. P. Taylor and William Curran, trustees of the reserve fund of the International Mutual Deposit Company of Lexington, Ky., for \$8,000, due 12 months after date, with interest at the rate of 6 per cent., and, to secure the payment thereof, executed a mortgage upon a tract of land on which he resided, and to which he held the legal title, containing 248 acres, situated in Shelby county, Ky., and that on the 26th day of February, 1901, he gave an additional note for \$3,000, due 12 months after date, with interest payable quarterly, to the same parties, and executed a second mortgage upon the same tract of land to secure its payment, and that, in addition to the mortgages and notes specified above, on the 9th day of May, 1901, he gave another note to the same parties for \$2,331.70. He alleges: That each of these notes and mortgages made to secure

the first two was executed in consideration of money which the defendants were to advance to him, to be used in the purchase of stock in the Mutual Deposit Company of Lexington, Ky. That the notes and mortgages were obtained from him by false and fraudulent representations made to him by Taylor and Curran, officers of the company, that the corporation was legally organized and solvent, and engaged in a lawful and prosperous business, and was earning for and paying to, and would continue to earn for and pay to, its certificate holders, depositors, and members, 50 per cent. on their investments, and that certificates would be issued therefor by the company, redeemable in a short time; that the plan was approved by the best and most successful financiers of the country; that they would advance to and pay for plaintiff the sums evidenced by the various notes, and treat them as so much cash paid by him to the defendant company, and issue certificates therefor, and that the earnings of the company would pay them off; and that he would under no circumstances be called upon to pay them. That these mortgages were a cloud upon the title of plaintiff, and interfered with the alienation and salable value of the land—and asked for a cancellation of the notes and mortgages. The summons which issued on the petition was directed to, and was executed by, the sheriff of Fayette county, upon Taylor and Curran, in Fayette county. And the trial court sustained a special demurrer to the jurisdiction of the court, and the plaintiff has appealed to this court.

The section of the statutes relied on to give the Shelby circuit court jurisdiction is as follows: "It shall and may be lawful for any person, having both the legal title and possession of lands, to institute and prosecute suit, by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other person setting up claims thereto; and if the plaintiff shall be able to establish and does establish his title to said land, the defendant shall be by the court ordered and decreed to release his claim thereto." It is the contention of appellant that the placing on record of the mortgages sought to be canceled was such a setting up of claim to the real estate owned by the plaintiff as to give the court jurisdiction. This statute was before this court for construction in the case of *Kincald v. McGowan, etc.*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289, and in *Campbell v. Disney*, 93 Ky. 41, 18 S. W. 1027. In the latter case it was held that, to maintain the action, "it should appear that the claim of title or right was hostile to the title of the plaintiff. Then the allegation that such claim of title clouded the plaintiff's title would be a substantive fact, which should be alleged. * * * To illustrate, suppose the defendants' claim was a lease from the plaintiff; such lease would be a rightful claim, which might greatly

lessen the market value of the property, yet no one would contend that an action of *quia timet* would lie in such case." It is apparent from the averments of the petition that defendants' claim to the land is in no sense hostile to that of plaintiff. On the contrary, their claim arises under and by virtue of the mortgage executed to them by the plaintiff, which is merely an incident to the notes, and only creates a lien to secure their payment. When the notes are paid, the mortgages have nothing on which to rest, and necessarily become extinct. The only relief sought is relief for fraud and deceit practiced upon him by the defendants, and which comes under the head of transitory actions, and must be brought in the county in which some of the defendants who may be properly joined as such reside or are summoned. We perceive no conflict in the cases of *Campbell v. Disney*, 93 Ky. 41, 18 S. W. 1027, and *Landrum v. Farmer*, 70 Ky. 46. In the latter case, Farmer executed to Landrum a bond for an undivided interest in a tract of land in his possession in Marshall county. He subsequently brought suit for the cancellation of the title bond, and had the process served on Landrum in Chaves county. The claim of Landrum in that case was a hostile claim of ownership—entirely different from a mortgage, as in this case.

Perceiving no error in the judgment appealed from, it is affirmed.

ILLINOIS CENT. R. CO. v. SCHEIBLE.

(Court of Appeals of Kentucky. Feb. 3, 1903.)

RAILROADS—SETTING FIRES—OTHER FIRES—ADMISSIBILITY OF EVIDENCE—CONDITION OF ENGINES—QUESTION FOR JURY.

1. In an action against a railroad company for damages by a fire set by its engines, evidence that the company's engines, shortly before and during the time of the injuries, emitted large quantities of sparks and started many fires in the vicinity of plaintiff's property, and that cinders covered the ground along the track and out beyond the right of way in the vicinity of the premises, is admissible, though the railroad company's servants testified that the engines causing the fire were equipped with suitable appliances, in proper condition.

2. In an action against a railroad company for damages by fire set by its engines, it is a question for the jury how the engines were operated, and whether the spark arresters were in proper condition at the time of the fire, though two of the company's witnesses testified—the one, that he examined the engines on their arrival at the terminus the night of the fire; the other, that he examined them before they left on their run that morning; and both, that the engines were properly equipped and in proper condition to prevent fire.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by G. C. Scheible against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Marriott, J. M. Dickinson, and Pirtle & Trabue, for appellant. L. A. Faurest, for appellee.

NUNN, J. This appeal is from a judgment of the Hardin circuit court for \$400, in favor of appellee against appellant, for the loss of rails, posts, fruit trees, and timber trees. It was alleged by the appellee that this loss was occasioned by five different fires started by defendant's engines; all of the fires having occurred between April 8, 1901, and August 21, 1901. The appellant admits four of the fires—the small ones—doing damage to the extent of \$37.48. Appellant states that no report of the fires was made at the time, and it was unable to ascertain the engines from which the sparks were emitted, and for that reason could introduce no evidence as to the condition of the engines. But appellant claims that the fire which caused the only considerable damage occurred on April 9, 1901, and was caused by one or the other of two engines, No. 4 or 303, and that it was conclusively shown that at that time said engines were furnished with the most perfect screens and spark arresters, and that they were in perfect order; and appellant further claims that the lower court erred to its prejudice in permitting appellee to prove by many witnesses that appellant's engines, shortly before and during the time he claimed to have sustained the losses, emitted large quantities of sparks and cinders and started and caused many fires along its road on and in the vicinity of appellee's farm, and that cinders from the size of a pea to the size of a man's thumb cover the ground along the track, and out beyond appellant's right of way; and in the vicinity of appellee's farm; and he cites two authorities to support his contention. One is the case of *N. N. & M. V. R. R. Co. v. Terry*, 16 Ky. Law Rep. 316, which is not reported in full, and is an opinion by the superior court, and which seems to support appellant's contention. The other is the case of *L. & N. R. R. Co. v. Dalton* (Ky.) 43 S. W. 431—opinion by Judge Haselrigg. As we understand this opinion, it is against appellant's position. The court in that opinion used this language: "Before liability can be fastened on the company for want of proper screens on its engines, or because of their defective condition, there must be some evidence to show such want or defective condition—such as that an unusual quantity of live sparks were being emitted while the train was going at an ordinary rate of speed, or the same engine started several successive fires on the same trip, or the like. In the case before us there is no evidence or circumstance of this character to rebut the testimony of a number of witnesses for the company who testified as to the perfect condition of the appliances after a thorough examination immediately after the fire." In this case the evidence of the witness Hart shows that one of these engines started a fire on the same day, very near the fire complained of; and there is much proof in this case that the engines of appellant, during the time mentioned, emit-

ted large quantities of live sparks and started fires in that vicinity. In the case referred to, the court said that the jury were not at liberty to reject the testimony of the railroad's witnesses, but, in effect, saying that, with such evidence before them as in the case before us, it was a question of fact for them to determine as to the condition of the spark arrester and the management of the engine at the time the sparks were emitted and the fire started. It is well settled in this state that a railroad company is not liable for injuries resulting from sparks escaping from its locomotive if it is furnished at the time with the best and most-approved screens and spark arresters in practical use when these appliances were in perfect order, if not otherwise guilty in the operation of its engines. In the case of *L. & N. R. R. Co. v. Samuel's Executors* (Ky.) 57 S. W. 235, the above principle was approved, and in that case and in that connection the court used this language: "The law is well settled in this state that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most-approved screen and spark arrester in practical use, when these appliances were in perfect order, if not otherwise guilty of negligence in the operation of its engine. But it is equally well settled that in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will of itself warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard." And again: "The question in that case was whether it was competent to show, about the time when the fire occurred, that sparks and burning coals were frequently dropped by other engines passing on the same road and upon previous occasions, and it was held that such testimony was competent." In the case of *The Kentucky Central Railroad Co. v. Barrow*, 89 Ky. 642, 20 S. W. 165, this court, by Judge Lewis, said: "The evidence on the trial of which appellant complains was, substantially, that trains frequently set fire to fences and grass at other places in the vicinity of appellee along the line of that road, and at different times during the fall of 1881. It was also stated that the trains usually passed with the screen or fender up or laid back." The court sustained this evidence and affirmed the case. To the same effect is the case of *The L. & N. R. Co. v. Taylor*, 92 Ky. 57, 17 S. W. 198.

As stated before, appellant contends that

when its two witnesses, McGariger and Turner, testified that the particular engines which started the fire were provided with screens or fenders that would effectually prevent the escape of sparks or fire from the chimneys of the locomotives, this concluded the case, and that the jury were not at liberty to reject the evidence of these two witnesses. McGariger said that, when the engines arrived at Louisville that night, he examined them, and found the screens to be all right and in proper position. Turner said that before the engines left Paducah he examined them, and found that the screens were all right and in proper position. And they both stated that these screens were of the best and most-approved appliances for the arrest of sparks and cinders. The appellant did not introduce those in charge of the said engines, Nos. 4 and 368, to show how said engines were managed and operated—whether properly or not—at the time and while passing the place where the fire started, nor show the condition and position of the screens and spark arresters at that time. And for these reasons it was a question of fact for the jury to determine as to how the engines were managed and operated, and as to whether or not the screens and spark arresters were in proper position and condition.

Perceiving no error, the judgment is affirmed, with damages.

DUDLEY v. CITY OF FLEMINGSBURG.

(Court of Appeals of Kentucky. March 8, 1903.)

MUNICIPAL CORPORATIONS—COASTING ON STREETS—INJURIES TO TRAVELER—LIABILITY.

1. A municipal corporation is not liable for injuries sustained by one run into by a sled while attempting to cross a street, for in preventing coasting on its streets it is engaged in the performance of governmental duties, and represents the state.

Appeal from circuit court, Fleming county.
"To be officially reported."

Action by W. B. Dudley against the city of Flemingsburg. Judgment for defendant, and plaintiff appeals. Affirmed.

G. A. Cassidy, J. D. Pumphrey, and J. F. Maher, for appellant. W. G. Dearing and O. R. Bright, for appellee.

NUNN, J. The appellant sued the city of Flemingsburg, alleging that in the month of February, 1902, a heavy sleet had fallen, and the streets of the city were covered with ice and snow, which remained on the streets for several days, during which time the mayor and the other officials of the city suffered, permitted, and encouraged men and boys to congregate on and coast down Main street, a distance of four or five hundred yards, on sleds and slides, at the rate of

about 75 miles per hour, to the great danger of persons using this street and other streets crossing it; "that this coasting was kept up almost throughout the entire day of the 7th of February, 1902, the day on which appellant was injured, and many complained to the authorities, the mayor, police judge, councilmen, and marshal, and they neglected and refused to prevent or stop the illegal usage and practice of coasting on the street, although the street was appropriated almost entirely to the use of boys and reckless men, white and black, who were boisterous and riotous in their behavior and manner, and the same was continued for several days, with the knowledge of the officials of the defendant, without protest from them, or any effort to prevent it, and that the officials could have prevented the illegal and dangerous use of the streets if they had made any effort to do so; that on the evening of the 7th day of February, 1902, about the hour of seven o'clock, appellant started to the business portion of the city, and in his effort to cross Main street, and when exercising ordinary care for his own safety, he was run against by one of the coasters with a sled, and was knocked down, and his head injured, his collar bone broken, and he was otherwise bruised and severely injured, and was put to great expense in the way of medical and doctor bills to effect a cure; and that he was permanently injured, to his damage in the sum of \$2,000." The court below sustained a demurrer to that petition, and appellant is here on appeal.

There are two general principles underlying the administration of government of municipal corporations: The one is that a municipal corporation, in the preservation of peace, maintenance of good order, and the enforcement of the laws for the safety of the public, possesses governmental functions, and represents the state. The other is where the municipal corporation exercises those powers and privileges conferred for private, local, or merely corporate purposes, peculiarly for the benefit of the corporation. Under the former the city is not liable for the malfeasance, misfeasance, or nonfeasance of its officers. Under the latter, it is. Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Nonfeasance is the nonperformance of some act which ought to be performed. Appellant's petition is, in substance and effect, to recover damages from appellee for personal injuries by reason of the misfeasance or nonfeasance of its officials in authorizing and consenting to the coasting on its streets by disorderly persons and riotous assemblies, and failing to prohibit and prevent same. In the case of *Schultz v. City of Milwaukee*, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779, the court said:

¶ 1. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1611.

"The coasting or sliding down Poplar street, in the manner and to the extent charged in the complaint, was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police, rather than a corporate duty, in the performance of which the corporation, as such, has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." And the court in that case relieved the city from liability. In the case of *Faulkner v. City of Aurora*, 44 Am. Rep. 9 (a case in which the facts are the same as those in the case at bar), the court said: "It is obvious that in the case before us the injury did not result from any defect in the highway. It was produced by the act of those improperly and unlawfully using the highway, which was at the time, and but for the unlawful act of those improperly using the street, in a reasonably safe and convenient condition for public travel. The complaint is not that the appellant's son was injured because of defects in the street rendering it unsafe and unfit for public use, but because persons, while engaged in improperly using the street, ran their coasting sleds against his son, thereby injuring him. If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. To hold incorporated cities liable for such injuries would be unjust, and, we think, without the sanction of law." In the case of *Borough of Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771, the court said: "The appellee could only arrest and stop the sport of coasting upon its streets through its officers and police force, but, as held in the same case, the appellee would not be responsible for the neglect or failure of its officers to stop those engaged in thus using its streets."

The appellant, in his petition, claims that the use and the manner of use of this street by the coasters amounted to an obstruction of the street for which the city was liable. In the case of *Faulkner v. City of Aurora*, supra: "It is held that anything in the condition of the highway which renders it unsafe or inconvenient for travel is a defect or want of repair. It may be a hole in the highway, or it may consist of a stone or log or other obstacle left on its surface, or a post standing within its limits, or a barrier stretched across it, though not touching it, or it may be trees or walls standing by or upon it, and liable to fall and injure travelers, or it may be an awning projecting over it." For injuries from such obstruc-

tions the city would be liable. Continuing, the court in that case said: "But we are not aware of any precedent for holding an illegal use of the highway by men, animals, vehicles, engines, or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the traveled part of, the highway, to be a defect or want of repair for which the city or town is liable." It is obvious that in the case before us the injury did not result from any defect or obstruction in the highway. It was produced by the acts of those improperly and unlawfully using the highway, and for which the city or corporation is not liable. To the same effect is the case of *Prather v. City of Lexington*, 13 B. Mon. 563, 58 Am. Dec. 585, in which a mob destroyed property of Prather in the city of Lexington. The court, after discussing defects in the petition, used this language: "But we place the decision of the question arising upon the demurrer to the plaintiff's declaration upon broader grounds. The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible." To the same effect is the case of *Ward v. City of Louisville*, 16 B. Mon. 191. In the case of *Jolly's Administrator v. City of Hawesville*, 89 Ky. 251, 12 S. W. 313, the facts were that numerous persons congregated on the streets of Hawesville, in the presence of and with the consent of the city officials, with guns and pistols, and engaged in sham battle, pursuing and shooting at each other in such close proximity as to endanger the lives of those who were not, as well as those who were, engaged; and this continued from early in the morning until late in the evening, without any effort on the part of the marshal, though aware of it, to stop it; and plaintiff's son, who was not engaged in this unlawful amusement, was shot in the eye with a wad and killed, and the plaintiff sued the city for damages. The court, applying the principles of law above named, dismissed her petition; and the court in that case, after referring to *Pollock's Administrator v. City of Louisville*, 13 Bush, 221, 28 Am. Rep. 260, and *Greenwood v. City of Louisville*, 13 Bush, 226, 26 Am. Rep. 263, and the two cases, 13 B. Mon., and 16 B. Mon., supra, as sustaining the court's position, used this language: "Such has been the uniform ruling of this court, and a different one would be not only perverse of the main design of creating municipal corporations, intended principally as auxiliary of the state government, but open the door for actions against cities on account of every personal injury in any degree attributable to misfeasance or nonfeasance of police officers, and thus impose burdens on taxpayers in no just sense at fault

or liable. This long and well settled doctrine has not been modified by statute of this state, except to the extent that section 5, c. 1, Gen. St. [now section 8, Ky. St.], makes a city liable for damages done to property therein by riotous and tumultuous assemblies of people. But the care and particularity with which the conditions of such liability are set out in the statute, and the restriction of it in express terms to cases of injury to property, shows the legislature did not intend to thereby authorize a recovery against the city for personal injury resulting from the malfeasance or negligence of police officers." To the same effect is the case of *City of Madisonville v. Bishop* (Ky.) 67 S. W. 269. These cases all rest on the ground that the municipal corporation represents the commonwealth, and municipal officers, while engaged in those duties which relate to the public safety and the preservation of public order, are the servants of the state.

Perceiving no error, the judgment is affirmed.

GERMAN INS. BANK v. FABEL.

(Court of Appeals of Kentucky. Feb. 20, 1903.)

USURY—JOINT NOTE—INDIVIDUAL RENEWAL
NOTE—NEW SECURITY—EFFECT.

1. A joint maker of a usurious note which has been frequently renewed, the usury being each time added to the principal, is not deprived of the defense of usury by the fact that later he executed his own note on new collateral security; the joint note being canceled, and the balance of the proceeds of the individual note being used by him on his own account.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Proceedings by Louise Fabel, as administratrix with the will annexed of the estate of Margaretha Fabel, for the settlement of her accounts, and for a sale of real estate to pay debts, in which the German Insurance Bank was made a defendant as a creditor of the estate. From a judgment allowing the defendant's claim for an insufficient amount, defendant appeals. Affirmed.

O. A. Wehle, for appellant. M. A., D. A. & J. G. Sachs, for appellee.

BURNAM, C. J. The appellee, Louise Fabel, brought this suit as administratrix with the will annexed of the estate of Margaretha Fabel for a settlement of her accounts, to ascertain the indebtedness of the estate, and for a sale of a sufficient amount of real estate to pay it. Appellant, the German Insurance Bank, was made a defendant and filed an answer, in which it alleges that Margaretha Fabel on the 14th day of July, 1900, executed to it her promissory note, due four months after date, for \$5,000, and at the same time pledged and delivered to it certain shares of stock owned by her, as collateral security. It admitted that the note

contained \$291.42 of usury, but alleged that the balance, \$4,708.58, with interest from the 17th of November, 1900, was just, due, and unpaid, and asked an enforcement of its lien, and a sale of the collateral to pay this balance. Appellee replied, and denied that the alleged balance set up by the bank was the true amount due by decedent. And in the second paragraph of the reply she alleges that on the 30th day of July, 1885, F. Fabel & Sons and Margaretha Fabel borrowed from the bank \$5,000, for which they executed their joint promissory note, due four months after date; that there were numerous renewals of this note by the same makers to the bank, at which interest in excess of 6 per cent. was either paid or added to the principal; that this course of dealing was kept up until the 30th of December, 1895, when she executed her individual note to the bank in lieu of the one signed by F. Fabel & Sons and herself, and that on the note so executed she paid interest at the rate of 7 per cent. and 8 per cent. per annum at each renewal thereof; and that it was finally merged in the obligation sued on—and asked that the entire usury which had been paid from the date of the original loan in July, 1885, should be extracted. Appellant, in its rejoinder, admits the transaction with F. Fabel & Sons and Margaretha Fabel, and alleges that there was due on the old note on the 30th of December, 1895, \$4,705; that on that day decedent executed to the bank her note for \$5,000, the proceeds of which (\$4,877.50) were placed to her credit; and that she checked on this sum to pay for the old note, and appropriated the balance (\$172.50) to other uses—and claims that this transaction was an independent loan made to decedent on the credit of the stock, and denies that the usury paid, between the date of the original loan and the date of this transaction, by F. Fabel & Sons and decedent, can be legally deducted from the obligation sued on. A demurrer was sustained to this response, and \$1,363.31 of usury deducted, and a judgment given for the balance of the plaintiff's debt; and to reverse that judgment this appeal is prosecuted.

Appellant contends that as the proceeds of the note executed by decedent in 1895 were placed to her credit, and were in excess of the balance due upon the old obligation, it cannot be regarded as a renewal of the previous debt, and seeks to distinguish this transaction from numerous others of similar character which this court has held to be mere renewals and devices resorted to to escape usury. In *S. Whinery v. R. D. Garrett*, etc. (which was decided at the present term of this court) 71 S. W. 855, A. J. Crawford, principal, and S. Whinery, as security, borrowed from the Somerset Banking Company \$3,300, by note, which was renewed from time to time until the 24th of January, 1896; interest being paid at each renewal at the rate of 8 per cent. In February,

1890, Crawford having become insolvent, Whinery executed his individual note to the bank for the balance due, which he renewed from time to time, making like payments in advance of interest by way of discount. He was sued at the last renewal of the note, and pleaded usury. The trial court purged the note of all usury which accrued after the execution by Whinery, but refused to purge the usury paid up to that time by Crawford. It was held that Whinery was entitled to have all the usury extracted which had been paid by Crawford from the date of the original transaction. In *The Bank of Russellville v. Coke* (Ky.) 45 S. W. 867, it was held that where a borrower had paid usury upon an indebtedness which was embraced, with other indebtedness, in a new note, he had the right to follow such usury into the new obligation, and recover the amount so embraced therein. In *Kendall v. Crouch*, 88 Ky. 190, 11 S. W. 587, it was held that dropping of the principal obligor, and the execution of a new note by the surety, was not such a novation as would deprive the surety of the plea of usury. We think it is impossible to distinguish, on principle, those cases from the one at bar. And appellee is not estopped from relying upon the defense of usury in the obligation sued on, any more than she would have been if she had merely executed a note to the bank for the exact amount due upon the note of Fabel & Sons and herself, which she took up and paid off.

For reasons indicated, the judgment is affirmed.

FOX v. WILLIS et al.

(Court of Appeals of Kentucky. Feb. 25, 1903.)

CLAIMS AGAINST THE GOVERNMENT—COLLECTION—FEE—MINISTER TO FOREIGN COUNTRY—ATTORNEY'S FEE.

1. Under Rev. St. U. S. § 5498 [U. S. Comp. St. 1901, p. 3707], prohibiting a person holding a place of trust or profit under the government from acting as agent for the prosecution of a claim against the United States, a person who has entered into a contract with another to assist him in prosecuting the claims of a city against the government, but who shortly afterwards accepts the post of minister to a foreign country, and holds such post during the prosecution of the claim, cannot recover any fee for the prosecution of the claim.

2. Where a minister to a foreign country had, before taking up his duties, entered into a contract with another to assist in the collection of certain claims against the government, which were prosecuted during his term of office, he can, upon payment of the claims, recover from his associate any attorney fees and costs advanced for his benefit, though he cannot recover any fee for services.

3. An attorney fee of \$500 certain and \$1,000 additional in case of success for the collection of a claim of \$19,017.05 by suit, is reasonable.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Suit by F. T. Fox against the Board of Sinking Fund Commissioners of the city of

Louisville to recover fees claimed to have been earned by the collection of a claim against the government. Mrs. Willis, as executrix of A. S. Willis, deceased, intervenes, and claims part of the fee under a contract with plaintiff. The board is permitted to pay into court the fund sued for. Judgment awarding intervener part of the fund, and plaintiff appeals. Reversed.

Pirtle & Trabue, Hasehriegg & Obenault, and J. T. O'Neal, for appellant. J. L. Clemons, for appellee.

NUNN, J. The substance of the facts of this case are that in the year 1890 the Board of Sinking Fund Commissioners of the city of Louisville, Ky., by resolution of the board, renewed the contract with F. T. Fox and A. S. Willis that it had, in 1874, made with F. T. Fox and S. H. Wires, to recover from the United States government internal revenue tax wrongfully collected from the city—Wires having died. By the contract Fox and Willis were to receive a sum equal to one-half of any sum they might recover; they to pay all costs and their expenses. Fox had other like contracts for the recovery of claims against the government, made with the state of Kentucky and Logan and Simpson counties (but they were only to receive on claims of counties a fee equal to 20 per cent. of the amount collected), in which contracts he procured the services of A. S. Willis, and agreed with him that they would divide the fees equally after deducting expenses. Under this arrangement they prosecuted the claims, and on the 16th day of March, 1891, they collected from the government \$42,514.03 on the Louisville claim. One-half of this sum—their fee—was divided between them on the basis of their agreement; Willis receiving the sum of \$11,257, and Fox \$10,000. On the 6th of March, 1894, they received further on their Louisville claim the sum of \$13,725.17, \$9,533.54 on their Logan county claim, and \$1,296.02 on their Simpson county claim. Their fees on these collections were adjusted and settled between Fox and J. L. Clemons, as agent and attorney for Willis, who was then in Hawaii. Fox received \$3,435.58 and Willis \$5,658. This settlement was made on the 6th day of March, 1894, and the basis for same was a settlement made by Fox and Willis on the 20th of October, 1893. The agreement is in words and figures, to wit:

"Louisville, Ky. 20th Oct. 1893. It is agreed by and between Albert S. Willis and F. T. Fox that in fees to be received from the city of Louisville, Simpson co. and Logan co. Ky., and the state of Kentucky, said Fox is to receive \$7,250.00 and said Willis \$11,957.04; but subject to this addition that if said Fox can get an allowance for expenses from Simpson co., the same is to be equally divided between them; and if the full claim for the State of Kentucky, then the additional fee for same is to be equally divided

between them, the additional sum for said state being supposed to be \$2,117.91. Said Willis is to pay the fee due Judge Hart of Washington. The above settlement is based on the payment of the claims aforementioned and is to be prorated if any of the claims is rejected. This settlement is in lieu of all others. F. T. Fox. Albert S. Willis.

"In the event said Fox can get from Logan county any allowance over the 20 per cent now agreed to be paid by said co., the same is to be equally divided between them. 20th Oct. 1893. F. T. Fox. Albert S. Willis."

When these last sums were paid by the government, it, by its officials, refused to pay the city of Louisville about \$17,000, which had been allowed when the last-mentioned claims were allowed; giving as a reason that it had, by some error or mistake, when it paid the \$42,514, paid \$17,000 too much. And in March, 1894, an action was brought to recover this sum. The Board of Sinking Fund Commissioners were successful in the lower court, and the government appealed to the Supreme Court, and lost again, and on the 20th of July, 1898, paid the sum, with its interest, to wit, \$19,017.05, to the Board of Sinking Fund Commissioners of Louisville, Ky.; and on the 5th day of October, 1898, appellant, F. T. Fox, sued the commissioners for one-half thereof, claiming that he was entitled to it in his own right. The commissioners answered, and admitted that they held the money, but that Willis' executrix was claiming a part of same as a fee for A. S. Willis, under the resolution of the board employing Fox and Willis in the year 1890; and also stating that they, as such board, had been summoned as garnishees in actions by the Louisville Banking Company against Fox and G. W. McCreedy against Fox, and that the Louisville Trust Company had given them notice of a written assignment by Fox to it of his fee in said fund; and asked to be allowed to pay the fund in court, and for the court to adjudge to whom the fund belonged; and under order of court said fund of \$9,508.57 was paid in court. Mrs. Willis, as executrix of A. S. Willis, answered, and controverted plaintiff's statement that he was entitled to the whole fee, and alleged that she, as such executrix, was entitled to a part of the fee, to be divided in the proportions and under the contract of Fox and Willis made October 20, 1893; and also alleging that Willis and she, as executrix, had advanced to Alphonso Hart his fee of \$1,500 to prosecute this last action to a judgment, and had paid \$385 costs and claims for printing in and about the proper prosecution of the claims, and asked the court to adjudge to her from the fund a sufficient amount to pay same. The appellant replied to appellee's answer, and denied her claim, and stated that A. S. Willis, in the fall of 1893, was appointed by the President of the United States a minister to Hawaii, and that he accepted this appointment; that under section 5498

of the Statutes of the United States [U. S. Comp. St. 1901, p. 3707] Willis was prohibited from prosecuting any claim against the government while holding such office, and that he held same until his death, which occurred in the year 1897; and that also he prosecuted the claim in his own name and right with the assistance of Hart, and that he had no knowledge or information that Willis took any part in the prosecution of the claim, or that he paid any costs or Hart's attorney fee, but says that he himself did not pay Hart, nor any costs except \$40. The lower court adjudged that Willis' executrix take \$6,924.35 of the fund, to which judgment appellant excepted, and the case is here on appeal.

The first or main question to be determined is, can the executrix of A. S. Willis recover any part of the \$9,508 as fee for the prosecution of the action to recover a claim against the United States after Willis became minister to Hawaii? Section 5498, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3707], is as follows: "Every officer of the United States, or any person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner or by any means, otherwise than in the discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both." In 2d Edition of American & English Encyclopedia of Law, page 933, this language is found: "That principle of law which holds that no one can lawfully contract to do that which has a tendency to be injurious to the public or against public good is well settled, and may be termed the policy of the law. And courts have not hesitated to declare illegal and unenforceable contracts which they have considered against the public policy." Again, on page 939, it is said: "In some early cases a distinction was taken in reference to the validity and enforcement of contracts between acts mala prohibita and acts mala in se, but in the words of an eminent jurist this 'has long since been exploded.' It was not founded upon any sound principle, for it is equally unfit that a man should be allowed to take advantage of what the laws says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state. When the statute ex-

pressly provides that a violation thereof shall be a misdemeanor, it would seem clear that it was the intention of the legislature to render illegal contracts violating the statute." The same principles are stated in the case of *Steele v. Curle*, 4 Dana, 384. In the case of *Lindsay v. Rutherford*, 17 B. Mon. 247, the court said: "A contract is void if prohibited by statute, though the statute only inflicts a penalty; because such a penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The question to be considered is, does the statute prohibit the contract attempted to be enforced?" In case of *Ex parte Curtis*, 106 U. S. 371, 27 L. Ed. 232, Chief Justice Waite reviewed the legislation of Congress on the subject of the disability of officers of the United States in matters of claims against the United States from the beginning of the government, and referred to section 5498 of the Statutes [U. S. Comp. St. 1901, p. 3707], as follows: "Which prohibits every officer of the United States or person holding any place of trust, profit or discharging any official function under or in connection with any executive department of the government, from acting as an agent or attorney for the prosecution of any claim against the United States." It is admitted that A. S. Willis held the position of minister to Hawaii from this government from the last of the year 1893, until his death, in 1897, and his case comes within the principles above referred to. The contract is in fact prohibited by section 5498 of the Revised Statutes of the United States, though the statutes only inflict a penalty, because the penalty implies a prohibition. If Mr. Willis, while an officer of the United States, as attorney, had prosecuted any claim against the United States, or assisted in the prosecution of such claim, he was liable to a fine of not more than \$5,000 or imprisonment for not more than one year, or both; and, the penalty for doing the act being imposed, the act itself was prohibited by law. The court is of the opinion that his executrix is not entitled to recover any part of the fund as a fee for the prosecution of the claim. But we are of the opinion that out of said fund Willis' estate should be reimbursed for the money advanced for the benefit of appellant in the prosecution of the claim, and for the amount due Willis from appellant as shown by their settlement of October 20, 1893, \$4,707.04, less the amount paid him as on their settlement in March 1894, \$2,222.42, with 6 per cent. interest to the date the sinking fund commissioners paid the fund into court, to wit, October 4, 1898. The contract of Fox and Willis of date of October 20, 1893, and the settlement of March, 1894, show that at the last date, and after the completion of the settlement, appellant was indebted to Willis in the sum of

\$2,484.62, and the proof shows that Willis paid Hart, for appellant, on the 4th of October, 1894, the sum of \$500. The record shows parties agree that statement in contract of 20th of October, 1893, "that Willis is to pay Hart," had no reference to \$1,500 paid Hart, but referred to other and premium fee, and paid for him for printing a brief, August 13, 1894, the sum of \$60, and March 12, 1896, \$120, and November 1, 1895, J. P. Morton account \$180, and costs paid for appellant December 11, 1897, by Willis' executrix, \$25, and paid Judge Hart balance of fee on August 20, 1898, \$1,000—making, with interest, the sum of \$5,244.76, the amount which the court should have adjudged to Willis' executrix. The appellant should not complain at the amount of the fee to Hart. A fee for the collection of a claim of \$19,017.05 by suit, when the claim was litigated for a fee of \$500 certain and \$1,000 additional in case of success, seems to us a not unreasonable fee, and we are satisfied that the contract made with Judge Hart by Clemons on such terms proved to be very beneficial to appellant.

For the above reasons, the case is reversed, and the cause remanded for further proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. DICKEY et al.

(Court of Appeals of Kentucky. Feb. 20, 1903.)

PRIVATE WATERWORKS—RAILROAD COMPANY—CONTRACT WITH TOWN COMPANY—LICENSE TO CITIZENS—EVIDENCE—ABROGATION OF CONTRACT—PRESCRIPTIVE RIGHT.

1. A railroad company took a deed of land securing to it the use of the water of a spring for railroad purposes. The land was conveyed to a land company, and a contract made between the railroad and it, by which the railroad agreed to repair a waterworks system constructed by the land company and to supply water. Lots were sold on representation that free water would be furnished citizens. Later the land company released the railroad from its obligation. Afterwards many citizens went to the spring and got water, often taking it in buckets from the supply pipe of the railroad's waterworks. *Held*, that this did not amount to continuing to supply citizens with free water under the abrogated contract, but constituted them merely licensees.

2. By the charter of a land company the entire management of its affairs was placed in the hands of its president, and a contract with a railroad company for a water supply was executed by him. *Held*, that the president had power to also execute the release to the railroad company, so as to bind the land company.

3. The land and railroad companies had the right to abrogate the contract for the water supply, the rights of the citizens under any contract they might have had with the land company not being affected thereby.

4. Certain citizens connected private pipes with the railroad's water main for more than 15 years prior to a suit by them to enjoin interference by the railroad company. This connecting of private pipes was with the permission of the railroad company, and no clause in the conveyances constituting the citizens' chain

¶ 4. See Easements, vol. 17, Cent. Dig. § 24.

of title contained any covenant for free water. *Held*, that the right to take water from the railroad company's mains through the private pipes was a mere license, which no lapse of time could convert into an easement.

5. The contract between the land and railroad companies for the water supply provided that, should the railroad fail to keep the present machinery of the waterworks in operation, or abandon the same, the land company, on giving notice, should have the right to take possession of the waterworks and operate them. *Held*, that this provision gave the railroad company the right, at any time it saw fit, to abandon the contract, and turn over to the land company the waterworks in question.

6. The fact that the bottom of the reservoir fell out, and the railroad company built a new water tank of its own, constituted an abandonment of the contract.

Appeal from circuit court, Barren county.
"Not to be officially reported."

Action by E. Dickey and others against the Louisville & Nashville Railroad Company. Judgment for certain of the plaintiffs, and the railroad company appeals. Reversed.

Jas. A. Mitchell, E. W. Hines, and B. D. Warfield, for appellant. L. McQuown, W. L. Porter, and V. H. Baird, for appellees.

BARKER, J. This action was instituted by the trustees of the town of Cave City, Ky., for the use and benefit of all its citizens, together with several citizens in their individual capacity, among whom were appellees, for the purpose of obtaining an injunction restraining appellant, the Louisville & Nashville Railroad Company, from refusing to supply the citizens of Cave City with water. Without going into the details of the case with unnecessary prolixity, it may be said that the issues were properly made by the pleadings, the evidence taken, and the whole case heard and submitted on the 11th day of July, 1901, at which time the court entered final judgment dismissing the petition as to G. T. Parker, one of the original plaintiffs, without prejudice, and then adjudging that the appellees, E. Dickey, W. A. Payne, and Martin Bros. (who were among the original plaintiffs), were entitled to the relief sought by the petition; that mandatory injunction be granted them against the Louisville & Nashville Railroad Company, and the said Louisville & Nashville Railroad Company be enjoined and required to permit plaintiffs (appellees) at their own cost to attach the water pipes that heretofore conveyed the water to the residences of W. A. Payne and E. Dickey and to the livery stable of Martin Bros. to the water pipes of defendant (appellant) at any point between the south water crane and the defendant's (appellant's) water tank; that, when said pipes are so connected, the defendant (appellant), the Louisville & Nashville Railroad Company, is enjoined and required to furnish water through said pipes to plaintiffs (appellees) Payne and Dickey for use at their residences, and the plaintiffs (appellees) Martin Bros. at their livery

stable, in the same manner and to the same extent that water was furnished to said plaintiffs (appellees), and used by them, before their said pipes were disconnected with defendant's (appellant's) water system at Cave City. No adjudication was had as to the rights of any of the plaintiffs except appellees, and it does not appear what conclusion the court below reached, except as to them. From this judgment appellant has prosecuted an appeal to this court.

The essential facts of this action, as we understand them, are as follows: In 1854, A. C. Hobson and others, being the owners of a large tract of land in Barren county, Ky., known as the "Duke Tract," by a deed of writing conveyed to the Louisville & Nashville Railroad Company a part of said tract of land, for the purposes of a right of way for the track of said railroad, and also for the purpose of enabling said Louisville & Nashville Railroad Company to erect a depot and waterworks station on their road where it passes through said land, and for such other purposes as they might deem necessary, connected with said railroad. Among other things, there was contained in said deed the following grant: "The party of the first part also hereby grant to the said Railroad Co. the right of way to the Sinkhole Spring, near the late residence of the said Duke, situated on the southeast side of said road, and the use of the water of said spring for all purposes connected with the said road. Also the right to erect all necessary machinery, water tanks, hydrants, pipes, etc., in order to elevate and carry water to the line of the road." "This conveyance is made with the express understanding and agreement that the party of the second part are to establish and continue a depot and water station upon the land herein conveyed, and are to occupy it only for such purposes as they may find necessary and convenient, and connected with said road." This deed, although properly signed and acknowledged by the parties thereto, was not recorded until 1875. Some time prior to the 1st day of June, 1863, there had been chartered, by an act of the General Assembly of the Commonwealth of Kentucky, a corporation known as the "Knob City Land Company," of which John H. Graham was president, and which had acquired the tract of land, a part of which had been conveyed to the Louisville & Nashville Railroad Company in 1854, as before stated. This land company platted and laid out the town of Cave City at and around the depot and water station of the Louisville & Nashville Railroad Company mentioned in the deed of 1854. It seems also to have established a waterworks at what is known as the "Sinkhole Spring," for the purpose of supplying the citizens of Cave City with water; and it appears from the evidence that in selling the lots in said city it was very generally represented to the purchasers, as an inducement to buy the land from the company,

that they would be entitled to water from said waterworks free of charge. Now, with this state of affairs in existence, on the 1st day of June, 1863, the Knob City Land Company, through its president, John H. Graham, and the Louisville & Nashville Railroad Company, entered into a contract in writing, which was intended to and did modify the contract of 1854 before mentioned. It is not necessary to set forth with any degree of particularity the various modifications which the new contract made in the old contract, so far as the real estate which it involves is concerned. But the contract of 1863 contains the following stipulations, upon which are based, at least in part, both the cause of action of the appellees and the defense of appellant: "It is agreed that the Knob City Land Co. grants to the Louisville & Nashville R. R. Co. the right to use the waterworks at Cave City as at present constructed for the purpose of supplying water to the locomotives, with the right of access at all times to the pipes, and to the cave, for the purpose of making repairs and running the machinery; also the right to erect on the ground of the Knob City Land Co. additional machinery or other implements necessary to carry out the object of this agreement. In consideration of the privileges granted to the Louisville & Nashville R. R. Co., said company agrees to keep in repair the waterworks, pipes and machinery, and agrees to supply water to the extent of the capacity of the two pumps as originally constructed, which pumps are driven by a water wheel and have a diameter of 4 inches and a stroke of 16 inches and are single acting. The Louisville & Nashville R. R. Co., without guaranteeing a constant and sufficient supply of water at all times, agrees to use their best efforts to supply the locomotives, the hotel and private citizens, to the extent of the capacity of the pumps above described, but in case that there should not be sufficient water owing to accidents to the machinery or owing to other causes, not under the control of the railroad company, to supply the locomotives, the hotel and private citizens, the Louisville & Nashville R. R. Co. shall have the right to supply their own wants in preference to private citizens or the hotel to the extent of not more than 1,000 gallons daily. It is understood that if water is unnecessarily wasted by private citizens, the Louisville & Nashville R. R. Co. shall have free authority to remedy this evil to the extent of stopping the water from citizens who are guilty of wasting water for such a period of time as may be thought sufficient by the L. & N. R. R. Co. to correct the evil complained of. The L. & N. R. R. Co. shall not be obliged to repair hydrants and pipes and cocks, but shall merely keep in repair the main pipes. If water is wasted from branch pipes, hydrants, etc., in the houses for the want of repairs, the L. & N. R. R. Co. shall have the right to stop the supply

of water to such pipes and hydrants until the same are repaired. If at any time hereafter the population of Cave City should increase to such an extent as to make the enlargement of the waterworks desirable, such enlargement shall be made at the expense of the parties interested in it, and the railroad company shall be entitled to be reimbursed for the expense incurred by the R. R. Co. in raising the additional quantity of water required over and above the quantity which the present capacity of the pumps could furnish. The amount and manner of compensating the company shall be agreed upon between the company and the parties interested on the principle that the company shall at no time be at the expense of raising a greater quantity of water than the pumps and water wheel above described could furnish now, nor shall the R. R. Co. be at the expense of maintaining more extensive waterworks than those existing at present. It is also agreed that should the L. & N. R. R. Co. fail to keep the present machinery of the waterworks in operation as herein provided, or abandon the same, the Knob City Land Co., on giving sixty days' notice in writing to the L. & N. R. R. Co., shall have the right to take possession of the waterworks now there and operate the same, but without prejudice to the rights of the L. & N. R. R. Co. to establish waterworks for the supply of their engines, as provided in the unrecorded deed aforesaid." Under the terms of this contract the Louisville & Nashville Railroad Company took charge of the waterworks of the Knob City Land Company at Sinkhole spring, and proceeded, so far as this record shows, to carry out the provisions of that instrument, up to the 30th day of October, 1871, when the following release was executed and delivered by the Knob City Land Company to appellant: "Albert Fink, Esqr., Gen'l Supt. of the Louisville & Nashville Railroad Co.: I hereby release you from all obligations to supply the citizens of Cave City with water in accordance with a contract entered into between the Knob City Land Company & Louisville & Nashville Railroad Company, dated June 1st, 1863, and hereby request and direct that you stop the supply. John H. Graham, Pres. Knob City Land Co. Oct. 30th, 1871." This release was accepted by the appellant in the following language: "The Louisville & Nashville Railroad Company has received the above notice, and accepts the release, and will carry out the directions to stop the supply of water to other parties. Albert Fink, Vice Pres't & Gen'l Supt." The foregoing instrument was duly and legally acknowledged, and delivered by John H. Graham, as president of the Knob City Land Company, to be his act and deed, on the 30th day of October, 1871, before the clerk of the Jefferson county court, as appears by the certificate of that officer, which is as follows: "State of Kentucky, Jefferson County—Sct. I, Chas.

M. Thruston, clerk county court for the county aforesaid, do certify that on this day the foregoing release was produced to me in my office and acknowledged and delivered by John H. Graham, as president of the Knob City Land Company, a party thereto, to be his act and deed, all of which is hereby certified to the proper office for record. Witness my hand this 30th day of October, 1871. Chas. M. Thruston, Clerk. by H. E. Sweetney, D. C."—and, being properly certified to the clerk of the county court of Barren county, was by that officer duly and legally recorded, as appears by his certificate, which is as follows: "State of Kentucky, Barren County—Sct. I, J. P. Nuckols, clerk of the county court for said county, do certify that on this day the foregoing article of release between John H. Graham, as president of the Knob City Land Company, and the Louisville & Nashville Railroad Company, was filed in my office for record. Whereupon the same and this certificate, together with the accompanying testimonial, have been recorded. Given under my hand this 26th day of January, 1874. J. P. Nuckols, C. B. C. C." At the time the appellant took charge of the waterworks of the Knob City Land Company under the contract of 1863, there existed in the town of Cave City a system of water pipes and hydrants, by means of which the citizens were furnished with free water. It does not appear from the evidence, definitely, at what exact period appellant ceased supplying the citizens generally with free water by this system of pipes and hydrants in and along the streets of Cave City; but it does appear that many years before the institution of this action this water system had been entirely abandoned, the pipes and hydrants either removed, or allowed to fall into ruin and decay by disuse and inattention. Appellant's contention is that it entirely abandoned the contract of 1863, so far as the citizens of Cave City were concerned, upon the execution and delivery of the release before mentioned; and there is great force in its contention, as it is not to be presumed that a business corporation, managed by business men, would accept and put to record a release absolving them from so burdensome an undertaking as the supplying of all the citizens of Cave City with water free, if they did not intend to avail themselves of its provisions. Certain it is that the town of Cave City, as a corporation, ceased entirely to look to the provision of the contract of 1863 for supplying its citizens with water, and proceeded to have dug a number of wells through the town, for the purpose of affording to the citizens free water. Considering all the evidence, we have concluded that, so far as the citizens of Cave City generally are concerned, appellant never furnished water, under the contract of 1863, after the release of 1871. It does appear that many of the citizens, and especially the colored population, went to the reservoir at Sinkhole

Spring, and there got water, and carried or hauled it away; oftentimes catching it in buckets from the supply pipe of appellant's waterworks as it ran from the pipe into the reservoir. But this was a different proposition from the supplying free water to the citizens, under the contract of 1863, through and by the system of water pipes, mains, and hydrants, as contemplated by that instrument. The taking of the water by the citizens at the reservoir was a mere license, to which the appellant and its employes would naturally not object, as there was an abundance of water, both for appellant's use and the small needs of those who came themselves with buckets to obtain water.

Appellees contend that the release relied on by appellant is void, as being only the individual act of John H. Graham, and that he had no power to make such release. An examination of the charter of the Knob City Land Company will show that the entire management of its affairs was placed in the hands of John H. Graham, its president. The contract of 1863, upon which appellees base, in part at least, their cause of action, was executed by him. We see no reason why he, who made the contract of 1863, upon which appellees rely, should not also have the power, by the consent of appellant, to abrogate said contract in whole or in part. This release of appellant would not, of course, interfere with any contractual rights between the citizens of Cave City and the Knob City Land Company. Those rights, whatever they were, remained precisely the same. The contract of 1863 was between the Knob City Land Company and appellant. By that instrument appellant undertook, upon certain considerations, to carry out the Knob City Land Company's contract with the citizens of Cave City. No good reason can exist for denying the right of the Knob City Land Company and appellant to dissolve their contractual relations, if they saw fit. This left the rights of the citizens of Cave City under any contract they may have had with the Knob City Land Company precisely where they were before the making of the contract of 1863. The long acquiescence of the town of Cave City, as a corporation, and of its citizens generally, in the release of appellant from further supplying them with water, and their entire abandonment of the water mains in their streets, at least tends to show that said release was with their consent. But it is contended by appellees that they stand on a different ground from that occupied by the citizens, generally, of Cave City; that, having had their private pipes connected with appellant's water mains for more than 15 years, their right to be supplied with water from the mains of appellant has by long user ripened into an easement, of which appellant cannot now deprive them. This contention cannot be maintained under the evidence. Whatever rights they have as against appellant they and their

vendors obtained by permission of appellant. An examination of their deeds and the deeds of their vendors, whether near or remote, back to the conveyance by the Knob City Land Company, fail to show any covenant for free water; and while they all speak in a vague way about their understanding that they were entitled to free water, their evidence conclusively shows that they asked for and obtained permission from appellant to connect their private water pipes with its mains. We are of opinion that their right to take water from the mains of appellant was a mere license, which no lapse of time converts into an easement. The money they paid to get the connection with appellant's mains was paid to the plumbers who did the work for them, and has no bearing upon their rights in the case.

But, aside from all this, by the terms of the contract of 1863, it was "agreed that, should the L. & N. R. R. Co. fail to keep the present machinery of the waterworks in operation as herein provided, or abandon the same, the Knob City Land Company, on giving sixty days' notice, in writing, to the L. & N. R. R. Co., shall have the right to take possession of the waterworks now there, and operate the same, but without prejudice to the right of the L. & N. R. R. Co. to establish waterworks for the supply of their engines, as provided in the unrecorded deed aforesaid." (Contract of 1864.) This, in our opinion, gave the appellant the right, at any time it saw fit, to abandon the contract between it and the Knob City Land Company, turning over to said land company upon said abandonment the waterworks received by it when the contract in question was entered into. This provision was not placed in the contract alone for the benefit of the Knob City Land Company, as is contended by counsel for appellees, but was clearly placed there for the benefit of appellant also; and whenever appellant saw fit to abandon said contract the right of the Knob City Land Company to retake possession of the property began. If appellees' right to free water from appellant was not a mere license, then it was based upon the contract of 1863, and, if so, existed so long as that contract was in force, and no longer. Whenever appellant saw fit to exercise the right to abandon said contract, then appellees' right to free water from appellant ceased. Now, whatever else may be said about the question as to when appellant abandoned the contract of 1863, it certainly did so when the bottom of the reservoir fell out and appellant built a new water tank of its own, and that was prior to the institution of this action; and at that time (if not before) appellant clearly had the right to refuse to longer supply appellees with water from its water mains.

With the question as to when, or upon what notice, the Knob City Land Company will retake possession of its waterworks, or

whether or not appellant will have to make good to it in damages any failure to keep the plant in proper repair, appellees have no concern. These are questions which the contracting parties can settle or adjudicate themselves.

Wherefore the case is reversed, with directions to dismiss the petition.

STEPHENS v. WILSON et al.

(Court of Appeals of Kentucky. March 4, 1908.)

FISCAL COURT—JUSTICES OF THE PEACE—COMPELLING ATTENDANCE—ARREST—JURISDICTION TO ISSUE WARRANT—LIABILITY—SHERIFFS—DEPUTY SHERIFFS—VOID WARRANT.

1. An answer which merely groups the allegations of the petition together and denies them as a whole, violates the provision of Code requiring each material allegation which it is proposed to controvert to be specifically denied.

2. Gen. St. c. 28, art. 17, providing for enforcing the attendance of the justices of the peace, by attachment, on sessions of the court of claims, of which they are members, has no application to the fiscal court, which is created by a different statute; and this though the powers of the fiscal court are largely the same as those of the court of claims, which it superseded.

3. Where three justices of the peace, being a minority of fiscal court, attempted to enforce the attendance of another justice by issuing a warrant for his arrest, though there was no statute authorizing such action on their part, they acted without jurisdiction, and were liable for damages.

4. The deputy sheriff executing the warrant was liable, the justices issuing it having no jurisdiction to do so, and it therefore affording him no protection.

5. The sheriff was liable where he advised, requested, and caused the warrant to be executed.

6. A sheriff, as principal, is liable for the acts of his deputy, done under color of his office.

Appeal from circuit court, Bath county.

"To be officially reported."

Action by W. R. Stephens against Charles Wilson and others. Petition dismissed, and plaintiff appeals. Reversed.

Alex Conner and O. W. Goodpastor, for appellant. R. Gudgeon & Son, for appellees.

BARKER, J. This action was instituted in the Bath circuit court by the appellant, W. R. Stephens, to recover damages of the appellees, Charles Wilson, J. M. Atchison, and S. C. Bascom, Jr., for false imprisonment. The petition states that: "On the 4th day of December, 1901, the defendants Charles Wilson and J. M. Atchison, in Bath county, Kentucky, wrongfully, and without authority of law, and against his will and consent, advised, requested, and caused their codefendant, S. C. Bascom, Jr., to assault and forcibly arrest and take into custody and imprison the plaintiff [appellant], W. R. Stephens, and that said S. C. Bascom, Jr., did on said day, in the town of Salt Lick, Bath county, Kentucky, against appellant's will

and consent, wrongfully, and without authority of law, assault and forcibly arrest and take the plaintiff [appellant] into his custody, and imprisoned him, and forcibly and against his will and consent took him from the town of Salt Lick to the town of Owingsville, Bath county, Kentucky, a distance of some nine miles, and there detained and kept him in his custody, and imprisoned him for the period of about five hours, until appellant was finally released from imprisonment upon a writ of habeas corpus." For this injury, appellant prayed judgment against the defendants in the sum of \$5,000. A general demurrer to the petition having been overruled, appellees Charles Wilson and J. M. Atchison filed a joint answer, intended to be a traverse, but which, we think, is in conflict with that provision of the Code requiring that each material allegation which it is proposed to controvert shall be specifically denied. The answer merely groups the allegations of the petition together, and denies them as a whole. S. C. Bascom, Jr., filed a separate answer, the first paragraph of which is practically a counterpart of the answer of his codefendants, Wilson and Atchison, and bad for the same reason. The second paragraph undertakes to justify the arrest of appellant by stating, in substance, that he was the deputy sheriff of Bath county, and there came to his hands, as such officer, a warrant of arrest for the plaintiff (appellant), W. R. Stephens, issued by the clerk of the Bath county fiscal court, dated December 3, 1901, directed to the sheriff of Bath county, and commanding him to arrest appellant, and have him at the courthouse in Owingsville, Ky., at 10 a. m., December 4, 1901, to attend a session of the Bath fiscal court (appellant being a member of the court), as well as answer for contempt in not obeying the summons served upon him to attend the session held on the 3d day of December, 1901; that under this warrant he arrested appellant, who refused to give bail, requesting to be put in jail, which was not done, he being afterwards released on a writ of habeas corpus; that all of the acts done by appellee under this warrant were done by him in good faith, and in his official capacity as deputy sheriff. A demurrer to this paragraph having been overruled, appellant excepted. Afterwards the appellees Wilson and Atchison filed an amended answer, in which they state, in substance, there being a vacancy in the office of county treasurer for Bath county, appellee Charles Wilson and two other justices of the peace of Bath county requested the county judge, John A. Daugherty, to call a special session of the fiscal court to fill it. This being refused, Charles Wilson and the two other justices of the peace, who constituted three of the five justices holding office in Bath county, met, elected one of their number chairman, served notice on appellant, who was also a justice of the peace of Bath county, requiring him to attend the meeting

thus instituted. Appellant having failed to do so, these three caused the clerk of the county court to issue a warrant of arrest against appellant, directed to the sheriff of Bath county, requiring that officer to arrest and bring him before the court on the 4th day of December, 1901, in order to make a quorum of the fiscal court of Bath county. This warrant of arrest thus issued came to the hands of S. C. Bascom, Jr., deputy sheriff for appellee J. M. Atchison, the sheriff of Bath county. In pursuance of the warrant, the officer took appellant into his custody, and brought him to Owingsville, where he was released on a writ of habeas corpus. Appellant's demurrers to the second paragraphs of the answers having been overruled, he declined to plead further, whereupon the court dismissed his petition, and he has prayed an appeal to this court.

Appellees contend that this case should be affirmed, because the first paragraphs of the answers traverse the material allegations of the petition, and therefore it was incumbent upon appellant, who was the plaintiff below, to introduce evidence in support of its allegations; that, he having failed to do so, the judgment of dismissal should be affirmed. This contention may be disposed of by repeating what we have already said—that the first paragraphs of the answers are bad, for the reasons stated, and made no issue between appellees and appellant. Moreover, the court rendered judgment on the pleadings, and, if appellees' contention that there were issues of fact raised by the first paragraphs of the answers, be sound, no opportunity was afforded appellant to introduce his evidence in support of his petition; the court evidently believing that the merits of the case turned upon the facts alleged in the second paragraphs of the answers, and that these constituted a valid defense to appellant's cause of action. The pleadings show there are five justices of the peace of Bath county. These, together with the county judge, constitute the fiscal court. The following sections of the Kentucky Statutes are material to the solution of the questions before us:

"Sec. 1833. Each county in the commonwealth of Kentucky shall have a fiscal court, which shall consist of the judge of the county court and the justices of the peace of said county, and their successors in office, in which court the judge of the county court shall preside, if present. If said judge is not present, and cannot preside, then a majority of the justices of the peace shall elect one of their number to preside; said justice so elected to act as judge of said court during the absence or inability of the county judge to preside. * * *

"Sec. 1834. Unless otherwise provided by law, the corporate powers of the several counties of this state shall be exercised by the fiscal courts thereof respectively."

"Sec. 1836. The county judge shall be the

presiding judge of the fiscal court, preserve order, and may fine and imprison for contempt of court, the same as when presiding as judge of the county court; and in the absence of the county judge, or when he cannot preside, the justice elected in his stead while sitting shall have the same powers as the judge of the county court when presiding as a member of the fiscal court.

"Sec. 1837. Not less than a majority of the members of the fiscal court shall constitute a quorum for the transaction of business, and no proposition shall be adopted, unless by a concurrence of at least a majority of the court present.

"Sec. 1838. The fiscal court shall be a court of record, and shall hold two regular terms in each year, commencing on the first Tuesday of April and October, and continue until the business of the court is disposed of. But the county court of any county may, by an order of record, fix a different date for the commencement of said terms: provided that one of said terms shall be held in October. The county judge shall have the power to call a special term of said court for the transaction of any business of which the court has jurisdiction. Whenever the necessity exists for a special session, and when the county judge is unable to act, the special session may be called by a majority of the court."

This court, in the case of *Bath County, by, etc., v. Daugherty, Commissioner, etc.*, 68 S. W. 436, held that the fiscal court of Bath county consisted of six members, and that three did not constitute a quorum for the transaction of business. The case cited had under consideration the same meeting of the fiscal court of Bath county which is now under discussion, it having come up upon another question growing out of the acts of the minority. The legality or illegality of the issuance of the warrant of arrest for appellant, and his arrest thereunder, turns upon the powers of the three justices who essayed to hold the term of the fiscal court of Bath county. The statute creating fiscal courts nowhere authorizes them, even when properly organized, to issue warrants of arrest for absent members to enforce their attendance. It is urged, however, that appellees were authorized to issue the warrant of arrest in question under the provisions of article 17, c. 28, of the General Statutes, relating to county courts. The pertinent parts of this statute are as follows:

Sec. 1. The county judge in each county shall hold the county court on the days prescribed by law; but at the court of claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him and constitute the court; a majority of whom shall constitute a quorum for the transaction of business; which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county."

"Sec. 3. The justices of the peace may be summoned by the county judge to attend at any term of the court, and as many as attend upon such summons, or at the regular court of claims, and assist in transacting business in court, shall be allowed three dollars each per day, to be paid out of the county levy. If a majority of the justices fail to attend the court of claims or any other court for which they have been summoned, the court may be adjourned from day to day until a quorum is attained; for which purpose attachments may be issued against those delinquent."

It does not require any argument to show that the provision for enforcing the attendance of the justices, by attachment, on sessions of the court of claims, has no application to the fiscal court, which is created by a different statute; although the powers of the fiscal court are largely the same as those of the court of claims which it superseded. The court of claims could only be called in special session by the county judge, and there was no provision for this to be done by the justices in default of action, in this regard, by the county judge. We conclude, then, that the three justices who undertook to hold, or enforce the holding of, a special session of the fiscal court of Bath county, were without jurisdiction to issue the warrant for the arrest of appellant; and that the appellee Charles Wilson, who constituted a part of the minority essaying to act, is liable for the illegal issuance of the void process.

This court, in the case of *Revill, Stribling, Foster & Martin v. Pettit*, 3 Metc. 314, said: "The general principle which exempts judicial officers of all grades from answering in a private action for any judgment given in the due course of the administration of justice is well settled. This court has frequently decided that no action can be supported against any person acting judicially within the limit of his jurisdiction, although he should act illegally or erroneously, unless he has acted from impure or corrupt motives. There are, then, two distinct classes of cases to which this principle of judicial protection does not apply: First, where a person having a special or limited judicial authority does any act beyond the scope of his authority; and, secondly, where, although acting within the limit of his jurisdiction, he is actuated by malicious or corrupt motives. In either case the judge or magistrate renders himself liable as a trespasser to the party injured." Again, the court, in the case cited, said: "If, as said in the case of *Cable v. Cooper*, 15 Johns. 157, 'every tribunal proceeding under special and limited powers decides at its peril,' it must necessarily follow that any person aiding, advising, or procuring the tribunal to transcend its jurisdiction and exercise powers not conferred by law acts also at his peril. The privileges of a judicial officer do not exempt him from liability for any injurious act done beyond the

limit of his authority." It is claimed for appellee S. C. Bascom, Jr., that, although the warrant of arrest may have been issued without authority, it protects him, inasmuch as it was apparently valid, and he acted in good faith in its execution. This contention cannot be upheld. An officer is only protected by process apparently valid when it is issued from a court having jurisdiction to issue it. Where the court issuing the invalid process is without jurisdiction of the cause, then the process affords the officer who executes it no protection, no matter with what good faith he may act in the premises. In the case of the State v. Schacklett, 37 Mo. 280, the rule is laid down thus: "Now, where the court has no jurisdiction of the cause, there the officer is not obliged to obey; and, if he does, it is at his peril, though he do it by virtue of an execution or other process directed to him, a void authority being the same as none at all. And a sheriff is bound to inquire into the authority of a court that issues a writ, and he is liable for its execution, when it is issued by a court having no jurisdiction. [Citing *Brown v. Henderson*, 1 Mo. 134; *Case of the Marshalsea*, 10 Coke, 68b; *Brown v. Compton*, 8 T. R. 424; *Mayor v. Morgan*, 7 Mart. (N. S.) 2, 18 Am. Dec. 232; 8 Bac. Abr. 691.] The officer is bound to know the law, and, if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril, and will not be protected." In *Cooley on Torts* (page 172) it is said: "Excepting the cases already named, and a few more, which will be referred to further on, whoever would justify an arrest must have legal process duly emanating from some judicial authority. This process must be pleaded, and it must have certain requisites in order to render it available as a defense. Speaking generally, these requisites are the following: It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service that in the particular cause there was no authority for issuing it. When the process will bear this test, the officer is protected in obeying its commands." In the case of *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, the plaintiff had been imprisoned by the sergeant at arms of the House of Representatives at Washington, under a warrant issued by the Speaker of the House. It being shown, however, that the warrant was wrongfully issued, in excess of the jurisdiction of the House, the sergeant at arms was held liable for false imprisonment. In the *American & English Encyclopedia of Law* (2d Edition) vol. 12, title "False Imprisonment," pages 762-3, it is said: "If an officer executes a warrant of arrest, invalid on its face, he is liable in damages for false imprisonment. Where, therefore, it appears on the face of the process that the magistrate

issuing it has not jurisdiction of the person of the plaintiff or the subject-matter of the suit, the officer executing it is a trespasser, and is liable in action for damages for false imprisonment. It has been said, indeed, that an officer is bound, or will be presumed, to know the jurisdiction of the court, whose officer he is, and that, if he acts in obedience to a precept which the court has no jurisdiction to issue, he will not be protected in false imprisonment. (See, also, the authority cited in the notes in support of the foregoing text.)" In the case of *Savacool v. Boughton* (N. Y.) 21 Am. Dec. 181, in which the authorities are exhaustively reviewed, the court adduced the following rule: "Where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendant, all its proceedings are absolutely void. Neither the members of the court nor the plaintiff (if he procured or assented to the proceedings), can derive any protection from them, when prosecuted by a party aggrieved thereby. If a mere ministerial officer executes any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it." As the three justices essaying to act as a fiscal court of Bath county were without authority to issue the process under which appellant was arrested, it was void, and all the justices acting as the court are responsible for its issuance. As the officer to whose hands the void process came was bound to know, and did know, from the face of the writ, in this instance, that the court issuing it lacked jurisdiction, it affords him no protection, and he is also liable. Appellee J. M. Atchison is liable under the allegation that he advised, requested, and caused the illegal arrest of appellant (*Revill, etc., v. Pettit*, before cited), and also because, as principal, he is liable for the acts of his deputy done under color of his office.

Wherefore the case is reversed for proceedings consistent with this opinion.

HAYS et al. v. McLIN et al.

(Court of Appeals of Kentucky. March 4, 1903.)

SALES—STANDING TIMBER—SUFFICIENCY OF DESCRIPTION.

1. In a contract for the sale of standing timber, a description of the timber sold as "all the merchantable yellow poplar, ash and cucumber trees * * * owned by us" on a certain tract of land is sufficiently definite to pass title to the timber.

Appeal from circuit court, Letcher county.
"To be officially reported."

Action by David Hays and another against J. B. McLin and others. From a judgment for defendants, plaintiffs appeal. Reversed.

W. S. Hall and David Hays, for appellants. S. B. Dishman and D. D. Field, for appellees.

PAYNTER, J. This action was instituted by the appellants, David Hays and Jonathan L. Holcombe, against appellees, for cutting and removing timber from a certain tract of land in Letcher county, Ky. The timber which they cut and removed was part of the timber which John Holcombe sold and conveyed to the appellants by deed dated 7th day of October, 1899. The timber sold to the appellants is described as follows: "All the merchantable yellow poplar, ash and cucumber trees or logs owned by us on the south side of Linefork creek and on the north side of Pine Mountain in Letcher county, Kentucky." It is recited in the deed "that the timber is sold with the expectation of immediate removal, and said second parties are to have until December, 1900, to complete the removal thereof." The appellees denied that the title to the timber was in the plaintiffs. On the trial of the case the plaintiffs introduced testimony which tended to show that their vendor entered upon the land before the late Civil War, and began to claim it under his father; that in 1806 the father of the plaintiffs' vendor executed and delivered to him a deed for the land upon which the timber in controversy grew; and that he had lived within the boundary, and claimed it adversely, to the extent of the boundary described in the deed, until the trial of the case. The proof tended to show that it was a well-defined and marked boundary. Upon this showing, the court gave a peremptory instruction to find for the defendants.

If the evidence of the plaintiffs is true, their vendor had a perfect title to the land, and he had a right to sell the timber standing upon it. From the argument of the counsel for appellees, we presume that the court below proceeded upon the idea that, under the deed from Holcombe, the appellants did not acquire title to the timber, and therefore had no right to maintain the action. To sustain the action of the court, the case of *Moss v. Meshew, etc.*, 8 Bush, 190, is cited. In that case it appeared that the owner entered into a contract by which he sold timber trees upon the land in number sufficient to make 40,000 staves; and the court held that the sale did not pass title to any particular trees, nor had the purchaser the right to enter and cut the timber without the consent of the vendor. In this case the vendor sold "all of the merchantable" timber of certain kinds on the tract, and we are of the opinion that title to them passed to the appellants, although in *Moss v. Meshew, etc.*, there was an expression of opinion, on a question not before the court, which would appear to be in conflict with this conclusion. The contract recited that immediate removal of the timber was contemplated, yet time was given until December, 1900, in which to

remove it. If a party sold 100 poplar trees upon a boundary of land, and did not mark them, then it would not vest the vendee with title to them; but, when one sells all of the merchantable timber on the land, it seems to us no additional designation is necessary. There is no marking to take place in that case, as in a case where only a certain number of trees are sold on a boundary of land. In *Dills v. Hatcher*, 69 S. W. 1092, the court recognized a sale as valid which included all of the timber on land, of certain dimensions.

The judgment is reversed for proceedings consistent with this opinion.

WRIGHT v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 4, 1903.)

MURDER—INSANITY AS DEFENSE—INSTRUCTIONS—ADMISSIBILITY OF EVIDENCE—REVERSAL ON APPEAL.

1. In the absence of prejudicial error, the verdict of the jury will be conclusive on the question whether defendant in a prosecution for murder was insane when he committed the act.

2. In the absence of prejudicial error of the trial court, a conviction will not be reversed on appeal.

3. A nonexpert witness in a murder trial testified as to previous difficulties between defendant and the deceased. Held not to be error to exclude his testimony as to whether there was any apparent cause therefor.

4. A former teacher of defendant in a prosecution for murder testified as to defendant's violent conduct towards his playmates. Held, that it was not error to exclude his testimony as to whether there was any cause for the conduct.

5. Witnesses who are acquainted with a person accused of a crime are competent to give their opinion as to his mental condition.

6. Where the defense in a prosecution for murder attempted to introduce a family tree of the accused, with statements in red ink as to members who had been insane, it was not error to refuse its admission unless the statements were omitted.

7. Where testimony has been introduced as to the effect of the excessive use of liquors on minds tainted with hereditary insanity and on those not so tainted, it is not error to exclude an expert's comparison of such effect.

8. Where the defense in a prosecution for murder had attempted to show defendant's carelessness in regard to money matters as an evidence of his insanity, it was proper to rebut it with testimony that he maintained business habits, and kept his money in a bank.

9. Evidence of the reputed insanity of an ancestor of a person on trial for murder is not competent to prove the insanity of the accused.

10. Voluntary drunkenness, or temporary insanity caused by getting drunk, is no excuse for the commission of homicide.

11. Where insanity is relied on as a defense to a criminal prosecution, it is not sufficient to prove its probable existence, but it must be proved to the "satisfaction" of the jury.

Appeal from circuit court, Bourbon county.

"Not to be officially reported."

James W. Wright was convicted of murder, and he appeals. Affirmed.

Breckinridge & Shelby, N. O. Fisher, and E. M. Dickson, for appellant. O. J. Bronston, for the Commonwealth.

PAYNTER, J. Appellant was indicted and convicted of the murder of Thos. Butler. The defense was that the accused was insane at the time he committed the act. It is a remarkable case, in that the testimony showed so much hereditary insanity and so many persons of feeble or diseased minds in his family. In that respect it is probably the most remarkable case ever brought to the attention of this court. As to whether the appellant was insane at the time he committed the act was a question for the jury, and its verdict must be accepted as conclusive on the question, unless some error occurred at the trial which prejudiced his substantial rights. It is only where such error exists that this court is authorized to reverse a case. The appellant was a farmer, living near the city of Paris. In the same neighborhood lived the deceased. By invitation, the deceased engaged in a game of cards with the appellant and others. During the progress of the game the appellant accused the deceased of "renigging," and claimed the right to count two points against him for that reason. The deceased denied that he had "renigged," and questioned the appellant's right to count two against him. Thereupon the appellant, while arising from the table, drew his pistol, and told the deceased that he was a liar, and that he would show him whether he would count two against him. While the deceased was still sitting in his chair, appellant fired, and as he was endeavoring to get up from his chair the appellant shot him twice in the back, from which he shortly thereafter died. It occurred in the back room of a saloon, and when the owner of it accosted the appellant, saying, "You have ruined me, and yourself, too," he replied, "I shot in self-defense." He was taken into custody, and again claimed that he had shot in self-defense, and continued to make that claim. One witness was introduced, who testified that the appellant had threatened to kill some of the Butler family, of which deceased was a member. The testimony tended to show that the appellant had been drinking, and was under the influence of liquor, but not to such an extent as to make him stagger, or render him unable to walk or talk with distinction. It also conduces to show that he had been addicted more or less to the use of liquor for a great many years, and had had quite a number of difficulties; that in his early school days he had had trouble with his playmates at school, etc. A reversal of the case is sought on the ground that the court erred in admitting improper testimony, and in rejecting competent evidence, and because the court did not give the jury the law of the case.

It was urged by the commonwealth that no testimony as to hereditary taint, or as to the effect which the previous habits of the appellant had in producing mental aberration, should have been permitted to go to the jury,

and that no instruction on insanity should have been given. As to this question, without discussing it, we assume the court acted properly, and we will consider the alleged errors upon that assumption. The killing took place in the back room of the saloon, and a witness was asked the following question: "Was there any evidence in that back room, or in the front room, of any ill feeling or hostility between Butler and Wright?" Again, a witness was asked: "So far as you could see or understand at the time, was there any cause apparent to you for any of these difficulties of which you have spoken?" This question followed the testimony tending to show that the appellant had had previous difficulties. These witnesses were introduced, not as experts, but to prove facts. When witnesses detailed the facts with reference to the acts, it was the province of the jury to determine whether or not there was any cause therefor; and it was quite as competent to do so as were the witnesses who detailed the facts.

McClure, who was the teacher of the appellant when quite a small boy, but who does not seem to have known him since that time, was not permitted to express an opinion as to whether there was any cause for the violent conduct of the appellant towards his playmates at school, he having testified to such conduct. It is insisted that he should have been permitted to testify as to whether there was any cause for such conduct. It was the province of the jury to determine, from the facts detailed by the witness, whether there was any cause for such conduct.

Woodward and some others were introduced as nonexperts, and gave their opinion as to the insanity of the appellant. It is claimed that these certain witnesses did not show themselves sufficiently well acquainted with the appellant to entitle them to give their opinions. When witnesses are acquainted with an accused, they are entitled to give their opinion as to his mental condition. *Brown v. Commonwealth*, 14 Bush, 398. In our opinion, the witnesses were qualified to express their opinions. When they gave the facts with reference to their acquaintanceship, the jury could judge as to the quality and value of their testimony.

The appellant complains of the refusal of the court to allow the use of a diagram or family tree of his family, upon which were written in red ink statements of what members of the family had been of unsound mind, and who of them had been sent to the asylum, etc. The court refused to admit the diagram as evidence with the statements on it in red ink. With the omission of these statements, he admitted it as evidence. We are of the opinion that the court properly ruled upon this question. The defendant, in the proper way, proceeded to introduce proof as to the unsoundness of mind, etc., of the various members of the family,

and all of the statements on the diagram were proven with elaboration.

The court refused to allow an expert witness to answer the following question: "What would be the likelihood of one with such heredity—the probability of one with such heredity—being injured by the excessive use of liquor over one with an ordinary heredity?" Testimony had been admitted as to the effect of hereditary taint, and likewise as to the effect of the excessive use of liquor and tobacco upon the mind of one so tainted and upon the minds of others. The jury had the full benefit of the testimony as to the effect of hereditary taint and the excessive use of whisky and tobacco upon the mind of one so tainted, and it seems to us it would have served no purpose to have allowed a comparison between the effect of such use of liquor upon the mind of one with such heredity and upon one without it. Had the question been proper, the refusal to permit it to be answered under the circumstances would not have been prejudicial to the appellant because of the previous testimony which had been admitted on the subject.

We are of the opinion that Sid Stout's testimony was properly offered in rebuttal.

It was endeavored to be shown by the defense that appellant had been careless in using and keeping his money as an evidence of unsoundness of mind. The books of the bank where he kept his money were introduced to rebut that testimony by showing that he maintained business habits, and kept his cash in the bank. For that purpose it was certainly competent.

The appellant belonged to a branch of the family descended from Mrs. John Kennedy, and every branch of the family which descended from her had either idiots, lunatics, or persons with defective intellect. The court refused to allow the appellant to show by tradition the insanity of Mrs. John Kennedy and her ancestors. In our opinion, the court did not err in refusing to allow this testimony to be introduced. Insanity is a fact to be proven. Had the court admitted this testimony, it would have allowed hearsay evidence to prove a collateral fact; hence such testimony was open to a double objection. In *Walker v. State*, 102 Ind. 507, 1 N. E. 856, the defendant offered to prove hereditary insanity in his family by family tradition, and it was held that the evidence was not admissible, and was properly excluded by the trial court. To the same effect is *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730. In *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, it was held that it was not allowable for defendant to prove that his father was reported in the neighborhood to be at times insane. This was rejected upon the ground that insanity is a fact which cannot be proven by reputation. It was held in *Choice v. State*, 31 Ga. 424, that family and neighborhood reputation is not admissible to

prove that accused was permanently injured in his mind by reason of a physical injury which he had received. If it were competent to prove insanity by reputation, it would be equally so to prove sanity in the same way. By such evidence a philosopher might be proven to be a fool, and a fool might be proven to be a man of genius.

Upon motion of the commonwealth, the following instruction (No. 6) was given: "Although the jury may believe from the evidence that the defendant, at the time of the killing, was without sufficient reason to know right from wrong, or that he had not sufficient power to govern his actions by reason of some impulse which he could not resist or control, yet, if they further believe from the evidence that such lack of reason to know right from wrong, or such insufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, but not from unsoundness of mind, they should not acquit the defendant on the ground of insanity." This court has repeatedly held that voluntary drunkenness, or temporary insanity occasioned by the act of one getting drunk, is no excuse for the commission of homicide. *Shannahan v. Commonwealth*, 8 Bush, 470, 8 Am. Rep. 465; *Bishop v. Commonwealth*, 60 S. W. 180. The latter case reviews some of the opinions of this court upon the question. This instruction told the jury, in substance, that, if a lack of reason upon the part of the appellant to know right from wrong, or sufficient will power to govern his actions or to control his impulses, arose alone from voluntary drunkenness, and not from mental unsoundness, he was not excusable for that reason. This question has been so often decided by this court that we regard it as wholly unnecessary to discuss it further. This court held in *Carpenter v. Com.*, 92 Ky. 452, 18 S. W. 9, that the mere fact that the defendant was drunk at the time he committed the offense with which he was charged did not entitle him to an instruction as to insanity.

It is complained that the court erred in defining "malice aforethought." The definition given in this case follows the rule enunciated in *Clark v. Com.*, 63 S. W. 740, and *Jolly v. Commonwealth*, 61 S. W. 49.

It is also complained that the instruction on the subject of insanity did not embody the law on that question. The court followed the instructions in *Abbott v. Commonwealth*, 55 S. W. 196, and *Jolly v. Commonwealth*. The jury was told in an instruction that, before they could convict appellant, they should believe that each and every element to constitute guilt as set out in the instructions had been proven beyond a reasonable doubt, and, while insanity was a defense, it was incumbent upon the defense to prove its existence to the satisfaction of the jury; and if, on the whole case, its existence was proven, it was their duty to acquit. The defendant offered an instruction which reads as

follows: "Before the jury can convict the defendant, they ought to believe that each and every element necessary to constitute guilt as set out in these instructions has been proven beyond a reasonable doubt; and, while insanity is a defense, it is only incumbent upon the defendant to prove its probable existence, and if, on the whole case, its existence is so proven, it is their duty to acquit." This court in numerous cases has held that, before a jury can acquit an accused on the ground of insanity, it must be established to its satisfaction. *Brown v. Commonwealth*, 14 Bush, 400; *Ball v. Commonwealth*, 81 Ky. 662; *Cottrell v. Commonwealth*, 17 S. W. 149. Should the court hold that the jury would be authorized to acquit on the ground of insanity if the defendant proved its probable existence, it would disregard many of its previous opinions.

In our opinion, no error occurred at the trial of this case prejudicial to the substantial rights of the appellant. Judgment is affirmed.

HUFFMAN v. AHL.

(Court of Appeals of Kentucky. March 5, 1903.)

CONTRACTS — CONSIDERATION — PLEADING — MONEY LENT—COLLATERAL AGREEMENT OF THIRD PARTY.

1. A petition alleging that plaintiff loaned money to a certain party, knowing him to be insolvent, and in reliance on defendant's promise, in his capacity as county judge, to withhold from the debtor a sufficient amount from a sum due the debtor by the county to satisfy the loan, and that defendant failed to withhold such sum, whereby plaintiff was unable to collect the debt, but not alleging that defendant knew that the debtor was insolvent, or that plaintiff had loaned him any money, or that he would not have loaned it except on defendant's agreement to withhold the amount, or that there was any consideration for defendant's agreement, did not state a cause of action.

Appeal from circuit court, Breckinridge county.

"Not to be officially reported."

Action by John R. Huffman against William Ahl. From a judgment for defendant, plaintiff appeals. Affirmed.

Barnes & Kincheloe and W. H. Julian, for appellant. David R. Murray, for appellee.

NUNN, J. The appellant sued appellee, and made these allegations in his petition: "Plaintiff says: That on the — day of August, 1901, one W. E. Washer sought to borrow from this plaintiff the sum of \$300, stating that he had a contract with the bridge commissioners of Breckinridge county, Kentucky, to repair a bridge in said county, which, when completed, would yield to him a sum of money in excess of the amount sought to be borrowed, and that the sum of money sought to be borrowed was to be used in carrying out his contract

with said commissioners. Plaintiff informed Washer that he would furnish him the sum if, as security, he would give this plaintiff a written order on the defendant, the then county judge of Breckinridge county, directing him to hold out from the amount due said Washer, upon the completion of his contract, the sum of \$300, and pay same to plaintiff, and further conditioned that the defendant was to accept the order, and agree to hold out the said sum from any amount due Washer upon his contract, when completed, and pay same to plaintiff, whereupon Washer executed and delivered to plaintiff the order, which is filed herewith and made part hereof, marked 'A.' That he sent a copy of the order, signed by Washer, to defendant, at Hardinsburg, Ky. That defendant acknowledged receipt of said order, and agreed and promised in writing, which is filed herewith, marked 'B,' to hold out the sum of \$300 from the amount to be due Washer upon the completion of his contract, and pay same to plaintiff. That relying on defendant's promise to deduct said sum from the amount to be due Washer upon the acceptance of his work by the bridge commissioners, and pay same to plaintiff, he did furnish said sum to Washer." He made another paragraph in his petition, in which he stated that he let Washer have another sum of \$275 on exactly the same terms and like conditions as stated in the paragraph above quoted. He then proceeded with his petition as follows: "That on the — day of December, 1901, the bridge commissioners of Breckinridge county filed a report with the defendant, a copy of which is filed herewith, marked 'E,' accepting said work of Washer, and further setting out that there was due him the sum of \$663.05, after deducting some small amounts already paid, and recommending the payment of the sum. That the defendant indorsed on the back thereof the words: 'Approved Dec. 16, 1901. [Signed] Wm. Ahl, J. B. C. C.' And that wholly disregarding his agreements and promises to deduct from the amount due Washer the amounts due this plaintiff, and which he had agreed and promised to do, the defendant ordered and directed the bridge commissioners to pay to Washer the amount due him, to wit, \$663.05—an amount more than sufficient to pay this plaintiff's demands. That the commissioners did pay to Washer the said sum of \$663.05. That Washer has not paid this plaintiff all or any part of his indebtedness to him, but took the said sum, and has gone to parts unknown to this plaintiff. Plaintiff further says that Washer is insolvent, and was known to be so to this plaintiff at the times hereinbefore set out; that he would not have loaned him these sums or any sum of money except upon the conditions hereinbefore set out, but that relying implicitly upon the defendant's acceptance of the orders, and his promise to pay same, he did furnish Washer the

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 1660.

sums of money set out in his petition; that defendant negligently and carelessly failed to carry out his promises and agreements to pay said sums of money to plaintiff, and that, unless defendant be compelled to pay same, this plaintiff will lose his debt; that demand has been made upon defendant that he pay said sums, and he refused and still refuses; that said sums are just, due, and unpaid." The lower court sustained a demurrer to and dismissed this petition, and appellant has appealed from that judgment.

The only question to be determined is whether the allegations of the petition stated a cause of action. The appellant alleges that Washer was insolvent, and he agreed to let him have \$575 to aid in his work on the bridge, provided he would give him a written order on appellee, the then county judge of Breckinridge county, to hold out for him this sum from the amount that would become due Washer on his bridge contract. We cannot find any allegation in the petition that appellee knew or had any information that Washer was insolvent, or that appellant loaned Washer any sum of money, or what the consideration was for the orders, or that appellant would not have loaned Washer the money except upon the conditions set out in his petition, or that there were any conditions with reference thereto. The petition is defective with reference to these matters, and fatally defective in not stating any consideration for the promises of appellee to hold out the money for him. It is a fundamental principle of law that, to make a contract or promise binding, there must be some consideration to uphold it. There is not a statement in the petition indicating that appellee had received or was to receive anything in consideration of his holding out the money for appellant. The effect of the statements in the petition with reference to this matter is that appellee, without any consideration whatever, and as a gratuity, promised to collect appellant's money, and failed. This doctrine is supported by *McGee v. Bast*, 6 J. J. Marsh. 455, and *Proctor v. Keith*, 12 B. Mon. 253, and many other authorities to the same effect, showing that a person is under no legal obligation to perform a gratuitous promise.

Wherefore the judgment of the lower court is affirmed.

MOSLEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 8, 1908.)

HOMICIDE—SELF-DEFENSE—IMPEACHING WITNESS—INSTRUCTIONS—EVIDENCE—REBUTTAL—DECLARATIONS OF OTHERS.

1. Civ. Code Prac. § 596, allows a party producing a witness to contradict him by showing that he has made statements different from his testimony. On a prosecution for murder, a witness for the state testified on cross-examination that deceased began the altercation, and presented a gun, as if to shoot accused, before

accused shot deceased. The state then recalled the witness, and asked him as to alleged statements made by him out of court contradictory to his testimony, to which he answered that he might have made, but did not remember making, such statements. *Held*, that the impression of the jury must have been either that it was an admission, or tended to destroy his previous statements, and it was error not to instruct that the statements made out of court by the witness were to be considered only as bearing on his credibility, and not as evidence of the fact claimed to have been stated.

2. On a trial of one of several persons charged with homicide, it was improper to admit evidence of a difficulty between the other defendants and deceased prior to the killing, and concerning declarations made by them at that time concerning deceased; the accused on trial not having been present when such statements were made or when the difficulty occurred.

3. Where, on a prosecution for murder, accused testified that he had only shot deceased four times, it was error to permit a witness to testify in rebuttal that accused had admitted to him that he fired five times, since such evidence was in chief.

Appeal from circuit court, Leslie county.
"Not to be officially reported."

Wiley Mosley was convicted of manslaughter, and he appeals. Reversed.

Jno. C. Eversole, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

O'REAR, J. Appellant and his sons Kelse and Robert Mosley were jointly indicted for the killing of E. L. Hart. Appellant was tried separately, and from the judgment convicting him of manslaughter he has appealed.

The deceased was shown to have been a violent and dangerous man, and quarrelsome. In a controversy between appellant and deceased concerning some timber and saw logs, the conduct of the deceased indicated an utter disregard of appellant's property rights, and a purpose to provoke a difficulty. On the fatal occasion the parties met in the road, the deceased being armed with a Winchester rifle. Appellant and his two sons, and two other persons, his employes, were on their way to the log woods to work. They were required to pass by deceased's home, and within a few feet of his house. On the day previous, deceased had accosted appellant with a Winchester rifle, using violent and threatening language. Appellant and his sons were also armed on the day of the killing. It looks like they were expecting trouble with deceased. The verdict of the jury, finding appellant guilty, fixed his punishment at 15 years' confinement in the penitentiary. At appellant's age, this is probably equivalent to a life sentence.

Although the instructions are complained of, we are unable to say that they are not a fair and clear announcement of the law applicable to this case. The only errors of the trial court are in the matter of admitting evidence prejudicial to the accused

§ 3. See Criminal Law, vol. 14, Cent. Dig. § 1612.

Besides appellant and his two sons, there were but two witnesses to the killing. These were Russell Wooten and William Oliver. Wooten testified that his attention was first arrested by a statement from appellant which was apparently in response to some question put by deceased; that upon turning his head he saw appellant fire his pistol, and saw the deceased start to raise his Winchester rifle, which was being carried so that the muzzle of it was pointing in the direction of appellant. The effect of this witness' testimony was that appellant made the first hostile demonstration on this occasion. Appellant and his two sons testified, however, that appellant was accosted by deceased in a manner indicating a purpose to reopen the controversy about the saw logs, and, being unsatisfied with appellant's response, started to raise his gun as if to shoot him, whereupon appellant fired. There is evidence tending to impeach appellant and one of his sons. It may be doubted whether the jury felt warranted in accepting the evidence of appellant and his sons, by reason of their interest in the outcome of the trial, independent of the matter of impeachment.

The other witness to the transaction was William Oliver. His testimony clearly corroborated appellant's version of the occurrence, and was that the deceased began the altercation, and followed it up with a demonstration of violence, by starting to present his gun as if to fire at appellant. This witness, as well as Wooten, was introduced in chief by the commonwealth. Oliver was not asked by the commonwealth as to who first started to fire, or made the first demonstration to do so. His testimony upon this point was brought out upon cross-examination. Afterwards the commonwealth recalled Oliver, and then propounded to him a series of questions concerning alleged statements made by Oliver out of court to other persons, to the effect, for example, as follows: "Q. Didn't you tell Green Morris and Mathew Langdon that Lon [that is, deceased] never raised his gun or presented it towards Wyle until after Wyle had fired the first shot? A. I don't remember whether I did or not. Q. And you tell this jury that, if you said that, you don't remember anything about it? A. No, sir; I don't remember it. Q. Didn't you tell them that out in the streets since you have been here? A. I might have said it, but I don't remember it. Q. If you did tell them that, have you any idea why you told them that? A. I don't know what all I have told since that. I was never sworn about it until this time. Q. Then in talking about it you just told the people any way? A. It was nobody's business, as I know of." This testimony seems to be rather an admission on the part of this witness that he made statements out of court different from his testimony covering the point in question, and they were very materially different. Although the witness

does not admit having made them, he does not deny it; and the impression upon the jury must have been either that it was an admission, or at least tended to destroy his previous positive statements to the contrary. Section 596 of the Civil Code of Practice allows a party producing a witness to contradict him by showing that he has made statements differing from his testimony. The effect of this testimony was not possibly competent, in any light, as substantive evidence, for, if he had answered in the affirmative, it would have been to have constituted the statements made by the witness out of court, not under oath, substantive evidence of the fact that appellant had fired at deceased before the latter had offered appellant any violence. In *Loving v. Commonwealth*, 80 Ky. 511, it was said: "Nor can a witness who fails to testify to substantive facts be asked if he has not made statements to others out of court that such facts existed, for the purpose of proving that he had made such statements, as that would transform declarations made out of court, and not under the sanction of an oath, into substantive testimony." If the witness had answered in the negative in this case, and the commonwealth had proven the facts about which the witness was asked, it would have been as fatally erroneous, unless the court had admonished the jury at the time that the sole purpose and effect of such testimony was its bearing upon the credibility of the witness Oliver. This matter was material to the accused, because, if the jury should not have believed that appellant had begun the difficulty, they could not have found him guilty. The effect of letting in the probable admission of Oliver of statements made by him out of court, thereby making them substantive evidence, was to corroborate Wooten, and destroy appellant's statements and theory of defense. Thus it may have appeared that the only two disinterested eyewitnesses were actually agreed in their version, and that they contradicted appellant and his sons. The court should have carefully admonished the jury that the statements made out of court by Oliver contrary to his evidence, if he made them, were to be considered only as bearing on his credibility as a witness, and in no event as evidence of the fact as to who made the first hostile demonstration.

George Begley, a witness for the commonwealth, was permitted to testify about a difficulty which Bob Mosley and Kelse Mosley had with the deceased and one Morris some time prior to the killing, and concerning declarations made by Bob and Kelse concerning the deceased on that occasion. Appellant was not present when those statements were made, nor when the difficulty occurred. The court is of opinion that this matter was incompetent upon the separate trial of appellant.

M. V. Davidson was permitted to testify in

rebuttal that appellant had admitted to him that he had fired at deceased five times. Appellant had testified that he had shot four times only. We are of opinion that this evidence, whatever it may have been worth, was in chief, and should not have been admitted in rebuttal.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial under proceedings consistent herewith.

PAYTON v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. March 5, 1903.)

RAILROADS—CATTLE GUARDS—PRESCRIPTIVE RIGHTS.

1. Under Ky. St. § 1793, providing that railroad companies shall erect and maintain cattle guards at terminal points of fences constructed along their lines, but, where there is a private passway across the railroad, the landowner shall bear half the expenses of the cattle guards and gates—the owner to erect the gates, and the railroad company the cattle guards—the railroad company is not required to erect cattle guards where its road enters and leaves a farm, there being no terminal point there of the right of way fence, or at a place where the owner has a passway, he not having offered to pay half the expenses thereof; and, it having done so, he can obtain no prescriptive right therein, and it may remove them.

Appeal from circuit court, Hardin county.
"To be officially reported."

Suit by George W. Payton against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Barry, J. D. Irwin, and R. L. Stith, for appellant. W. H. Marriott and E. W. Hines, for appellee.

BURNAM, C. J. The appellant, George W. Payton, brought this suit to compel the appellee, the Louisville & Nashville Railroad Company, to restore cattle guards removed by it, which it had maintained for 35 or 40 years on both sides of his farm crossing, and also at the property line between his farm and the one adjacent, on the ground that by long-continued use of the passway he had acquired an easement in the wing fences and cattle guards which inclosed it, and that their removal had rendered his crossing less convenient in driving stock across the railroad from one part of his farm to another, as there was nothing to prevent them from running up and down the right of way. A general demurrer was sustained to the petition, and, failing to plead further, his petition was dismissed, and he appeals.

The common law imposed no duty upon railroad companies to fence their roads, maintain cattle guards, or erect any other barrier or stay against the intrusion of stock upon their roads or right of way. See Elliott on Railroads, section 1198; 7 Am. &

Eng. En. of Law, 908, 912; Rorer on Railroads, 616; Birmingham, etc., R. R. Co. v. Parsons (Ala.) 13 South. 602, 27 L. R. A. 264, 46 Am. St. Rep. 92. And wherever these duties exist they are always by virtue either of the contract or a statute. There is no claim that the defendant owed plaintiff any duty to maintain these cattle guards by virtue of any contract. And section 1793 of the Kentucky Statutes is the only statute bearing upon the question. It provides: "All corporations and persons owning or controlling and operating railroads, as aforesaid, shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are required to be fenced on both sides and at public crossings. But where there is a private pass way crossing said railroad, the land owner for whose benefit it is kept open, shall bear one half of the expense of cattle guards and gates. The former to erect gates. The corporation or person operating the railroad to erect the cattle guards." In McKee v. Chicago, New Orleans & Texas Pacific R. R. Co.'s Receiver (Ky.) 43 S. W. 241, it was the contention of the landholder that it was the duty of the railroad company operating its line through his farm to construct and maintain cattle guards at the point where the railroad company entered his farm and where it left it. And in that case, as in this, the company had actually constructed such guards when it built its railroad, in 1876, and had torn them down in 1894, and in consequence thereof his farm had been trespassed upon and his crops destroyed. In response to this contention, the court said: "The railroad company, not being under any legal obligation to maintain cattle guards at the points of entering and leaving the plaintiff's farm, merely because they were dividing lines with his neighbor, might remove them at any time. These guards were not division or partition fences between his lands and those of the company. They were wholly on the lands of the company, and the rights of the parties were not regulated by the provisions of the law as to division fences on farm lands." There is no averment that the passway is obstructed, or that plaintiff had ever offered to pay one-half the expense of erecting and maintaining them, and consequently he does not bring himself within the purview of the statute. And "no obligation rests upon the landowner to fence the way in which another has an easement." See Jones on Easements, section 409. The cattle guards and wing fences were erected and maintained by the railroad company entirely on its own land, and form no part of the division fences between its right of way and the land of plaintiff, and no length of time would have vested him with a prescriptive right to require their maintenance by the railroad company alone.

For reasons indicated, the judgment is affirmed.

J. E. HAYNER & CO. v. McKEE et ux.

(Court of Appeals of Kentucky. March 4, 1903.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR HUSBAND'S DEBTS.

1. Though the husband has the right to reduce his wife's choses in action to possession, he is not required to do so, and may let them remain as her property, and impress on it the character of her separate estate.

2. Where the separate property of a wife was invested in a grocery business, etc., which was managed by her husband, he receiving a salary therefor, and through his management the business greatly increased in value, and out of the profits other property was purchased, but the evidence as to the value of the whole property was conflicting, and there was considerable indebtedness against it, and the salary paid the husband appeared to be as much as his services were worth, the creditors of the husband were not entitled to subject the property, or any part of it, to the husband's debts.

Appeal from circuit court, Christian county.

"Not to be officially reported."

Action by J. E. Hayner & Co. against L. H. McKee and wife. Judgment dismissing the petition, and plaintiffs appeal. Affirmed.

Hunter Wood & Son and W. L. Reeves, for appellants. James Breathitt, Downer & Russell, and T. L. Edelen, for appellees.

HOBSON, J. On October 14, 1896, appellants recovered judgment in the Christian circuit court against appellee L. H. McKee for the sum of \$6,936.56, with interest from that date, on notes executed by him to them in the year 1882. Execution was issued on the judgment, and returned "No property found." Appellees then instituted this action, under section 439 of the Code of Practice, to subject to their debt the following property standing in the name of his wife, Nannie L. McKee:

Grocery store, saloon, and fixtures, worth, as alleged.....	\$ 8,000
Notes and accounts, worth, as alleged	5,000
61 shares in Hopkinsville Tobacco Company, worth, as alleged.....	3,000
Cold storage house, worth, as alleged...	700
Improvements put on storehouse, worth, as alleged	1,000
Dairy business and cattle, worth, as alleged	2,000
Horses, worth, as alleged.....	400
Dwelling house, less lien, worth, as alleged	2,100
Acme Mill stock.....	300
Total	\$22,500

The wife claimed the property as her own, and on final hearing the court dismissed the petition.

The proof shows that L. H. McKee was a member of the firm of Cowan, Huggins & McKee in the year 1882, and that the firm failed; McKee losing all that he had in the failure, although he seems not to have been to blame for it. Before he went into that firm he had been a merchant at Casky, Ky.,

and while in that firm he conducted the grocery business, and the other members of the firm attended to its grain and implement business. McKee, it seems, was a good business man, and understood the grocery business. The failure of his firm was due to losses in the other business which he had nothing to do with. After that failure a firm was formed, of McKee & Pool, which conducted for about two years a grocery business. The McKee of this firm was Charles McKee, the father of L. H. McKee. L. H. McKee stayed in this store as a clerk at a salary of about \$50 a month. In May, 1883, he married Nannie L. Ellis, who had about \$1,500 in the hands of her brother; being money derived from insurance on the life of her father, who had died several years before. She knew her husband's financial condition, and it was agreed between them that her money should be kept separate, and held as her separate estate. In November, 1883, her brother, who held the money for his sister, paid it over to her husband. He deposited it in bank in the name of L. H. McKee, agent, and in the following January and February checked it out to McKee & Pool, except some of it used by his wife, and the bank account was closed. A year or more after this, Pool withdrew from the firm, and the firm of McKee & Pool was succeeded by Charles McKee & Sons; the sons being the two brothers of L. H. McKee. L. H. McKee stayed with this firm as with its predecessor. One of his brothers died, and in the year 1889 L. H. McKee's wife received from the estate of this brother nearly \$300. She then bought the home where they now live for \$1,500. The property was deeded to her, and the money received from the estate referred to was paid on the property. In 1890 Charles McKee died, and, by a proceeding in the Christian circuit court, Nannie McKee was made a feme sole. She then bought the grocery store of Charles McKee & Sons, and her husband continued in charge of it, running it in her name, and has continued to run it to the present time; increasing the business from year to year, and adding a saloon to the grocery. His wife stayed at home, and he ran the business, but it was run in her name. Out of the profits of the business the family were supported, the annual cost of this being about \$1,500. The dwelling house was improved, and \$300 of the unpaid purchase money was paid, and the interest on the remainder. The property is now worth, perhaps, \$2,500, and there is a lien on it for \$900. A storeroom was bought for \$6,700, and \$1,000 spent in improving it, although the purchase money for the store was not paid. Sixty-one shares of the stock in the Hopkinsville Tobacco Company were bought—5 shares at \$100 apiece, and the other 56 shares at 10 cents on the dollar, at a time of depression. The company is now doing well, and the stock is taken in bank as collateral security for a loan of

¶ 1. See Husband and Wife, vol. 26, Cent. Dig. §§ 27, 412.

\$2,500. The husband also bought in the name of his wife, and out of the profits of the business conducted by him, three shares of Acme Mill stock, valued at \$300, and a cold storage house, which rents for \$120 a year, but which was bought at auction for something over \$200, although it cost \$700. In addition to this, in the name of his wife he went into the dairy business, putting into it something over \$2,000, and is now running the dairy. He also began some farming operations in partnership with Thomas H. Carlos, but no money seems to have been made either in the dairy or in the farming operations. The proof is conflicting as to the present value of the store; ranging on the stock of goods from \$4,000 to \$8,000, and on the accounts and notes from \$3,500 to \$5,000; fixtures, etc., \$1,000. It is impossible to read the record without reaching the conclusion that L. H. McKee is a business man of more than ordinary capacity, and that, starting with small capital, by reason of his capacity and attention the business conducted by him has grown from small beginnings to its present size, besides supporting his family.

It is earnestly insisted for appellant that the fund in the hands of the wife's brother vested in the husband on their marriage, and that therefore the increase of that fund, and everything purchased with it, was the property of the husband. We cannot concur in this contention. The husband had the right to reduce his wife's choses in action to possession, but he was not required to do so. He might let them remain as her property, and impress upon it the character of her separate estate. The facts of the case warrant the chancellor's conclusion that the husband and wife, knowing of his involved condition, agreed that this fund should be the separate estate of the wife, and that it was held and controlled by her as her separate estate. The wife was entitled to an equitable settlement, and this small fund was no more than, in equity, might properly have been settled upon her.

It is also earnestly argued that the husband cannot give his wife the profits arising from his own business sagacity, and that the profits of this business made by the husband, or a reasonable part of them, should be subjected to the payment of plaintiff's debt. See *Carter Bros. v. Martin*, 91 Ky. 294, 15 S. W. 663; *Brooks-Waterfield Co. v. Frisbie*, 99 Ky. 125, 35 S. W. 106, 59 Am. St. Rep. 452. There is much force in this, but in view of the evidence as to the amount of debts outstanding, and the conflicting evidence as to the value of the property, the court concludes that we ought not to disturb the chancellor's finding on the facts. It is shown that the debts due for goods in the store amount to \$3,500. There are also a note in bank for \$2,000, and a balance of \$900, with some interest, due on the dwelling house, and \$6,700 due on the storehouse. It

is also shown that about the year 1894 the wife received a devise of something like \$3,500 and \$2,000 was put into the store. The husband has been paid regularly a salary out of the store, which, according to the evidence, was as much as his services were worth. The court is therefore of opinion that the facts of this case do not bring it within the rule laid down in the cases referred to.

Wherefore (the whole court sitting) the judgment is affirmed.

EARLY'S ADM'R v. LOUISVILLE, H. & ST. L. RY. CO.

(Court of Appeals of Kentucky. March 3, 1903.)

RAILROADS—NEGLIGENCE—ACCIDENT ON TRACK—PRESUMPTION—RES GESTÆ.

1. In an action for the death of one killed by being run over by a railroad train, testimony as to what one of the trainmen said about the accident when the train stopped, after running over deceased, was not admissible as a part of the res gestæ; it having been made too long after the accident.

2. Evidence cannot be complained of by plaintiff on appeal where it was brought out by his counsel on examination in chief.

3. Where one was killed by being run over by a railroad train at a private crossing, and there was an unobstructed view of the track for a mile in the direction from which the train came, and it did not appear that it was customary for signals to be given when approaching such crossing, failure to give a signal for the same was not negligence.

4. Where, in an action for the death of one run over by a train at a private crossing, the evidence did not show whether deceased was walking on the track, or attempting to cross it, or lying on it, and there was an unobstructed view for a mile in the direction from whence the train came, it was not error to direct a verdict for defendant.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by Walter Early's administrator against the Louisville, Henderson & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. P. McClain and Clay & Clay, for appellant. Yeaman & Yeaman, Jas. P. Helm, and Chapeze Wathen, for appellee.

SETTLE, J. This action was instituted in the Henderson circuit court by the appellant, Farmers' Bank & Trust Company, as the administrator of Walter Early's estate, to recover damages for the alleged negligent killing of the deceased by the servants and employes of appellee in charge of one of its freight trains. The answer denies the negligence complained of, and, for further defense, avers that the death of appellant's decedent was caused by his own negligence, which is denied by the reply. The trial resulted in a verdict for appellee by reason of a peremptory instruction given by the lower

¶ 1. See Evidence, vol. 20, Cent. Dig. § 305.

court at the conclusion of appellant's evidence, and, a new trial having been refused the appellant, it asks this court to declare that the giving of the peremptory instruction by the lower court was improper, and also that that court erred in overruling the motion for a new trial.

The record shows that the only ground relied on for a new trial is the alleged error of the lower court in giving the jury the peremptory instruction to find for appellee. It is patent, therefore, that the question of whether the peremptory instruction was or not proper must be determined from the evidence introduced by appellant on the trial. Our examination of the record leads us to the conclusion that the following facts are to be regarded as satisfactorily established by the evidence, viz.: First. That appellant's decedent was killed on the afternoon of May 9, 1901, by appellee's west-bound freight train, at or near a private crossing one mile from Reed's station, and at a point about 330 yards south of a public crossing. Second. That at the point where he was struck he could, if on the track, or within 40 or 50 feet of it, see up the track towards Reed's station, whence the train was coming, a distance of at least a mile. Some of the witnesses not in view of the train itself say they saw the smoke from it, heard distinctly the noise it was making in running, and heard it whistle for, or before reaching, the public crossing, which was 330 yards from the point where the deceased was killed. Third. That the crossing at or near which he was killed was a private crossing; that is, one made where a road from the adjoining field crossed the railroad track. The evidence does not disclose whether the deceased, at the time he was killed, was walking on the track, or attempting to cross it in front of the train, or lying with his body on the track. No eyewitness was introduced to testify as to the manner of his death, unless the statements of one or more of the trainmen, made to the witness Patry, and detailed by him on the trial, are to be considered as competent evidence. Patry testified that when the train stopped, after running over Early, one of the trainmen called him to the place of the accident to see the remains of the dead man; and when he got there he was, in substance, told by the conductor in charge of the train that the man killed was lying on the track about three feet east of the crossing when run over by the train, and that they first saw something white on the track, which looked like a piece of paper, and, when they discovered that it was a man, they were too close with the train to stop it before striking him. We do not think these statements competent, and they should have been excluded by the lower court upon the objection made by counsel for appellee, as they appear to have been made too long after the accident to be considered a part of the res gestæ; but they were admitted by that court,

and were probably considered as evidence on the motion for a peremptory instruction, of which appellant cannot complain, as the statements were brought out by its counsel on the examination in chief, and thereby became part of its evidence. So, if the statements of the conductor are to be relied on, they not only exonerate appellee from the charge of negligence, but show that the deceased was guilty of contributory negligence. If this view of the case is not to be accepted, the manner in which the deceased met his death is wholly a matter of conjecture. But whether he was walking on the track, lying thereon, or attempting to cross it in front of the train, as there was nothing to obstruct the view from where he was for the distance of a mile in the direction of the approaching train, it is as reasonable to suppose that he saw it, heard the noise of its running, and heard it whistle for the public crossing (which was 330 yards away), all in time to have enabled him to get out of its way, as it would be to suppose that those in charge of the train saw him and realized his peril in time to have avoided killing him by stopping the train before it struck him.

As already stated, the crossing at or near which the deceased was killed was a private or farm crossing, and this court has held that the usual signals are not required of a train in approaching such a crossing. But where a private crossing is maintained by the railroad company, for the benefit of a landowner, in consideration of the grant of a right of way through his lands, and it is at a point where the view of the track is obstructed—it being a custom of the trains to give warning of their approach to the crossing—it has been held by this court that one injured by a train at such a crossing may recover therefor, when no signal was given of its approach, upon the ground that the failure to give such signal constitutes negligence. *L. & N. R. R. Co. v. Bodine*, 59 S. W. 740; *Johnson's Adm'r v. L. & N. R. R. Co.*, 91 Ky. 651, 25 S. W. 754. In *Cahill v. Cincinnati, etc., Railroad Co.*, 92 Ky. 345, 18 S. W. 2, the company was held liable for injury inflicted by one of its trains at a private crossing, but it was because of failure of those in charge of the train to signal its approach to a public crossing a short distance from the private crossing; it appearing that it was customary for these signals to be given for the public crossing, and that they were relied upon by persons using the private crossing. The doctrine here announced was reaffirmed in *L. & N. R. R. Co. v. Survant*, 44 S. W. 88. The facts of the case at bar do not authorize a recovery as in the cases supra. Here the crossing is in a field, and from it a clear and unobstructed view is to be had of the railroad track for at least a mile in the direction of Reed's station; and though one or two witnesses testified that they had known trains to sound the whistle in approaching the crossing, it does

not appear that such signals were customary, or that they were not given at the time of Early's death for the public crossing, instead of the private one.

There is no presumption of negligence against the appellee, any more than there is a presumption of contributory negligence on the part of the deceased. It was incumbent on the appellant to prove negligence on the part of appellee's servants in charge of the train, or facts from which such negligence could properly be inferred. *Hughes v. Cincinnati, etc., Railroad Co.*, 91 Ky. 526, 16 S. W. 275; *Wintuska's Adm'r v. L. & N. R. R. Co.* (Ky.) 20 S. W. 819; *L. & N. R. R. Co. v. Vittitoe's Adm'r* (Ky.) 41 S. W. 269; *Morris' Adm'r v. L. & N. R. R. Co.* (Ky.) 61 S. W. 41. The only duty appellee's servants in charge of the train owed the deceased was to use reasonable care to prevent injuring him after discovering his presence on the track, and a careful examination of the record convinces us that there was no evidence adduced on the trial that tended to prove the want or absence of such care.

We do not attribute to the tests made by some of the witnesses, as to the distances from which certain objects placed by them on the railroad track at the point of the accident could be seen, the importance attached to them by counsel for appellant, for we know that objects to which the attention is called in advance can more readily be seen and identified by a person stationed on the ground at a given distance than by one on a rapidly moving train, however keen his vision, or constant his outlook on the track ahead of the train. But these tests do not of themselves, or in connection with the remainder of the evidence, supply the facts from which negligence on the part of appellee may be inferred; and being of the opinion that the lower court did not err in giving the peremptory instruction, nor in refusing the appellant a new trial, the judgment is affirmed.

COLUMBIA FINANCE & TRUST CO. et al. v. MITCHELL'S ADM'R et al.

(Court of Appeals of Kentucky. March 4, 1903.)

NOTES—ACTION—BURDEN OF PROOF—ARGUMENT—RIGHT TO CLOSE EVIDENCE—NOVATION.

1. In an action on a note, the first signer set up that he was a surety only, and had been released by an extension granted, without his consent, in consideration of an advance payment of interest. Plaintiff filed an amended petition, in which it was alleged that no interest had been paid, and that two credits indorsed on the note were entered by mistake. *Held*, that it was proper to give defendant the burden of proof, and the concluding argument before the jury.

2. Where a defendant to an action died between the first and second trials, it was not prejudicial error to allow his testimony on the former trial to be read in evidence, as to his transactions with one also deceased, where the

testimony of the other as to such transactions was also read, and there was no conflict between their testimony, and it was confirmed by other evidence, and uncontroverted.

3. In an action on a note, the defense was that defendant was a mere surety, and the other signer was the principal, and that the surety had been released by reason of an extension granted in consideration of an advance payment of interest. Plaintiff claimed that credits of interest were indorsed on the note by mistake, as no interest was paid. It appeared that the account of the principal with plaintiff bank had been charged with the interest, and the bank credited in its interest account by such amount as collected, and it appeared that there had been deposits made after the charge. *Held* that, in the absence of evidence that the subsequent deposits were insufficient to cover the balance due when the charge was made, it would not be presumed that it was not so covered, and hence it was not shown that the money was not paid, especially in view of the fact that the claim was not made until seven or eight years after the credits were given.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by the Columbia Finance & Trust Company and the assignee of the New Farmers' Bank against William Mitchell's administrator and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Ed. C. O'Rear and R. A. Mitchell, for appellants. H. M. Woodford, H. R. Prewitt, and A. W. Young, for appellees.

HOBSON, J. This is the second appeal of this case. For opinion on former appeal, see *Young v. New Farmers' Bank's Trustee*, 102 Ky. 257, 43 S. W. 473. The facts are set out in that opinion, and need not now be repeated. On the return of the case to the circuit court the plaintiff filed an amended petition, in which it was alleged that no interest had been paid on the note, and that the two credits of \$80 indorsed thereon were entered by mistake. The allegations of this pleading were traversed by the defendant, and the case was again tried, resulting in a verdict and judgment for the defendant.

It is insisted that the court erred in giving the defendant the burden of proof and the concluding argument before the jury, under the pleadings as they stood at the trial. We are unable to see that the burden of proof was changed by the amended petition. The defendant Young admitted signing the note, and a judgment for plaintiff must have been entered against him thereon unless he had, by proper evidence, overthrown the prima facie case which the note made out against him. To do this, he had to show that he was a surety in the note, and not the principal, and that a novation had been made by which he was released, under the principles laid down in the former opinion.

It is also insisted that the court erred in allowing the testimony of the defendant Young given on the former trial to be read on this trial (he being dead), so far as he stated trans-

actions with William Mitchell, who had also died since the preceding trial. But the testimony of William Mitchell, given on that trial, was also read, and there was no conflict between his testimony and Young's as to what took place between them. The testimony of Mitchell was confirmed by other evidence, and there was no contrary evidence offered by appellant. The admission of Young's statements was not prejudicial, as they could not possibly have affected the result.

This brings us to the last and pivotal question in the case. It is urged that Mitchell, the principal in the note, did not, in fact, pay anything on it, and that there was, in truth, no novation. It was shown that, at the time the two credits indorsed on the note were made, Mitchell's account with the bank was simply charged with these sums, and this his account on these dates was overdrawn. The account of Mitchell with the bank was not produced, but it would appear from the evidence that it was a large one. It ran on for many months, and until the bank closed. This charge of the money to Mitchell in that account was acquiesced in by the bank directors. At least, there never appears to have been any complaint about it, or any disaffirmance of the charge. The bank was credited in its interest account on its books by these amounts as collected on the interest on this note. Although Mitchell's account was overdrawn on the day the charge was made, the balance may have been subsequently covered. There is no evidence to the contrary. And as money was deposited to the account, it would be applied by operation of law to the older items of debt; and so, to show the money was not paid, it would be necessary to prove that the subsequent deposits were insufficient to cover the balance due on the account when the charge was made. This had not been done, and, from the acquiescence of the bank in the charge, it cannot be presumed that it was not so covered. *Grant County Deposit Bank v. Points* (Ky.) 56 S. W. 662; 1 *Morse on Banking*, section 355.

The two credits in controversy were conceded in the petition, and were not controverted in any way, until, after the return of the case from this court, the amended petition was filed, on January 25, 1899, which was something like seven or eight years after the credits were given. The long delay in setting up this claim is potent evidence of the acquiescence of the bank, and the court should not disturb a matter of this sort, after such great lapse of time, without the clearest evidence.

The circuit court on the trial followed the principles laid down by this court on the former appeal, and, on the whole record, we see no error to the prejudice of the substantial rights of the appellant. The judgment complained of is therefore affirmed.

LOUISVILLE & N. R. CO. et al. v. S. D. CHESTNUT & BRO.

(Court of Appeals of Kentucky. March 4, 1903.)

NEGLIGENCE OF CONNECTING CARRIER—LIABILITY OF RECEIVING CARRIER—BILL OF LADING—CORPORATION—SERVICE OF PROCESS—APPEARANCE.

1. Where a contract between a carrier receiving goods for transportation beyond its lines and the shipper provides that the agreement is between the shipper, the carrier, and the connecting lines, and that no line shall be liable for the negligence of any other, and that the car in which shipment is made may be transferred to all necessary connecting lines, the receiving carrier is not liable for any negligence of other carriers.

2. Civ. Code Prac. § 51, subsecs. 3, 4, provide that, if defendant operates a railroad, summons may be served on its passenger or freight agent stationed at or nearest to the county seat of the county where suit is brought. *Held*, that the phrase "passenger or freight agent," etc., refers to a person in the service of defendant, and stationed by it at some point, and hence, in an action against the last of several connecting carriers by a shipper for negligence in transporting goods, service on the agent of the first carrier is insufficient.

3. Where the service of process is insufficient to give the court jurisdiction, but defendant appeals to a reviewing court, it is, in effect, a general appearance in the action.

Appeal from circuit court, Todd county.

"To be officially reported."

Action by S. D. Chestnut & Bro. against the Louisville & Nashville Railroad Company and others. From a judgment for plaintiffs, certain defendants appeal. Reversed.

Perkins & Trimble, E. W. Hines, and B. D. Warfield, for appellants. W. L. Reeves and B. B. Petrie, for appellees.

HOBSON, J. Appellees, S. D. Chestnut & Bro., shipped a car load of turkeys from Trenton, Ky., to Chicago, Ill., on December 11, 1898. The car was carried by the Louisville & Nashville Railroad Company to Evansville, Ind., and there delivered to the Evansville & Terre Haute Railroad Company, which took it to Terre Haute, and there delivered it to the Chicago & Eastern Illinois Railroad Company, which transported it to Chicago all right, but failed to take it from its yard to the unloading track at Chicago; and while the car was so delayed it turned very cold, and a number of the turkeys were frozen. The car reached Chicago about 7 o'clock in the morning, and should, in the ordinary course of business, have been unloaded in a few hours; but, by reason of the delay, the unloading of it was not finished until some time the next day. The proof by the defendants tended to show that the turkeys were not in good condition, and the loss on them was due in part to this fact, and in part to the delay of the consignee in unloading the car after it was placed on the proper track.

† 3. See *Appearance*, vol. 2, Cent. Dig. §§ 41, 52.

The court peremptorily instructed the jury to find for the defendant the Evansville & Terre Haute Railroad Company, and submitted the case to the jury as to the Louisville & Nashville Railroad Company and the Chicago & Eastern Illinois Railroad Company. There was no evidence showing negligence on the part of the Louisville & Nashville Company, and therefore the only question in the case is whether it is liable under the contract, as a through carrier, for the negligence of its connecting line.

The written contract, so far as is material, is in these words:

"Received by the Louisville & Nashville Railroad Company the following-described live stock to be transported in accordance with the terms and conditions of the contract entered into below:

Consignee, Destination, &c.	Description of Stock.	Car No.
S. D. Chestnut & Bro. Care of H. L. Brown & Son, Chicago, Ill. Charges \$22.00	Poultry Reed.	Tacoma 628

"Tariff rate on this shipment from Trenton to Evansville is \$62.00 per car.

"Contract for Transportation of Live Stock.

"Trenton, Ky., Station, Dec. 11, 1898.

"This agreement made between the Louisville & Nashville Railroad Company and its connecting lines of the first part and S. D. Chestnut & Bro. of the second part Witnesseth, That, whereas the said Louisville & Nashville Railroad Company and its connecting lines transport live stock only as per above tariff; but in consideration that the said party of the first part will transport for the said party of the second part one car of poultry from Trenton, Kentucky, to Evansville, Indiana, station at the rate of thirty one dollars per car and a free passage to the owner or his agent on the train with the animals (if shipped in car load quantities), the same being a special rate lower than the regular rate mentioned in the said tariff, the said party of the second part hereby releases said party of the first from all liability in the transportation of said animals, except as hereinafter agreed and agrees that such liability shall be only that of a private carrier for hire; and it is further distinctly understood by the parties hereto that all liability of said Louisville & Nashville Railroad Company as carrier of said animals shall cease at its destined station if on said company's railroad, or if destined to a point beyond said company's railroad, then at said company's station at its terminus, when ready to be delivered to the owner, consignee, or carrier, whose line may constitute a part of the route to destination. * * *

"And it is further agreed that when necessary for said animals to be transported over the line or lines of any other carrier or car-

riers to the point of destination, delivery of the said animals may be made to such other carrier or carriers for transportation, upon such terms and conditions as the carrier may be willing to accept: provided that the terms and conditions of this bill of lading shall inure to such carrier or carriers, unless they shall otherwise stipulate; but in no event shall one carrier be liable for the negligence of another."

The proof shows that appellees were charged \$22 for the poultry car Tacoma, \$31 for transporting it from Trenton to Evansville, and \$34.40 as the freight from Evansville to Chicago; making, in all, \$107.40, which was paid by the consignees in Chicago. It is insisted for appellees that the written contract is an undertaking by the Louisville & Nashville Railroad and its connecting lines to carry the car Tacoma from Trenton to Chicago; that they are all parties of the first part, who received the car to be carried to its destination, and are all bound alike by the stipulations of the contract to transport the car from Trenton to Evansville, and from Evansville to its destination. It is also urged that the limitations of the contract are not limitations on the obligation of any of the lines, but only an attempt to limit their liability by reason of the obligation; and the case of *Ireland v. Mobile & Ohio Railroad Company*, 105 Ky. 400, 49 S. W. 188, 453, is relied on. But it will be observed that while the writing is a receipt by the Louisville & Nashville Railroad Company for the poultry car Tacoma, consigned to Chicago, Ill., it is stipulated that the party of the first part will transport the car from Trenton, Ky., to Evansville, Ind., and that all liability on the part of the Louisville & Nashville Railroad Company for the car shall cease at its terminus, when ready to be delivered to the connecting line; and it is also agreed that the car may be transferred to such connecting lines as are necessary to reach its point of destination. Taking the contract as a whole, we think it means that the Louisville & Nashville Railroad Company is to transport the car to its terminus, and there deliver it to the connecting line, and to be no further responsible for it. The bill of lading in the Case of the *Mobile & Ohio Railroad Company* read very differently. There the *Mobile & Ohio Railroad Company* was the only contracting party, and the court reached the conclusion that the covenants of the paper could only refer to it. A bill of lading on substantially the same form as that above quoted was before this court in *L. & N. Railroad v. Tarter*, 39 S. W. 698, and it was held that the initial carrier was not liable beyond its line. The court said: "The general rule is that a carrier is not liable beyond its own line, unless by contract to that effect, express or implied. *Elliott on Railroads*, sec. 1433; *Bryan v. Memphis, etc., Railroad*, 11 Bush, 597. It is held in most of the courts that the mere acceptance of goods

directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extraterminal liability; but, whether so or not, it has never been held that such liability existed in the face of a contract to the contrary. This is not a case of attempted limitation of liability for negligence; hence the cases cited by appellee's counsel do not apply." The same rule was followed in *L. & N. Railroad v. Cooper*, 42 S. W. 1184, on the same form of bill of lading. The soundness of these rulings was recognized in the *Ireland Case*, where the court said: "It is urged that the clause is an attempted limitation of the carrier's common-law liability, and is therefore void. We do not think so. At the common law, without a contract to the contrary, there was no liability beyond the carrier's own line." 105 Ky. 403, 49 S. W. 188, 453. This was recently approved in *P., C. & St. L. Railroad Co. v. Viers*, etc., 68 S. W. 469. We therefore conclude that, under the contract referred to, the Louisville & Nashville Railroad Company was not responsible beyond its own line.

As to the appellant the Chicago & Eastern Illinois Railroad Company a different question is presented. It had no officer in the state, and the process for it was served on the president of the Louisville & Nashville Railroad Company, on the idea that the Louisville & Nashville Railroad Company was its agent in the state in the making of the contract sued on, and therefore the process might be properly served on such agent. In *Nashville, etc., Railroad Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177, under a bill of lading similar to that before us, it was held that as the contract was made in Marion county by the Louisville & Nashville Railroad Company, acting as agent for the appellant, the Nashville, etc., Railroad Company, the contract must, within the meaning of section 73 of the Civil Code of Practice, be regarded as made there by appellant itself, and as, by that section, an action against a common carrier upon a contract to carry property may be brought in the county in which the contract is made, the Marion circuit court properly had jurisdiction of the action. This case was followed in *P., C. & St. L. v. Viers*, etc., 68 S. W. 469; but in both these cases the summons was served on an agent of the defendant in this state. By subsections 3, 4, § 51, of the Civil Code of Practice, it is provided that if the defendant operate a railroad the summons "may be served upon the defendant's passenger or freight agent stationed at or nearest to county seat of the county in which the action is brought." The words "passenger or freight agent stationed at or nearest to the county seat of the county" must refer to a person who is in the service of the defendant, and is stationed by it at some point. The Louisville & Nashville Railroad Company, although it may have

72 S.W.—23

acted as the agent of the defendant in making the contract, is not such an agent as the statute contemplates; and therefore the service of process upon it was invalid, and should have been quashed. But on the return of the case to the circuit court no further process will be necessary, as the appeal enters the defendant's appearance to the action. In 8 Cyc. 510, the rule on this subject is thus stated: "Taking an appeal or suing out of a writ of error from an inferior court to an intermediate appellate court, which tries the same *de novo*, constitutes a general appearance in the intermediate court, and confers jurisdiction of the person on that court, whether the court from which the appeal was taken had acquired jurisdiction of the person or not. If the appeal is to a reviewing court, it is a general appearance, in the sense that on reversal and remand to the trial court the defendant is in court for the purpose of further proceedings without any further steps to bring him into court, even though the judgment was reversed on the ground that the trial court had not acquired jurisdiction of the person of defendant." This rule was laid down in the year 1809 by this court in *Grace v. Taylor*, 4 Ky. 430. It was followed in 1815 in *Graves v. Hughes*, 7 Ky. 84, and *Wharton v. Clay*, 7 Ky. 167; also in 1826 in *Hockaday, etc., v. Commonwealth and Adkins*, 20 Ky. 12. In a number of subsequent cases the rule is adhered to. *Bradford v. Gillaspie*, 38 Ky. 67; *Chesapeake, Ohio & Southwest R. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832; *Thompson v. Moore*, 15 S. W. 6, 358; *Lillard v. Brannin*, 91 Ky. 511, 16 S. W. 349.

After its objection to the process was overruled, the defendant filed answer to the merits, and there was a trial, and judgment on the whole case. From this judgment the appeal before us is prosecuted. It will therefore be before the court on the merits when the action is returned to the lower court.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

CHESAPEAKE & O. RY. CO. v. WILDER.

(Court of Appeals of Kentucky. March 4, 1903.)

NEGLIGENCE — DANGEROUS PREMISES — INSTRUCTIONS — DEPOTS — INJURY TO PERSON LOADING GOODS—MINORITY OF PLAINTIFF—LOSS OF EARNING POWER.

1. Plaintiff was injured by the falling of a door while moving certain hogsheads belonging to his master in the depot of defendant railroad company. There was evidence that defendant knew of the insecure condition of the door, and that plaintiff was moving the hogsheads to make room for other freight of his master, and not with a view of then loading them on defendant's cars. *Held*, that an instruction that if the defendant knew the door was unsafe, and plaintiff was moving the hogsheads as a part of the work of loading them on defendant's cars for shipment, the jury should find for plaintiff, unless he knew of the unsafe condition

of the door, or was moving the hogsheads for the convenience of his master only, was proper.

2. Where plaintiff was injured by an insecure door while he was moving certain hogsheads in defendant's depot, evidence that plaintiff's master at times put hogsheads in the depot for his own convenience was admissible upon the issue of whether plaintiff was moving the hogsheads with a view of loading them on defendant's cars for shipment, or merely for the master's convenience.

3. In a personal injury action by an infant, where the pleadings raised no question as to plaintiff's right to recover for his loss of earning capacity between the time of the injury and the time he became 21 years of age, and it appeared that plaintiff was 20 years of age, and it was not shown that he had a father or mother, or for any reason his time was not his own, an instruction not to allow anything for his loss of earning power prior to his attaining his majority was properly refused.

Appeal from circuit court, Clark county.

"Not to be officially reported."

Action by Gordon Wilder against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jno. T. Shelby, for appellant. J. M. Benton, for appellee.

HOBSON, J. Appellant's depot building at its station Thompson, in Clark county, is situated close to the tobacco barn of A. T. Duckworth, in which he prized tobacco. It was his custom to make shipments whenever he got a car load. As the hogsheads were prized, by an agreement with appellant's agent he rolled them into the depot, and, as soon as enough were there to load a car, they were put on it. The cars were ordered from time to time as they were needed. About December 20, 1900, a car was ordered, and in the regular course of business should have reached Thompson about 7 o'clock the next morning. Early that morning, before the arrival of the car, and in anticipation of its coming, Duckworth directed appellee, Gordon Wilder, and another man, who were working for him, to go into the depot, and roll the hogsheads together, so as to make room for three more hogsheads, then in the barn, so that they could be rolled in and be ready for the loading of the car. There were a number of hogsheads in the room; some belonging to Duckworth, and some to others. It was customary for shippers to do this when they wanted to get tobacco in. While appellee was rolling the hogsheads, a heavy door fell upon him, breaking his arm, injuring his shoulder, and inflicting a serious, if not permanent, injury. The door was a sliding door to the depot, large and heavy. One of the hinges had been broken some month or more, and the other hinge had been broken a few days before. The door had then simply been set up in its position, and a tobacco hogshead had been rolled against it to hold it in place. When this hogshead was moved, the door fell, and injured appellee. He did not know that

the door was broken, and had no notice of the danger until it fell on him. By the course of business Duckworth was required to put his tobacco on the car, and he could load it on the car either directly from the barn, or bring it into the depot, and load it from there on the car. The court instructed the jury that if the defendant or its employes knew the door to be loose from its fastening, and not in a reasonably safe condition, and he was injured by reason of the door's falling on him while he was engaged in moving or arranging the hogsheads preparatory to and as a part of the work of loading the tobacco on the defendant's car for shipment, they should find for the plaintiff, unless he knew of the unsafe condition of the door, or could, by the exercise of proper care, have discovered it, or failed to use proper care in moving the hogsheads; but if, at the time he was injured, he was not moving or arranging the hogsheads preparatory to loading the tobacco on the defendant's car for shipment, or was moving them for the convenience or benefit of Duckworth only, they should find for the defendant. The jury found for the plaintiff in the sum of \$1,000, which is not so excessive, under the evidence, as to justify us in disturbing the verdict on this ground.

There was evidence from which it might be inferred that the purpose in moving the hogsheads was to get them out of Duckworth's way in the barn, and not with a view to their shipment. The instruction of the court was, therefore, proper; but the evidence on the subject was such that it was a question for the jury, and was properly left to them by the court.

It was incumbent upon the railroad company to keep its premises reasonably safe for the use of persons properly thereon in the business of delivering or receiving freight. There is no doubt, under the evidence, of the unsafe condition of the door, and that the agent knew of it. The rule is thus stated in 2 Shearman & Redfield on Negligence, section 704: "The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. This rule is specially applicable to an owner of real property who receives compensation for its use—as, for example, in the case of a wharfmaster, who receives payment for the use of his wharf; a railroad company, with respect to its platform or other structures; or the occupant of premises used for public entertainment, and charging an admission fee." To same effect, see 1 Thompson on Negligence, secs. 985-987. The fact that

Duckworth at times put tobacco in this depot for his convenience, or that at times his hands set up hogsheads there, was competent evidence to go to the jury on the question as to what was the purpose of the work done at the time appellee was injured; but on all the evidence we do not think the verdict of the jury in favor of appellee is against the weight of the evidence on this subject, the rule being, of course, conceded, as stated by the court in its instruction, that the railroad company is not answerable to him if he was hurt while working there simply for the furtherance of Duckworth's prizing business, and not in getting the tobacco ready for shipment on the car then expected.

It is insisted that the court should have instructed the jury not to allow anything for the loss of appellee's earning capacity until he was 21 years of age. He was 20 years of age at the time he was injured, and was 21 a few months later. No question was made in the pleadings on this subject. It does not appear from the pleadings that he had a father or mother, or that for any reason his time was not his own. It would seem from the proof that he was working for himself, and that after he was hurt he was taken to his mother's. It would also appear from the proof that his mother had some transaction with the attorney who brought the suit for him in regard to his fee, and the action is brought by Nannie Cox, as his next friend. It is said in the brief that she is his mother, and, if so, under the case of *C. & O. Railway Co. v. Davis*, 60 S. W. 14, the instruction asked was properly refused by the court. He was so nearly of age that, nothing else appearing, we think it may be assumed that his mother was not asserting her right to control his time; and we are unwilling to reverse for so slight a matter as this, which was not presented in any way in the pleadings, or called to the attention of the court by any proof heard on the trial.

When Dr. Combs was on the stand as a witness for appellee he was asked, on cross-examination, in regard to certain matters, with a view to show his interest in the case. Appellee was then allowed on re-examination to go into the particulars of the conversations referred to, the court telling the jury that the matters were only to be considered by them for the purpose of illustrating the interest, if any, the witness had taken in the case. If it be conceded that the evidence was improperly admitted, we are unable to see that it was prejudicial to appellant, or that for this cause a new trial should be had. The matters testified to all took place long after the injury, and had no relation to the merits of the case. By the court's instructions these things were substantially eliminated from the consideration of the jury, and the real issue was fairly presented to them.

Judgment affirmed.

DIERIG v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. March 4, 1903.)

RAILROADS—EXPULSION OF PASSENGER—FALSE IMPRISONMENT—ARREST OF PASSENGER—BREACH OF CONTRACT—ACTION—COMPLAINT.

1. A complaint against a street railway company alleged that, by contract between the carrier and two certain towns, the carrier was bound to transport passengers from a certain city to either of such towns for one five-cent fare, and that, plaintiff having taken passage on a car of defendants, the conductor refused to accept the five-cent fare offered for a continuous ride from the city to one of the towns. *Held*, that the allegation did not amount to a statement that defendant refused to carry plaintiff.

2. In an action against a railway company, the complaint alleged that defendant, by an agent, called the police to arrest plaintiff, and that the police illegally placed plaintiff under arrest, and wrongfully held him as a prisoner. *Held* that, in the absence of an allegation that it was done maliciously and without probable cause, the complaint stated no cause of action for false imprisonment.

3. A complaint against a railway company alleged that, by contract between the carrier and two certain towns, the carrier was bound to transport passengers from a certain city to either of such towns for one five-cent fare, and that, plaintiff having taken passage on a car of defendants, the conductor refused to accept the five-cent fare offered for a continuous ride from the city to one of the towns, and that defendant, by an agent, called on the police to arrest plaintiff, and that they illegally placed plaintiff under arrest, and wrongfully held him as a prisoner. *Held*, that the complaint did not state a cause of action for false arrest and imprisonment.

4. If plaintiff intended to endeavor to recover for violation of the contract, and also for illegal arrest, the complaint stated two separate and distinct causes of action.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by Herman Dierig against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Geisler & Lockhart, for appellant. L. J. Crawford, for appellee.

PAYNTER, J. The petition in this case reads as follows: "The plaintiff says that the South Covington & Cincinnati Street Railway Company is a corporation incorporated under the laws of the state of Kentucky for the purpose of maintaining and operating street railways, and for the carrying of passengers upon said street railways; having the capacity to sue and to be sued. Plaintiff says that by contract made and entered into by and between the cities of Bellevue and Dayton, in the county of Campbell, Kentucky, with the defendant herein, in the year 1892, the defendant, among other things, bound itself to transport passengers on one continuous ride from Bellevue and Dayton, in Campbell county, Kentucky, to Fountain Square, in the city of Cincinnati,

Ohio, and from said Fountain Square, or any intermediate point, to the cities of Bellevue and Dayton, Kentucky, for one five-cent fare, and no more. Plaintiff says that on the — day of —, 1901, he entered a Bellevue and Dayton car of the defendant in the city of Cincinnati, Ohio, as a passenger, for the purpose of being carried from said city of Cincinnati to the city of Dayton, Campbell county, Kentucky. Plaintiff says that he offered to pay to the conductor of said car five cents for a continuous ride from the said city of Cincinnati to the said city of Dayton. Plaintiff says that the conductor refused to accept said five-cent fare offered him by the plaintiff for said continuous ride as aforesaid, but plaintiff says that the defendant, in disregard and in violation of its contract as herein stated, did, upon the arrival of the plaintiff on the car of the said defendant in Newport, Kentucky, by its agent, to wit, an inspector of the cars of said defendant corporation, call upon the police of the city of Newport, Kentucky, to arrest him (the plaintiff), and that at the instance and by the procurement of the said defendant the said police did violently lay hands upon the said plaintiff, and did wrongfully and illegally put him under arrest, and take him from said car, and compel him to go with them to the office of the police of the city of Newport, where he (the plaintiff) was held wrongfully and illegally and against his will as a prisoner for trial, and that at said trial the plaintiff was dismissed. Plaintiff says that by said act or acts of the defendant, and in violation of its contract hereinbefore cited, he was caused by the aforesaid acts of the defendant great mental and physical suffering and anguish; that he was thereby greatly damaged, and ought to recover damages in the sum of \$5,000." On motion, the court below ruled that the plaintiff had stated or attempted to state two causes of action, and therefore required him to paragraph his petition, which he accordingly did. The plaintiff paragraphed his petition so that the first paragraph would consist of the averments of the petition which preceded and included the language in the petition, to wit, "refused to accept said five-cent fare offered him by the plaintiff for said continuous ride aforesaid." The balance of the petition after the word "but," following the above quotation, was designated as the second paragraph of the petition, to which the court sustained a demurrer. The plaintiff failing to plead further, the court dismissed the petition.

Neither the petition, nor either of its paragraphs, states a cause of action. As to the first paragraph, there is no averment that the appellee refused to carry the appellant as a passenger on a Bellevue and Dayton car from Cincinnati to Dayton, Ky. It is averred that he tendered the conductor a five-cent fare for the continuous ride, but the conductor refused to receive same. From the

averments of the petition, the court is unable to tell whether the conductor wanted him to pay more for the continuous ride, or that he desired to carry him free. In the second paragraph it is averred that the agent of the appellee called upon the police of the city of Newport to arrest the appellant, and that, upon his procurement, he was wrongfully and illegally arrested and taken from the car to the office of the police of the city of Newport, and there wrongfully and illegally detained, and that he was tried and dismissed. It is not averred in this paragraph of the petition for what reason he was arrested, or upon what charge. It is not averred that it was done maliciously and without probable cause. If the second paragraph of the petition stated a cause of action in other respects, it failed to do so because there was no averment that the procurement of his arrest was done maliciously and without probable cause. It is unnecessary to cite authorities upon this question, because the necessity of such averments is so universally recognized as being essential. If the averments of the first paragraph were added to those of the second paragraph, then the second paragraph would not state a cause of action for false arrest and imprisonment. Neither would the addition of the averments in the second paragraph to those of the first paragraph constitute the essential averments of a cause of action. If the plaintiff was endeavoring to recover upon the grounds that the company refused to carry him from Cincinnati to Dayton for one fare, and put him off the car because he did not pay more, he should have made the necessary averments. If he was endeavoring to recover because he was wrongfully arrested on some charge, then he should have made the necessary averments to enable him to maintain an action. If he was endeavoring to recover for violation of a contract, and also for illegal arrest, then they were separate and distinct causes of action.

The judgment is affirmed.

J. I. CASE THRESHING MACH. CO. v. LYONS et al.

(Court of Appeals of Kentucky. March 4, 1903.)

SALES — WARRANTY — BREACH — DEFENSE — NOTICE TO VENDOR — SUFFICIENCY OF NOTICE — WAIVER OF DEFECT.

1. In an action for the price of a threshing machine and separator sold under a written contract, with warranty, the defense was that plaintiff had also sold an engine, as part of the same transaction, which had failed to work properly. Plaintiff's testimony tended to show that defendant purchased it of a third party. The contract of sale executed between plaintiff and defendant contained no reference to an engine, and a mortgage executed to plaintiff to secure the notes described the engine as having been purchased from the third party. Held to show a purchase of the engine from the third party, and not from plaintiff.

2. Where a contract of sale of machinery provides that, if it does not work properly, notice

shall be given to the seller, and also to his agent, a notice to the agent, without notice to the seller, is not sufficient to entitle the purchaser to rely on a breach of warranty.

3. The purchaser of property, who desires to rescind for defects, must, within a reasonable time after their discovery, offer to restore the property and place the seller in statu quo, as far as practicable.

4. Where threshing machinery was sold with warranty, and the contract provided that notice of defects should be at once given to the seller and to its agent at a certain point, and the purchaser discovered defects almost immediately, but kept the machinery through an entire wheat-threshing season without any notice to the seller, and finally left the machinery in an open field, subject to the elements, and made no offer to return any of the property, in an action for the price the purchaser could not defend on the ground of breach of warranty.

Appeal from circuit court, Logan county.
"Not to be officially reported."

Action by the J. I. Case Threshing Machine Company against A. Lyons and others. From a judgment for defendants, plaintiff appeals. Reversed.

Johnson & Wickliffe, for appellant. E. B. Drake, for appellees.

BARKER, J. In the year 1891 the appellees, who lived in Logan county, Ky., entered into negotiations for the purchase of a "threshing outfit" with J. S. Depoyster and O. E. Matlock, who were agents of the appellant for the purpose of selling its threshing machines in that part of the state of Kentucky wherein appellees resided. These negotiations culminated in the sale by appellant to appellees of one J. I. Case Threshing Machine Company's 24x42 separator (No. 33,295) and one Case wind-straw stacker (No. 3,898). This machinery was sold by appellant under a contract in writing, which sets forth at great length the terms and conditions of the sale. It also contains the warranty of appellant as to the machinery sold by it to appellees. For the purchase price of the machinery so sold, appellees executed and delivered their three promissory notes, for the aggregate sum of \$580. The first was for \$150, due September 1, 1901; the second was for \$215, due September 1, 1902; and the third for \$215, due September 1, 1903; the payment of all being secured by first mortgage on the machinery sold, and also on one 10 horse power Aultman engine, the property of appellees. It appears that, at the time of these negotiations with appellant's agents, appellees were desirous of going into the business of threshing grain for profit; and, to do this, it was necessary that they purchase an engine to run the thresher. In the negotiations between them and O. E. Matlock, appellant's agent, they stated to him that they were contemplating the purchase of a secondhand engine, and that they could purchase a suitable one in connection with another, and rival, threshing machine, whereupon Matlock stated to them that he knew

of a secondhand engine which he thought would in every way suit their purpose; that this engine belonged to one J. W. Hays, of Bowling Green, Ky. Matlock, in company with appellees A. Lyons and J. B. Logan visited Bowling Green, inspected the engine, and negotiated for its purchase for the sum of \$200 in cash and a note for \$100, due September 1, 1901. The contract of purchase is as follows: "Bowling Green, Ky., Feb. 19, 1901. The following repairing to be done on the J. W. Hays' C. Aultman engine now the property of J. W. Hays and when repaired to become the property of A. Lyons, J. B. Logan and L. G. Baugh when they pay cash on delivery \$200, note for \$100 due Sept. 1st, 1901; engine to be inspected in Bowling Green, Ky., and if found to comply with the following repairing to be received by said parties: Right-hand drive wheel placed in order. Replace the fly if the one Mr. J. W. Hays has can be made to fit; if not, repair the one on the engine, new leak in the boiler under crank shaft on right-hand side of engine stopped, new smokestack cock on cylinder repaired, damper fixed, repair platform; stop holes in heater except one, place drain cocks in this one, fit wrist pin, brass boxing, also brass box on connecting rod, and adjust governors, and furnish new link for guide chain. [Signed] A. Lyons, J. B. Logan." The engine was shipped from Bowling Green to appellees by J. W. Hays, the owner, and the threshing machine and stacker were duly shipped to them by appellant, and the entire threshing outfit was in their possession prior to the beginning of the wheat season of 1901. In January, 1902, the first of the notes executed and delivered by appellees for the purchase price of the threshing machine and stacker having matured, and not being paid, the appellant instituted an action in the Logan circuit court for judgment for the principal and interest of the note in question, and also electing to declare the other two notes due and payable, under a provision in the mortgage, securing the payment of the notes, authorizing such election and declaration. Appellees filed an answer in which they, in substance, claimed that the purchase by them of the thresher, stacker, and engine was one transaction, for which they were to pay \$880; that they stated to the agents of appellant at the time of the contract that they desired to purchase one complete threshing outfit from one party, and that they would not purchase this thresher and stacker unless they could purchase from appellant, also, a secondhand traction engine; that thereupon the agents of appellant agreed to procure such an engine for them, and agreed that it should be embraced in the contract for the sale of the thresher and stacker, and included in the warranty to be made by appellant concerning the new machinery; that appellant's agents, Depoyster and Matlock, agreed to procure such an engine, and sell them the threshing outfit, in-

cluding the engine, as a whole; that, in pursuance of said contract, appellant's agents procured the engine from J. W. Hays, of Bowling Green, and delivered it to appellees, together with the thresher and stacker; that said agents fraudulently failed to include the engine in question in the bill of sale from appellant to them, in violation of their contract that the same should be done; that the engine sold and delivered to them was entirely worthless, and appellees were unable to make it operate the thresher and stacker; and that by reason of its worthlessness the whole outfit purchased by them of appellant was useless; and they prayed for a rescission of their contract with appellant, and a judgment against it for the sum of \$200 paid in cash, and the cancellation of all the notes executed by them, together with the mortgage securing their payment. The reply of appellant put in issue the material allegations of the answer, and the issues were properly made up.

The first question which meets us in the discussion of this case is whether appellees purchased the engine from appellant or from J. W. Hays. It is not contended that the thresher and stacker in any way failed to come up to the warranty contained in the contract of sale between appellant and appellees. The defects complained of existed only in the engine, and appellees' defense to appellant's cause of action is based entirely upon their claim that the engine was purchased of appellant, through its agent O. E. Matlock, and that by reason of the defects of the engine the threshing outfit, as a whole, was useless to them. It is not denied by appellees that at least two of them went with Matlock to Bowling Green, and inspected the engine in question; that the terms of purchase, and the repairs to be done upon the engine so as to make it serviceable, were agreed on between them and Hays, the owner. The contract of sale for the engine was reduced to writing and signed by two of the appellees. An inspection of this contract shows that it was made with Hays by appellees; that it stipulated that the engine then belonged to J. W. Hays, and that, when repaired as set forth in the contract, it was to become the property of A. Lyons, J. B. Logan, and L. G. Baugh, when they paid, cash on delivery, \$200, and note of \$100 due September 1, 1901; the engine to be inspected in Bowling Green, Ky., and, if found to comply with the stipulation in regard to repairs, to be received by appellees. The inspection of the engine did not take place in Bowling Green, but by request of appellees it was shipped to them at Dunmor, where they received it. This contract of sale, signed by the parties thereto, shows that it contained no such warranty as is now claimed by the appellees. It shows conclusively that appellees dealt with Hays in the purchase, and not with appellant. The mortgage which appellees executed to appellant, securing the notes

for the purchase price of the thresher and stacker, in describing the property subject to the mortgage, contains the following description of the engine in question: "And one 10 H. P. O. Aultman (Star engine) #4202, it being the engine purchased by A. Lyons et al. of J. W. Hays, Bowling Green, Ky." This mortgage was signed and formally acknowledged by appellees before the county clerk of Muhlenberg county, and was by him recorded. The bill of sale from appellant to appellees, which warrants the thresher and stacker, was in writing, and made out in duplicate, a copy of which was delivered to appellees. This bill of sale shows conclusively that the warranty of appellant was only as to the thresher and stacker, and that it contains no warranty of the engine. This paper was in the possession of appellees all of the time from the delivery of the machinery until the institution of this action, and is signed by all of them. It contains, among other things, this provision: "Agents have no authority to waive, alter or enlarge this contract or to make any new or substituted or different contract or warranty." The oral evidence upon the disputed points is conflicting and irreconcilable. Depoyster and Matlock, the agents of appellant, flatly contradict appellees as to the purchase of the engine from appellant, and they disclaim any authority to have made the purchase of the secondhand engine for the appellant, or to give any warranty in reference thereto, and there is no evidence in this record to establish any such authority in them. On the other hand, the appellees all depose in such a manner as to fully uphold the allegations of their pleadings. But it seems to us that all the written evidence bearing upon the question of the purchase of the engine indisputably shows that it was purchased of J. W. Hays, and not from appellant.

Assuming, for the sake of argument, that appellees' contention in regard to the engine having been sold by appellant, and the agreement to include it in the warranty contained in the bill of sale for the thresher and stacker, to be established, still their claim for rescission cannot be maintained. The warranty contained in the bill of sale is as follows: "It [the machinery] is warranted to be made of good material, and durable with good care, to do as good work as any made in the United States if properly operated by competent persons, and the printed rules and directions of the manufacturers intelligently followed. If purchasers, by so doing, after trial of ten days, are unable to make the same operate well, written notice shall at once be given to J. I. Case Threshing Machine Co., at Racine, Wis., and also the agent from whom purchased, stating wherein it fails to fulfill the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty, the purchaser rendering the necessary and friendly assistance; said company reserving the right to replace any defective

part or parts, and if then the machinery cannot be made to fulfill the warranty, the part that fails is to be returned by the purchaser free of charge to the place where received, and another substituted therefor, that shall fill the warranty, or the notes and money for such part immediately returned, and no further claim made on the company. Failure so to make such trial or to give such notices, in any respect, shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the purchasers, and any assistance rendered by the company, its agents or servants in operating or in remedying any actual or alleged defect, either before or after the ten days trial, shall in no case be deemed any waiver of, or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty." It is admitted by the appellees that they did not give the notice mentioned in the foregoing contract to the J. I. Case Threshing Machine Company, at Racine, Wis. They do claim to have made complaint to the agent Depoyster, but this can in no wise excuse them from their obligation to also give notice to appellant at Racine, Wis. This very question arose in the case of *Frick Co. v. Morgan & Co.*, etc. (Ky.) 69 S. W. 1072. In that case, in speaking of a warranty on a threshing machine similar to the one in the case at bar, the court said: "The warranty in this case is materially different from that recited in the case of *The Keystone Mfg. Co. v. Yeager* (Ky.) 55 S. W. 682. In that case the contract required that the vendee should give notice either to the company or to the agent of any defect in the machine, in two days. In this it requires the notice to be given both to the agent and to the company. And the law is well settled that, where the purchaser of the machine agreed that if it proved defective he would give notice thereof to the vendor, he was not entitled either to return the machine because of a defect of which he did not give notice, nor resist the payment of the purchase price because of such defect." Citing *Osborne v. Traylor*, 8 Ky. Law Rep. 359; *American & English Encyl. of Law*, vol. 28, page 112; *Benjamin on Sales*, section 703. The rule is well settled that the vendee of property, who desires a rescission of the contract of sale for defects, or the failure of the property to come up to the terms of sale, must, within a reasonable time after discovery of the defects or failure, offer to restore the property, and place the vendor in statu quo in regard thereto, as far as practicable. In the case of *Bailey, etc., v. Nichols, Sheppard & Co.*, 8 Ky. Law Rep. 64, it is said: "The purchaser of a traction engine is not entitled to a rescission of the contract of sale because of a breach of warranty; having failed to return or offer to return the engine within a reasonable time after he ascertained that it would not perform the work it was warranted to perform,

and having continued its use after he ascertained that fact." In the case of *Colyer v. Thompson & Johnson*, 2 T. B. Mon. 18, the court said: "Nor will a court of equity in every case set aside a contract on the ground of fraud. Where the injured party, within a reasonable time after he has discovered the fraud, makes his election to disaffirm the contract, and offers to restore the property, a court of equity will, at his instance, interpose and set it aside. But if after discovering the fraud he still retains the property, and uses it as his own, and makes no offer to restore it, or does not otherwise evince a determination to avoid the contract, a court of equity will not set it aside, but permit him to seek redress in an action at law. *Hardwick v. Forbes' Administrator*, 1 Bibb, 212; *Robinson v. Gilbreth*, 4 Bibb, 183." In the case at bar the appellees received the engine, together with the thresher and stacker, and, according to their own statement, discovered almost immediately the defects of the engine. They state that they were unable to make it work at all, and yet, with this knowledge, they kept the property through the whole wheat-threshing season, without any notice to appellant at Racine, Wis., and finally left the thresher and stacker out in an open field, subject to be ruined by the weather. So far as this record shows, they made no tender back of either the engine or thresher or stacker during the whole season. Under these circumstances, it seems to us inequitable to allow them a rescission of the contract, even if it had been of a tenor comporting with their claim; but we are satisfied from the evidence that the purchase of the engine was made from J. W. Hays, and not from appellant.

Wherefore the case is reversed, with directions to enter a judgment in favor of appellant for its debt, as shown in the pleadings, and for other proceedings consistent with this opinion.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 5, 1903.)

RAILROAD LEASE—FAILURE TO RECORD—INDICTMENT.

1. Under Ky. St. § 791, requiring every person operating a railroad under a lease to have it recorded with the Secretary of State, and in the county clerk's office of every county in which the road lies, and section 793, making violation thereof an offense, an indictment, the descriptive part of which states facts showing jurisdiction in the circuit court of B. county, and the accusatory part of which is the offense of "operating a railway in Kentucky under a lease, without having the same recorded in the office of the Secretary of State and in the county clerk's office of B. county," is sufficient.

Appeal from circuit court, Bracken county.
"Not to be officially reported."

Demurrer to an indictment against the Chesapeake & Ohio Railway Company was

sustained, and the commonwealth appeals. Reversed.

Clifton J. Pratt, M. R. Todd, and Ed Daum, for the Commonwealth. W. H. Wadsworth, for appellee.

O'REAR, J. The appellee was indicted by the grand jury of Bracken county for the offense of operating a railway in this state under a lease, without recording the lease in the proper offices. The descriptive part of the indictment is admittedly ample. In the accusatory part this language is used: "The offense of operating a railway in Kentucky under a lease without having the same recorded in the office of the Secretary of State and in the county clerk's office of Bracken county." The indictment was found under sections 791 and 793, Ky. St., which are:

"Sec. 791. Every person now operating, or that may hereafter operate, a railroad in this state under a contract or lease, shall have the same recorded in the office of the Secretary of State and in the county clerk's office of every county in which said road, or any part thereof, lies, within thirty days after the contract or lease is executed; or, if heretofore made, within thirty days after this law goes into effect."

"Sec. 793. Any company failing to comply with or violating or permitting any of its employes or agents to violate any of the provisions of sections 772, 773, 774, 775, 777, 778, 780, 781, 782, 786, 787 and 791 of this article, shall, in addition to subjecting itself to any damages that may be caused by such failure or violation, be guilty of a misdemeanor, and be fined for each failure or violation not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the circuit court of any county through which the company in default operates a line of road, or in the Franklin circuit court."

A demurrer was sustained to the indictment because it was held to be not a sufficient compliance with subsection 2 of section 124 of the Criminal Code of Practice, that the indictment must be certain as regards the offense charged. This offense is created by the statute, and has no distinguishing name. While it is true that both the offense charged and its particular circumstances must be directly and certainly stated in the indictment, it is not required that the same thing must be repeated in full in both parts of the indictment. The law does not require a vain thing. Inasmuch as the same combination of acts may constitute two or more punishable offenses, it is proper that the commonwealth should be required to clearly announce the name of the offense; that is, the charge, upon which the accused will be arraigned. But in a case such as is at bar, if the charge is so certainly stated that the accused may be fairly apprised of its nature,

it will be held sufficient. In this case the charge may be said to be the act of operating a railroad in this state under a lease, without having recorded it in the proper offices. Then the acts constituting that offense—the descriptive part of the indictment—must be directly and clearly set forth. The accusatory part of the indictment need not, and generally does not, set out jurisdictional facts. It is true that appellant was not guilty of an offense, under this statute, for operating a railroad under a lease in this state, although it failed to record the lease in Bracken county, unless it operated the road in Bracken county. Its offense was not for operating the road in Bracken county, nor for operating a road in Bracken county or in this state under a lease, but was for failing to record the lease. The descriptive part of the indictment stated the facts showing jurisdiction in the Bracken circuit court under section 793. Com. v. C. & O. Ry. Co., 101 Ky. 159, 40 S. W. 250. We are of opinion that the indictment was sufficiently explicit, and that the court erred in sustaining the demurrer.

Judgment reversed, and cause remanded for further proceedings not inconsistent herewith.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 5, 1903.)

CARRIERS—DISCRIMINATION—INDICTMENT.

1. Under Const. § 215, providing that all railroad companies shall haul freight of the same class for all persons from and to the same points, and on the same conditions, in the same manner and for the same charges, an indictment for discriminating in charges must allege that the services to the different persons were on the same conditions.

Appeal from circuit court, Johnson county.

"Not to be officially reported."

Demurrer to an indictment against the Chesapeake & Ohio Railway Company was sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee was indicted for an alleged violation of section 215, Const. Ky., which section reads thus: "All railway, transfer, belt lines or railway bridge companies, shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment." The indictment thus describes the acts which it is charged constitute a violation of this section: "The said defendant, Chesapeake & Ohio Railway Company, on the

1st day of October, 1898, in the county and circuit aforesaid, did unlawfully, willfully and knowingly charge, collect and receive from Hiram Roberts 21 cents per 100 pounds for hauling eggs for him from White House, Johnson county, Kentucky, to Catlettsburg, Boyd county, Kentucky, while at same time defendant charged, collected and received from Isaac Ward 7½ cents per one hundred pounds for hauling eggs for him from said White House, Kentucky, to said Catlettsburg, Kentucky. Said freight hauled by defendant for said Roberts and Ward was of same class, and hauled from and to same points by defendant as a common carrier aforesaid; against the peace and dignity of the commonwealth of Kentucky." The circuit court sustained a demurrer to the indictment, and dismissed it. It will be observed that it is not charged, nor is it anywhere intimated, in the indictment, that the service rendered to Ward and Roberts by the carrier, and for which it charged a discriminative rate, was made "upon the same conditions." The section of the Constitution recognizes the propriety, and therefore admits the right, of the carrier to charge more for one service than for another similar service, if the conditions under which the service is rendered are not the same. This question was fully considered by the court in an elaborate opinion by Chief Justice Hazelrigg, in *L. & N. R. R. Co. v. Com.*, 57 S. W. 508.

The indictment was fatally defective, and the judgment must be affirmed.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 5, 1908.)

CARRIERS—DISCRIMINATION—INDICTMENT.

1. An indictment against a carrier for discrimination in violation of Const. § 215, must allege the hauling was under the same conditions.

Appeal from circuit court, Johnson county. "Not to be officially reported."

Demurrer to an indictment against the Chesapeake & Ohio Railway Company was sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. Wadsworth & Cochran, for appellee.

O'REAR, J. This case involves the sufficiency of an indictment against appellee as a common carrier for unlawful discrimination under section 215 of the State Constitution. It is charged that appellee charged one shipper (Preston) 7½ cents per 100 pounds for hauling dry goods from Catlettsburg, Ky., to White House, Ky., and another shipper (Meek) 24 cents per 100 pounds for hauling dry goods for him between the same points; the freight being of the same class. The indictment fails to aver that the hauling

was done under "the same conditions," and therefore, under the authority of *L. & N. R. R. Co. v. Com.* (Ky.) 57 S. W. 508, and of the opinion of the court in another case between the commonwealth and this appellee, this day decided (72 S. W. 360), the judgment in this case dismissing the indictment is affirmed.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO. (three cases).

(Court of Appeals of Kentucky. March 5, 1903.)

CARRIERS—DISCRIMINATION—INDICTMENT.

1. An indictment against a carrier for discrimination, in violation of Const. § 215, providing that carriers shall haul freight of the same class for all persons between the same points, and on the same conditions, in the same manner and for the same charges, is bad, it charging the hauling of freight of the same class between the same points for different persons for different charges "and on different conditions."

Appeal from circuit court, Johnson county. "Not to be officially reported."

Demurrers to indictments against the Chesapeake & Ohio Railway Company were sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee, a common carrier, was indicted in these three cases for a violation of section 215 of the Constitution of this state. In the descriptive part of the indictments there is the same omission discussed in other cases this day decided from the same court against this appellee. 72 S. W. 360, and *ubi supra*. But these three indictments contain this curious variation from the others discussed: "The accusative part of the indictment charges appellee with the offense of unlawfully, willfully, and knowingly hauling freight of same class from and to same points for different persons for different charges, and on different conditions."

The judgment of the circuit court sustaining a demurrer to the indictment and dismissing it because it fails to charge a public offense is affirmed.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 5, 1903.)

CARRIERS—LONG AND SHORT HAUL—JOINT TRAFFIC RATE.

1. A joint traffic arrangement, by which connecting carriers haul from a point on one road to a point on the other road for less than the first carrier charges from the same point on its road to its terminus, between the points, is not in violation of Ky. St. § 820, making it an offense for a carrier to charge more for hauling

for a shorter than for a longer distance "over the same line" in the same direction, the shorter being included in the longer distance.

Appeal from circuit court, Johnson county.
"To be officially reported."

Demurrer to an indictment against the Chesapeake & Ohio Railway Company was sustained, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee was indicted by the grand jury of Johnson county for a violation of the "long and short haul statute" (section 820, Ky. St.). That offense is thus described in the indictment: "The said defendant * * * did unlawfully charge and receive from James N. Meek 24 cents per barrel on flour as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, and at the same time charge, collect and receive from Frank Preston fifteen cents per barrel on flour (being same class and kind of property delivered to said Meek at 24 cents per barrel for the railroad haul aforesaid) as railroad charges for transporting flour from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Kentucky, which last-mentioned haul is a longer distance than first-mentioned haul, and in same direction, and the first-mentioned haul from Catlettsburg, Boyd county, Kentucky, to White House, Johnson county, Kentucky, is included in the said longer haul from Catlettsburg, Boyd county, Kentucky, to Paintsville, Johnson county, Ky. Said property was transported and delivered to said James N. Meek and said Frank Preston under substantially same or similar circumstances and conditions; and which railway company operates and did at said time operate a line of railway in the state of Kentucky, which line runs into Johnson county, Kentucky, as aforesaid, at said time not having been authorized by the railroad commission of this commonwealth to charge less for a longer than for a shorter distance for the transportation of flour." It is not averred, nor do we understand it to be a fact, that appellee then operated a line of railroad from Catlettsburg, Ky., to Paintsville, Ky., but that its southern terminus of that line then was at White House, some 10 or 12 miles north of Paintsville, on the Big Sandy river, a stream navigable by steamboats. The statute under which this indictment was returned is (in part): "If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being

included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fines," etc. It is to be noticed that to constitute the offense proscribed by the statute the carrier must have carried (1) property of like kind; (2) under similar circumstances and conditions; (3) must have charged more in the aggregate for the shorter than the longer distance; (4) the carrying must have been over the same line, (5) in the same direction, and (6) the shorter must have been included within the longer distance. If any one of these conditions is lacking, no offense against this statute is committed. The indictment fails to say that the two shipments were over the same line. Doubtless the reason of the failure was because it could not have been truthfully alleged. The railroad company, by joint traffic arrangement with another common carrier, a steamboatman—for example, Frank Preston—might have agreed to carry flour from Catlettsburg, Ky., to Paintsville, Ky., using the railway to White House and steamboats to Paintsville, at a rate different and less than was charged by the railway alone for shipping flour from Catlettsburg to White House, and no further. Is that a violation of the statute? Among the earliest efforts to regulate this question of "long and short haul" discriminations by legislation was the Interstate commerce act of February 4, 1887. Since then many states have applied its provisions, so far as applicable, to similar transactions within the several states. Congress could have legislated only with regard to traffic and shipments between the states. It could not, and did not, attempt to regulate shipments of freight beginning and ending in the same state. To supplement, and to make this provision effective as a comprehensive scheme, most or all of the state legislatures have adopted substantially, if not literally, the provisions of the federal act on this subject. The interstate commerce act contained this clause: "That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance." Act Feb. 4, 1887, c. 104, § 4, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]. Whether a joint traffic rate adopted by two carriers, by which they agreed to carry a certain class of freight over their two lines for less than either charged for the same class of freight over a part of its own line, the shorter being included in the longer distance, was a violation of the section just quoted, came on to be considered for the first time, so far as we know, in the case of Chicago & N. W. Ry. Co. v. Osborne, 8 C. C. A. 347, 52 Fed. 912, before Mr. Justice Brewer and Judges Caldwell and San-

born, sitting as the Circuit Court of Appeals for the Eighth Circuit, October 17, 1892. Mr. Justice Brewer delivered the opinion of the court. In the course of the opinion the learned Justice said: "Where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its lines. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the unreasonableness of the local tariff of either line is determined." And again (page 350, 3 C. C. A., and page 916, 52 Fed.): "The use of the word 'line' is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the 'same line,' so as to compel either company to graduate its tariff by that of the other." Our statute on this subject, which follows the federal act so closely as to be almost a literal copy, was enacted April 5, 1893. It must be presumed that the language of the federal act was adopted by the Legislature with knowledge of the construction put upon it by the federal courts, and that, therefore, a similar meaning was to be ascribed to the same language under substantially the same circumstances. The common carriers, in fixing their traffic rates under the law, may well have relied on the fact that the same language, used in connection with this same subject, and under circumstances so nearly alike, would be construed uniformly by all courts, as it ought to be. *Parsons v. C. & N. W. Ry. Co.*, 11 C. C. A. 489, 63 Fed. 903, followed *Chicago & N. W. Ry. Co. v. Osborne*, supra. Its facts grew out of the same tariff rates and arrangement discussed and decided in *Osborne's Case*. The *Parsons Case* was carried to the Supreme Court, and was there affirmed. *Parsons v. Chi. & N. W. Ry. Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231. The opinion of the court was delivered by Mr. Justice Brewer, the *Case of Osborne*, supra, being cited and expressly approved. In the case at bar appellee could not have delivered the goods at Paintsville, Ky., by shipping over its railroad line alone, for the reason that its railroad line did not reach to Paintsville by some 10 or 12 miles. It was necessary that some other line, by some other carrier, and under some joint traffic arrangement, should be employed, else appellee could not in fact have delivered the goods as charged. This brings us right up to the question whether the words omitted from the indictment, and used in the statute, viz., "over the same line," are essential to constitute the offense denounced by the statute,

and whether a traffic arrangement between two carriers owning or operating different lines, so that the freight in question passes in part over each, is included in the expression "over the same line," when used to regulate one of the carriers' traffic over its own line. We hold that the omitted words are essential to make a good indictment, and that, where the freight passes over two or more lines of different carriers, it is not embraced by the terms of the statute when regarded in connection with other carriers' shipments locally over its own line alone.

The judgment of the circuit court sustaining the demurrer to the indictment and dismissing it is affirmed.

COMMONWEALTH v. JENKINS.

(Court of Appeals of Kentucky. March 5, 1903.)

INDICTMENT—MISTAKE IN NAME—CORRECTION.

1. Under Cr. Code, § 125, providing that an error in the name of a defendant shall not invalidate an indictment or proceedings thereon, and, his true name being discovered before execution, an entry thereof shall be made on the minutes referring to the fact of his having been indicted under the name in the indictment, "J. J." having been indicted under the name of "A. J.," the style of the prosecution may be changed to "J. J.," though a person by the name of "A. J." lived in the county, and he, by mistake, was first arrested.

Appeal from circuit court, Boyd county.
"To be officially reported."

Indictment against Jeff Jenkins. From a judgment quashing the bench warrant under which he was arrested, and discharging him from custody, the commonwealth appeals. Reversed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. T. R. Brown, for appellee.

SETTLE, J. It appears from the record in this case that one Jeff Jenkins, of Boyd county, was accused of the crime of mayhem, and at the May term, 1902, of the circuit court of that county, the grand jury, intending, doubtless, to indict the Jenkins accused of the crime in question, found and returned an indictment in which the name of the defendant and person accused was given as "Albert Jenkins." Thereupon a bench warrant was issued upon the indictment for the arrest of Albert Jenkins, with bail indorsed. There seems to have been an Albert Jenkins in the county, who was arrested under the bench warrant, and he gave bond for his appearance in court, and to answer the charge in the indictment; but at the next term of the court after his arrest, the commonwealth's attorney having made the discovery that Jeff Jenkins, not Albert, was the person guilty of the crime, caused the following order to be entered by the court: "It appearing to the satisfaction of the court that the true name of the de-

fendant is 'Jeff' Jenkins, not 'Albert,' the name he was indicted in, on motion of the attorney for the commonwealth the style of this prosecution is changed from 'Albert Jenkins' to 'Jeff Jenkins.' The return and bond on bench warrant as to Albert Jenkins is quashed, and ordered that a bench warrant issue for Jeff Jenkins, allowing him bail in the sum of \$500.00." Thereafter Jeff Jenkins was arrested on the bench warrant ordered to issue against him, and he gave bond for his appearance to answer the charge in the indictment. At the term of the court following Jeff's arrest the case against him was continued upon his motion. At the next term of the court, without pleading to the indictment, he entered motion to quash the bench warrant under which he had been arrested, the return thereon, and bond given for his appearance, which motion was sustained by the court, and the defendant discharged from custody, on the ground that the order which substituted the name of "Jeff Jenkins" for that of "Albert Jenkins" was improper, and in violation of law.

We are unable to admit the conclusion reached by the circuit judge. It must be presumed that the grand jury intended to indict the Jenkins guilty of the crime named in the indictment; hence, if Jeff Jenkins is in fact the person supposed to be guilty, it was merely a mistake to name him Albert Jenkins in the indictment, and when the attention of the commonwealth's attorney was called to the mistake it was his duty to have it corrected, which he did by substituting the Christian name "Jeff" on the record for that of "Albert." The change was made by express authority given by section 125, Cr. Code, which provides that "an error in the name of a defendant shall not vitiate an indictment or proceedings thereon, and if his true name is discovered at any time before execution, an entry shall be made on the minutes of the court of his true name, referring to the fact of his having been indicted by the name mentioned in the indictment. * * *". The section of the Code, supra, was construed by this court in *Commonwealth v. Kelcher* (a woman) 3 Metc. 485, in the following language: "If the erroneous statement of the whole name of the defendant would not vitiate the indictment, certainly the omission to set out the Christian name of the defendant could not, and the objection to the indictment on that account must be regarded as unavailing. * * * Now, if the appellee was not the person intended to be indicted, or if some one else having her surname was the person who had committed the offense charged, the omission of the Christian name in the indictment would not deprive her of the privilege of showing the facts, nor could she thereby be deprived of any substantial rights upon the merits." In *Commonwealth v. Ford*, 12 Ky. Law Rep. 507, the superior

court held that "the failure of the indictment to state the surname, Christian name, or the name in full of the defendant will not vitiate the indictment, and it is not a ground for a demurrer." It often occurs that the wrong man is arrested by reason of mistakes in the name, hence the section of the Code which allows the name to be changed provides a rule which the trial courts can safely follow. The indictment in this case was not vitiated in any way by the error in giving the Christian name of "Jeff," nor did the error in any way affect his substantial rights. If the Christian name of Jeff Jenkins had been given in the indictment as "John," it would not be contended that the substitution of "Jeff" for "John" on the record would have been improper, or that Jeff Jenkins' substantial rights would have been prejudiced thereby. Then, can the change on the record from "Albert" to "Jeff" be improper merely because there happens to be a person living in the county of the name of "Albert Jenkins"? Surely, such a proposition needs no argument to demonstrate its fallacy.

The judgment of the lower court is reversed, and cause remanded, with directions to set aside the judgment quashing the bench warrant and return, and discharging appellee from custody, and for such further proceedings as may be consistent with the opinion herein.

BUSH v. WEBSTER et al.

(Court of Appeals of Kentucky. March 5, 1903.)

TRUSTEES—MAKING PROFIT.

1. Where a cestui que trust gives a person an order on the trustee for the amount she owes him, and he sells or settles it with the trustee for less than its face, the trustee is not liable to the trust estate for the profits, not having made them in dealing with it.

Appeal from circuit court, Hardin county.

"Not to be officially reported."

Suit by E. R. Webster and others against S. H. Bush, trustee, for a new trial. Judgment for plaintiffs. Defendant appeals. Reversed.

J. P. O'Meara, for appellant. R. L. Stith, for appellees.

O'REAR, J. Prior to 1872, appellant had qualified as trustee for appellee E. R. Webster. The trust estate seems to have been a certain estate devised by Mrs. Webster's father, consisting of real estate, bonds, and other property. Directly after his qualification, appellant instituted an equitable action in the Hardin circuit court concerning settlements of his accounts from time to time, in

which he made biennial settlements. Sometimes upon exceptions and sometimes without exceptions, it seems that these settlements were approved. In 1897 the trustee was discharged, and the trust estate was adjudged to be delivered to Mrs. Webster. The trustee thereupon appeared in court in that action, and made a final settlement of his account with the master commissioner. Appellee had timely notice of this settlement. The settlement was reported to the court, and ordered to lay over for exceptions, and, none having been taken or filed, the report was confirmed. Later in the term Mrs. Webster and her husband, through their counsel, filed exceptions, which were overruled by the court. This suit was brought after that term of the court to obtain a new trial of the action in which the settlements and the final settlement above named had been made. The ground was an alleged fraudulent arrangement between appellant and the appellees' attorney in that suit, by which it was charged that appellant was suffered to have his settlement approved and confirmed by the court, and a judgment thereon entered in his behalf, without the presentation at the trial of appellees' objections and exceptions to the settlement.

We are of opinion that there is a total failure of proof to sustain the ground. Besides, the petition for a new trial is lacking in specific averments as to the nature of appellees' exceptions, their grounds, and the nature of the various items to which they were taken, so that the court might determine whether appellees had a valid defense in that action. It was essential that, not only should these grounds be specifically set forth, but that they should be sufficient of themselves to have justified a different judgment from that rendered; and, furthermore, they should have been sustained by sufficient and competent proof before a new trial could be granted. Section 521, Civ. Code Prac. The only ground that was specifically set forth was that appellant, the trustee, had compromised a claim against the trust estate for \$1,658 by the payment of \$1,350, and that the profit in this transaction, under familiar principles of equity, should have been adjudged to the cestui que trust. The facts are that appellee owed about \$1,608 to her attorney, which was an obligation not at all payable by the trustee, nor was it a matter with which he had any legal connection. Appellee gave an order on appellant for the amount of the claim—the \$1,608—and the attorney, for his own convenience, and upon a sufficient consideration, sold it to, or settled it with, appellant for \$1,350. We recognize the salutary principle that the trustee cannot deal to his advantage with the trust estate, and that the profits made by him therein must go to the cestui que trust; but as the trustee was not dealing with the trust estate in this transaction, it does not come within the principle invoked. We are of

opinion that the circuit court erred in adjudging the new trial; that there were no grounds shown therefor.

The judgment is reversed, and cause remanded, with directions to dismiss the petition.

STUART v. HARMON et al.

(Court of Appeals of Kentucky. March 4, 1903.)

PARTNERSHIP—EXISTENCE—EVIDENCE—COUNTERCLAIM—CROSS-PETITION—ESTOPPEL.

1. Where two persons form a partnership for the purchase of land, and one of them is to furnish the money, the other, if he continues to recognize the former as a partner until the land has been purchased and sold, cannot then deprive him of his right to participate in the profits, though he did not furnish the money as agreed.

2. Any objection to the maintenance of a cross-petition is waived by the filing of the answer thereto.

3. Where one of two persons, who have made an agreement to purchase land and sell the same, sues the other for the alleged balance of profits due him four years after a demand for a settlement, and during that time defendant has refused to make a statement of money received, the doctrine of stale claim has no application.

4. Where one holding a note informs the maker that he holds it merely for collection, and the maker states that he will pay it, the maker, in an action on the note by the one who stated that he held it for collection, is not estopped to set up a counterclaim against the payee.

Appeal from circuit court, Clark county.
"Not to be officially reported."

Action by one Beckner against T. G. Stuart, who filed a cross-petition against Archer Harmon. From a judgment for plaintiffs, defendant appeals. Reversed.

Nelson & Pendleton and Hazlerigg & Chenault, for appellant. J. M. Benton, for appellees.

PAYNTER, J. The appellee Beckner sued the appellant on a note amounting to \$378, dated March 8, 1895, secured by a mortgage on land, which note had been assigned to him by appellee Harmon. As an offset thereto, the appellant pleaded one-half of his profits received and not accounted for by Harmon in a partnership venture in the purchase and sale of nearly 500,000 acres of eastern Kentucky lands, and for the balance of his alleged profits he prayed judgment against Harmon. The questions to be determined are: (1) Did the alleged partnership exist? (2) Did Harmon receive from the sale of the land any profits above cost and expenses of the partnership? (3) Is the appellant estopped to plead his share of the profits, if any, as a set-off against the note in the suit? There is another question in the case, but, from our point of view, it is unnecessary to consider it.

In the spring of 1884 Harmon and Stuart entered into an arrangement by which they were to purchase 500,000 acres of land from the state of Kentucky, which had been sold

for taxes and purchased by the state. Harmon claims that Stuart was to furnish one-half of the money to pay for the land, and to pay the necessary expenses in holding and selling it, and that, as Stuart failed to do so, he was not a partner in the transaction, and not entitled to participate in the profits thereof. On the other hand, Stuart states that he made the discovery of the land, and suggested the possibility of large profits in its purchase and sale, and that, as he did not have the money to buy it and place it upon the market, Harmon agreed to do so, and, after paying expenses, divide the profits with him. Stuart's testimony is supported by that of others that he was to be a partner in the transaction. He admits that he did not furnish any of the \$1,500 or \$1,600, the amount paid the state for the land. After the land was purchased, Harmon recognized Stuart as a partner in the venture. In July, 1884, Harmon recognized Stuart as a partner, because he and Stuart entered into a written contract with others in regard to the land, and there was no occasion for Stuart's signing the contract unless he was a partner. In the fall of that year Harmon had Stuart go to Philadelphia, where he was endeavoring to negotiate a sale of it to Knight & Co.; thus recognizing Stuart as a partner. Besides, in 1886, he wrote Stuart a letter in which he said: "Our agreement is that I am to take the money advanced by father and I out of the first money received and divide the net profits with you. So far I have not received anything of consequence. * * * When this deal is closed, if ever done, I can show the whole thing up through the Union Trust Co. of Philadelphia. They have, as you have repeatedly been told, held the whole thing in trust for two years." This is a distinct recognition of the partnership. In the fall of 1884 there was either a conditional or absolute sale made of the property, and this was before the letter from which we have quoted, recognizing Stuart's right to participate in the profits of the transaction, was written. Thus we find that Harmon recognized Stuart as a partner after the land had been sold. There were other facts developed in the testimony which go to support Stuart's claim that he was a partner, and that Harmon recognized him as such. Although Stuart may have agreed to furnish the money to help pay for the land, and pay the necessary expenses in holding and selling it, still, if Harmon continued to recognize him as a partner until the land was sold, and the partnership venture, in a measure, completed, he could not then deprive him of his right to participate in the profits because he had not furnished the money which he agreed to furnish. Our conclusion from this record is that the understanding of the parties was that Harmon was to furnish the money necessary to pay the expenses of the partnership for the purchase, holding, and

sale of the land. To hold that the partnership did not exist, we would be compelled to close our eyes to the facts as they appear in this record.

It is contended that the appellant cannot maintain his cross-petition against Harmon under section 96 of the Civil Code of Practice, as interpreted in *Wells v. Boyd*, 1 Duv. 366. It is a sufficient answer to this to say that Harmon filed his answer to the cross-petition of Stuart, and made it a counter-claim against him, and prayed for a recovery of about \$10,000 against him. If the objection was available, it was waived by the filing of the answer and the counter-claim.

It is urged that Stuart's claim is stale, and for that reason an action cannot be maintained. Stuart was urging upon Harmon the settlement of the matter, but Harmon put him off upon the claim that the deal had not been finally settled. As late as 1888 Stuart was demanding of Harmon a settlement, and the payment of whatever might be due him on account of the profits of the transaction. This suit was filed four years later, and in this Stuart asserted his claim. The delay was not the fault of Stuart, but that of Harmon, in refusing to make his partner a statement of the money which he had received and the expenditures which he had incurred. The doctrine of stale claim has no application to the facts in this case.

Harmon paid such expenses as were paid in the purchase, holding, and sale of the land, and he received all of the money arising from it. It was his business to keep a correct account of the transaction. He should therefore make an itemized account of the expenditures made by him, including the item of \$6,800 which he claims was expended before the — of July, 1884. He should account not only for the money which he received from Knight & Co., but that which he received from persons holding under the Swan claim, because he admits he received more from that source than from Knight & Co.

The appellee Beckner claims that Harmon assigned him the note in the suit as collateral to secure a debt which Harmon owed him. He admits that he told Stuart that he held it for collection, but claims that, while he so held it, Stuart promised to pay it. The appellee Beckner testifies that in 1890, whilst he and Harmon were standing on the street in Winchester, appellant passed, and Harmon called him and asked him to pay the note, as it had been running a good while, and he owed him (Beckner), and wanted to pay him out of the proceeds of that note, and that, after Stuart had left, Harmon induced him to take the note. Harmon testified that he assigned the note to Beckner in appellant's presence, and the appellant then promised to pay it. Stuart says that he did not make the promise. From Beckner's statement, the promise was,

in effect, a promise to Harmon to pay the debt to him. Stuart was not aware that Beckner held the note other than for collection, and in that he is supported by Beckner's testimony. He was not advised that Beckner held it as collateral, nor was he advised that Beckner had any intention of acting upon any statement which he made. The promise which he made to Harmon, if at all, could not estop Stuart's right to plead it as an offset against the note in the hands of Harmon's assignee. Beckner was aware that Stuart asserted the claim against Harmon growing out of this partnership venture. He therefore knew that, if anything was coming to Stuart from Harmon, he had a right to plead it as an offset against the note. From the facts in this record, we reach the conclusion that appellant did not induce Beckner to purchase the note, and he is not estopped to plead as an offset against it any sum which may be ascertained in this action to be due him, growing out of the partnership between him and Harmon.

The court is urged to settle the partnership upon the facts as they appear in this record. We are of the opinion that the case should go to a commissioner for that purpose.

Judgment is reversed for proceedings consistent with this opinion.

REED et al. v. SCHMIDT et al.

(Court of Appeals of Kentucky. March 5, 1903.)

RAILROADS—MORTGAGES—BONDS—FORECLOSURE SALE—BONDHOLDERS—ORGANIZATION OF POOL—RIGHT TO MEMBERSHIP.

1. Prior to the foreclosure sale of a railroad certain of the bondholders took steps to form a pool to buy the property at the sale, an agreement by which the bondholders signing the same appointed an agent to purchase the property and agreed to advance a sum in cash proportionate to their holdings of bonds being circulated among the bondholders. Plaintiff bondholders asked to sign the agreement, and were told to leave their bonds with a certain person, who would sign for them. Plaintiffs did so, and this person signed his name to the agreement as the owner of twelve bonds, nine of which were plaintiffs'; all of the bonds being signed for in the agent's name, as an organizer of the pool objected to plaintiffs becoming members thereof because of personal antipathy. This person, on learning that the agent's signature included plaintiffs' bonds, insisted upon the subscription being canceled, which was done, against plaintiffs' protest. Held that, when the pool agreement was signed by plaintiffs' agent, they became members of the pool, and the subsequent withdrawal of their names did not affect their rights.

2. Under Ky. St. § 771, providing that upon judicial sale of any railroad the purchaser shall pay in cash, except that, if the property be purchased by the holders of securities issued by the company, the purchaser shall be required to pay only such amount as the court may deem sufficient to insure compliance with the bid, and the purchaser shall therefore be entitled to pay the bid by payment of money or surrender of securities in proportion as such securities shall be entitled to receive the purchase money, and that all holders of the same class

of securities shall be entitled to have equal rights in such purchases, all holders of railroad bonds are entitled to membership in a pool organized among the bondholders to purchase the property at foreclosure sale.

3. Where holders of railroad mortgage bonds are improperly excluded from a pool organized by bondholders to purchase the property at foreclosure sale, they are entitled, after the property has been sold by the pool to third parties, to an accounting, and to their proportionate share of the proceeds of the transaction.

Appeal from circuit court, Shelby county. "To be officially reported."

Suit by W. D. Reed and others against A. L. Schmidt and others. From a decree for defendants, plaintiffs appeal. Reversed.

W. W. Thum, J. D. Reed, and J. C. Beckham & Son, for appellants. Willis & Willis, for appellees.

O'REAR, J. The Cumberland & Ohio Railroad Company (Northern Division) issued bonds in 1879 to the amount of \$250,000, and executed a mortgage on its railroad and franchises, etc., to Joshua F. Speed, trustee, to secure their payment and interest. After the death of Speed, appellee A. L. Schmidt was substituted, under the provisions of the mortgage, as trustee for the bondholders. The Cumberland & Ohio Railroad Company (N. D.), contemporaneously with the execution of the mortgage named, entered into a contract with the Louisville, Cincinnati & Lexington Railroad Company, by which the latter leased the properties of the former for a term of 30 years, agreeing to provide, out of the rentals and otherwise, a sinking fund for the payment of the mortgage debt and interest. This lease and contract were assigned by the Louisville, Cincinnati & Lexington Railroad Company to the Louisville & Nashville Railroad Company. Default was made for several years in the payment of interest coupons by the Cumberland & Ohio Railroad Company (N. D.), and a suit was brought in the circuit court of Shelby county by certain bondholders to enforce the mortgage lien. The result was a decree for the sale of the railroad property and franchises free of all liens. This sale came on to be made by the court's commissioner on the 12th day of March, 1900. The trustee under the provisions of the mortgage, A. L. Schmidt, had been engaged in numerous and extensive litigations for about 12 years on behalf of the bondholders against the Louisville & Nashville Railroad Company and others. It appeared at times as if the lessor road was bankrupt, and that it could pay little or nothing on its bonded indebtedness. This was so evident that the bonds depreciated in market value till they had become practically unsalable. During that time the trustee had called upon bondholders for funds to enable him to prosecute and defend the various suits affecting their lien. Certain ones, including Mrs. Jane M. Reed, Miss E. T. Reed, and those whose names appeared upon the reorganization pool contract hereinafter named, contributed as called up-

on, enabling the trustee to make the contests leading up to, if not bringing about, the condition of the decretal sale on March 12, 1900. Before that time, however, both Mrs. Jane M. Reed and Miss Reed had died, and the bonds previously owned by them had been distributed to their devisees and heirs, and had been sold at executor's sales, so that on and before March 10, 1900, appellants W. D. Reed, J. D. Reed, and S. S. Reed (who were sons of Mrs. Jane M. Reed, and brothers of Miss. E. T. Reed) became the owners, each of three of those bonds, of the denomination of \$1,000 each. That for which the bondholders had been waging a wearisome fight for and against for many years was come to its final test. Upon its issue depended whether they would receive anything, and, if anything, what amount, to reimburse them for their original and subsequent investments. It was understood among those who had been conducting and backing this matter that the only tangible method of protecting their interests finally was to form a purchasing syndicate of bondholders, who could and would by co-operation and conjoint effort either buy in the road at the sale, and by its operation and resale make themselves whole on their investments, or by their bidding force another to pay for it such a price that the bondholders would receive upon their debts against the road its full value at the time of the sale. In view of the character of the property, it was not probable that any one of the bondholders could or would feel justified in alone buying the property, or that he could even become an acceptable bidder thereon. It is customary, and, indeed, it may be said that it is nearly always necessary, that some such arrangement be made and allowed, or the sales of such properties at auction would be impracticable. The parties A. L. Schmidt and others agreed to organize such a buying pool in this instance. P. Booker Reed, a brother of appellants, appears to have been one of the prime movers in this enterprise. He was a bondholder to the extent of 26½ bonds. An agreement was prepared upon the following form, and industriously circulated among the bondholders for their agreement to its terms, and for their signatures: "This writing witnesseth, that whereas, the Cumberland & Ohio Railroad (Northern Division), with all its property, rights, etc., is about to be sold under decree of the Shelby circuit court, in action of Germania Safety Vault & Trust Company, assignee, etc., against said railroad company, enforcing the lien under a mortgage made for the benefit of the holders of bonds of said road: Now, in order to protect our interests in the premises, we, the undersigned holders of the bonds of said road, do hereby constitute and appoint — as our agent, and as such do hereby authorize and empower them at any sale of said railroad under aforesaid decree to bid on said railroad and property, and buy it in for us at a price not exceeding — dollars,

and each of us to be bound only for our pro rata of the price, to be ascertained by our proportion of the bonds held by the undersigned; and we will also pay a like pro rata of like costs or expenses of said agent incurred in perfecting this transaction; and, as the terms of sale require a cash deposit of \$2,500.00 by the purchaser, each of us agree to put into the hands of said agent twenty dollars per bond held by us, to be applied for that purpose, or so much thereof as may be necessary." P. Booker Reed and A. L. Schmidt were the principal actors in soliciting these subscriptions. Appellants received notice through Schmidt of the plan to form the syndicate. They at once took steps to avail themselves of the privilege, and say that they applied to Schmidt to be permitted to sign the paper, and were by him told to leave their bonds with J. W. Nichols, of the Southern National Bank; that he could sign for them. Appellants accordingly left their nine bonds with Nichols, and paid to him \$180 (\$20 a share upon each bond), as required by the pooling agreement. Nichols then, on the following day, March 10, 1900, signed the agreement thus: "J. W. Nichols and F. N. Lewis, 12" (meaning that Nichols and Lewis represented and subscribed 12 of the bonds of the issue to form the pool). As a matter of fact, Nichols and Lewis owned but three of the bonds; the other nine being owned by appellants. It is claimed that the paper was signed in this manner at the instance of A. L. Schmidt, because P. Booker Reed had violently opposed appellants' being admitted into the syndicate. That appellants authorized an adequate subscription by Nichols, and paid the assessment required by the pooling contract, is not denied, nor is it that Nichols intended to subscribe for them, and on their behalf, to the extent of nine bonds, in making the subscription that he did. On Sunday evening, March 11, 1900, P. Booker Reed learned that Nichols' subscription represented appellants' bonds. He at once became violently angry and indignant, and in a most dictatorial manner required of Nichols that appellants' subscription should be revoked, or "scratched off," under threat that he would withdraw from the syndicate, and form another. All of this was because of a family quarrel between P. Booker Reed and his brothers, the appellants, and entirely disconnected, it seems, from the merits of this suit. Nichols thereupon, late that Sunday evening, informed appellants that he would, on the following morning, because of their brother's violent hostility and threats, cancel the subscription made by him. Appellants promptly and emphatically forbade his doing or attempting to do anything of the kind, expressly informing him that the extent of his agency for them in the matter was to subscribe for them to the proposition, and not to revoke a subscription which they had authorized. They followed this up with formal written notices to the same effect to P. Book-

er Reed and other principal promoters of the purchasing syndicate, including Nichols, which were delivered late Sunday night. The sale was the following day at about 11 o'clock a. m., at Shelbyville, some 25 miles from Louisville. Schmidt and the Reeds and the most numerous of the others signing the agreement resided at Louisville when the occurrence first stated had taken place. To get to Shelbyville in time for the sale it was necessary to leave Louisville about 7 o'clock in the morning. At about 7:45 o'clock of Monday morning, March 12, 1900, Nichols, at the instance of P. Booker Reed, and in the presence of appellee Schmidt, and with the concurrence of others of appellees (but not in the presence of appellants), erased the word "12" from his subscription, and wrote "3" in its stead, and received from P. Booker Reed his check covering the payment of \$180, above alluded to, and which was on the next day tendered to appellants, but rejected. At the sale P. Booker Reed, as agent for the syndicate of bondholders, parties to the agreement, bought in the railroad property for \$25,001. At once appellants begun steps to have themselves recognized as members of the syndicate by intervening in the foreclosure suit. The sale was approved, and the report confirmed. Appellants offered to pay into court any further assessment necessary under the pooling arrangement to finish paying for the property and expenses incident to the purchase, etc. All of this was bitterly resisted by P. Booker Reed on behalf of the syndicate. On final hearing the circuit court dismissed appellants' intervening petition; hence this appeal.

Appellees seem to stake their case upon the proposition that one has the right to select his partners, and, at any rate, that a court of equity will not compel one to enter into an unwilling copartnership with others in whom he has not confidence, and with whom his personal relations are such as to make their co-operation impossible. It is not necessary to gainsay either proposition, if it could be done. But it seems to us that the situation of these parties is far beyond the point assumed by appellees. Have they not already embarked into a joint enterprise, in one sense in the nature of a partnership, by which the rights of appellants have attached, and cannot now be ignored or destroyed by the others? This is true, in our opinion, whether we come to the conclusion that appellants became parties to the pooling arrangement by the act of Nichols, their agent, or whether it be rested upon an earlier right of possible equal dignity; that is, their rights, as members of a class of bondholders, having equal equities against the property, and against whose interest the trustee and a majority of the bondholders of the same class had no right to discriminate. It seems to be assumed that P. Booker Reed, as one of the moving spirits of this scheme, had the legal right to control the matter of whom

should be let into it; and that, if his personal dislike or hostility was sufficient cause for him, or even without cause, he might reject any applicant for membership into the syndicate, no matter what his equities. But this is an erroneous assumption. It undertakes to settle these property questions upon the basis of personal feeling, instead of legal rights. These bonds for years helped to bear the burden of the common fight for the benefit of all. Their owners contributed from time to time, certainly with the clearly implied, if not the expressed, understanding that they were to share, or at least be offered an opportunity to share, in the result. When the pooling agreement was signed by Nichols as agent for appellants, with the assent of Schmidt, they became members in fact. P. Booker Reed had not the right to require their names to be withdrawn, nor had Nichols the right to withdraw them. Independent of their contract right as members of the syndicate, appellants, as holders of a part of these bonds, were beneficiaries of all reasonable efforts by their trustee to realize the very best results. Appellee Schmidt, known by all his associates to be trustee for all the bondholders under the mortgage, could not create a pool for buying in the mortgaged property at the least possible price for the exclusive benefit of a favored and chosen number of the bondholders, himself included. All should have been afforded a fair opportunity to share on equal terms. A purposeful failure to offer, or denial of, such privilege was a fraud upon the excluded bondholders. *Cook on Corp. sec. 888*; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492; *Wetmore v. R. R.*, 1 McCrary, 467, 8 Fed. 177; *Cox v. Stokes* (N. Y.) 51 N. E. 320.

From the enormities of the properties involved, and of the sums necessary to buy them in at decretal or foreclosure sales, the courts have favored combinations of those interested in the property as bondholders or stockholders, organized to buy in the properties, for the reason that by this means only are bidders assured, and the best interests of those having claims upon the property protected. *Terbell v. Lee* (C. C.) 40 Fed. 40; *Carey v. Railway Co.* (C. C.) 45 Fed. 438; *Cook on Corp. sec. 886*, and authorities there cited. But the courts have borne in mind all the time the rights and interests of all who are so interested, and they have not allowed some to use this privilege of the law to oppress the weaker of those holding equal equities. *Jenkins v. Frink*, 30 Cal. 594, 89 Am. Dec. 134; *Cox v. Stokes*, supra. This has given rise to legislative cognizance of the subject. In this state, since 1896, a somewhat elaborate and careful plan for the reorganization of insolvent railroad companies sold out under foreclosure or insolvency proceedings has been provided by section 771, Ky. St., and its various subsections. Unless a reorganization plan is first submitted to and approved by the court decreeing the sale

of the corporate properties, it is provided: "At any such sale, or at any sale which shall be hereafter made, of any railroad or bridge under any decree of sale, the purchaser or purchasers shall be required to pay the amount of the bid in cash: provided, however, that if the property shall be purchased by or in behalf of holders of any class of securities issued by the said company, the purchaser or purchasers shall be required to pay in money or securities, immediately, such amount only as the court may deem sufficient to provide against a non-compliance with the bid; and the purchaser or purchasers shall thereafter be entitled, within such time as may be fixed by the court, to pay the amount of the bid by the payment of such money as may be necessary, and by the surrender of securities in proportion as such securities shall be entitled to receive the purchase money; and all holders of the same class of securities shall be entitled to have and enjoy equal rights in any such purchases with other holders of the same class." We are of opinion that under this section, even without a previous agreement with the members of the pool, appellants, if offering within a reasonable time to bear their proportion of the expenses and assessments necessary to carry the sale into effect, were entitled to join in the purchase, and to share the profits. Having made such offer before the confirmation of the sale, and repeated it before the property was conveyed to the corporation formed by the syndicate, appellants should have been admitted.

It is suggested in the record that the property has since been sold, and passed into the hands of independent owners. If appellants had been admitted as members of the syndicate, it would necessarily have been upon terms that they abide the judgment of the authorities of the corporation organized by the membership to own and operate the property. And if this corporation has in fact and in good faith sold the property and conveyed it, appellants are entitled to an accounting, after deducting what they would have been compelled to pay into the pool, on the basis charged other members, and interest thereon from the time same should have been paid, and those necessary costs and expenses incurred in perfecting the enterprise and making the sale. The net proceeds should be then distributed upon the basis of the total number of shares of stock in the pool, including appellants'.

Judgment reversed, and cause remanded for judgment and proceedings consistent with this opinion.

LACOTTS v. DUNN.

(Supreme Court of Arkansas. Feb. 14, 1903.)

APPEAL—CONFLICTING EVIDENCE.

1. Where the decree of the chancellor is not clearly against the weight of the evidence, it will not be reversed on appeal.

Appeal from Arkansas chancery court; Jno. M. Elliott, Chancellor.

Action by John Lacotts against W. H. Dunn. Judgment for defendant on his cross-complaint, and plaintiff appeals. Affirmed.

The appellant brought suit in ejectment in the circuit court below for the recovery and possession of five acres in a square in the southeast corner of the southeast quarter of the southeast quarter of section 33 in township 4 south, and range 3 west, in Arkansas county, Ark., and the adjoining town of De Witt. The complaint alleges title in appellant, and wrongful possession by appellee, to his damage of \$150. The complaint was filed on the 23d day of March, 1898. On the 5th day of April, 1898, the appellee filed his answer and cross-complaint, and motion to transfer to equity. The answer denies title in appellant, and asserts title in appellee. He claims title by purchase from appellant; that in August, 1894, he exchanged the southeast quarter of the northeast quarter of section 16 in township 4 south, range 2 west, in Arkansas county, Ark., for the tract in controversy; that it was agreed at the time that proper deeds of exchange would be executed; that no deeds were ever passed; that on or about the 11th day of January, 1898, appellee executed a deed to appellant for the 40-acre tract, and tendered same to appellant, but he declined to accept it, and also to make a deed to the land in controversy, claiming that no such trade had ever been made; that appellee entered into possession of the land in controversy, and placed improvements thereon to the value of \$430. A copy of the deed tendered was exhibited. Prayer that the cause be transferred to equity; that appellant be required to execute a deed to the 5 acres, or, on his failure to do so, that title be divested out of him and vested in the appellee. The case was transferred to the Arkansas chancery court. On May 27, 1898, the appellant filed his response to the cross-complaint. He denies there was any agreement for exchange of property as alleged; that he ever exercised any control over the 40 acres, or ever collected any rent therefrom. He alleges that appellee went into possession of the 5 acres under an agreement to make certain improvements in payment of the rent during his term of occupancy. He admits appellee did some work on the premises, but denies it was of the character and value claimed. The chancellor found from the testimony that the trade was made, and appellee was entitled to the relief prayed for in his cross-complaint, and decreed that the title to the 5 acres be quieted in appellee, and that appellant "take the deed from the files in the court to the southeast quarter northeast quarter section 16, township 4 south, range 2 west, and that his title to same be, and is hereby, quieted." Lacotts at the time excepted, and prayed an appeal to this court, which was granted.

Carpenter & Ingram and Ratcliffe & Fletcher, for appellant. James A. Gibson and John F. Park, for appellee.

HUGHES, J. (after stating the facts). This is a question of fact. There is conflict in the testimony. There is evidence tending to support the contention of both the appellant and that of the appellee. Unless the decree of the chancellor is clearly against the weight of the evidence, it must be sustained. While there may be room for doubt, we are of the opinion that the decree is not clearly against the weight of the evidence, and therefore should not be reversed. *Gaty v. Holcomb*, 44 Ark. 216.

Affirmed.

MILLER v. JOHNSTON.

(Supreme Court of Arkansas. Jan. 10, 1903.)

EVIDENCE—RULES OF CORPORATION—COPY—BURDEN OF PROOF—JUDICIAL NOTICE—PRIVATE LAWS.

1. Where the only proof of the rules of a corporation attached to a deposition was a statement of a witness that he had attached a copy of the rules and a certificate of another on the fly leaf of the book purporting to be a copy of the rules that "this is a true copy of the charter and by-laws" of the corporation, the one certifying not being a witness in the action, and not shown to be an officer of the corporation, or to be familiar with its rules, or to have compared the copy with the original, such proof was insufficient to make the rules competent as evidence.

2. When one attempts to introduce in evidence a copy of the rules of a corporation, the burden of proving such copy is on him.

3. Act April 11, 1901, p. 164, providing that the courts of the state shall take judicial knowledge of the laws of other states, does not apply to the private statutes of those states.

Bunn, C. J., and Battle, J., dissenting.

Appeal from circuit court, Crawford county; Jephtha H. Evans, Judge.

Action by R. J. Johnston against R. J. Miller. Judgment for plaintiff, and defendant appeals. Reversed.

Pierce & Southmayd, for appellant. Oscar L. Miles, for appellee.

WOOD, J. This is the second appeal in this case. The opinion of this court on the first appeal is found in 67 Ark. 172, 53 S. W. 1052, where the issues are fully stated. Appellee, it appears, was a member of the New York Cotton Exchange, and as such bought and sold cotton for appellant, and brought this suit to recover of appellant for services and money expended in buying and selling cotton for him under the charter and rules of the New York Cotton Exchange. Appellant depends mainly upon the ground that the transaction had with appellee was a dealing in futures, and contrary to law. The cause was heard by the judge sitting as a jury. To maintain the issues on his part, appellee introduced his own deposition, in which occurs the following: "Int. 4. In buying and

selling cotton, what rules, if any, govern your transactions? Ans. The rules of the New York Cotton Exchange govern all my transactions. Int. 5. If you state that your transactions are governed by the rules of the New York Cotton Exchange, please attach to your deposition a copy of those rules as an exhibit. Ans. Have attached to this deposition a copy of the by-laws and rules of the New York Cotton Exchange." Then follow a number of interrogatories and answers thereto showing the nature of the transaction. To the introduction of each of the interrogatories numbered 4, 5, etc., the appellant, at the time same were offered to be read in evidence, objected, on the ground that they were based upon the rules of the New York Cotton Exchange, which rules were incompetent and irrelevant, and for the further reason that said rules had not been properly proven. Exceptions were saved to the overruling the objection, and this is made one ground of the motion for a new trial.

The court should have excluded the purported copy of the rules of the New York Cotton Exchange, and all the questions and answers based upon said rules. The rules being in writing, and it being, doubtless, inconvenient or impossible to produce the original, it was proper to prove same by an examined or authenticated copy. But nothing short of such copy was competent. The statement of the witness that "he attached a copy of such rules to his deposition" fell far short of showing that the document or book so attached was a copy of such rules. The statement was but the opinion or conclusion of the witness, without a statement of the facts upon which such opinion was based. The law in such cases requires a statement of facts from which the court or jury may see that the document is a copy. *Supreme Lodge K. of P. v. Robbins*, 70 Ark. 73, 67 S. W. 758. There is nothing here to show that the document or book purporting to be a copy was taken from the original in the hands of the proper custodian. The witness does not show that he had compared the paper purporting to be a copy with the original. There is nothing to show an examined copy. Mr. Greenleaf says: "The proof of records by an examined copy is by producing a witness who has compared the copy with the original, or with what the officer of the court or any other person read as the contents of the record. It should appear that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept; and this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found." 1 Gr. Ev. 508. It is true, Mr. Greenleaf here refers to court records, but the same principle applies to the records of a corporation. They are usually kept by a secretary or other official of the corporation, upon whom devolves the special

duty, and kept in a room or place where the corporation has its office. But it may be said, inasmuch as the witness testified that he attached a copy, the appellant, if not satisfied that such document was a copy, or if he desired to know the facts upon which the witness based his conclusion, should have ascertained the source of witness' information on cross-examination when the deposition was being taken. But not so. The burden was on appellee to prove the copy before it was competent testimony. The certificate of E. R. Powers on the fly leaf of the book purporting to be the rules of the New York Cotton Exchange that "this is a true copy of the charter and by-laws of the New York Cotton Exchange," was not sufficient to prove the copy. Powers was not a witness. It is not shown by any witness that he was the superintendent of the New York Cotton Exchange, nor that as such superintendent it was his duty to keep the records of the New York Cotton Exchange, nor that he was familiar with the rules of the New York Cotton Exchange, nor that he knew this to be a copy thereof, after having examined and compared the same with the original. The book itself could not be used to prove Powers' official position, or his duties, until it was first properly proved to be the rules and by-laws.

The charter of the New York Cotton Exchange was likewise not properly proved. The statute incorporating it was a private statute (Laws N. Y. 94th Sess. [1871] p. 724), and the act of April 11, 1901, p. 164, providing that the courts of this state shall take judicial knowledge of the laws of other states, does not apply to the private statutes of those states. The record recites that "the plaintiff, to further maintain the issues on his part, introduced the charter of the New York Cotton Exchange, which is embodied in an act of the Legislature of the state of New York, which is in words and figures as follows, to wit." Then follows what purports to be an act incorporating the New York Cotton Exchange. The appellant objected to the introduction of this act, because "it was not properly certified to or shown by any competent evidence to be an act of the Legislature of the state of New York; that it was not proven as required by law." The statute law should have been proved by a production of the statute itself, the printed acts purporting to have been published by authority of the state. Crawford's Dig. p. 353.

Inasmuch as the findings of the court were based upon incompetent testimony, it would be premature, if not improper, to discuss the legal effect of such testimony. Therefore we do not pass upon the other questions presented in the brief of appellant.

For the errors indicated, the judgment is reversed, and the cause is remanded for new trial.

BUNN, C. J., and BATTLE, J., dissent.

BEARDSLEY v. HILL.

(Supreme Court of Arkansas. Feb. 7, 1903.)

TAX SALES—PROCEEDINGS TO CONFIRM—JURISDICTION OF COURT.

1. Under Sand. & H. Dig. c. 25, providing: for proceedings to confirm a tax title, and that, in case any person claiming title to the land opposes the confirmation, the court "tries the validity of the sale, and if valid, confirms it, but if the sale has been made contrary to law the court" annuls it, the court can only determine the validity of the sale; and a judgment confirming a tax sale which was void because of defective description, on the ground that the petitioner had actually occupied the land for two years, was error.

Appeal from Howard chancery court; James D. Shaver, Chancellor.

Proceeding by J. B. Hill to confirm a tax title. From a judgment in favor of the petitioner for a portion of the land claimed by Catherine A. Beardsley, she appeals. Reversed.

W. C. Rodgers, for appellant. W. V. Thompkins and D. B. Lain, for appellee.

BATTLE, J. J. B. Hill instituted proceedings to confirm a tax title to the following lands in Howard county, in this state: The middle $\frac{1}{4}$ part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 26, township 9 S., range 27 W., containing $13\frac{1}{2}$ acres; the middle $\frac{1}{4}$ part of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ section 26, township 9 S., range 27 W., containing 9.2 acres, and the W. $\frac{1}{2}$ of the middle $\frac{1}{4}$ part of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 26, township 9 S., range 27 W., containing 6 acres. They were assessed for taxation, were forfeited to the state on account of the nonpayment of the taxes of 1894, and were sold and conveyed to J. B. Hill by the commissioner of state lands of this state by the following description:

"Middle $\frac{1}{4}$ part S. E. N. W. Sec. 26, Tp. 9 S., R. 27 west, $13\frac{1}{2}$ acres.

"Middle $\frac{1}{4}$ part S. W. N. E. Sec. 26, Tp. 9 S., R. 27 west, 9.2 acres.

"W. $\frac{1}{2}$ middle $\frac{1}{4}$ part S. E. N. E. Sec. 26, Tp. 9 S., R. 27 west, 6 acres."

Catherine A. Beardsley opposed the confirmation, and showed that she was the owner of the lands at the time they were returned forfeited to the state. No evidence was adduced to show that she ever parted with the title. It was proved that Hill held a part of the land said to be in controversy, adversely, for two years before such proceedings were instituted.

The court found and decreed as follows: "The court further finds that the forfeiture to the state of the lands claimed by the remonstrant [Beardsley] was void and of no force, and that the deed relied upon by the petitioner, and made an exhibit to the petition, is void for uncertainty of description of the land attempted to be described therein, except that it is sustained and confirmed as to the land herein found to have been

actually occupied under inclosure by the petitioner or his privies for the time of two years before the filing of this petition to confirm," which is the land held by the petitioner, as before stated. Catherine A. Beardsley appealed.

The proceeding prescribed by the statutes for the confirmation of the sale of land mentioned in chapter 25, Sand. & H. Dig., is special. It is not a proceeding by one party against another. On the contrary, there can be no confirmation by such proceeding "of the sale of any lands that are in the actual possession of any person claiming title adverse to the petitioner." The proceedings are commenced by the party who seeks confirmation publishing a notice in which he states "the authority under which the sale took place and gives the description of the land purchased and the nature of the title by which it is held," and calls "on all persons, who can set up any right to the lands so purchased in consequence of any informality or any irregularity connected with such sale, to show cause * * * why the sale so made should not be confirmed." After this a petition for confirmation is filed. On the trial of the cause the petitioner exhibits "to the court the tax receipts showing the payment of the taxes for at least three successive years, and the deed or deeds under which he claims title, or the record thereof, or a certified copy or copies from the record, and oral or written proof by one or more witnesses acquainted with the lands, showing that no one is in possession claiming adverse to the petitioner." "If the deed or deeds are in proper legal form and properly executed and the tax receipts show payment of the taxes, and if the evidence shows that no one is in possession adverse to the petitioner, then in case no one has appeared to show cause against the prayer of the petition, the petition is taken as confessed, and the court" renders a decree confirming the sale in question. In case any person or persons claiming title to the land oppose the confirmation of sale, the court "tries the validity of the sale, and if valid, confirms it, but if the sale has been made contrary to law the court" annuls it. Sand. & H. Dig. c. 25. The issues to be tried and the judgments to be rendered are prescribed by the statutes. The only question involved in this proceeding is, is the sale in controversy valid? The statutes do not authorize the court to try any other issues. The right acquired by or incident to possession is not involved in or affected by the proceedings. Buckingham v. Hallett, 24 Ark. 519.

The party opposing confirmation is not required to show a valid title to any part of the land. No condition of this kind can be imposed upon his right to oppose confirmation, or made necessary to defeat confirmation wholly or in part. He is not required to show anything, except he can claim some interest in the land in question, and

show cause why the sale of it should not be confirmed.

In *Thweatt v. Howard*, 68 Ark. 430, 59 S. W. 764, it is said: "If no one claiming adversely is in possession, and the other conditions prescribed by the statute are complied with, and any one claiming title to the land opposes the confirmation of the sale, then it is the duty of the court to try the validity of the sale. No investigation or inquiry into the validity of the title of the person opposing confirmation is required by the statute. The person claiming title must, however, do so in good faith. He should not be permitted to contest the validity of the sale solely for the purpose of defeating confirmation. The privilege granted to him is for the purpose of enabling him to protect his interest in the land; and it is necessary and sufficient for him to allege and prove such a state of facts as will show that he might claim in good faith some interest in or right to the land."

In the case at bar the person opposing confirmation (Catherine A. Beardsley) proved a state of facts which showed that she might at least claim in good faith some interest in or right to the land purchased from the commissioner of state by the petitioner, that the forfeiture of the lands to the state for taxes was void because the description by which it was assessed for taxation and forfeited was insufficient, and that the conveyance of it by the state to the petitioner was void for the same reason; yet the court, in effect, refused to annul the sale, as to a part of the land, because Beardsley did not prove that she had a valid title to all of it, but held that petitioner had acquired title to a part of the land by adverse possession, and thereby determined a question that was not legally involved or presented by the proceeding.

Reversed and remanded, with instructions to the court to render a decree in accordance with this opinion.

LEWIS et al. v. RUTHERFORD.

(Supreme Court of Arkansas. Feb. 7, 1903.)

DECEDENT'S ESTATES—PROBATE COURT—JURISDICTION—ANCILLARY ADMINISTRATION.

1. Where, on the death of a resident of another state, leaving property in Arkansas, administrators were appointed in both states, the probate court of Arkansas was without jurisdiction, at the petition of the primary administrator, to consider the question of the general solvency of the deceased, and to order the ancillary administrator to pay over to the primary administrator a sufficient amount of the assets, so that all the creditors would receive an equal per cent. of their debts.

Appeal from circuit court, Sebastian county; Styles T. Rowe, Judge.

Petition by Georgiana A. Lewis and others for an order requiring R. B. Rutherford, administrator of the ancillary estate of G. W.

Lewis, deceased, to pay over to the administratrix of the principal estate, in another state, so much of the assets in his hands as would give all creditors of the deceased an equal per cent. of their debts. From an order dismissing the petition, the petitioners appeal. Affirmed.

Appellants presented to the probate court of Sebastian county a petition in which they state "that one G. W. Lewis at the time of his death resided in Barry county, Missouri; that appellant G. A. Lewis was by the probate court of said county of Barry duly appointed as his administratrix, and qualified as such; that appellants Bertha M. Creed and the Commercial Bank of Monett, Mo., have claims amounting to considerable sums against said estate, which have been presented to, and duly allowed by, the probate court of said county of Barry; that the probate court of the Ft. Smith district of Sebastian county, Arkansas, had allowed \$3,676.16 against the ancillary estate; that the probate court of Barry county, Missouri, had allowed debts amounting to \$6,789.04 against the principal estate, and the assets in the hands of the primary administratrix, which included all of the property belonging to the estate, aside from that in the hands of said R. B. Rutherford, amounted to \$868.53; that no payment of any kind had been made upon any debt probated against the estate in Barry county, Missouri." Petitioners asked that out of the assets in the hands of R. B. Rutherford, ancillary administrator, a sufficient amount be set aside and turned over to G. A. Lewis, the primary administratrix, to give to all of the lawful creditors an equal per cent. of their debts. To this petition R. B. Rutherford interposed the following demurrer, to wit: "Now comes administrator herein, and demurs to the petition of Georgiana Lewis et al., and for cause thereof says that the petition filed herein in the probate court does not state facts sufficient to constitute a cause of action against this administrator, nor does the petition state any facts sufficient to entitle the petitioners to the relief prayed for. And because it appears from said petition that petitioners reside in the state of Missouri, in which state the primary or domiciliary administration upon the estate of the said G. W. Lewis, deceased, is pending, and that the defendant administrator herein is the ancillary administrator of the said estate in Arkansas, and that there are debts due creditors residing in this state from the said estate, more than there are assets in this administration sufficient to pay off and discharge, so that, after the payment of the claims of the resident creditors, there will not be any estate remaining in the hands of this administrator." The court sustained the demurrer and rendered judgment dismissing the petition.

F. M. Jamison, for appellants. C. E. Warner, for appellees.

WOOD, J. (after stating the facts). The probate court had no jurisdiction. It is well to remember that these tribunals have only such special and limited jurisdiction as is conferred upon them by the constitution and statutes, and can only exercise the powers expressly granted, and such as are necessarily incident thereto. *Apel v. Kelsey*, 52 Ark. 344, 12 S. W. 703, 20 Am. St. Rep. 183; *Smith v. Howard*, 86 Me. 203, 29 Atl. 1008, 41 Am. St. Rep. 537. They have no general equity jurisdiction. There are authorities which hold that it is the duty of an ancillary administrator to retain the funds in his hands for a pro rata distribution, according to the laws of the state of his administration, among the citizens thereof, having regard to all the assets, both in the hands of the principal administrator and the ancillary administrator, and having regard, also, to the whole of the debts which by the laws of either state are payable out of those assets. *Dawes, Judge, etc., v. Head*, 3 Pick. 128; *Davis v. Estey*, 8 Pick. 476; *Miner v. Austin*, 45 Iowa, 221. Other authorities hold that it is the duty of the ancillary administrator to satisfy in full the creditors of his jurisdiction, even though the principal administration be insolvent. In other words, that it is the duty of the ancillary administrator to protect only home creditors. *Wharton, Con. Laws, sec. 640*; *Minor, Con. Law, p. 250*; *Smith v. Bank*, 5 Pet. 518, 8 L. Ed. 212. Our own court, in *Sheggog v. Perkins*, 34 Ark. 117, said: "The only duty devolving upon the [ancillary] administrator was to collect the assets here, and to appropriate so much of the avails of the same to the payment of debts due to our citizens as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of primary administration." This seems to recognize the former of the above views as correct. But this language of our court was dictum; the question in *Sheggog v. Perkins* being whether the ancillary administrator in Arkansas could allow the claim of a Tennessee creditor, as in the case of a local or Arkansas creditor. The question of insolvency was not involved. We are not called upon in this proceeding to decide between these conflicting views. Because, even if it be conceded that the view as expressed in *Sheggog v. Perkins* as to the duty of the ancillary administrator be correct, still we are clearly of the opinion that the probate court, with its limited jurisdiction, is not the forum to determine the question of the general solvency or insolvency of the estate of the deceased, and the questions of the priorities and preferences under the varying laws of the different jurisdictions that might arise between the creditors. The rules of procedure and the machinery of the probate court are not sufficient for this purpose.

The petition asks that an amount be "set aside and turned over to G. A. Lewis, the primary administratrix." This court said in

Duval et al. v. Marshall, 30 Ark. 230, at page 242: "The question is not to be determined by the extent of the local indebtedness of the intestate, but whether in any case the administrator at the domicile can dispose of or withdraw the assets in the hands of the ancillary administrator, until the debts are paid and the administration settled, and we are clearly of the opinion that he cannot." It follows as the logical sequence of this, and the holding in *Shegogg v. Perkins*, and what we have said in other cases, that the prayer of the appellants could not be granted. See *Clark, as, Adm'r, v. Holt*, 16 Ark. 257, etc.; *Williamson v. Furbush*, 31 Ark. 539; *Gibson v. Dowell*, 42 Ark. 167; *Green, Adm'r, v. Byrne, Adm'r*, 46 Ark. 465, where the duty of an ancillary administrator is defined. These cases are not decisive of the question here, but they shed light upon it.

We are not called upon to decide whether appellants would have rights in a court of equity, and we do not decide that question.

Affirmed.

WHITMIRE v. MAY et al.

(Supreme Court of Texas. March 5, 1903.)

TRUST DEEDS—PURCHASE MONEY—ASSUMPTION OF DEBT—POWER OF SALE—REVOCA-TION—DEATH OF OWNER.

1. Decedent's husband, after giving a trust deed on land to secure notes for the price, conveyed one-half of the land to decedent by a deed reciting her assumption of one-half of the notes. *Held*, that the wife's death before foreclosure of the deed revoked the power of sale contained therein, after which the land could be subjected to payment of the debt only in proceedings for the administration of decedent's estate.

2. The fact that the notes were given for purchase money, and therefore entitled to precedence in payment from the land to other debts of the deceased, did not justify a sale under a deed of trust.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by P. C. Whitmire against Sallie May and others. From a judgment in favor of defendants, affirmed by the Court of Civil Appeals (69 S. W. 100), plaintiff brings error. Affirmed.

M. T. Conner and Plowman & Baker, for plaintiff in error. Harry P. Lawther, for defendants in error.

GAINES, C. J. On the 1st day of February, 1897, one F. H. Doran sold to one J. D. Pippin the tract of land, the half of which is in controversy in this suit. Pippin paid \$625 in cash, and executed to Doran five promissory notes, of \$100 each, maturing at different dates, as a consideration for the land. Doran's deed reserved a lien for the unpaid purchase money, and at the same time Pippin executed a deed of trust which empowered the trustee, W. H. Lewis, to sell the property

for the payment of the notes in case of default. On February 13, 1897, Pippin, for a recited consideration of \$312.50 in cash, and the assumption of the payment of one-half of the purchase-money notes, conveyed to his wife, Jennie E. Pippin, an undivided one-half interest in the land. Mrs. Pippin did not pay the \$312.50 as recited in the deed. She lived upon the land as her homestead until she died, in April, 1900. She left surviving her two children by a former husband. At the time of her death, her husband had disappeared, and whether he was living or dead was not known. The defendant R. H. Powell became administrator upon her estate, and rented the premises in controversy to defendant Sallie May. Doran transferred the notes to Mrs. E. E. Waller, and, default having been made, the trustee, in pursuance of the power conferred by the deed in trust, after the death of Mrs. Pippin, and after administration upon her estate, sold the property, and Mrs. Waller became the purchaser at the sale. Subsequently she conveyed it to the plaintiff, P. C. Whitmire. Whitmire brought suit against Sallie May, the tenant in possession, to recover the property; and her landlord, Powell, as administrator of the estate of Mrs. Pippin, appeared and defended the suit. The judgment was for the defendant, and on appeal it was affirmed by the Court of Civil Appeals.

The Court of Civil Appeals held that the case was ruled by the decision in *Buchanan v. Monroe*, 22 Tex. 537. There it was decided that where a mortgagor has sold the mortgaged premises, and the purchaser has died before foreclosure, the power of sale given in the mortgage is revoked, so long as an administration is pending. When we granted the writ, we concurred in the view that *Buchanan v. Monroe* was decisive of the question, but we are not inclined to follow that ruling. So far as we have been enabled to discover, although that case was decided more than 40 years ago, the precise point has never been again presented to this court. The case has, however, been frequently cited, and always with approval. If it were an original question, we should be inclined to hold that the death of a purchaser of property subject to a mortgage with a power of sale neither revokes nor suspends the power, but that the trustee may proceed to sell in the same manner as if the death had not occurred. But in view of the long lapse of time since *Buchanan v. Monroe* was decided, and of the fact that it has never been overruled or questioned, we feel constrained to hold that it has become an inflexible rule of property, which it is the duty of the courts in this state to uphold. The rule is unsatisfactory to us, for the reason that it seems unjust that the mortgagor, by a sale of the property, should have the power to put the mortgagee in a position where his rights may become impaired by the death of the purchaser. In following *Buchanan v. Monroe*, another

¶1 See Mortgages, vol. 25, Cent. Dig. § 1012.

difficulty presents itself to our minds. The statute provides that claims against an estate shall be sworn to and presented to the administrator in the first instance. Rev. St. art. 2072. Until this is done, the creditor has no standing in the probate court. The form of the affidavit indicates, in some measure, that this was intended to apply to claims owed by the decedent. But when a mortgagor has sold the property subject to the lien, and the vendee has not assumed the mortgage, the latter does not owe the debt. It is a mere incumbrance on a specific piece of property. But since it is held that the mortgagee must proceed in the probate court to enforce his lien, it must follow that he has the right to make oath to his claim, not as a claim against the entire estate, but as a claim against a specific part thereof, and to have it allowed and approved or otherwise established as provided by law. But it is insisted that since the claim in this case was for the purchase money, for which a lien was expressly retained in the deed, the rule should not apply. But that argument is met by the leading case of *Robertson v. Paul*, 16 Tex. 472, where it was held, in effect, that the power was suspended by the death of the original vendee, although the contract was virtually executory, and there were no claims which were entitled to precedence over that for the purchase money.

The judgment of the district court and that of the Court of Civil Appeals are affirmed.

EARL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

INTOXICATING LIQUORS—SALE ON SUNDAY—OWNERSHIP OF SALOON—ISSUANCE OF LICENSE—EVIDENCE.

1. In a prosecution for selling liquor on Sunday, information charging that accused sold as the agent and employé of a certain firm, evidence that it was generally understood that the firm were the owners of the saloon where the sale occurred is inadmissible, the proper method of proving ownership being by the license, bond, etc.

2. The county clerk testified that he kept a stub book from which retail liquor licenses were issued. The stub book showed the issuance of the license to the firm employing accused, its date and expiration, etc. *Held*, that the stub book was inadmissible.

Appeal from Hood county court; Phil Jackson, Judge.

Hal Earl was convicted of selling liquor on Sunday, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling liquor on Sunday, and fined \$20. The information charges that appellant sold as the agent and employé of Humphreys & Finton. There is no question as to the sale. The state was permitted to prove by the witness Mantooth that it was generally

understood that Humphreys & Finton were the owners of the saloon and business where the sale occurred. Various objections were urged to the introduction of this testimony, which we think are well taken. We do not believe this character of testimony is admissible as evidence of ownership of a mercantile business. If as a matter of fact Humphreys & Finton were the owners, there are various ways, under our law, by which this could be shown. These parties must take out license and run their business under the terms of the law; they are required to give bond, etc. This testimony was inadmissible.

George Tarrant, the county clerk, testified that he kept a stub book from which retail liquor licenses are issued; and, over the objection of appellant, this stub book was permitted to be read in evidence, or that portion of it which is as follows: "File Number 3. No. —. \$510. Liquor Dealers' License. Issued to Humphreys & Finton. 18. Town of Granbury. Term, twelve months. Commencing on the 3rd day of Sept., 1900. Expiring on the 2 day of Sept., 1901. T. H. Hiner, County Clerk. Received this license 9/3, A. D. 1900." We do not believe this testimony was admissible. If there is any statute requiring such a book to be kept, we have been unable to find it. Nor do we believe it is brought within any of the rules authorizing the introduction of papers or records.

For the errors indicated, the judgment is reversed, and the cause remanded.

CARWILE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

INTOXICATING LIQUOR—SALE TO A MINOR—AGE OF PURCHASER—KNOWLEDGE OF DEFENDANT.

1. In a prosecution for sale of liquor to a minor, the evidence showed that the purchaser was 13 years of age; that he resided over the saloon where the sale occurred, and where appellant had been bartender for a long time; that he had bought beer from defendant on several occasions; that the owner of the saloon had instructed defendant not to sell beer to the boy; that defendant never asked any question as to his age; and that the boy was small and had no beard. *Held* sufficient evidence of defendant's knowledge that the purchaser was a minor to support a conviction.

Appeal from Tarrant county court; M. B. Harris, Judge.

Billy Carwile was convicted of selling liquor to a minor, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for selling intoxicating liquor to a minor; the punishment assessed at a fine of \$100.

Appellant requested the court to charge

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 302.

the jury that the state having failed to prove the appearance of the purchaser to be a minor, or to prove any fact which brought home knowledge to defendant of the minority of the purchaser, they should acquit. And he also suggests the insufficiency of the evidence, because of its failure to show that appellant made the sale knowing the purchaser to be a minor. The evidence discloses the purchaser to have been 18 years of age; that he and his mother resided over the saloon where the sale occurred, where appellant was and had been bartender for a long time; that the witness had bought beer from appellant on several occasions; that the owner of the saloon had instructed appellant not to sell beer to the boy. Appellant never asked any question as to his age. The evidence shows the boy's physical appearance was such as to indicate that he was under 21 years of age; that he was small, and had no beard on his face. We are of opinion that the court did not err in refusing the instruction requested by appellant, and that the evidence is sufficient to sustain the conviction.

The judgment is affirmed.

GABLES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

ATTEMPTED POISONING—DRUGGED LIQUOR—EVIDENCE—SUFFICIENCY.

1. In a prosecution of a saloon keeper for mixing some poisonous substance in a glass of liquor with intent to kill the person to whom the liquor was sold, evidence considered, and held insufficient to support a conviction.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

John Gables, alias One-Eyed John, was convicted of attempted poisoning, and appeals. Reversed.

R. B. Allen and P. M. Stine, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with having willfully and maliciously mingled and caused to be mingled a noxious potion and substance, the name of which is to the grand jurors unknown, with a certain drink, to wit, beer, with the intent to injure and kill R. L. Burns.

There are several questions, of more or less interest, suggested for revision; but, under the view we take of the case, it is not necessary to discuss any, except those which relate to the insufficiency of the evidence. Taking the state's case in its strongest light, it shows: That Burns placed \$40 in his left-hand pants' pocket, and \$16 in his vest pocket, the latter to be used in his peregrinations among the houses of prostitution in the city of Dallas. After supper he and some friends left the hotel, and after visiting, as

he stated, all, or about all, of the houses of prostitution in what is termed the "Reservation" in the city of Dallas, entered the saloon of appellant, and called for a bottle of beer. While drinking it, a woman came in and asked appellant for a nickel. He hesitated about giving it, and witness told him to give her the nickel, and he would give her one, and set up the beer to defendant. Each gave the woman a nickel, and appellant took down a bottle of beer and remarked that they would divide it. The beer was drunk by the parties, and the witness asked the price, and paid him 25 cents. Then a woman came in and requested witness Burns to treat her to beer. He ordered the beer, and they sat down at the table in the saloon; and appellant brought two bottles on the tray, and the woman and Burns drank them, or a part of them. The bottles were opened by defendant, but witness did not know who poured them out; did not know where they were opened. All of the bottles of beer bought from defendant were pint bottles. That he discovered nothing unusual about the taste of the beer. Witness offered to pay 50 cents for the last two bottles, and appellant demanded a dollar. Witness demurred that it was too much, and refused to pay it. This brought on trouble between them, and appellant notified him that he would pay it, and drew a pistol, pointing it at witness. This resulted in witness paying the dollar. He then walked off, remarking to appellant that he would see him later. He said he was very much excited when defendant was holding the pistol on him, and was watching him. After stepping out of appellant's place, witness started to the hotel, "when he began to feel weak in the knees." Witness further testified: "I went out, but got to feeling worse, and, feeling unable to get to my hotel, I inquired of a negro woman for some place to stop. She took me across the street to Mrs. Williams' house, where I stayed until daylight. It was with difficulty that I was kept awake by being walked up and down the room, and by the application of wet cloths to my head. About daylight I started for my hotel, and met a policeman, was helped back to my hotel, and went to bed, and was unconscious for several hours." It is further shown by this witness that he drank more or less beer at all of the houses of prostitution he had previously visited, appellant's place of business being the last at which he drank. It was about 45 or 60 minutes from the time he drank the last beer before drinking beer in appellant's saloon. However, he says that he did not drink in every place where the beer was opened, nor did he always drink a full glass. Policeman Brannon testified that he found witness Burns, on the morning of the 12th of June, staggering around and acting queerly; that he was delirious, and answered questions sometimes rationally and sometimes "wildly." He took him to the hotel, and sent for

Dr. McClanahan. Dr. McClanahan testified that he had had considerable experience in the treatment of cases of poisoning, and that he called on the witness Burns on the morning of the 11th of June, and found him in a stupor, "and suffering from nervous depression;" that the action of his heart was weak and irregular, and when aroused he appeared delirious, and was suffering from the effects of some narcotic poison, but he could not tell what it was, except that it was some narcotic; "that I am positive" it was not the effect of intoxicants. After his treatment, witness Burns was able to be up in the afternoon.

This is the strongest possible state of facts upon which the state could base a prosecution or hope for conviction. Whatever may be said of expert testimony—however much probative force it may or may not carry—the evidence in this case on that line, to say the least of it, is most unsatisfactory. It is evident from the expert's testimony that there are various poisons of the class he terms "narcotic." No investigation was made with reference to these from this witness. If, as stated by the witness Burns, there was nothing peculiar about the taste of the beer drank by him in appellant's saloon, perhaps the expert might have thrown some light on the matter at this point. Whether or not any of these narcotics are tasteless is not shown, or the length of time necessary for them to take effect upon the patient. If there was a narcotic administered in the saloon of appellant to witness Burns, it evidently took effect very suddenly, for immediately upon passing out of the saloon he complained of "weakness about his knees." Later on, this terminated in stupor and difficulty in being kept awake. Recurring to the evidence of the witness Burns as to what occurred at appellant's saloon, there is nothing to indicate that any poison was administered to him at that point, outside of the fact that immediately after passing out of the saloon he began to feel "weakness about the knees," followed subsequently by drowsiness and stupor. This poison, so far as this record is concerned, could have been administered at any of the numerous houses of prostitution and saloons visited by him prior to reaching appellant's. So we have, summing up the case in brief, the witness visiting many houses of prostitution, drinking quite a lot of beer at these different places, and finally drinking beer at appellant's saloon, followed shortly afterwards by "weakness in the knees," and subsequent drowsiness, and the statement of the expert that the indications were that witness had been given a narcotic. Tested by any criterion known to us, this evidence is totally insufficient to show that appellant administered the noxious potion. In cases of this character—that is, cases depending on circumstantial evidence—it should be made out with sufficient certainty to exclude all reasonable hypotheses

except the guilt of the accused. This testimony brings the case barely up to a suspicion.

Because the evidence is not sufficient to justify the verdict of the jury, the judgment is reversed and the cause remanded.

LUNA v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

PERJURY—MATERIALITY OF FALSE TESTIMONY—INSTRUCTIONS—BELIEF—EVIDENCE.

1. The materiality of testimony on which perjury is assigned is usually a question for the court.

2. Defendant, being drunk or feigning drunkenness, was taken home and laid on the bed by two of his tenants, who knew he had money on his person. On awaking, he found that his money was gone, and made inquiry of his wife and one of the tenants, who was sleeping in the house. On his prosecuting further inquiries, one of the tenants fled the country, after telling defendant's son that the other had gotten him into all the trouble, and now had defendant's money. Relying on these facts, defendant made an affidavit for a search warrant, charging the tenants with the theft of his money, and was indicted for alleged perjury contained therein. *Held* error not to give an instruction that, if defendant believed at the time he made the affidavit that the statements were true, he should be acquitted.

3. It was error not to give an instruction that, if defendant believed he had reasonable grounds upon which to predicate the affidavit that his tenants took the money, he should be acquitted.

4. Evidence, in a prosecution for perjury for making a false affidavit charging theft of money, that the defendant, the morning after he missed the money, assaulted the person charged, and threatened to cut his throat if he had taken the money, and that the person threatened fled the country, should have been admitted, as showing the defendant's belief in regard to what became of his money.

5. Evidence, in a prosecution for perjury in making a false affidavit charging two of defendant's tenants with theft of money, that one of the tenants tried to induce the other to leave the country, should have been admitted, as it showed a circumstance suggesting to defendant the belief that the tenants were acting together, and had taken his money.

Appeal from district court, Titus county; J. M. Talbot, Judge.

D. C. Luna was convicted of perjury, and appeals. Reversed.

Pounders & Bearford and Glass, Estes & King, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years.

The indictment was attacked in several particulars. Without entering into a discussion of the various questions assigned, we are of opinion, after a careful examination, that it is sufficient.

It is urged that the court's charge is fatally erroneous, in submitting the question of the materiality of the evidence to the jury,

as fact to be determined by them. We believe this exception is well taken. The materiality of testimony upon which perjury is assigned usually is a question for the court, and not the jury. While it may be true that it might be a mixed question of law and fact in some cases, this is not true as to the case before us.

Appellant tendered a special instruction to the court, in which he requested the submission of his theory; that is, if they should find he believed at the time he made the affidavit that the statements were true, he should be acquitted. Under the facts, this charge should have been given.

He further requested the jury be charged that, if defendant believed he had reasonable grounds upon which to predicate the affidavit that Tom Horn and Virgil Hazlewood took his money, they should acquit. A few facts might be stated, to show that this charge should have been given: Milner testified: That in going out from town in a wagon with defendant and Hazlewood, defendant proposed that Hazlewood and Milner should assist him in concocting a scheme by which they were to get a couple of fine mares from Horn; that appellant on the following day should put \$110 in his pocket, and go to the residence of his stepson, Stevens, and display this money, and pretend to be very drunk, then take Horn riding, and thereafter deliver the money to his wife, and bring an accusation against Horn, charging him with theft of the money. Defendant was then to obtain, as a compromise with Horn, the mares; appellant paying Milner \$25, and Hazlewood \$10, for their aid and assistance in the execution of the scheme. Appellant went to Stevens, and subsequently took Horn riding, and was either very drunk, or pretended to be so. That Horn went with appellant to appellant's residence, and Hazlewood assisted him in carrying appellant into the house, where they placed him on the bed. During the night, appellant waked up about 3 o'clock in the morning, and discovered his money was gone. He immediately woke his wife, and made inquiry of her in regard to it, as well as of Hazlewood, who was sleeping in the house. Hazlewood and Horn were tenants of appellant. Appellant began to inquire about his money; instituted search and investigation early in the morning, after he missed it at night. Horn went to Hazlewood, and told him that the elder Milner intended prosecuting him (Hazlewood) for disturbing the peace, and advised him to leave the country. Appellant's son and appellant instituted investigation as to whether the elder Milner had instituted proceedings against Hazlewood, and discovered that to be false. Appellant's son went to Hazlewood about the matter, and Hazlewood promised to see the elder Milner and make inquiries himself, started in that direction, was gone a short while, and returned. Be-

coming suspicious, the younger Luna followed the tracks of Hazlewood, and discovered that he did not go to see Milner about the matter, and so informed him. Hazlewood admitted that he did not, and further stated that Horn had gotten him into all this trouble, and that he was going down in the field and "whip hell out of him," and, pointing to Horn's house, said, "He has gotten me into all this trouble, and he now has your father's money in his house." Hazlewood fled the country. These are the circumstances that induced appellant to make the affidavit charging Horn and Hazlewood with the theft of his money, and asking for a search warrant. Under this state of case, the charges requested by appellant should have been given.

Appellant offered to prove by Hazlewood that he made an assault upon witness with a knife, and told witness, if he (defendant) knew that he (Hazlewood) had gotten his (defendant's) money, he would cut witness' throat; that, on account of said threats, Hazlewood left the country. This testimony should have been admitted. The state predicated perjury upon the fact that he charged Horn and Hazlewood with the theft of the money. It is always a question, upon a trial for perjury, whether the statements were willfully and falsely made. If defendant had reason to believe Hazlewood and Horn—either or both—got his money, the falsity of the testimony against him might be met by this as a circumstance in his favor. This testimony, occurring the following morning after he missed his money at night, went to show the condition of defendant's mind, and his belief in regard to what became of his money.

Another bill shows that after Horn had testified that he went into the field where Hazlewood was at work, and told Hazlewood that Milner was going to prosecute him for disturbance of the peace, defendant offered to prove that on the evening of the same day Horn again went to Hazlewood, where he (Hazlewood) was at work in the field, and told him that he (Hazlewood) was a single man, and ought to leave the country before said Milner indicted him for disturbing the peace on June 1, 1901, and that said Horn then and there advised Hazlewood to leave the country. The first conversation, which was admitted, was of the same character, but not so extended, as the latter. This testimony, if true, shows that Horn was trying to induce Hazlewood to leave the country, and was a circumstance, connected with the other circumstances, which would tend to prove appellant's theory that Hazlewood and Horn were acting together, and suggested to appellant the belief that they got his money; and it should have been admitted. These facts were known to appellant when he made the affidavit.

For the errors indicated, the judgment is reversed, and the cause remanded.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

SELLING LIQUOR TO MINOR—EVIDENCE—CONVERSATIONS.

1. In a prosecution for selling liquor to a minor, defendant, on cross-examination, brought out the fact that the minor had come to witness on the day the sale was alleged to have been made, and asked him to get him some whisky. On redirect examination the witness was allowed to state that the minor told him that he had seen defendant's son, who had agreed to sell him half a pint of whisky, and to allow him to pay 10 cents on the same, and credit him for the balance. This evidence was objected to because defendant was not present when the conversation was had, but the bill of exceptions did not state as a fact that defendant was not so present, but merely assigned it as a ground of objection. *Held* that, as presented by the bill of exceptions, the admission of the evidence was not shown to be error.

2. It appearing that defendant and his son were both present when the whisky was actually sold, the admission of the evidence was proper, even if defendant was not present at the time of the conversation between his son and the minor.

Appeal from Somervell county court; J. G. Adams, Judge.

Mart Martin was convicted of selling liquor to a minor, and appeals. Affirmed.

J. J. Farr and Hines & Wilson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of selling liquor to a minor, and fined \$25.

By the first bill of exceptions it is made to appear that while counsel for appellant was cross-examining witness Will Force he stated "that the witness Carriger came to where he was in C. W. Hill's store, gave him a dime, and told him that he wanted him to get him some whisky." On redirect examination he testified, over appellant's objections, "that Andrew Carriger told him, as they went from Hill's store to Martin's saloon, on the day of the alleged purchase of the whisky, that he had seen Letch Martin, and that Letch had agreed to sell him one half pint of whisky, and had agreed to let him pay ten cents on same, and credit him for the balance." This was objected to because appellant was not present when any trade was made or conversation had between Andrew Carriger and Letch Martin, and could serve no purpose other than to prejudice the rights of appellant. The court explains this bill by stating: "After defendant had proved by witness Force that Andrew Carriger had come to him at C. W. Hill's store on the 1st of March, 1902, and requested said witness to take a dime and buy him a half pint of whisky, and after said testimony was given, the state insisted and the court permitted the remainder of the conversation that was had between witness and Carriger at the time Carriger delivered witness the dime; and at the same time the court instructed the said wit-

ness not to detail any conversation other than that had between them at the time of the delivery of the dime and the request to purchase the whisky. Whereupon said Force stated that the remainder of the conversation between him and Andrew Carriger at the time was that Letch Martin, who was helping defendant run the saloon that day, had agreed to sell him, Andrew Carriger, a half pint of whisky for ten cents, and credit him for the balance, provided said Carriger would get some one else to buy the whisky for him. This evidence was offered by the state to show why witness Force and Carriger visited said saloon and called for Letch Martin, who was helping defendant run the saloon that day, and for the purpose of getting all the conversation before the jury," etc. It will be observed that the bill of exceptions fails to show that Letch Martin and his father (appellant in this case) were not together at the time of the alleged conversation. It is assigned as a ground of objection that defendant was not present when the trade was made between Letch Martin and Carriger, but it is not stated as a fact, but simply urged as a ground of objection. The testimony of Carriger is to the effect that he undertook to buy the whisky in appellant's saloon, and was told by appellant that he would not sell it to him, as he was a minor; that, if he wanted to purchase the whisky, he must get some adult person to make the purchase for him. It was the day of the primary election, and appellant was in and out of the saloon during the day, but devoted most of his time to the interest of some candidate for sheriff; and that his son, Letch, was attending to the saloon on that day. The testimony further shows that they were both in there at the time of the purchase of the whisky. As the matter is presented by the bill, there is no error. Nor do we believe that it would have been error because Letch Martin was in there at the time and delivered the whisky to Force, who purchased it for Carriger, the minor. The 10 cents was then received, and the minor granted time in which to pay the remainder. This was a part and parcel of the conversation brought out by appellant, and on the facts above detailed we believe the court did not err in admitting this testimony. Appellant injected the matter, which authorized the state to follow it up.

There being no error in the record, the judgment is affirmed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

WEAPONS—CARRYING PISTOL—TRAVELER—PERSON AT PLACE OF BUSINESS—EXEMPTION FROM CRIMINAL LIABILITY—NECESSITY—SUFFICIENCY OF EVIDENCE.

1. A railroad train porter, whose run carries him some 150 miles every day, is a traveler, so

as to be exempted from criminal liability for carrying a pistol.

2. A railroad train porter, whose duty it is to look out for persons stealing rides, and to put or keep them off the train, and also to load and unload baggage at stations, sweep out cars, and generally follow the conductor's directions, is at his place of business when on board the train, so as to be exempted from criminal liability for carrying a pistol.

3. Evidence in a prosecution for carrying a pistol considered, and held to show that defendant had reasonable grounds for fearing an unlawful attack upon him, and that the danger was so imminent as not to admit of the arrest of his assailant on legal process, so as to overthrow a jury finding to the contrary.

Appeal from Limestone county court; James Kimbell, Special Judge.

Hamp Williams was convicted of unlawfully carrying a pistol, and appeals. Reversed.

Williams & Bradley, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol, and fined \$25; hence this appeal.

The evidence shows that appellant was a regular porter of the passenger train on the Houston & Texas Central Railroad running from Ennis to Houston, and that it was his duty, among other things, to look out for "bums," or persons stealing rides on the train, and to load and unload baggage at all stations, sweeping out cars, and generally to follow the directions of the conductor who was in charge of the train. He was also authorized, under instructions of the conductor, to keep all "bums" or persons who were not passengers off the train, or, if he found such persons on the train, to put them off. It was also shown in evidence that persons stealing rides frequently gave trouble to the trainmen, and frequently, when they were put off, they threw rocks, sticks, pieces of coal, and other things at persons who put them off; and sometimes such persons were armed with pistols and knives. The conductor testified that on this account, when he knew or believed such persons were stealing rides on the train, he generally sent the porter and others of the train crew to make such persons get off the train. On the particular night in question, when the train approached Mexia, a number of persons were found to be stealing rides on the train, and the conductor sent appellant forward to make them get off the blind baggage. Twice, after the train stopped at the depot, it was stopped, in order to afford an opportunity to make such persons get off. Among these "bums" was the prosecutor, Luther Herod. When appellant went forward to clear the blind baggage of such persons as were intruding on the train, said Herod cursed appellant, and told him to "get away from here, you damn negro; I will cut your throat." Herod jumped down from the train at the front end of the car, and started toward appellant with a knife, as he testified; and

appellant called to him not to come on him with that knife, and fired his pistol in the air, to scare him. The train then pulled out, but prosecutor, Herod, succeeded in getting on the train again. Bentley, one of the train crew, heard Herod say that he was going to kill defendant. This was communicated to appellant before they reached Groesbeck. When the train stopped at Groesbeck, appellant, as was his duty, went forward to help put the baggage on the car, and carried his pistol in his hand. As soon as he began to handle the baggage, Herod came up with something in his hand, which appellant took to be a knife or a pistol, but which in reality was a coupling pin. Appellant immediately called out to those around, "Take that man away from here." Herod replied, "You shot at me at Mexia, and I am going to kill you." Appellant insisted on the crowd taking the man away, at the same time holding his pistol in his hand, as he testified, in order to protect himself. At this juncture an officer, who happened to be at the train, interfered, and stopped the difficulty, and took appellant's pistol away from him. It was also shown that appellant generally carried his pistol on the train in a grip or valise, which he kept in one of the cars; that on this particular night, when instructed by the conductor to keep the "bums" off the train, he got his pistol at Mexia, and kept it on his person from that time until after the trouble at Groesbeck. Appellant set up three defenses to the state's charge: (1) That he was a traveler, and as such had a right to carry a pistol; (2) that he had reasonable grounds for fearing an unlawful attack upon his person, and the danger was so imminent and threatening as not to admit of the arrest of the person about to make such attack upon legal process; (3) that he was at his own place of business, and had a right to carry arms. In regard to his defense of being a traveler, we would reiterate what was said in *Bain v. State* (Tex. Cr. App.) 44 S. W. 518—that under the general term "traveler," which means one who travels in any way, one who makes a journey, one who goes from place to place, appellant would seem to come under this definition; for going on a train every day some 150 miles would, in common parlance, constitute him a traveler. We are of opinion that appellant was both a traveler and was at his place of business at the time he is charged to have carried said pistol. His business constituted him a traveler, and he was engaged in his business while traveling, and that business required him to be alert, and at his post of duty, not only to protect the train against any interlopers or persons who were not authorized to ride thereon, but to aid in protecting the passengers themselves when called upon by the conductor in charge of the train. In our opinion, he had a right, both as a traveler and as being at his place of business, to carry a pistol. Appellant requested both of

these issues to be submitted to the jury, but the court refused to entertain his request. In this, we think, there was error. The court did submit to the jury the issue as to whether appellant had been threatened, and was in imminent danger at the time he was shown to have carried the pistol. However, the jury found against him on this issue. In this, we think, the jury was at fault, as the testimony, in our opinion, unquestionably showed that in the performance of his duty he had offended prosecutor, Herod, who had threatened his life; and at the time appellant was discovered carrying the pistol Herod was in the act of making an onslaught on him with a coupling pin. As it transpired, his apprehension was well grounded; and the evidence further showed that he had no opportunity to have applied to a peace officer. The jury should have found in appellant's favor on this issue.

The judgment is reversed, and the cause remanded.

TERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

WITNESSES — CONTRADICTION — WRITTEN STATEMENT — FOUNDATION — OPINION EVIDENCE — PURPOSE OF EVIDENCE — LIMITATION.

1. Where a witness denied that he had made statements contained in an affidavit, which it was alleged he had signed and sworn to, it was error to permit the introduction of the affidavit in evidence without further proof that the statements were in fact made by him.

2. In a prosecution for assault with intent to murder, a witness' opinion as to who fired the shot was inadmissible.

3. Where, in a prosecution for assault with intent to murder, an affidavit of the witness, taken at the instance of the county attorney in defendant's absence, was used to contradict a witness on the stand, its consideration should be limited by the court to such question.

Appeal from district court, Anderson county; John Young Gooch, Judge.

Will Terry was convicted of assault with intent to murder, and he appeals. Reversed.

Campbell & McMeans, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

The third bill of exceptions is substantially as follows: That while Claude Johnson was being cross-examined by private prosecutor N. B. Morris, Esq., and while said attorney held a paper in his hand, purporting to be a statement in writing made and sworn to by witness about a week after the shooting, and which witness identified as being the statement signed and sworn to by him, the said witness was asked and made replies

to the following questions: "Q. Is it not true that you and Will Terry went to Jule Nash's saloon, and drank a bottle of beer each, and had it charged to you? A. No, sir; we drank two bottles of beer each. Q. In this affidavit (exhibiting paper) did you not say (reading): 'We then went together to Jule Nash's saloon, and drank a bottle of beer each, and had it charged to me?' A. I did not state that in the county attorney's office, and, if my affidavit says two bottles, it is incorrect. That may have been one of the corrections that I asked to be made in the written statement. Q. Is it not a fact that defendant asked Goldberg (reading): 'If his credit was good for two bottles of beer until the next day? That Goldberg replied to him that he did not do that kind of business. That defendant then insisted several times that Goldberg should let him have the beer on credit, and was refused by Goldberg, who stated as his reason that he did not sell beer on credit. Will Terry got mad, and asked Goldberg if he thought he would not pay him for it. Goldberg then told Will Terry for him to get out of the saloon; that he did not want to have any trouble with him. Terry replied to him in a rough and angry manner that he ought to let him have the beer. Goldberg then told him to go out of the saloon; that he did not want to break his face.' And was not this all that was said between the parties?" Witness replied that this was not altogether true, but said that it was true that Terry asked for credit, but not that Terry got mad, and replied in a rough and angry manner; and it was not true that Goldberg said he did not want any trouble with him, and that it was not true that this was all that was said. Here state's counsel then read from the affidavit, in the presence and hearing of the jury, the matters contained in the above questions, and asked witness if he did not make such statements in Mr. Harris' office and in said affidavit, to which he replied that he did not. He was then asked the further questions by the state's attorney: "Q. Is it not true that, after coming out of the front door, and as soon as you and Terry got out of the door, that Terry asked you to go back in the saloon with him, saying that he wanted to ask Goldberg what he said about breaking his face, and did you not say in reply, 'No, let's go up the street?'" State's counsel then asked him if he did not make said statements in Mr. Harris' office and in said affidavit, to which he answered, "No." Witness was asked why he and Terry went to Wilcox's restaurant, and replied that he did not know. "State's counsel then asked him if he did not say in the said statement (reading from the statement), 'The reason we went to this restaurant was because we wanted to go there to borrow a pistol;' and asked him if he did not say in reply that they would not let them have a pistol if they had one, to which witness replied that he did not make such state-

ment in said affidavit. Witness was asked if Terry did not talk to Richardson that night, and if Terry did not tell him that Richardson would not let him have the gun, to which he answered, 'No.' Then the state's counsel read such statement from the affidavit, and asked witness if he did not make said statements in Harris' office and in said affidavit, to which he replied in the negative. Witness was asked if it was not true that he and Terry drank only three bottles of beer each, while they were together that night. Witness answered, 'No.' Then he was asked by the state's counsel (reading from said statement) if he did not say in said statement: 'While I was with Terry, we drank three bottles of beer each—one each at Jules Nash's saloon, one each at Arthur Rainey's, and one each at the St. Charles. Jules Nash waited on us at his saloon, Arthur Rainey waited on us at his saloon, and Andrew Sweaney waited on us at the St. Charles.' To which witness answered, 'No.' To the reading of which statement from said document to witness, in asking him questions in the presence and hearing of the jury, defendant objected, because it was not a statement taken in any judicial proceeding to which defendant was a party, and said statement was taken at a time when neither defendant nor his attorneys were present, and that he had no opportunity to cross-examine witness; and, further, that said statement could not and should not be introduced in evidence against defendant for any purpose, and that same is not legal testimony. And thereafter the state, by said private prosecutor, to contradict witness, offered in evidence so much of the written document as is quoted above, purporting to be the statement made by the witness Claude Johnson, under oath, in writing, a few days after the shooting of Goldberg, having asked each question separately; and after first having been asked if he made the several statements in the affidavit, to which defendant objected, for the reasons stated, and, further, because it was not a voluntary statement of witness; that witnesses Claude Johnson, T. J. Harris, and Parks Addington had testified that at the time said affidavit was made and read over to him he requested certain changes to be made therein, and certain additions made thereto, which additions and changes appear from the statement itself had not been made or interlined; and that said statement therefore was not a correct statement of the facts made by said witness at the time. The defendant further objected to the introduction of said portions of said statement for the reason that it was not a voluntary statement of witness, which objection was overruled; and the district attorney was permitted to read said disputed or qualified statement before the jury in interrogating said witness, and after permitting said disputed and qualified statements to be introduced as evidence in the case. To which rulings of the court the defendant ex-

cepted, and here tenders his bill of exceptions, and prays that it be approved and filed; and, without waiving the foregoing objections, defendant asked that the other portions of said affidavit, not introduced by the state, be read in evidence, which was permitted and done."

In this action of the court there was error. If the defendant's witness Claude Johnson, prior to the institution of this prosecution, had made a written statement, and signed and swore to the same in the county attorney's office, questions could be read from said affidavit to the witness, and he could be asked if he made statements contained therein in said office. If the witness denied making them, then it would be proper for state's counsel to place witnesses on the stand, and prove that he did make such statements. But in the absence of such proof it would not be proper to introduce and read to the jury the affidavit containing said statements, which statements had been controverted and denied by the witness. It is always proper practice to contradict a witness, wherever it can be done, upon material issues. But the contradiction must be by positive evidence; and to ask a witness if he did not make a certain statement, which statement had previously been written out, although signed and sworn to by him, and he denies this, then with this character of predicate it is not proper to introduce the written document in evidence. Therefore we hold that the court erred in admitting this affidavit. Witness Claude Johnson's opinion as to who fired the shot should not have been admitted. Appellant also insists that this testimony should have been limited by the court, in its charge, to the question of the credibility of the witness Johnson. We would suggest upon another trial that this should be done. *Drake v. State*, 25 Tex. App. 293, 7 S. W. 868.

For the error discussed, the judgment is reversed, and the cause remanded.

McDONALD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

WITNESSES—IMPEACHING CREDIBILITY.

1. In a prosecution for theft, the state, on cross-examination of defendant, could prove, for the purpose of impeaching his credibility, that he had been previously convicted of theft.

Appeal from Hill county court; L. C. Hill, Judge.

Erd McDonald was convicted of theft, and appeals. Affirmed.

C. F. Greenwood, Co. Atty., B. Y. Cummings, Asst. Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of misdemeanor theft, and fined \$25, and 10 days in the county jail.

There is only one bill of exceptions in the record, and that was to the action of the court allowing the state to prove by appellant, he being a witness on his own behalf, on his cross-examination, that he had previously been convicted of the theft of a coat. This testimony was relevant as going to his credibility, and the court did not err in receiving it. The charge of the court, as given, was without error, and the evidence in our opinion amply supports the verdict.

The judgment is affirmed.

TACKABERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

INTOXICATING LIQUOR—SALE ON SUNDAY—EVIDENCE—APPEAL—BILL OF EXCEPTIONS.

1. A bill of exceptions in a criminal appeal, signed by the county attorney, but not indorsed by the judge, cannot be considered.

2. Alleged error in permitting counsel for the state in a criminal prosecution to read in the presence of the jury evidence taken in the grand jury room cannot be considered on appeal, when it was not excepted to at the time.

3. In a prosecution for selling liquor on Sunday, evidence that the sale took place on Sunday held sufficient to support a conviction.

Appeal from Tarrant county court; M. B. Harris, Judge.

W. B. Tackaberry was convicted of violating the Sunday law, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the Sunday law, and his punishment assessed at a fine of \$25.

In motion for new trial it is contended that the court erred in instructing the jury that the agency of defendant, if any, could be shown by circumstantial evidence, as could, also, the sale. As the record is before us, it falls to show that this charge was given. It is signed by the county attorney, but is not indorsed by the judge. In fact, it falls to show the charge was given. Therefore it is unnecessary to discuss it.

The fifth ground of the motion for new trial, to the effect that the court erred in permitting the state's counsel to read, in the presence and hearing of the jury, evidence of Harry Hendrick taken in the grand jury room, was not excepted to at the time, if in fact it occurred.

It is contended the evidence is insufficient to show the sale on Sunday. We are of opinion this is not correct. It is placed beyond question that, in the billiard room attached to the saloon, appellant furnished beer on Sunday, as charged. Carter expressed some doubt as to whether it was paid for at the time, or whether it was charged against him, after having first stated that he did not recollect whether it was a sale or a gift. But when his attention was called to his testi-

mony before the grand jury, he admitted that his statement before that body was true; and this testimony proved the sale, but left it in doubt whether he paid the cash for it, or it was charged on the books against him. Appellant himself testified that he never sold any drinks of any kind on Sunday, but that on one occasion the proprietor, Brown, gave some of the boys beer. Brown testified that he employed appellant to work by the week, and always paid him off on Saturday night; that he had no authority from him to sell on Sunday; that he himself was in the saloon, at the bar, on the 30th of March, the Sunday in question; and that Tackaberry never got any beer from him on that day. This is the day the witnesses show the beer was obtained by Carter. If in fact Tackaberry let Carter have the beer, as testified by that witness, we believe the case is made out.

The judgment is affirmed.

BALL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

RAPE—CONTINUANCE—ABSENT WITNESS—MATERIALITY OF TESTIMONY—SUBSEQUENT ILL TREATMENT OF PROSECUTRIX—ADMISSIBILITY OF EVIDENCE.

1. In a prosecution of a father for the forcible rape of his 14 year old daughter by a former wife, accused was refused a continuance on account of his wife's absence in another state. It appeared that the couple had parted owing to a disagreement. No process had been served on the wife previous to her departure, but she promised to return for the trial. No attempt was made to take her deposition. The daughter's testimony showed that most of the ill treatment received from accused was in the wife's presence, or within her knowledge. Held that, in view of the materiality of the wife's testimony, it was error to refuse a new trial, notwithstanding the lack of diligence to secure her attendance.

2. In a prosecution of a father for the forcible rape of his 14 year old daughter it is error to admit evidence of beatings given the daughter by accused, while drunk, a few months subsequent to the offense charged, and not connected with any attempt to repeat the crime.

Appeal from district court, Parker county; J. W. Patterson, Judge.

G. T. Ball was convicted of rape, and appeals. Reversed.

Preston Martin, Gilbert & Gilbert, and Brown & Bledsoe, for appellant. R. B. Hood and Sam Shadle, for the State.

HENDERSON, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 99 years. The rape was committed upon Mayrtie Ball, a girl about 14 years old, the daughter of appellant by his former wife. Appellant married his first wife, the mother of prosecutrix, in West Virginia, and lived with her there for two or three years, and then separated from her, leaving his children with her. Appellant afterwards moved West, and came to the Indian Territory, where he

married his present wife. His former wife in the meantime had died about a year antedating the offense here charged. Appellant had his two children, including prosecutrix and a son younger than she, named Bennett, to come from West Virginia to the Indian Territory. The record shows a course of ill treatment exercised by appellant towards his daughter in the territory, including various attempts to have carnal intercourse with her anterior to the commission of the offense charged. Some time in July or August, 1902, appellant moved with his family, including his wife and her children by a former husband, and one or two of his own by her, and prosecutrix and her brother, into Texas. They stopped about a month in Parker county, and the offense for which he was tried, as shown by this record, is alleged to have been committed by appellant on prosecutrix in Parker county some time during August. The testimony of prosecutrix shows that he had intercourse with her there, and, as far as we can judge from the record, this was the first time that appellant's private parts penetrated the private parts of prosecutrix. Appellant's wife was confined in Parker county, giving birth to a child. After this, about September, they moved to Johnson county, and lived there some time. A number of acts of ill treatment suggesting carnal intercourse or attempted carnal intercourse were shown to have been committed by appellant on prosecutrix in Johnson county. Prosecutrix and her brother were sent by appellant from here to West Virginia, their former home. They stayed there but a short time, not exceeding a month, and appellant is shown to have gone to West Virginia, and brought them back to Johnson county. Acts of ill treatment are shown to have been committed by him on prosecutrix in West Virginia; among other things, that she was forced to return with him from West Virginia to Texas. After prosecutrix came back to Johnson county, other acts of misconduct and ill treatment were shown by appellant toward prosecutrix. Before this, however, it appears that his wife had separated from him, and prosecutrix's testimony tends to show that appellant, when they returned to Johnson county, proposed that she should live with him, and was in the act of fitting up a house with furniture, when he was arrested. This is a sufficient statement of the case to present the questions of law that arose during the trial.

Appellant made a motion for continuance on account of the absence of his wife, who, it was alleged, at the time of the trial was in the Indian Territory; that when she left Texas she promised appellant to return to his trial, but at the time was too ill to travel. This is supported by an affidavit made by the brother of appellant. No process was served on Mrs. Ball prior to her leaving Texas; nor was any attempt made to take her depositions. It occurs to us that the ap-

plication shows a lack of that diligence required by law that should have been exercised in order to secure the attendance of his wife. Ordinarily, a man might depend on his wife attending court, but in this particular case it appears appellant and his wife, about the time of his arrest, or before his arrest, had separated on account of some disagreement; and it would seem this would put him on notice of the necessity of using process to compel her attendance or take her depositions. But aside from the lack of diligence on the trial, it was made to appear that she was a very important witness, inasmuch as prosecutrix's testimony developed the fact that nearly all, if not quite all, of the ill treatment which she had received at the hands of appellant, occurred in the presence or within the knowledge of Mrs. Ball, which rendered her a very material witness. We are inclined to the view that, under the circumstances of this case, a new trial should have been granted, in order to secure her attendance or her deposition.

By the first and second bills of exception appellant raises a question as to the admissibility of the testimony of prosecutrix, Mayrtie Ball, and Felix Jones, showing misconduct and abuse by appellant of prosecutrix. This occurred in the town of Cleburne, Johnson county. The first bill also involves the misconduct of appellant toward prosecutrix in West Virginia, in forcing her to return to Texas with him. Both of said witnesses testified that in Johnson county appellant gave prosecutrix a severe beating; that he was under the influence of liquor at the time. Witness Jones interfered to prevent appellant from further injuring prosecutrix. The extent of her injuries were detailed by the witness Jones, and by another witness, Dr. Roark, who testified as an expert and physician as to the character of injuries inflicted on the prosecutrix, which is presented in the third bill of exceptions. This ill treatment was not in the nature of an endeavor at the time to have carnal intercourse with prosecutrix, but simply showed an assault of violent character, made by appellant, who was drunk, evidently because prosecutrix had left the house which he was preparing for her to live in, and had gone to Mr. Crow's, at the wagon yard. All of this testimony was objected to on the ground that it was irrelevant, and immaterial to any issue in the case, and because said acts were subsequent to the charge of rape, for which appellant was on trial. Appellant also, by a written instruction, requested the court to charge the jury not to consider any misconduct or assault made by appellant on prosecutrix subsequent to the alleged offense in Parker county as criminative evidence against defendant, which the court refused. However, the court instructed the jury that appellant was on trial for the offense committed in Parker county, and that the evidence as to acts of violence and threats other than the one char-

ged in the indictment was offered for the purpose of showing whether or not the will of the said witness was subjugated to the will of defendant, and that they should consider the same for no other purpose. Without discussing the propriety of these charges, we will consider merely the admission of acts of misconduct by appellant toward prosecutrix subsequent to the alleged offense. This question was reviewed in *Smith v. State*, 68 S. W. 995, 5 Tex. Ct. Rep. 372, and, after reviewing the authorities, we held that the acts in said case were not admissible. The acts which were there complained of were subsequent, but more remote in point of time than those here suggested. It was pointed out in said case that the authorities authorized the introduction of evidence of subsequent acts in cases of incest and adultery, which were continuous offenses. *Burnett v. State*, 32 Tex. Cr. R. 87, 22 S. W. 47; *Wharton, Cr. Ev. sec. 35*; *Bishop, Stat. Crimes, sec. 682*. It was further remarked in said case that we could find no authority extending this doctrine to cases of rape; but it was suggested, in that connection, that it was difficult to discriminate in principle between the admission of such evidence in cases of rape by consent, where prosecutrix was under age, and cases of incest and adultery. The only object of such testimony in either case was to shed light upon the main question at issue, which was as to act of carnal intercourse between the parties. But inasmuch as the question is again presented, we have deemed it proper to again look into the authorities. We understand the state relies upon *Sharp v. State*, 15 Tex. Cr. App. 171, as authorizing this character of evidence. We have examined that case, and, while we find appellant, in his brief, raises the question of subsequent acts, we do not find the court, in its opinion, treated that phase of the case, but merely decided the question as to the admission of prior acts. As stated heretofore, we can find no case of rape where subsequent acts have been held to be admissible. Under some of the authorities even prior acts of a similar character are held inadmissible. See *People v. Tyler*, 36 Cal. 522. But this is not the received doctrine. *Sharp v. State*, 15 Tex. Cr. App. 171; *People v. O'Sullivan* (N. Y.) 10 N. E. 880, 58 Am. Rep. 530; 2 *Bishop, Cr. Proc.* 970; *Smith v. State*, 68 S. W. 995, 5 Tex. Ct. Rep. 372. The subsequent acts here do not show carnal intercourse, but consist of acts of cruel conduct of appellant toward prosecutrix, and would tend to show that he was domineering and coercive, and capable of controlling her will power. A number of similar acts were proven prior to the alleged act of rape, but no objection was here made to such evidence; exception only being taken to subsequent acts indicating cruel treatment on the part of appellant toward prosecutrix. We held that such subsequent acts were not admissible. Rape is not a continuous act. But when the act of

carnal intercourse is proven by force, as is contained in one count in the indictment, the offense is complete; or when the offense of carnal intercourse is proven with the consent of prosecutrix, where she is under 15 years of age, the offense is clearly complete, and the proof of subsequent acts of rape would be a distinct offense; and the same might be said of an assault. And such distinct offenses, subsequent to the act complained of, while not admissible as evidence, would serve the purpose of inflaming the minds of the jury against appellant, and of aggravating his punishment. It was accordingly error on the part of the court to admit such subsequent acts.

It is not necessary to discuss other assignments of error. But for the errors pointed out the judgment is reversed, and the cause remanded.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL PROCEDURE—JURIES—DISCRIMINATION—NEGROES—LOST MONEY—OWNERSHIP—POSSESSION—CONTINUANCE—DILIGENCE—EVIDENCE.

1. A negro moved to quash an indictment against him on the ground that in the formation of the grand and petit juries he was discriminated against. Not more than 10 per cent. of the voters in the county were negroes, and but a very small per cent. of those were shown to be qualified to serve as jurors. The testimony of the commissioners who drew the jurors did not show any discrimination. *Held*, that the court did not err in overruling the motion.

2. An indictment for the theft of lost money properly charges the ownership and possession in the owner of such money, though he did not have the control and custody at the time of the theft; he being in constructive possession.

3. On a motion for continuance on the ground of absence of a sick witness, proof of the service of process on her on the day of or the day before the trial shows sufficient diligence.

4. Defendant, indicted for the theft of money found by him, moved for a continuance on the ground that his wife, who was too ill to attend the trial, would testify that when he found the money he carried it to her, at his home, about a quarter of a mile from where he found it, with instructions to hold it until he could interview the officers of the law, to discover the owner, and secure any reward that might be offered. *Held*, that what he said to his wife when leaving the money with her was competent as a part of the *res gestæ*, and to show his intention, and was material.

Appeal from district court, Delta county; H. C. Connor, Judge.

Brooks Martin was convicted of theft, and appeals. Reversed.

Jno. R. Hatcher and L. N. Cooper, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of money over the value of \$50, and his punishment assessed at confine-

¶ 2. See *Larceny*, vol. 32, Cent. Dig. § 33.

ment in the penitentiary for a term of two years; hence this appeal.

Appellant made a motion to quash the indictment because, in the formation of the grand and petit juries (appellant being a negro), he was discriminated against. This question was gone into by the court, and witnesses examined. In our opinion, appellant failed to show that his race was discriminated against in the formation of either the grand or petit jury. True, no jurors of his race were drawn on either jury; but the number of persons who were shown to possess the necessary qualifications to serve as grand or petit jurors was very small; there being not more than one-tenth of the voting population of Delta county, which contained about 3,000 voters, of the negro race, and of these a very small per cent. was shown to possess the necessary qualifications to serve as jurors. The commissioners who drew the jurors do not show by their testimony that they discriminated against the negro race in drawing the jury lists, either for the grand or petit jury, and, without some proof of this, we would not presume that they did. The burden was on appellant to show this, and he failed to do so. Accordingly we hold the court did not err in overruling the motion to quash.

Appellant does not except to the indictment, but contends that the indictment charges a possession and ownership of the alleged lost property in John Tennison, but the proof shows that he was not in the care, control, or custody of said property; that it was lost, and the property could not have been stolen from him. We take it that, even of lost property, the ownership as well as the constructive possession thereof is in the real owner. To illustrate, if cattle stray from their accustomed range, and are temporarily lost to the owner, they are none the less his property, and in his constructive possession, wherever they may be. True, he has lost the immediate management and control of them, but he is entitled to that management and control. While our statute does not treat of the subject of lost property, and as to its ownership and possession, still, under all of the authorities, the lost property belongs to the rightful owner, and he is entitled to the possession thereof. Our decisions follow the rule at common law, holding that, where property is lost by the owner and found by another person, before such person can be convicted of theft thereof the proof must show that at the very time of the finding and taking he formed the felonious intent to steal the property. If he formed this intent subsequent to the taking and ascertainment of the contents of the package, it is not theft. In this case we hold that the allegation of ownership and possession was properly laid in John Tennison, whom the proof shows had recently lost the money. See, on this subject, *Statum v. State*, 9 Tex. App. 273; *McClain*, Cr. Law.

vol. 1, secs. 545, 571; *Bishop*, New Cr. Law, vol. 2, 878 to 883, inclusive.

Appellant sought a continuance on account of the absence of his wife, who, it appears, was served with process on the day of or day before his trial; and he swears that she, at the time of the trial, was too ill to attend court. We take it that sufficient diligence was shown. Appellant proposed to prove by this witness that, as soon as he found the purse of money, he picked it up and carried it to her, at his home, in the town of Cooper, about a quartef of a mile from where he found it, and deposited it with her for safe-keeping, with instructions to hold the same until he could interview the officers of the law, looking to the discovery of the proper owner, as well as to invoke the aid of the officers toward securing any reward that might be offered for the finding of the money. The fact that he left this money with his wife was used by the state as an inculpatory fact against him, and it occurs to us that what he said at the time he deposited said money and purse with her was competent as a part of the *res gestæ* of that transaction, and to show his object in leaving the money with her. If he had carried it and left it with some merchant in town, with instructions to ascertain the owner, we think it would have been competent evidence in his favor; and we can see no reason why the same character of evidence, though coming from the wife of appellant, would be inadmissible. *Lancaster v. State* (Tex. Cr. App.) 31 S. W. 515. If it clearly appeared from the record that when he first found the money he took it with the determination of holding and secreting the same until he could get a reward for delivering it to the owner, then it might be that the testimony of the wife would be immaterial, as it has been held that, where property is taken originally for the purpose of securing a reward for its restoration, this is theft. See *Dunn v. State*, 34 Tex. Cr. R. 257, 30 S. W. 227, 53 Am. St. Rep. 714; 18 Amer. & Eng. Ency. of Law (2d Ed.) p. 504. But we do not understand such to be the testimony here. Moreover, the taking was of lost property, which was found by appellant. In such case he might expect a reward, without at the time having any ulterior motive to withhold and conceal the property until he got a reward. So that there may be a distinction between that character of case and one where the original finding and taking were of the property of an unknown owner, which had been lost. At any rate, the testimony here does not show that appellant proposed to withhold and conceal said property until he could get a reward for its restoration to the owner. While, no doubt, he expected a reward, yet, if his theory is to be believed, he was taking steps to ascertain the owner, and was endeavoring to communicate with the sheriff for that purpose. This theory may not ac-

cord with the state's theory, but it is not for us to decide as to which theory is correct. That is a matter for the jury, under proper instructions from the court. We only hold that the testimony of the wife was admissible, under the circumstances; and, for the refusal of the court to continue the case on that account, the judgment is reversed, and the cause remanded.

LANKSTER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1902.)

MURDER—IMPEACHMENT—CHARGE—BILL OF EXCEPTIONS.

1. A witness may not be impeached as to testimony irrelevant to the issue.

2. Where the testimony of defendant's witness to prove the bad character of the state's witness proved his good character, defendant may not prove a particular transaction of the state's witness, collateral in its nature, to rebut or refute his own witness.

3. A charge that if defendant was holding and cocking his gun immediately before it fired the shots which killed R., for the sole purpose of protecting himself against an attack with a pistol by S., then, if, under these circumstances, the gun was fired by accident, "and" defendant should be acquitted, and if the jury so believe, or have a reasonable doubt on the issue, they will acquit, will be held to have been understood by the jury as telling them that if defendant was preparing to fire the shot for the sole purpose of protecting himself, and the gun then was accidentally discharged, they should acquit, where they were also charged that if they believed defendant committed the assault as a means of defense, believing that he was in danger, and that the shots were intended as a means of defense against an assault by S., defendant would be excused if thereby he accidentally killed R., and that, if they had a reasonable doubt on the issue, they should acquit.

4. Where a charge given does not appear of record, a bill of exceptions should be taken to it, to present the question for review.

5. For the court to orally tell the jury, "You must not arrive at your verdict by lot or chance, but only by considering the evidence," is but an admonition, and not prejudicial.

Davidson, P. J., dissenting.

Appeal from district court, Anderson county; John Young Gooch, Judge.

W. H. Lankster was convicted of murder, and appeals. Affirmed.

See 56 S. W. 65; 59 S. W. 888; 65 S. W. 373.

John I. Moore, Wm. Watson, O. M. Kay, A. G. Greenwood, and Adams & Adams, for appellant. Ned B. Morris and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 25 years; hence this appeal.

This is the fourth appeal in this case. In 41 Tex. Cr. R. 603, 36 S. W. 65, will be found a statement of the facts. The evidence on this appeal is not materially different from that, with the exception that some

new witnesses were introduced on the same lines. Briefly stated, litigation was pending in the justice court at Crockett between Lankster, appellant, and deceased, Reinhardt. On the day of the homicide the case was tried, resulting in a verdict and judgment in favor of deceased. Deceased and Reinhardt, who lived west of Crockett, and beyond the store of appellant, attended court on the day of the homicide at Crockett, and so did Lankster. There were witnesses in said case. After the decision of the case, deceased and Stringer started home in a two-horse wagon, and when about seven or eight miles en route they met Lankster, who had preceded them and gone to his store, and was then returning to his son's house, who lived some two or three miles from the store, and between it and Crockett. When they met, the testimony for the state tends to show that appellant, as he came up with the wagon, reined in his horse, and, after some preliminary remarks, said to witness Stringer: "Ed, you swore a lie in that case." To which witness replied: "What about? I don't think so." Appellant answered: "You swore that I was to deliver Mr. Reinhardt fifty cows." Witness replied: "Mr. Reinhardt swore the same thing; Mr. Hughes swore the same thing; the contract says the same thing; and, if I lied, the whole business lied." He then replied: "It is a damned lie." Witness said: "I never have taken the damned lie off of any man. You are armed, and I am not. All I ask you is to give me a chance." He then got off his horse and cocked his gun and said, "Damn you! I'll give you a chance," and came towards the wagon, at the time raising his gun to his shoulder. Witness threw himself forward toward the front end of the wagon. Just as he dodged, the gun fired, and then immediately fired again. Witness then jumped out of the wagon, on the left-hand side. Reinhardt had fallen on the ground on the same side of the wagon, with his face down, and at once expired, having received a fatal shot from right to left through the body, ranging slightly upwards; the wounds being inflicted with buckshot. He was also wounded in the arm and head. Witness was also wounded in the right shoulder. There is some testimony showing that after this appellant drew a pistol on the witness Stringer, who asked him not to shoot—that he had already killed Reinhardt, and given him a death shot. Appellant is shown to have snapped his pistol at witness twice, and then got on his horse and rode off a short piece, but wheeled again and came back to the wagon, saying: "I know I will have to die for this. By God! you will have to die first." Witness Stringer then abandoned the team and ran to the fence, and got over and escaped. On the part of appellant it was shown: That in the evening after the trial he went to his store some eight or ten miles west of Crockett, staying there a short while, and then

started to his son's to stay all night. His son being sick at Crockett, he expected to stay at his son's house that night. That he carried his gun with him, as it was his custom to do. As he approached the wagon in which Reinhardt and Stringer were, Stringer was driving, and pulled up his team, and asked appellant "if he thought we had enough rain. And I told him, 'Not enough to do any good.' Then he spoke up and said, 'We beat you in that case to-day,' and I remarked, 'If you did, it was by swearing a lie.' He replied, 'I did not swear a lie.' Then I said, 'You lie, you dirty puppy.' He then remarked, 'I won't take it,' and handed the lines to Reinhardt. Reinhardt took the lines. Stringer then reached down in the wagon, and raised a pistol and commenced snapping it at me, and when he did I pulled back my horse, and hallooed to Reinhardt to get out of the way. As soon as I hallooed to Reinhardt to get out of the way, I got off my horse. I told him to get out of the way because I saw that Stringer was going to shoot me. I jumped off the horse. That threw the horse between me and the wagon, like. The hammer of the right-hand barrel of the gun was already pulled back, and I commenced pulling the hammer of the left-hand barrel. When I jumped off the horse I took the gun in my left hand, and that threw the stock of my gun under my left shoulder. I must have had my finger on the right-hand trigger of my gun, instead of on the guard, as I thought it was, and, in my effort to pull back the left-hand hammer, I pressed on the trigger, and the right-hand barrel went off; and, when it did, I must have turned the left-hand hammer loose, or let it slip, and it went off, too. The shots were just as quick as I could turn the hammer loose. Both of the barrels fired at once, almost. I threw up my head to see, and Stringer was bent in toward the end gate of the wagon. He then fell over the left-hand side of the wagon. As I walked around to the back end of the wagon, Stringer hallooed to me not to shoot any more. He said, 'I believe you have killed me.' I said, 'No, Mr. Stringer; I am not going to shoot any more.' I then went to my horse, which was some 25 or 30 steps distant, and got on him. When I got on the horse, before catching up the reins, he had walked back to the wagon." Stringer then broke and ran, and the last thing appellant saw of him he was going over the fence. That he (appellant) did not tell Stringer that he would have to die for this, and he (appellant) did not have a pistol at the time. Appellant states he thinks he saw Stringer with a pistol in his hand when he went over the fence. Neither of the shots were intended for Reinhardt. "We had always been good friends. I had nothing against him. He was a nice man. There was nothing between us but the lawsuit. The gun was a breech-loader, and I had three or four loaded shells in my

shot sack." This is a sufficient statement of the case, both for the state and appellant, in order to discuss the questions presented for review.

On the trial, appellant reserved the following bill of exceptions to the refusal of the court to allow him to introduce certain testimony, to wit: "J. E. Stringer, a witness for the state, was on the stand, and was asked upon cross-examination if he had not been a member of the jury commission of Leon county some time before and since last trial of this case; and he replied, he had been. And he was then asked if he had not, as jury commissioner for Leon county, consulted W. P. St. John, a citizen of Leon county, in reference to putting such men on the jury as would convict one Miller, who had a case then pending in the district court of Leon county, and if he had not, as said commissioner, violated his oath; and said Stringer denied having consulted W. P. St. John for such a purpose, and denied having so sworn in the district court of Leon county on a trial of a motion to change the venue in the case of *The State vs. Miller*. And then defendant proposed to prove, and offered in court William Watson, Tom Tubbs, and Robert West, each and all of whom would have sworn, that Stringer admitted under oath in the district court of Leon county, in the trial of the said motion to change the venue, that he had consulted W. P. St. John in order to fix a jury to convict Miller, and that he did consult St. John as to proper men who would convict Miller; but the court refused to allow said witnesses, Watson, Tubbs, and St. John, to testify to said matters. Defendant offered said evidence to affect the witness' credibility generally before the jury, and also, further, because a witness for defendant (Hughes) had testified that Stringer's character for veracity was by some in his community esteemed good, and by others bad, but that in court matters he had never heard Stringer's veracity questioned. But the court refused to permit these witnesses to testify to the evidence in the change of venue trial in the *Miller* case." It will be seen from this bill that appellant desired to introduce the evidence of the witnesses Watson and others as to what witness Stringer had previously sworn in the district court of Leon county in the trial of one Miller in regard to a change of venue; that is, he proposed to prove by them that the witness Stringer had testified or admitted in that case that he, as a jury commissioner of Leon county, had conferred with one St. John, a citizen of said county, in reference to putting men on the jury who would convict Miller, who had a case then pending in the district court. Appellant says his purpose in offering this testimony was to affect the witness Stringer's credit generally before the jury, and also for the purpose of contradicting or impeaching one Hughes, a witness for defendant, who had testified that Stringer's

character for veracity was by some esteemed good, and by others bad, in the community, but that his reputation in court matters for veracity was good. Was it competent to impeach the witness Stringer by this character of testimony? All the authorities hold that the impeachment must be on a matter relevant to the issue. If the testimony is collateral, the witness cannot be impeached on this matter. See *Underhill's Cr. Ev.* sec. 241; *Wharton's Cr. Ev.* sec. 484; *Walker v. State*, 6 Tex. App. 576; *Johnson v. State*, 27 Tex. App. 163, 11 S. W. 106; *Preston v. State* (Tex. Cr. App.) 53 S. W. 127. Mr. Wharton says: "When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?" Now, when appellant propounded the question to the witness Stringer, shown in the above bill, with reference to his conduct in the Miller case, this was purely a collateral matter; and, when he denied the imputation, appellant was compelled to content himself with his answer, and could not impeach him. Could this testimony be used to contradict appellant's witness Hughes? We understand it is competent for the party to impeach his own witness when he has been taken by surprise at his testimony, but the bill does not show any surprise. Hughes merely answered that the witness Stringer's character was good in court matters. If Hughes had been the state's witness, and he had testified to the good character of the witness Stringer, on cross-examination appellant might have gone into particulars with the witness Hughes. *Forrester v. State*, 38 Tex. Cr. R. 245, 42 S. W. 400. But even this would not authorize him to go into particular transactions with other witnesses whom he might introduce. Viewing this question from the bill itself, appellant's own witness, instead of proving the bad character of witness Stringer, proved his good character; and under no rule that we are familiar with would this authorize appellant to prove particular transactions, collateral in their nature, by other witnesses, in order to rebut or refute his own witness. At the same time, he would not be estopped to prove by other witnesses, if he could, that the witness' character was bad as to court matters. The court did not err in refusing to admit this testimony.

In the motion for new trial, appellant excepted to the fifth paragraph of the court's charge, which is as follows:

"If the defendant, Lankster, was holding and cocking his gun immediately before it fired the shots which killed Reinhardt (if he was so killed) for the purpose and sole purpose of protecting himself against an actual or anticipated attack or assault with a pistol

by the witness Stringer, which might have resulted in death or serious bodily injury to said Lankster (if it did so appear to him), then, if under these circumstances the gun was fired off by accident, and the defendant should be acquitted; and if you so believe, or if you have a reasonable doubt on this issue, you will acquit the defendant."

This charge is objected to on the ground that it makes defendant's right to an acquittal depend on the conjunction of the right of self-defense and accident and the acquittal, before the jury would be authorized to acquit. If this were the only charge on self-defense, appellant's first ground of contention would be correct; but we find in the charge another paragraph, instructing the jury as follows:

"If you believe that defendant committed the assault, if any, as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life or of serious bodily injury at the hands of one Stringer, and that the shots were intended as a means of defense against an assault by said Stringer, the defendant would be excused, in law, if thereby he accidentally killed said Reinhardt; and in such event, or if you have a reasonable doubt upon the issue, you will find the defendant not guilty."

We understand these two charges to adequately present the only two theories of self-defense arising from the evidence. Recurring to the evidence, it will be seen that the jury might believe from the state's evidence that appellant fired intentionally to kill Stringer, and that, without an intention directed to Reinhardt, he accidentally shot and killed him. Now, if the jury should believe this phase of the case (that is, that appellant was justified in shooting Stringer on account of a demonstration by Stringer, and he accidentally killed Reinhardt), then they were instructed to acquit him. The other charge, as we understand it, was directed to another phase of the case, arising from the evidence, and founded entirely on appellant's own testimony; that is, that he did not intentionally fire his gun at Stringer, but that Stringer was about making or in the act of making an attack on him, and he was preparing to defend himself with his gun, when it was accidentally discharged, and killed Reinhardt. The charge in question was predicated upon this phase of the case, and correctly directed the attention of the jury to it, and it would have been error, had the court failed to give it. It is said, however, that this charge is misleading, and increases the burden of appellant, in that it requires justification and accident, and also acquittal, before the jury could acquit appellant. True, the charge uses the conjunction "and" in connection with the phrase "the defendant should be acquitted." It occurs to us that the plain and obvious reading of this charge simply tells the jury that if appellant was preparing to fire the shot for the sole pur-

pose of protecting himself, etc., and the gun at that juncture was accidentally discharged, and killed Reinhardt, defendant should be acquitted; and the jury could not, without a strained construction, have understood otherwise, and we must concede to the jury, at least an ordinary degree of intelligence. If there was any difficulty, the subsequent clause of the charge, which submits to the jury the reasonable doubt on the issue presented in the charge, would effectually dissipate it. We do not believe the charge was misleading or liable to confuse the jury, and appellant was not injured thereby.

It is also urged that this case should be reversed because the court gave a verbal charge to the jury. This question is made to appear in the motion for new trial, and is to be found nowhere else in the record. While it is competent for an exception to be made to charges of the court given and apparent of record, by an exception taken in motion for new trial, we think, where a charge is given which does not appear of record, a bill of exceptions should be taken to the same, in order to present the question for review. However, if it be conceded that the motion for new trial sufficiently presents this question, we do not believe it presents error. The charge here presented in the motion for new trial is as follows: "Gentlemen: You must not arrive at your verdict by lot or chance, but only by considering the evidence." The court in this charge had instructed the jury on this subject; that is, they were the exclusive judges of the facts, but must take the law from the court, and be governed thereby. And the action of the court was simply tantamount to calling the jury back and admonishing them with reference to that portion of the charge. But aside from this, we fail to see how it could possibly injure appellant for the court to admonish them that they must try appellant alone on the testimony, and not arrive at their verdict by lot or chance. This was simply an admonition, and, it occurs to us, for his benefit. *Sargent v. State*, 35 Tex. Cr. R. 325, 83 S. W. 364; *Rumage v. State* (Tex. Cr. App.) 55 S. W. 64.

There being no error in the record, the judgment is affirmed.

(March 4, 1903.)

DAVIDSON, P. J. I cannot concur in the opinion of my Brethren. The indictment charged appellant with the murder of one Reinhardt. He was convicted of murder in the second degree, and his punishment assessed at 25 years in the penitentiary. On the morning preceding the killing in the evening, Reinhardt and appellant had litigation before the justice court at Crockett, which resulted adversely to appellant. Immediately upon the decision of the court, appellant left town for his store, some 10 miles in a westerly direction; and later in the evening Reinhardt and his main witness,

Stringer, left in a wagon traveling the same road, which carried them by appellant's store. Appellant, returning from his store, met Stringer and Reinhardt. Conversation ensued, about which the parties widely differ. The state's theory makes appellant guilty of murder. Appellant's testimony justifies the homicide. Appellant testified in his own behalf that Stringer began the conversation, which led to angry words; that Stringer reached down in the bottom of the wagon and secured a pistol for the purpose of making an attack upon him; that he immediately hallooed to Reinhardt to get out of the way, and cocked his gun to defend against the action of Stringer; that in bringing his gun up, after cocking it, it fired, and the firing of the first shot, he supposed, so jarred the gun that the second barrel went off; that it fired before he was ready; and that both discharges of the gun were accidental. Stringer was sitting nearest appellant in the wagon. The shot, passing across Stringer's shoulder, cut away the flesh to the depth of a half inch or more, and took effect in Reinhardt, killing him instantly. Whether the second shot took effect in Stringer or Reinhardt is left in doubt; but the indubitable proof shows that Reinhardt was struck in the shoulder with several shot, and in the hip with several, and the shooting was at very close range. Another witness, who places himself near by, in an old road, testifies that he saw the difficulty, and to facts which, if true, show that appellant acted in self-defense. Appellant is corroborated in some of his testimony and statements by a negro witness or two, who were in a field near by. The state's case is mainly predicated upon the testimony of the witness Stringer, if not altogether, as to immediate facts.

Exception was reserved and error assigned upon the following portion of the court's charge: "If the defendant, Lankster, was holding and cocking his gun, and immediately before it fired the shots which killed Reinhardt (if he was so killed), for the purpose and sole purpose of protecting himself against an actual or anticipated attack or assault with a pistol by the witness Stringer, which might have resulted in death or serious bodily injury to said Lankster (if it did so appear to him), then, if under these circumstances the gun was fired off by accident, and the defendant should be acquitted; and if you so believe, or if you have a reasonable doubt on this issue, you will acquit the defendant." We believe the exception is well taken. Appellant had the right to defend himself against an attack on Stringer, whether he shot intentionally or the gun was fired accidentally, and in either event he should have been acquitted. But this charge limits the right of self-defense to the accidental firing, and it also requires, before the jury could acquit upon this theory, that the law of self-defense and accidental firing should concur. As written, the jury may

have inferred and believed that, before they could acquit on the theory of self-defense, it was necessary that the killing should have been an accidental or an unintentional homicide. The charge is further criticised because it made the right of defendant to be acquitted depend upon the fact that the jury, in the same connection, should find, in addition to the concurrence of self-defense and accidental shooting, that he was entitled to be acquitted, before they could give him the benefit of the reasonable doubt. The state contends that the language used by the court, "and the defendant should be acquitted," and the jury so understood, that the word "and," in that expression, meant "then," and the jury so acted upon it. We have nothing before us to ascertain how the jury regarded that particular expression, but, as given, it is not correct; and the charge can only be construed as it is, and the probable effect it had on the jury. In my opinion, this charge was erroneous, and the judgment ought to be reversed.

CROW v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 28, 1903.)

BIGAMY—EVIDENCE—CONTINUANCE—TESTIMONY OF WIFE.

1. Defendant, on a trial for bigamy, is not entitled to continuance for absence of a witness who would testify that, before the second marriage, he had a letter from defendant's former place of abode, stating that his first wife was dead; the letter not being admissible.

2. Defendant cannot object to testimony as that of his wife, it appearing that at the time he was married to her he had a wife living.

3. On a prosecution for bigamy, a petition for divorce from defendant's first wife, executed and sworn to by him, is admissible as his declaration, though it had not been filed or published.

4. A letter from defendant to his first wife is admissible on a prosecution for bigamy, though written several years before his second marriage.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

C. H. Crow, alias Henry C. Crow, was convicted of bigamy, and appeals. Affirmed.

Randolph Paine, Louis Wilson, and P. M. Stine, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of bigamy, and given five years in the penitentiary; hence this appeal.

Appellant made a motion for continuance, which was overruled, and he assigns this action of the court as error. The motion was predicated on account of the absence of W. B. Vestal, said to reside in Dallas county. Defendant says that he caused subpoena to be issued for said witness, but he was not found, and that he has been subsequently informed said witness is temporarily absent in west Texas. Defendant says he expects

to prove by the witness that he had a letter from Ft. Wayne, long before the second marriage, to wit, in March, 1902, which stated that defendant's wife was dead; said letter being written to witness by H. B. Campbell, of Ft. Wayne, Ala., at which place defendant formerly lived, and at which place defendant's first wife resided up to her death. It does not occur to us that said letter would be admissible as evidence. If, as a fact, appellant had any information at the time of making the motion for continuance, that was trustworthy, to the effect that his wife was dead, he should then have craved a continuance, in order to take the depositions of witnesses in Alabama to prove that fact. The court further explains this bill by stating that defendant's evidence showed he did not marry his second wife under the belief that his former wife was dead. There is some testimony in the record to that effect; still, if defendant had reliable information to the effect that his former wife was dead at the time of the trial, he should have asked a continuance or postponement in order to procure legal testimony to prove that fact.

Appellant also objected to the testimony of Katie Faight, on the ground that she was his wife. The testimony before the court, in our opinion, shows that she could not have been his legal wife, because it established that, at the time the ceremony of marriage was performed between appellant and Katie Faight, he had a former wife then living, to wit, Jennie Crow.

Appellant also objected to the introduction of an alleged petition for divorce in favor of himself against Jennie Crow, which appears to be dated June 3, 1902, and was sworn to by appellant. Appellant objected on the ground (1) that the state had not proved the execution of said instrument by defendant; (2) because it was not shown to be a file paper, but among his private papers, and had not been filed or published; (3) and because, if defendant did execute the last page, there is no proof that he executed the first page. We do not regard these objections as tenable. We think the execution of the document was sufficiently proved by witnesses, and that it was sworn to by appellant. That it was not filed or published would be no ground for its exclusion. It was evidently prepared to be filed in a proceeding for divorce, and it was sworn to by appellant, and, as such, was his declaration, and would afford the basis, if not in a judicial proceeding, of a charge of false swearing, at least. There is nothing before us to show that the first page was not executed, and, for aught we know, the two sheets were together.

Appellant objected to the introduction of a letter which purported to have been written by him on July 4, 1896, to his wife in Alabama. The execution of this letter was sufficiently proven. The fact that it was remote in point of time, having been written

*Rehearing denied March 4, 1903.

some six years before his last marriage, would not go to its admissibility.

We think it was abundantly shown by the evidence that appellant's first wife was living at the time of his second intermarriage. This was established not only by appellant's own confession, but by other witnesses and circumstances in the case. *Gorman v. State*, 23 Tex. 646; *Hull v. State*, 7 Tex. App. 593.

Appellant complains of some action of his attorney in the examination of Katie Faught, in propounding to her certain questions reflecting on her character, and an apology which he says was required to be rendered by said attorney, but this matter is not in such shape as to be revised.

No reversible error appearing in the record, the judgment is affirmed.

LIVELY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

INTOXICATING LIQUORS — LOCAL OPTION — ELECTION—ORDER—NOTICE—CERTIFICATE—EVIDENCE—RECORD ON APPEAL.

1. In a prosecution for violation of the local option law, a recital in the record that "the state offered in evidence the order of the commissioners' court ordering a local option election to be held" does not show that the order for the election was in accordance with the statute.

2. A statement, in the record of a trial for violating the local option law, that "the state read in evidence the order of the commissioners' court declaring the result of a local option election, and ordering the result to be published," does not show whether the election resulted in favor of or against local option.

3. A certificate of the county judge, in which he states that notice of the result of a local option election ordered to be published by the commissioners' court was published four times on certain specified days, which were one week apart, is not such a certificate as is required by law to put local option into effect.

4. In a criminal case the appellate court cannot look into the bill of exceptions in order to complete the statement of facts.

5. Testimony of a defendant on trial for violating the local option law that, "It looks like I sold out the stock of whisky I had on hand as the time was up for us to close as result of the election, after the time had expired," is not an admission that local option was legally in effect in the county.

Appeal from Montague county court; W. W. Cook, Judge.

F. R. Lively was convicted of violating the local option law, and appeals. Reversed.

James A. Graham, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

There is only one question that need be considered; that is, the sufficiency of the evi-

dence to sustain the conviction. The contention is that neither the order of the court authorizing the election nor the order of the court putting local option into effect is shown by the record. We find the following in regard to these orders: "The state offered in evidence to the jury the order of the commissioners' court ordering a local option election to be held in Justice Precincts Nos. 1, 2, 4, 5, 6, 7, and 8 in Montague county, Texas, on June 7, 1902, in which order the field notes are as follows," etc. After setting out the field notes, it is stated, "Said election was ordered held throughout said territory on June 7, 1902." Then follows this: "The state then read in evidence to the jury the order of the commissioners' court of Montague county, Texas, declaring the result of said election, and ordering the said result to be published in the Montague Democrat, a weekly paper published at Montague, Texas; and which order contained the field notes as set out above in ordering said election. The state then read in evidence to the jury certificate of W. W. Cook, county judge of Montague county, Texas, in which he states that said notice of the results was published in the Montague Democrat on June 21, June 28, July 5, and July 12, 1902." We do not think the mere statement, "local option election," is equivalent to a showing that the order for the election was in accordance with the statute on the subject. Nor does the evidence show how said election resulted—whether in favor of prohibition or against it. Moreover, the certificate of the county judge, which is required to put local option into effect, is not such as is authorized by law. These various orders are not otherwise shown in the statement of facts, and we are not authorized to look to the bills of exception in order to complete the statement of facts. The bills of exception set out some of these orders. The court, in its charge, treated local option as in effect in said territory; presumably on the theory that the necessary orders were introduced. But we do not find them in the statement of facts, and there is no agreement that local option was in effect in said territory. The statement of appellant in his cross-examination, to the effect, "It looks like I sold out the stock of whisky I had on hand as the time was up for us to close as result of the election, after the time had expired," is not an admission, as we take it, that local option was legally in effect in said county. Because the orders of the court putting local option into effect in said county are not shown in the statement of facts, the judgment must be reversed, and the cause remanded. See *Johnson v. State* (Tex. Cr. App.) 44 S. W. 834; *Tyrel v. State* (Tex. Cr. App.) 44 S. W. 159; *Morton v. State* (Tex. Cr. App.) 38 S. W. 1019.

The judgment is reversed and remanded.

HEAD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

FORGERY—INDICTMENT—INNUEENDO AVERMENTS—EXPLANATORY AVERMENTS—SUFFICIENCY.

1. An indictment for forgery in the utterance to M. of a written instrument of unintelligible character charged that the instrument was "intended to purport to be" an order by S. to B. to let accused have \$5 worth of merchandise, and charge it to S.'s account. It then alleged that accused represented that the instrument meant as follows: "Mr. B., please let H. [accused] have \$5 in merchandise for S. June 25, 1902 (meaning by the figures 192, 1902, and by the figure 5)." The indictment further charged that accused did then and there mean the instrument to convey to M., a partner of B., that S. had executed it; and that accused knew the same to be false and forged, and passed it as true. Held, that the indictment was defective for want of sufficient innuendo averments disclosing the meaning of the instrument.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Jim Head was convicted of forgery, and he appeals. Reversed.

Nugent & Pannill, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of passing as true a forged instrument in writing, and his punishment assessed at two years' confinement in the penitentiary.

The indictment charges that appellant passed as true to one C. H. McComick, an instrument of writing, to the tenor following:

Mine No.	Check No.
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11	11
12	12
13	13
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86	86
87	87
88	88
89	89
90	90
91	91
92	92
93	93
94	94
95	95
96	96
97	97
98	98
99	99
100	100

—And then charges that said instrument was intended to purport to be an order by one M. F. Stapp to one Jess Bowen to let the said Jim Head have \$5 worth of merchandise,

and charge the same to the account of him, the said M. F. Stapp; and then charges that appellant represented the instrument to mean, as follows, to wit: "Mr. Jess Bowen please let Jim Head have five dollars in merchandise for M. F. Stapp, June the 25th 1902 (meaning by the figures 192, 1902; and by the figure 5)." The indictment further charges that the allegation that the said Jess Bowen was then and there a member of the mercantile firm of McComick & Bowen, who were partners in the mercantile business at Topas, a post office in Erath county, and said firm composed of C. H. McComick and Jess Bowen; and the said Jim Head did then and there mean the said instrument to convey to the said C. H. McComick that the said M. F. Stapp had signed and executed the same; and that the said Jim Head knew the same to be false and forged, and passed the same as true. Appellant made a motion to quash this indictment on various grounds; Among others, that the instrument is not plain and intelligible on its face; that the words written are unintelligible, and the instrument itself does not import an obligation, and was and is not the subject of forgery; that, if it is the subject of forgery, to have made the words intelligible there should have been innuendo averments, giving the meaning of the same; and that the indictment failed to do this. Furthermore, that, before the instrument could be held the subject of forgery, apt extrinsic or explanatory averments should have been used in the indictment so as to show that said instrument imported an obligation, and was calculated to deceive some one. In Cagle v. State, 39 Tex. Cr. R. 109, 44 S. W. 1007, the difference between innuendo and explanatory averments was discussed. It was there held, following the authorities: "That an innuendo averment does not enlarge or point out the effect of language beyond its natural and common meaning in its usual acceptance, it being intended merely to explain or make clear the use of terms in the paper itself; while extrinsic averments are such additional allegations as show a writing, otherwise incomplete, to be such as, in connection with other allegations, is an instrument which will create, increase, diminish, discharge, or defeat a pecuniary obligation." The instrument above set out is difficult to be made out, and is so unintelligible in itself as, without the aid of innuendo averments, to be not susceptible of conveying to the ordinary mind that it is a pecuniary obligation. Unless one is informed as to what is meant by the use of the words in the instrument, it is difficult, if not impossible, to decipher it. We do not understand that any innuendo averments are used in the indictment except the figures "192" meaning "1902," and by the "5" figure "5." The allegation with reference to the other parts of the instrument was with reference to appellant's representation as to what they were. We hold that

as to the instrument as presented, before it could be the subject of forgery, it was necessary to have made the meaning of almost every word thereof plain and intelligible by an innuendo; for without this it is impossible to understand the instrument. We know of no case in which an innuendo was demanded more than in this. We are not holding that the instrument, if it had been made plain by innuendo averments, was not the subject of forgery. We are of opinion that it is. See *Davis v. State* (Tex. Cr. App.) 60 S. W. 73, and authorities there referred to. And see the subject discussed in *Anderson v. State*, 20 Tex. App. 596. In that case the instrument was held not the subject of forgery, because it did not appear to have been signed by any person. Martin Basinger, whose name was alleged to have been forged, appeared in the body of the instrument, and there was no explanatory averment in the indictment. But we think this indictment is different from that, in that the name of the person here alleged to have been forged appeared at the bottom of the instrument. The explanatory or extrinsic averments with reference to C. H. McCormick's connection with the firm of McCormick & Bowen, who were engaged in merchandising, etc., we believe sufficiently set out the extrinsic facts. But for the defects in the indictment, not containing proper innuendo averments, it should have been quashed. In the view we have taken, it is not necessary to discuss other assignments, including the misconduct of the jury, which of itself, as shown by the bill of exceptions, would be sufficient to reverse the case.

The judgment is reversed, and the prosecution ordered dismissed.

SIRMONS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE.

1. On a trial for assault with intent to commit rape, evidence held insufficient to support a conviction.

Appeal from district court, Erath county; W. J. Oxford, Judge.

W. T. Sirmons was convicted for an assault with intent to commit rape, and appeals. Reversed.

Ell Oxford, W. J. Thompson, and C. Nugent, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to commit rape, and his punishment assessed at confinement in the penitentiary for a period of two years and one day.

Minnie Gordon, the prosecutrix, testified, substantially: That she worked for defend-

ant—washing dishes, sweeping floors, making up beds, etc., about the hotel—but did not wait on the table. That she slept in the same room with appellant and his wife, but in a separate bed. "One morning, about four or half past four o'clock, defendant came to my bed. When I waked up, he was standing with one hand on my right shoulder and one on my waist [indicating the place]. Both of his hands were on top of the cover. He stooped down to kiss me, and I slapped him in the mouth. He did not say anything. He did not put his hands under the cover. I told him if he did not go away I would tell papa. He went away. I did not look where he went. He had on his night clothes. He did not speak. The next morning he came to me at the ice box, and asked me what I hallooed for." This occurred on Wednesday night—and that she left defendant's house Friday night, when her father came after her. On witness' attention being called to what defendant said at her bed, she stated that "he asked me if I was going to holler." Prosecutrix was 14 years of age. Various witnesses testified to lascivious and filthy remarks about prosecutrix made by appellant, and as to what he had done and intended doing with her. We do not think the testimony of prosecutrix supports the finding of the jury. It fails to show any intent on the part of appellant to assault prosecutrix, with intent to commit rape upon her.

Because the evidence is not sufficient, the judgment is reversed, and the cause remanded.

CUMMINGS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

BANKING GAME—CRAPS.

1. A game called "craps," played by one man throwing dice on a table and betting on certain numbers, while another party bets against him, without the intervention of the owner of the table, who acted as a mere stakeholder, and took from the stakes 10 cents for every two passes as a commission, was not a banking game, for the keeping of which the owner of the table was liable to prosecution.

Appeal from Tarrant county court; M. B. Harris, Judge.

Cal Cummings was convicted of exhibiting a gaming table and bank, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of exhibiting, for the purpose of gaming, a certain gaming table and bank; and his punishment assessed at a fine of \$25, and 30 days' confinement in the county jail.

The evidence shows that the crap game was exhibited under the following circumstances, as shown by the witness Davis: "I

¶ 1. See *Gaming*, vol. 24, Cent. Dig. § 194.

bet at the crap game with the defendant. He was standing behind the table, which was about 4½x6 feet, with raised edges, to keep the dice from falling off on the floor, and with a hollowed out place across one corner, where defendant stood. I bet several times on this game with any one who desired to bet around the table. Defendant did not fade every man who desired to bet, nor did he put up his money against each and every better. He took his chances with the balance of the men who were throwing dice, and took his turn as the dice came around the table if he so desired. If a man wanted to bet, he would throw the money on the table in front of defendant, and, if another wanted to bet, he would cover the money so put in front of defendant, and the man throwing the dice would bet on 7 or 11 or his point to win. If he threw 7 or 11 on the first throw, he would win, but, if he threw 8 on the first throw, 8 was his point; but if he threw 7 or 11 before again throwing 8, his point, he would lose. Defendant 'picked the passes' that night; that is, he would get ten cents for every two passes." On cross-examination he states: "I know defendant did not bet against every man who wanted to bet on this night, but he would take the money that they wanted to bet and hold it until another man who desired to fade the first better put up his money, and he would pay the whole amount of said money to the man who won; taking out of the money, for his services, ten cents for every two passes." This evidence does not constitute a banking game. The essential element of a banking game is that it is one against the many, and the banker accepts all bets. This evidence does not show this character of game, but belongs to that class of crap games which is discussed in Chappell v. State, 27 Tex. App. 310, 11 S. W. 411.

Under the authority of Chappell's Case, the judgment is reversed, and the cause remanded.

CAMPBELL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

BANKING GAME—CRAPS.

1. An ordinary game of craps, at which the parties who were in attendance played against each other, and where the owner of the game or table did not bet against all comers, was not a banking game or table, for the keeping of which the owner was liable to prosecution.

Appeal from Tarrant county court; M. B. Harris, Judge.

George Campbell was convicted of exhibiting a gaming table and bank, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of exhibiting a gaming table and bank, and his punishment assessed at a fine of \$100 and 90 days' confinement in the county jail.

The only question that we deem necessary to consider is, does the testimony support the finding of the jury? We have examined the record carefully, and, in our opinion, it does not. A gaming table or bank, and the distinction between it and gaming generally, was defined by Judge Roberts in Stearnes v. State, 21 Tex. 692, and that decision has since been followed. Bell v. State, 32 Tex. Cr. R. 187, 22 S. W. 687. In Chappell v. State, 27 Tex. App. 310, 11 S. W. 411, the ordinary game of craps was described, and the distinction which had theretofore been declared in Stearnes v. State was adopted. The facts of this case show that it was not a banking game, where one person kept or exhibited the game, and bet against all comers, but that it was a game at which the parties who were in attendance played against each other; that is, it was an ordinary game of craps. See the companion case, No. 2,689, Cal Cummings v. State (just decided) 72 S. W. 395.

The judgment is reversed and the cause remanded.

TAYLOR v. STATE.

(Court of Criminal Appeals of Texas. Jan. 28, 1903.)

MURDER—EVIDENCE OF THREAT—JURORS—HARMLESS ERROR—VARIANCE.

1. The examination is not sufficiently extended to show that there is established in the juror's mind such an opinion as to disqualify him; he answering that he had heard of the case, and, from what he had heard, had formed an opinion as to guilt or innocence; that it would require evidence to remove the opinion, but that he could go on the jury, and try the case fairly, according to the evidence and charge.

2. The overruling of a challenge for cause is not ground for reversal; defendant's peremptory challenges not being exhausted, and it not appearing that he was compelled to take an unfair or partial juror.

3. Evidence that, four days before the murder, defendant said to a girl, of the attention of deceased to whom he was jealous, "I am going to do some devilment, and get my name in the paper," is admissible, not only because of its malignant character, showing that defendant was bent on mischief, but because it is shown to have been directed towards deceased, by defendant's statement at the same time that deceased "thinks he can run it over me, but I am going to kill him and leave town."

4. There is no variance between an indictment charging the killing with a gun, and evidence that it was with a pistol.

Appeal from district court, Dallas county; Chas. F. Clint, Judge.

George Taylor was convicted of murder, and appeals. Affirmed.

O. F. Wencker, J. J. Fagan, and A. S. Bassett, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

¶ 1. See Gaming, vol. 24, Cent. Dig. § 196.

¶ 4. See Homicide, vol. 28, Cent. Dig. § 254.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

On the impanelment of the jury, appellant excepted to the action of the court in overruling his objection to G. H. Eagan, who had been summoned on the special venire. This juror answered that he had heard of the case, and from what he had heard he had formed an opinion as to the guilt or innocence of the defendant; that it would require evidence to remove this opinion, but that he could go into the jury box, and try the case fairly, according to the evidence and charge of the court. This juror was challenged by appellant on the ground that he had formed an opinion as to the guilt or innocence of appellant, such as would require evidence to remove it. The court overruled the challenge for cause, whereupon appellant peremptorily challenged the juror, and he was set aside. In the first place, the examination does not appear to have been sufficiently extended to show that there was established in the juror's mind such an opinion as would disqualify him, nor that the juror had read the evidence in the case. In the second place, appellant's challenges were not exhausted, nor was it shown that he was compelled to take an unfair or partial juror. *Nalley v. State*, 28 Tex. App. 387, 13 S. W. 670; *Blackwell v. State*, 29 Tex. App. 194, 15 S. W. 597; *White v. State*, 30 Tex. App. 652, 18 S. W. 462.

By bills of exception Nos. 2, 7, and 6, appellant questions the action of the court in admitting the testimony of witnesses Mary Taylor and Della Anderson, to the effect that, when George Taylor came to the witness Della Anderson's house on the night of Thursday before the killing of Ed White on Monday night, he called Mary Taylor out on the gallery, and said, "I am going to do some devilment, and get my name in the papers." The objection to this testimony was that the declaration or threat of appellant was too general, and did not show it was directed toward, or had any reference to, deceased, Abe White, and did not import any personal violence toward deceased or any one, and that the state did not connect the statement with deceased or show that defendant meant thereby that he intended to do any personal violence to deceased. It has been held in a number of cases that where the threats made by defendant are not directed toward deceased by name, or are otherwise shown to be so directed against him, such threats are not admissible. *Godwin v. State*, 38 Tex. Cr. R. 406, 43 S. W. 336; *Holley v. State*, 39 Tex. Cr. R. 301, 46 S. W. 39; *Strange v. State*, 38 Tex. Cr. R. 280, 42 S. W. 551. Although the name of deceased be not mentioned, yet, if it can be reasonably gathered that deceased was meant or alluded to, the evidence of such threat will be admissible. Moreover, if the

threats, though general, were of such malignant character as to embrace deceased, and the circumstances of the killing were such as would indicate that deceased must have been referred to, the testimony will be admissible. See *Sparks v. Com.*, 89 Ky. 644, 20 S. W. 167; *State v. King* (Mont.) 24 Pac. 265; *Brooks v. Com.* (Ky.) 37 S. W. 1043. In this case the threat showed a malignant disposition, and suggested that appellant was bent on mischief. Moreover, it is shown that appellant was solicitous in regard to the attentions of deceased to Mary Taylor, his kept woman, and evidently the killing occurred because of this. Judged by this record, appellant assassinated deceased because of his intimacy with Mary Taylor. The killing occurred in her room, and the party who did it was familiar with the surroundings, and must have known deceased would be there that night, and shot him from the outside, through a window. In addition to this, on that same night appellant requested Mellin Taylor, another witness, to raise the window curtain at the house where the homicide occurred, in order that he might kill deceased, Abe White. In the explanation of the judge to one of the bills, we are referred to the evidence contained in the record; and we are authorized to look to it, in order to ascertain the competency of this evidence. Besides, the bill itself does not assume to disclose all the circumstances under which this evidence was admitted. We hold that the evidence objected to was admissible, because it was of that malignant character which embraced deceased, and so was directed towards him. We further hold that the record shows the threat was aimed at deceased, and no one else.

Appellant objected to testimony offered by the state showing that tracks were found near the window of the house through which deceased was shot and killed, leading from there across a bridge to a tub; that by the tub was the imprint of the left hand of a man, spread out, and also the imprint of the fist of the right hand of a man, and immediately in front of it a small hole in the ground about one-half or three-fourths of an inch in diameter; and that subsequently there was found at defendant's room a 38-caliber pistol, with black, sandy dirt in the muzzle, which was identified as appellant's pistol; and that the soil by the tub was of a black, sandy character. This testimony was objected to on the ground that the indictment charged the homicide to have been committed with a gun, and this proof tended to show that it was done with a pistol; that a gun and pistol are not the same thing, and there was a variance. It is the received doctrine that in homicide cases, where the indictment alleges the killing was done with a gun, proof can be made under such allegation that the killing was done with any firearm. Although a gun is alleged a pistol may be proved, and vice

versa. *Brown v. State*, 65 S. W. 529, 3 Tex. Ct. Rep. 517, and authorities there cited. So there was no variance. This also disposes of the evidence introduced by the state showing that at Dallas a pistol was called a "gun." The evidence was not required, but it was immaterial.

The charge requested by appellant, defining "express malice," was not necessary to be given, as the court fully covered the definition of "express malice" in the charge given. The charge on alibi, as given by the court, was all that was required, and the special charge on this subject was not called for.

There being no error in the record, the judgment is affirmed.

On Rehearing.

(March 4, 1903.)

This case was affirmed at a former day of this term, and now comes before us on motion for rehearing. Appellant strenuously insists that in the original opinion the court erred in holding that the remark of appellant made to Mary Taylor, at her house, on Thursday night preceding the homicide on Monday night, to the effect, "I am going to do some devilment, and get my name in the paper," was admissible; his contention being that the remark was of a general character, was not a threat against deceased, and did not embrace him. This remark was testified to both by Mary Taylor and Della Anderson. We discussed this question at length in the original opinion, as if the bill of exceptions were full, and showed that the remark in question was isolated, and not connected with any other remark so as to have a bearing on, and point to, deceased. The grounds of objection urged in the bill are not equivalent to a certificate that the fact existed, but merely a certificate of the judge that those grounds of objection were urged. The bill of exceptions should have been so full as to have shown all the testimony bearing on the question, or the judge should have certified that the evidence in question was not otherwise connected with, or pointed to, deceased. However, the judge in certifying the bills—especially the sixth—refers to the statement of facts. While in the original opinion we refer to the statements in response to the judge's certificate, we do not recite all the facts that tended to show deceased, and no other person, was meant by the remark of appellant made on Thursday night. In addition to what was said in the original opinion, we refer to the testimony of Sarah Taylor, who states that on that same Thursday night, George Taylor said, "Abe thinks he can run it over me, but I am going to kill him and leave town." Now, taking this remark in connection with what was said in the original opinion, there can be no question that appellant, when he made the remark to the effect that he was

going to do some devilment, and get his name in the papers, had reference to deceased.

The other ground urged by appellant in his motion for new trial is to the effect that the court failed to give his special requested instruction on the burden of proof. There was no occasion to give a charge on the burden of proof. The court gave a full charge on circumstantial evidence, and a charge on presumption of innocence and reasonable doubt. We think this was sufficient.

The motion for rehearing is overruled.

KNOWLES v. STATE

(Court of Criminal Appeals of Texas. Dec. 11, 1902.)

RAPE—CONTINUANCE—VENUE—EVIDENCE OF AGE—HEARSAY—EXCLUSION OF ANSWER—INSTRUCTIONS—INTERCOURSE WITH OTHERS.

1. Refusal of a second continuance for cumulative testimony is not error.

2. To show venue of a prosecution for rape, prosecutrix may testify that she showed her father the place, and he may testify that it is in a certain county.

3. There is no error in admission of the answer of prosecutrix, in a statutory rape case, to defendant's inquiry as to how she knew her age, that she knew it from the family record and what her mother told her.

4. Defendant in a statutory rape case cannot prove that prosecutrix told defendant's brother that she was over the age of consent, and that the brother told this to him. This is hearsay.

5. Testimony of prosecutrix's father that on the night of the alleged rape he searched for her in town, and could not find her, is admissible to corroborate her testimony, she locating the place of the crime outside of the town.

6. Exclusion of witness' answer cannot be held error, it not being shown what it would have been.

7. A requested charge that, while prosecutrix in a rape case need not be corroborated, still the jury should carefully consider her testimony, is on the weight of evidence.

On Rehearing.

8. On a prosecution for statutory rape, the question of consent vel non not being relied on by defendant, prosecutrix having testified that she had no previous intercourse with any one but defendant, and that he was the father of her child, defendant may show that she had had intercourse with others at a time when they could have been the father of the child.

Brooks, J., dissenting.

Appeal from district court, Bosque county; W. Poindexter, Judge.

Ab Knowles was convicted of rape, and appeals. Reversed.

Lockett & Cureton and Wm. Knight, for appellant. H. S. Dillard, Co. Atty., W. L. Alexander, Asst. Co. Atty., and Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape upon a female under the age of 15 years, and given 5 years in the State Penitentiary.

Bill No. 1 complains of the action of the

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1223.

court overruling the application for continuance. This was the second application, and the explanation of the trial judge to the bill and an inspection of the evidence shows that the testimony was purely cumulative. There was no error in refusing the continuance.

The second bill complains of the court permitting the state to show by prosecutrix that some four or five months after the alleged crime she took her father to the pasture in which the crime was committed, and pointed out the place. The seventh bill complains that the court erred in permitting the father to testify to this fact, and to further state that said place was in Bosque county. The trial court states that this evidence was admitted for the purpose of locating the place by the prosecutrix, in order that other witnesses might testify that particular place was in Bosque county. The evidence was so limited in the charge. The usual manner of locating the place is for the witness to describe the place if he does not know in what county it is situated, and then for witnesses to be placed on the stand and testify that said place is or is not in the particular county. However, we see no objection to proving the matter as was done in this case.

Appellant also complains that the court erred in permitting the prosecutrix to testify that she knew her age from an inspection of the family Bible, which stated it, and from what her mother taught her. The bill shows that appellant asked the witness how she knew her age, to which she replied, "From the family record." She was then asked if she knew it from the family record only, and she replied that she knew it from the record and from what her mother taught her. The court, in his explanation, states that such record was put in evidence, and spoke for itself. We do not think there was any error shown by said bill. *Tull v. State* (Tex. Cr. App.) 55 S. W. 61.

Bills of exception Nos. 4, 9, and 10 complain that the court erred in not permitting appellant to ask prosecutrix, for the purpose of laying a predicate to impeach her, as to whether or not she had had previous carnal intercourse with other parties than defendant, and to prove by said other parties that they had had carnal intercourse with prosecutrix, and that her general reputation for chastity was bad. There was no error in this, since the question as to whether or not prosecutrix consented to the rape is not a matter to be inquired into, and it becomes immaterial and irrelevant whether or not prosecutrix had had carnal intercourse with other parties, she being under the age of consent. *Favors v. State*, 20 Tex. App. 155; *Wilson v. State*, 17 Tex. App. 525. In *Thomas v. State* (decided at the present term) 72 S. W. 178, the motion for new trial complained that the court erred in not giving special instructions requested to the effect that the reputation and condition in life of prosecutrix, as well as defendant, should be

viewed by the jury in the light of mitigating the punishment. We held that such a charge would be upon the weight of the evidence, and not the law. *Lawson v. State*, 17 Tex. App. 302; *Kennon v. State* (Tex. Cr. App.) 42 S. W. 378; *Steinke v. State*, 33 Tex. Cr. R. 66, 24 S. W. 900, 25 S. W. 287.

In bill No. 5 appellant complains that the court erred in refusing to permit him to prove by appellant's brother that said brother had a conversation with prosecutrix, in which she told him that she was over the age of consent, and that he communicated this fact to appellant. In his explanation to the bill the court states that the evidence going to show that prosecutrix had declared she was over the age of consent was admitted, but he declined to admit evidence to the effect that the brother of appellant communicated this fact to appellant. This testimony is hearsay, and not admissible.

Upon the trial the court permitted the state to show by the father of the prosecutrix that on the night the crime was alleged to have been committed he searched for his daughter in the town of Valley Mills, and could not find her. The court, in his explanation to the bill, states that this evidence was material to show that the girl was out with defendant during the night, and tended to show that defendant did not go to Valley Mills that night, as he stated to his brother that night he was going to do. This circumstance would be pertinent evidence going to corroborate the testimony of prosecutrix, and, however remote or weak it might appear, would only go to the weight, and not to the admissibility, of the testimony.

The eighth bill complains that the court should have permitted appellant to show by his brother that the sister of prosecutrix stated to appellant's brother, in the presence of prosecutrix, what the age of prosecutrix was. An examination of the bill shows that the answer of the witness would have been that prosecutrix's sister said that prosecutrix was — years old. The court states that no predicate was laid for the introduction of this testimony to impeach the prosecutrix. For aught the bill shows, the answer might have been against appellant's interests, since it does not state what the age of prosecutrix was, merely saying that she was — years old.

Appellant also complains because the court did not charge the jury, as requested, that, while prosecutrix in a rape case need not be corroborated, still the jury should be instructed to carefully consider her evidence. This charge is upon the weight of the evidence, and the failure to give the same was not error.

There is a great deal of testimony in the record pro and con upon the question of rape. The jury has settled the controversy against appellant, and the evidence is sufficient to support their finding.

The judgment is accordingly affirmed.

On Motion for Rehearing.

(Jan. 18, 1903.)

This case was affirmed at the Tyler term, 1902, and now comes before us on motion for rehearing. Appellant insists "that the court has misconceived the point raised by his bills of exception numbers four, nine, and ten, because in the latter part of that paragraph of the opinion discussing these bills the court used the following language: 'There was no error in this, since the question as to whether or not prosecutrix consented to the rape is not a matter to be inquired into.' Appellant insists that the question of consent is not raised in his brief at all, but that the point raised is that prosecuting witness, Ethel Stoval, having testified that appellant was the father of her child, and produced the child in court to corroborate her testimony, and also having testified that she never had sexual intercourse with any other person, thereupon appellant proposed to contradict her testimony by showing that it was not true, and that she had intercourse with various parties, named in said bills of exception, at a time not so remote but what these parties could have been the father of this child." The writer is still of opinion that this evidence is inadmissible. Mr. Greenleaf, in his work on Evidence, uses this language: "The character of prosecutrix for chastity may be impeached, but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself. Nor is such evidence of other instances admissible." This proposition is supported by the great weight of American authorities (see Amer. & Eng. Ency. of Law, vol. 5 [2d Ed.] p. 878; Rice on Ev. vol. 3, p. 825; Wharton's Cr. Law, sec. 568; Bishop New Cr. Proc. vol. 2, secs. 965, 966; Smith v. State, 80 Am. Dec. 355, and notes; Rice v. State [Fla.] 17 South. 286, 48 Am. St. Rep. 247; State v. Campbell, 20 Nev. 125, 17 Pac. 620), and has been so held in this state as early as Pefferling's Case, 40 Tex. 486, and approved in Dorsey v. State, 1 Tex. App. 35; Jenkins v. State, Id. 354; Mayo v. State, 7 Tex. App. 349; Lawson v. State, 17 Tex. App. 302; Wilson v. State, Id. 533. Judge Moore, delivering the opinion in the Pefferling Case, supra, used this language: "The inquiry is for the purpose of proving the character, and it would operate a surprise if any inquiry as to particular instances of immorality or intercourse with particular persons was permitted to establish the character of the witness who, as has been said, cannot be supposed to come prepared to defend her character except against a general attack;" citing a great number of authorities. But it may be insisted that this testimony is admissible to contradict prosecutrix. If so, it

is on an immaterial issue, because she is under the age of consent, and the general reputation of prosecutrix has nothing whatever to do with the question in this case, as it is a violation of law to have carnal knowledge of her person with or without her consent. Lawson v. State, 17 Tex. App. 292; Steinke v. State, 33 Tex. Cr. R. 66, 24 S. W. 909, 25 S. W. 287; Favours v. State, 20 Tex. App. 155; People v. Johnson, 106 Cal. 294, 39 Pac. 623; Underhill on Cr. Ev. sec. 418; McClain Cr. Ev. sec. 460; State v. Duffey, 128 Mo. 549, 31 S. W. 98; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360. If specific acts of intercourse are not admissible where appellant is on trial for rape upon a matured woman, but only general reputation or specific acts of intercourse with defendant, there can be no good reason why the same rule would not apply to prosecutrix under the age of consent. All the authorities hold that the general reputation of prosecutrix, or specific acts of intercourse with the defendant, are only admissible on the question of consent; and the authorities hold that it is the duty of the court to limit it to this purpose. Then, clearly, it would be inadmissible for any other purpose.

But appellant insists that, the state having proven by prosecutrix that appellant was the father of her child, he should then be permitted to contradict her by proving previous acts of intercourse with other parties who had opportunities of becoming the father of the child; and that their testimony would have shown that they did have such intercourse at a time that would make it appear they could have been the father of the child. Concede it. It is immaterial in this case whether appellant was the father of the child. If he had carnal intercourse with prosecutrix, he is guilty of rape, whether with or without her consent. The fact that he is the father of the child makes him none the less or more guilty. Defendant could have objected to the testimony when the state proposed to prove that he was the father of the child, as it was wholly immaterial whether he was the father of the child or not. The following authorities hold that, where the question is asked prosecutrix whether or not she has had intercourse with other parties than the accused, her answer is conclusive, upon the theory that it is an inquiry into an immaterial matter, and cannot be pursued further. Reg. v. Holmes, 12 Cox, C. C. 137; s. c. L. R. I. C. C. 334; Reg. v. Cockcroft, 11 Cox, C. C. 410; People v. Jackson, 3 Parker, Cr. R. 391. However, as appellant insists, the case of Bice v. State, 37 Tex. Cr. R. 43, 38 S. W. 803, is exactly in point, supporting his contention. In that case appellant offered to prove by the witness F. T. Kinman that on two occasions about the 1st of September he saw prosecutrix in the act of intercourse with one Jim Kinman. The court there held that the testimony should have been admitted to refute the facts

and circumstances in evidence tending to establish pregnancy of the said Minnie Cannon on account of her alleged intercourse with said defendant. The writer does not agree with this decision, but the majority of the court hold that the same is correct, and under the authority of said case the motion for rehearing is granted, and, on account of the failure of the court to permit the introduction of said testimony, the judgment is reversed, and the cause remanded.

DAVIDSON, P. J. The question of consent vel non is not the issue relied on by appellant. Therefore the authorities collated by Judge BROOKS are not applicable. The question here is the same as in Bice's Case, 37 Tex. Cr. R. 43, 38 S. W. 803, which announces the correct rule on the question involved, and is decisive of this rehearing favorably to appellant.

HENDERSON, J., concura.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 18, 1908.)

INTOXICATING LIQUORS—LOCAL OPTION LAW —VIOLATION—ELECTION BETWEEN OFFENSES—EVIDENCE.

1. Under the direct provisions of Pen. Code, art. 407, the fact that a person purchases intoxicating liquor from one who sells it in violation of the law does not constitute such a person an accomplice.

2. In a prosecution for violation of the local option law, evidence that witness was acquainted with a person who had been employed to secure evidence against violators of the local option law, and that on two occasions this person turned over to witness some whisky which the former had purchased, was improperly admitted.

3. In a prosecution for violating the local option law, where the prosecuting witness had been permitted to testify that he had purchased liquor from defendant on several different dates prior to the information, the state could have been required to elect upon which one of the transactions it would proceed; but, in the absence of a request to require the state to elect, it was not error to admit evidence of all the transactions.

4. In a prosecution for violating the local option law, evidence of other sales than those alleged in the information, and to other parties than the prosecuting witness, is not admissible.

Appeal from Eastland county court; J. R. Stubblefield, Judge.

John Walker was convicted of violating the local option law, and appeals. Reversed.

J. J. Butts, D. G. Hunt, and Earl Conner, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 25 days' confinement in the county jail.

The attack made on the information is

without merit. This information is in the usual form, and such as has been repeatedly held sufficient.

The record is incumbered with many questions with reference to the attitude of witnesses Alexander and Hightower—as to whether or not they were accomplices. Alexander was the purchaser, and Hightower was president of an anti-saloon league, who employed Alexander to ferret out violations of the local option law; and it may be conceded that Alexander induced appellant to sell him the whisky for the purpose of instituting criminal proceedings against him. There were various charges given and requested in regard to accomplices that are not altogether intelligible. It is a sufficient answer to all these questions to say that, under the facts of this case, neither of the witnesses is an accomplice. Article 407, Pen. Code, provides, “* * * The fact that a person purchases intoxicating liquor from any one who sells it in violation of the provisions of this chapter, shall not constitute such person an accomplice.” The question of these witnesses being accomplices, under the facts, is not an issue. They are not accomplices under the statute.

The witness Hightower was permitted to testify that he was slightly acquainted with Alexander, and had had dealings with him; that Alexander turned over to Hightower some whisky the latter part of January or the first of February, 1902; that in the same month he turned over to witness a bottle, the contents of which the witness was ignorant, but it smelled like whisky. This testimony should have been rejected. It was a matter occurring between Alexander and Hightower, which was in no way binding upon appellant, and could not be used against him.

Alexander was permitted to testify that he bought on January 10 and 16 and February 7 and 9, 1902, other intoxicating liquors from defendant. The complaint upon which this prosecution was based was filed February 17, 1902. The affidavit which was made by Alexander contained but one count, and he testified to the facts constituting the offense alleged. So all of the acts complained of occurred between Alexander and appellant. It will be observed that all these matters occurred prior to the filing of the affidavit. This, in law, required the state to elect upon which one of the transactions it would seek the conviction. There was no request, however, made to require the state to elect. When an election is to be had, the rule is that the prosecution, and not the defendant, is authorized to select the transaction upon which the conviction will be sought. Defendant, when authorized, may demand that the state elect, but this cannot be done by objection to testimony. For this would give the accused the right to select the transaction upon which the state should prosecute. Had a motion been made

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1087. 72 S.W.—28

at the proper time by appellant, requiring the state to elect, it would have been error to refuse to grant it. See *Williams v. State*, 70 S. W. 957, 6 Tex. Ct. Rep. 265; *Larned v. State*, 41 Tex. Cr. R. 509, 55 S. W. 826; *Batchelor v. State*, 41 Tex. Cr. R. 501, 55 S. W. 491; *Fisher v. State*, 33 Tex. 792; *Lunn v. State*, 44 Tex. 85; *Bradshaw v. State*, 32 Tex. Cr. R. 381, 23 S. W. 892. This rule applies to cases of this character; that is, where a conviction could be had upon either transaction testified about, under the allegations in the indictment. The conviction in this case could have been predicated upon any one of the transactions testified by Alexander, because they all occurred between himself and appellant prior to the information, and within the period of limitation. However, this rule would not apply if the transactions introduced, or the sales testified about, occurred, between defendant and another party than Alexander, for in that case they would not be introducible if the transaction in hand showed clearly and distinctly a sale. See *Johnson v. State* (Tex. Cr. App.) 62 S. W. 755, in which case the transaction occurred between accused and different parties. Wherever facts testified in regard to the case on trial are plain and certain, extraneous matter cannot be introduced under the rule in regard to system, developing the *res gestæ*, or proving intent. *Johnson's Case*, supra; *Long v. State*, 39 Tex. Cr. R. 537, 46 S. W. 821; *Nixon v. State*, 31 Tex. Cr. R. 205, 20 S. W. 364. In this character of cases the objection to the testimony should be sustained, unless, under the peculiar facts of the case on trial, it is brought within the rule laid down in the *Long* and *Nixon* Cases, supra. Upon another trial the state should be required to elect upon which one of the transactions it will seek a conviction.

The judgment is reversed, and the cause remanded.

F. GROOS & CO. v. FIRST NAT. BANK OF IOWA PARK.*

(Court of Civil Appeals of Texas. Jan. 24, 1903.)

CHATTEL MORTGAGE—DEBT SECURED—FUTURE ADVANCES—POSSESSION BY MORTGAGEE—CONDITIONS.

1. Where a chattel mortgage recites as its consideration a debt of a stated sum, "more or less," it is competent to show a contemporaneous oral agreement that it should also secure future advances.

2. Where a chattel mortgage was given to secure a present debt, a subsequent oral agreement that it should secure future advances was void as to creditors of the mortgagor.

3. Where a chattel mortgage authorized the mortgagee, in case of default, to take charge of the property, and sell the same at public outcry after notice, the mortgagee, by allowing the mortgagor to remain in possession and sell at

private sale, and account for the proceeds, waived its right to take possession and sell as provided in the mortgage.

Appeal from Wichita county court; W. P. Skeen, Judge.

Action by the First National Bank of Iowa Park against F. Groos & Co. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Montgomery & Hughes, for appellant. Mathis & Barwise, for appellee.

STEPHENS, J. August 26, 1901, J. A. Cox gave appellee bank a chattel mortgage on "7,000 or more bushels of No. 2 soft wheat, while contained in my [Cox's] granary in Iowa Park, and in W. O. Anderson's elevator at Vernon, Texas," to secure an indebtedness, as therein recited, "of \$5,500, more or less, as evidenced by my [Cox's] open account due said bank, and due on demand, and payable to the order of the First National Bank." The defeasance clause was as follows: "Now, if I pay or cause to be paid said indebtedness at or before its maturity, then this obligation is to become null and void. But in case said note is not paid at its maturity, then the said First National Bank is hereby fully authorized and empowered to take charge of the property hereinbefore described, and sell the same at public outcry for cash at Iowa Park, in said county and state, after giving notice of the time and place and terms of said sale by posting notice of the sale in three public places in said county." November 2, 1901, and after the mortgage had been duly registered, appellants caused execution in their favor against J. A. Cox to be levied on 171 bushels of the wheat in Cox's granary at Iowa Park. Appellee, as mortgage creditor of Cox, claiming to have been in possession of the wheat at the date of the levy, brought this action for damages, and recovered judgment against appellants for both actual and vindictive damages, from which this appeal is prosecuted.

The first and most important question raised by the assignments of error is whether it was competent for appellee to prove by Cox that there was an "agreement between him and the bank that the mortgage introduced in evidence should cover any future amounts he might become indebted to the bank in buying wheat during the season of 1901," over the objection that appellee could not thus alter the terms of the mortgage by parol to the prejudice of appellants, who had caused levy to be made in ignorance of the parol stipulation, especially as appellee had not pleaded as the foundation of its right a mortgage to secure future indebtedness, but only one to secure a debt owing at the date of the mortgage. It is not very clear from the statement of facts whether this parol agreement was contemporaneous with or subsequent to the making of the mortgage, but it seems to be treated both in the bill of ex

*Rehearing denied February 23, 1903.

¶ 1. See Evidence, vol. 20, Cent. Dig. § 1921.

ceptions and in appellants' brief as contemporaneous, and we will so treat it. The proposition seems to be well sustained by the authorities that, where a mortgage "recites an existing debt as its consideration, it is no violation of the law of evidence to receive proof that the actual consideration was advances to be afterwards made." *Huckaba v. Abbott* (Ala.) 6 South, 48; *Moses v. Hatfield* (S. C.) 3 S. E. 538; *McAteer v. McAteer* (S. C.) 9 S. E. 966; *Harrington v. Samples* (Minn.) 30 N. W. 671; *Dicken v. Morgan* (Iowa) 7 N. W. 149. This is but an application to mortgages of the more comprehensive and well-established rule that the real consideration of a written instrument may be shown by parol when the consideration as recited therein is not itself a contract. The mortgage in question merely recites as its consideration an indebtedness of \$5,500, more or less, as evidenced by open account, and hence comes within the rule. The allegations of the petition were also quite general, and were, perhaps, broad enough to admit the proof. *Collins v. Carlile*, 13 Ill. 254, and cases cited in footnote. If this agreement had been made subsequent to, and hence not as a part of, the written mortgage, it would have been, in effect, a new and oral mortgage, and, as such, inadmissible against appellants, since it would have been void, as to them, with or without notice. It is only in the case of a subsequent purchaser or mortgagee that notice of an unregistered chattel mortgage is important. As to a creditor fixing a lien by legal process, it is absolutely void, unless "followed by an actual and continued change of possession." *Rev. St. art. 3328*; *Oak Cliff College v. Armstrong* (Tex. Civ. App.) 50 S. W. 610, and cases there cited.

It is next insisted that appellee was neither in possession nor entitled to possession of the wheat when the levy was made, and therefore, under the allegations of the petition, was not entitled to maintain this action. It is well settled that a mortgagee is no more entitled to possession of the mortgaged property after default on the part of the mortgagor than before, unless, as in this instance, the mortgage contains a clause conferring the right. That such a clause is valid, see *Singer Sewing Machine Co. v. Rios*, 71 S. W. 275, 6 Tex. Ct. Rep. 293. The right of the bank to possession was therefore such only as the clause quoted above gave it, which was a right after default by Cox to take charge of the wheat and sell it at "public outcry for cash at Iowa Park," after posting notices, etc. Instead of doing this, the bank not only permitted Cox to remain in possession after default, but also authorized him to sell the wheat at private sale, which he proceeded to do; only requiring him to turn over to the bank the drafts made upon purchasers. It seems that the wheat had thus been sold, but had not all been delivered, when the levy was made. This was

inconsistent with the right of the bank to take possession of the wheat and sell it at auction, for which purpose, alone, it had the right, under the mortgage, to take possession. In thus consenting for Cox to dispose of the wheat in a different manner, the bank waived its right to take possession and sell as provided in the mortgage. It must therefore abide the election so made, and seek relief by an equitable action, in accordance with the views expressed by this court in the case of *Mack v. Mittenenthal*, 36 S. W. 799.

The judgment is therefore reversed, and the cause remanded for a new trial.

FIRST NAT. BANK OF CROCKETT v. ADAMS et al.*

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

JUDGMENTS—LIEN—EXECUTION—FAILURE TO ISSUE.

1. In 1896 the defendant recovered a money judgment against plaintiffs' grantor, and caused an abstract thereof to be duly recorded and indexed, but, having failed to recover against others in the action, appealed; the only error assigned relating to such others. In 1897 the Court of Civil Appeals affirmed such judgment, and held incidentally that there had been no appeal from the judgment against plaintiffs' grantor. A writ of error was denied by the Supreme Court in January, 1898, and in February the mandate from the Court of Civil Appeals was filed in the district clerk's office. In January, 1899, the first execution was issued, and returned "No property found." In May, 1901, plaintiffs purchased the land in controversy of such judgment debtor, and in November, 1901, defendant caused an alias execution to be issued, and the land to be sold thereunder. *Sayles' Rev. St. art. 3289*, provides that a judgment, when recorded and indexed, shall operate as a lien on the real property of the debtor; and article 3290 provides that such lien shall continue for 10 years "unless the plaintiff shall fail to have execution issued on his judgment within 12 months after the rendition thereof, in which case said lien shall cease to exist." *Held*, that the lien of the judgment on the land had ceased to exist at the time plaintiffs purchased.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by W. A. Adams and another against the First National Bank of Crockett. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Humphries & Harris and Nunn & Nunn, for appellant. F. E. Dycus and Sidney L. Samuels, for appellees.

SPEER, J. Appellees, W. A. Adams and A. C. Walker, instituted this suit in the district court of Tarrant county against the appellant, First National Bank of Crockett, Tex., in the dual form of trespass to try title and to remove cloud from title, involving valuable residence property in the city of Ft. Worth; being lots numbers 1, 2, and 3

*Rehearing denied February 23, 1903, and writ of error denied by supreme court.

¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1406, 1416.

in block No. 1 of Daggett's Second addition to said city. The parties claim through M. Harrold as common source—the appellees, by deed of purchase; and the appellant, through sheriff's deed at execution sale under a judgment lien. The facts established by the record which are material to our conclusions are as follows: Appellees on May 8, 1901, purchased the lots in controversy from the owner, M. Harrold, paying therefor the sum of \$8,000, and received a deed duly conveying the same, executed by the said Harrold and his wife, which deed was properly recorded in the deed records of Tarrant county, Tex., on May 14, 1901. Appellant recovered on October 16, 1896, in the district court of Houston county, Tex., judgment against E. H. East and M. Harrold for the sum of \$7,678.12, with 10 per cent. interest; and, at the same time, judgment was rendered against appellant bank in favor of E. B. Harrold, W. Scott, S. B. Burnett, and M. Harrold, as assignee, on their pleas to the jurisdiction of the court. The bank had sued E. H. East and M. Harrold on notes signed by them, payable in the town of Crockett, and sought to hold the other defendants upon an allegation that M. Harrold had received the estate of E. H. East under a deed of assignment, and that W. Scott and S. B. Burnett were sureties on said assignee's bond; that the bank was a nonaccepting creditor of said East; and that there were ample assets in the hands of the assignee to pay all of the debts of said estate, but that the same had been wasted, squandered, and converted by said M. Harrold, E. H. East, and E. B. Harrold. An abstract of the judgment was duly recorded and indexed in Tarrant county October 26, 1896. The bank appealed from the judgment of the district court, and on December 2, 1896, filed in said cause its appeal bond, conditioned as required by law, payable to all of the defendants. The only assignment of error was as to the action of the court in sustaining the pleas to the jurisdiction interposed by certain of the defendants mentioned above. On November 11, 1897, the Court of Civil Appeals affirmed the judgment, and held, incidentally, that there had been no appeal from the judgment against East and M. Harrold on the notes, but only from the judgment in favor of the defendants on their plea to the jurisdiction of the court over their persons. *First National Bank v. East*, 17 Tex. Civ. App. 176, 43 S. W. 559. The bank filed its motion for rehearing November 25, 1897, and on December 23, 1897, this was overruled. On January 5, 1898, the bank filed in the Court of Civil Appeals its petition for a writ of error to the Supreme Court, and the same was filed in the latter court January 11th, and on the 13th day of the same month the Supreme Court made an order refusing the writ. This judgment was certified by the clerk of the Supreme Court on January 29, 1898, which certificate was filed in the Court

of Civil Appeals at Galveston January 30, 1898. The mandate of the Court of Civil Appeals was issued February 18, 1898, and filed in the district clerk's office, Houston county, on February 19, 1898. Execution was issued out of the district court of Houston county on said judgment, January 25, 1898, and placed in the hands of the sheriff of said county, who on the next day, January 26th, returned the same indorsed, "No property found subject to this execution." An alias execution was issued November 9, 1901, addressed to the sheriff of Tarrant county, Tex., reaching his hands November 11th, and on the same day was by that officer levied upon the lots in controversy in this suit, as the property of M. Harrold. On the first Tuesday in December, 1901, after due advertisement, the property was sold, and bid in by appellant for the sum of \$3,000, crediting the amount on the execution after paying all costs; and the sheriff executed and delivered to appellant his deed to the property so sold.

The court, as we think, correctly instructed the jury to return a verdict for the appellees. Article 3289, Sayles' Rev. St., reads: "When any judgment has been recorded and indexed, as provided in the preceding articles, it shall, from the date of such record, and index, operate as a lien upon all of the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county." The succeeding article (3290) reads: "When a lien has been acquired, as provided in this chapter, it shall continue for ten years from the date of such record and index, unless the plaintiff shall fail to have execution issued upon his judgment within twelve months after the rendition thereof, in which case, said lien shall cease to exist." We are all agreed—though not precisely upon the same grounds—that appellant's lien upon the lots in controversy had ceased to exist prior to its levy and to appellees' purchase, for the reason that it had not exercised the required diligence in having an execution issued upon its judgment against M. Harrold. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Semple v. Eubanks*, 13 Tex. Civ. App. 418, 35 S. W. 509.

It, of course, follows that we affirm the judgment of the district court.

FOUST et al. v. WARREN.

(Court of Civil Appeals of Texas. Feb. 14, 1903.)

JUDGMENT—EXECUTION—ACTION TO ENJOIN—VENUE—PRIVILEGE—WAIVER—SERVICE—RETURN—PRESUMPTIONS—LIMITATIONS.

1. Rev. St. art. 2996, requiring writs of injunction to restrain the execution of a judgment to be made returnable to and tried in the court rendering the judgment, has no application to a

¶ 1. See *Execution*, vol. 21, Cent. Dig. § 520.

writ issued to restrain the collection of a judgment rendered in justice court, such court having no authority to issue writs of injunction or to determine issues dependent thereon.

2. The privilege conferred by Rev. St. art. 1194, cl. 17, on the defendants in a suit to enjoin the execution of a judgment to have the action brought in the county in which the judgment was rendered is waived where, defendants' attention being called to the question of venue, they proceed to trial without objection or plea to the jurisdiction.

3. Execution of a judgment should not be enjoined on the ground that the judgment debtor was not served with summons, where he fails to allege or prove that he had a defense or other equity.

4. The return of service indorsed on a justice summons, merely signed with the name of a person without official designation, though not showing that he had authority to make the service, does not show that he did not have authority, and the presumption is in favor of the judgment.

5. Under Rev. St. art. 3358, providing that every action for which no limitation is otherwise prescribed shall be brought within four years next after the right to bring the same shall have accrued, an action to enjoin the execution of a judgment is barred at the expiration of four years after the existence of the judgment is discovered, or by reasonable diligence might have been discovered.

Appeal from district court, Palo Pinto county; W. J. Oxford, Judge.

Action by G. W. Warren, Sr., against J. E. Foust and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Lattimore & Browning and C. W. Massie, for appellants. Stevenson & Ritchie, for appellee.

CONNER, C. J. We adopt the following statement of this case from appellee's brief, viz.: "This cause was instituted in the district court of Palo Pinto county on the 12th day of December, 1900, by appellee, Warren, against J. E. Foust, W. R. Cook, justice of the peace of Precinct No. 3, Tarrant county, and J. M. Kyle, constable of Precinct No. 5, Palo Pinto county, and was a suit to restrain the defendants from further proceeding in the collection and execution of a certain judgment rendered in the justice court of Precinct No. 3, Tarrant county, Texas, on the 18th day of December, 1890, in favor of the defendant J. E. Foust and against G. W. Warren, Sr., and G. W. Warren, Jr., and to restrain the defendant J. M. Kyle from advertising and selling certain cattle and other property of the plaintiff which the said Kyle had levied on by virtue of an execution issued upon said judgment, the plaintiff alleging that said judgment was as to him a nullity, and void, for the reason that he had no notice actual or legal of the pendency of the suit against him in the said justice court of Precinct No. 3 of Tarrant county prior to the pretended rendition of said judgment against him in said cause, and had no notice of same subsequent thereto until long after the rendition of said judgment, and until long after the expiration of time

within which he could have had the said cause reviewed by the county court of Tarrant county, Texas, by appeal or certiorari. A temporary writ of injunction was issued as prayed for, and upon final hearing at the June term, 1902, of the district court of Palo Pinto county, same was perpetuated, from which judgment the defendants appealed, and have brought the case to this court for review."

Without taking up the assignments of error in their order, we deem it sufficient to state that they raise two material questions. The first relates to the jurisdiction of the court. It is insisted that the district court of Palo Pinto county was without power to try the issues involved, and committed error in overruling appellants' plea of privilege to be sued in Tarrant county. The amount in controversy was evidently the amount of the justice's judgment, which, exclusive of interest, was \$108.41; and hence article 2996, Rev. St., requiring writs of injunction to be made returnable to and tried in the court rendering the judgment, and which is held to be mandatory, has no application in this case, the justice court not having been clothed by the constitution and laws with the power to issue writs of injunction or to determine issues dependent thereon. It therefore follows that the seventeenth clause of the general statute on the subject of venue (Rev. St. art. 1194) alone applies. This clause of the article referred to provides that suits brought to enjoin the execution of a judgment shall be brought in the county in which such judgment was rendered, and does not relate to the subject of the court or county to which the writ shall be made returnable by a court empowered to issue, but not to try, under article 2096. We conclude, therefore, that said clause 17 of article 1194 confers a mere privilege upon a defendant that may be waived, as has been expressly held to be true in cases arising under clause 14 of the same article, relating to the venue of suits for the recovery of lands or damages thereto; which in terms is equally as imperative as clause 17. See *Willis v. White* (Tex. Civ. App.) 29 S. W. 818, and authorities there cited. If so, it is clear that appellants waived their privilege to require this suit to be brought in Tarrant county, where the justice judgment was rendered, for at the June term, 1901, of the district court of Palo Pinto county, after the institution of the suit in December, 1900, the court called the attention of the parties to the question of venue involved, whereupon appellants, without objection, and without plea to the jurisdiction, proceeded to a trial upon the merits, which resulted in a mistrial, the plea to the jurisdiction overruled in this case being thereafter filed and overruled at a subsequent term of the court. All assignments involving this question are therefore overruled.

Copy of the judgment sought to be enjoined was not in evidence, and there was nei-

ther allegation nor proof that it did or did not recite service upon appellee; nor is there allegation or proof of a meritorious defense on appellee's part to the cause of action upon which the judgment was rendered, and the remaining assignments of error requiring discussion raise the question whether, under such state of pleading and fact, appellee showed himself entitled to the relief afforded him. Appellee insists that without service of citation upon him, to which he testified, and which evidently was so found by the jury, the judgment is absolutely void, and hence other defense need not be by him set up or shown; citing *Freeman on Judgments*, sec. 120a; *Ry. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *Ry. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430. These authorities, and many others that might be cited, support the proposition that a judgment is void where jurisdiction over the person of the defendant has not been acquired by appearance, citation, or waiver of process; and in such case it is said in *Ry. Co. v. Ware*, supra, that the party against whom such void judgment is rendered "is not compelled to show a defense to the action in order to enjoin it." In the case of *Chambers v. Gallup* (Tex. Civ. App.) 70 S. W. 1009, however, and in which the Supreme Court refused writ of error, the point was distinctly raised, and this court held that, to show right to enjoin the alleged void judgment in that case, a defense to the cause of action upon which it was founded, or some other equity, should have been set up. The judgment in that case was attacked on the ground that the recital in the judgment that the defendant therein had answered was not true, and that he had never been cited. The cases thus, perhaps, appear conflicting, but we think they are distinguishable. In the *Ware* Case it affirmatively appeared from the record—the return on the citation—that the defendant railway company had not been cited by an authorized person, but in *Chambers v. Gallup* the contrary was true; the judgment there reciting an appearance by the defendant. And upon this distinction we think many of the apparently conflicting cases may be reconciled, and that it should be held upon the great weight of authority that, even in cases of direct attack, a plaintiff seeking the interposition of the court's equitable power by injunction to stay proceedings under an alleged void judgment must allege and show either that the judgment on its face or the record in the cause otherwise affirmatively shows a want of jurisdiction, or else that some equity against the judgment or defense to the cause of action upon which it is predicated exists. As we said in *Chambers v. Gallup*, supra, in an opinion by Justice Hunter: "Courts are instituted not to discuss and deliberate on the abstract rights of individuals, but to redress wrongs and injuries, when shown to exist. What wrong or injury has the appellant suffered by the judgment complained of?

He shows none whatever. The violation of an abstract right is not cognizable in any court, much less in a court of equity, unless injury and damages are alleged and proved to have resulted therefrom." 70 S. W. 1010. See this case and authorities therein cited. See, also, Rev. St. art. 2990. Did appellee comply with the rule announced? We think not. As before stated, there was no pleading of such effect, and the only record evidence introduced on the subject was that of the citation and the constable's return thereon, which we think at least substantially tend to show service, if in fact it does not fully do so. The citation is regular in form and commands the summons of G. W. Warren, Jr., and G. W. Warren, Sr. (appellee), to appear before the justice court at Grapevine, in Tarrant county, on the third Friday in December, A. D. 1890, to answer the petition of appellant Foust upon a note for \$75, with certain stated credits, alleged to have been due October 1, 1887, and has this indorsement, among others, thereon: "Sheriff's Return. Came to hand this the 12 day of Dec., 1890, at ——— o'clock ——— m., and executed the 13th day of Dec., 1890, by delivering to G. W. Warren, the within-named defts., each in person, a true copy of this citation. G. B. Coke, Tarrant County, Texas. Fees: Serving copy, \$0.70." While not suggested in briefs of counsel, it may be said that such record fails to show that G. B. Coke, who signed the return, was either sheriff or constable, and hence authorized to serve the citation, although he testified that he at the time was the duly acting constable, and as such that he in fact served both defendants, as stated in the return. But if it be conceded that the return fails to show service by an authorized person, it certainly fails to show a want of authority, and the presumptions are in favor of the justice judgment. *Wilkerson v. Schoonmaker*, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803; *Heck & Baker v. Martin*, 75 Tex. 469, 13 S. W. 51, 16 Am. St. Rep. 915; *Freeman v. Miller*, 53 Tex. 373. In the present state of the record before us we cannot say what may otherwise appear in the record proper of the cause in the justice court. It follows that the assignments raising the questions last mentioned must be sustained, but the judgment will be reversed, and the cause remanded, instead of here rendered, inasmuch as the court overruled the demurrers to appellee's petition presenting the questions; and appellee may amend, and also be able to show facts necessary to the relief sought under the rule herein announced.

In view of another trial we will add, upon the issue of limitation, that while a judgment or record affirmatively showing service may, in a direct proceeding, as this was, be attacked, and shown to be void because of a want of service or appearance in fact, yet we see no reason why, in such case, the action would not be barred at the expiration of

four years after appellee discovered, or by the use of reasonable diligence might have discovered, the existence of the judgment. Rev. St. art. 3358; *Stewart v. Robbins* (Tex. Civ. App.) 65 S. W. 899.

We find no error in the action of the court as set forth in the seventh, eighth, ninth, and eleventh assignments; and as to the action of the court complained of in the twelfth assignment, in refusing to submit the issue of appellee's indebtedness, we think it sufficient to call attention to the cases of *Willis v. Gordon*, 22 Tex. 241, and *Masterson v. Ashcom*, 54 Tex. 324.

Because of the errors discussed, the judgment is reversed, and the cause remanded.

McLAVY et al. v. JONES et al.*

(Court of Civil Appeals of Texas. Jan. 30, 1903.)

ADVERSE POSSESSION—EVIDENCE OF TITLE—RECORD—NECESSITY.

1. The statute provides that adverse possession of land for five years under a recorded deed, with payment of taxes, shall be a bar to any recovery of the land from the possessor. *Held*, that one adversely in possession of land which had been set apart to her in partition of the estate of an ancestor could prescribe under the deed to the ancestor, without there having been a record of the order of the probate court setting the land apart to her.

2. One adversely in possession of land may prescribe under a recorded deed to one who devised the land to him without a record of the will, a will not being such evidence of title as is required by the law of registration to be recorded.

3. Possession of the real estate by the executor, being authorized by Rev. St. arts. 1867, 1869, is in trust for the devisees, and cannot be considered as a break in the five-years possession required to establish title by adverse possession.

Appeal from district court, Walker county; J. M. Smither, Judge.

Suit by A. B. McLavy and others against J. B. Jones and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

McKinney & Hill, for appellants. Ball, Dean & Humphrey, for appellees.

GARRETT, C. J. A. B. McLavy and others sought by this action to recover of J. B. Jones and wife 1,920 acres of land situated in Walker county, patented to the heirs of Seaborn A. Mills, deceased. The defendants pleaded not guilty and the statute of three, five, and ten years' limitation. There was a trial by jury, which resulted in a verdict and judgment in favor of the defendants.

The land in controversy was patented to the heirs of Seaborn A. Mills October 14, 1868. Seaborn Mills fell with Fannin at Goliad, and the certificate for 1,920 acres of land was issued to him as a bounty for his service in the army of the Republic of Texas. He died without issue, leaving as his

heirs his father and mother, Moses and Annie Mills. The appellant McLavy put in evidence deeds and powers of attorney from certain heirs of Moses and Annie Mills, who were dead, executed during the years of 1883 to 1885, by which the grantors conveyed to him "all land in the state of Texas which we are entitled to as heirs and devisees of Seaborn A. Mills, deceased." James Mills was one of the sons of Moses and Annie Mills, and the brother of Seaborn A. Mills, deceased. On August 18, 1868, James Mills executed a deed of conveyance to M. J. McMillan, which was proved for record by Neil McMillan, and filed for record in the office of the county clerk of Walker county on October 27, 1868, by which the said Mills conveyed to the said McMillan all the lands, land warrants, donations, headrights, or other certificates (with the exception of a 640-acre donation warrant) that may have been issued to the heirs of Seaborn A. Mills, who fell in — company, in Texas, in the struggle for independence. The deed recites: "I, the said James M. Mills, as heir at law, having good right to sell said interest, and also a transfer from my father, Moses Mills, to the whole interest in the entire estate and claim that he, as legal heir, was entitled to through the services of my brother in the army of the late Republic of Texas, who fell with —, in the struggle for independence, and I hereby make said transfer a part of this transfer." M. J. McMillan was the wife of Neil McMillan. The records of the general land office show that deeds and proof of heirship were exhibited by Neil McMillan, and patent delivered to him October 14, 1868. Neil McMillan and his wife, M. J. McMillan, conveyed the land in controversy to C. C. Murray by deed dated August 8, 1870, filed for record August 11, 1870. Murray went into possession, and erected a sawmill thereon, and remained in possession until he sold to Thomas and William Stevens May 24, 1872, by deed recorded June 11, 1872. There is a break in the record title here, but it appeared from the testimony of C. C. Murray that Thomas and William Stevens conveyed the land to Thornton and Armstrong, who continued to operate the sawmill until the land was bought by Byrd Eastham, who purchased the same at a sale made under a mortgage executed by Thornton and wife to D. D. Alston and W. A. Oliphant, with power to them or their agent to sell. The land was regularly sold under the mortgage, and bought by Byrd Eastham February 14, 1876, and a deed was executed to him by Alston and Oliphant, by their attorneys, Randolph and McKinney. The deed was duly acknowledged, and was filed for record May 29, 1878, and duly recorded in the record of deeds for Walker county. Byrd Eastham and Delha Eastham, his wife, were married in 1868, and lived together as man and wife until October 10, 1883, when he died. He left a will, which

*Rehearing denied, and writ of error denied by supreme court.

was duly probated February 5, 1885. By the will Byrd Eastham devised one-half of his estate as community property to his wife. The remainder was devised to his children, the share of each to be delivered as he or she married or became of age, except a tract of land in Travis county and one in Ellis county, which were reserved from sale until all became of age, when they were to be divided equally. Delha Eastham, his wife, was appointed executrix, without bond, with power to sell real estate except the land in Travis and Ellis counties, when, in her judgment, she might think it best to sell. Delha Eastham, qualified as executrix of the will. On August 17, 1886, as shown by an entry in the minutes of the probate court of Walker county, the court approved a report of partition filed in the estate of Byrd Eastham, deceased, by the executrix, setting apart the land in controversy and other property to the defendant Helen M. Jones, who had married, as her share of the estate, except the lands in Travis and Ellis counties, and ordered that the same be recorded; and further ordered that all the right, title, and interest of the other heirs (naming them), the minors being represented by a guardian ad litem appointed by the court, be devoted out of them, and that the executrix deliver the said property to the said Helen M. Jones, together with the title deeds, as her share of the estate. This decree was never recorded in the record of deeds. The defendant Helen M. Jones is a daughter of Byrd Eastham, deceased. About March 1, 1886, a tenant entered into possession of the land under a contract with the executrix of Byrd Eastham for the purchase of the timber on 240 acres thereof at \$300, and an option to buy the balance of the timber at 50 cents per M, and had the 240 acres surveyed. He put a sawmill, houses, stock pens, and a garden on the land. This tenant held and claimed the entire tract for the Eastham estate until the land was set apart to the defendant Helen M. Jones, and after that continued to hold it for her and her husband, J. B. Jones, until December 1, 1897. About January 1, 1890, he made a contract with J. B. Jones to purchase the balance of the timber on the survey for \$500. He then moved his sawmill to another place on the tract. When he left, December 1, 1897, he sold his sawmill and houses to another person, who went into possession as tenant for Jones and wife, and remained in possession of the houses and operated the mill for about three years. These tenants were authorized to cut and did cut timber from all over the tract promiscuously. All the taxes were paid on the land by Byrd Eastham and his estate from 1880 to 1886, and by the defendants from 1886 to 1897, inclusive. The possession was exclusive and adverse, and of such character as to confer title by limitation.

We are of the opinion that the plea of the statute of five years' limitation was sustain-

ed by the evidence. Byrd Eastham claimed the land under a deed duly acknowledged and recorded. The deed was dated February 14, 1876, and was filed for record May 29, 1870. Payment of taxes by him was shown to have been made from 1880 to his death, and by his executrix to 1886, when the land was set apart to his heir and devisee, the defendant Helen M. Jones, as a part of her share of the estate. The taxes were shown to have been paid by the defendants from 1886 to 1897, inclusive. Possession under the deed to Byrd Eastham was commenced by his executrix March 1, 1886, and on August 17, 1886, the date of the order of the probate court, it was commenced by the defendants, and continued for more than 10 years, accompanied by payment of taxes. Helen M. Jones, as the heir and devisee of Byrd Eastham, could prescribe under the deed to him without record of the order of the probate court. *Motley v. Corn* (Tex. Sup.) 11 S. W. 850; *Carothers v. Covington* (Tex. Civ. App.) 27 S. W. 1040; *Foster v. Johnson*, 89 Tex. 640, 30 S. W. 67; *Fossett v. McMahan*, 74 Tex. 546, 12 S. W. 324; *Ollive v. Bevil*, 55 Tex. 423; *Cochrane v. Faris*, 18 Tex. 850. The purpose of the statute requiring possession under a recorded deed is to give notice of the character of the adverse possession, and it must be such as is required in the registration of deeds, and the right of the party in possession to prescribe may be derived from a deed to a predecessor in title in privity with whom he holds. Possession may be tacked, and the title may be deraigned through several parties in order to give the necessary five years, but every muniment of the record title must be recorded, and the possession must be unbroken, and must be accompanied by the payment of taxes for the requisite period. *Porter v. Chronister*, 58 Tex. 56; *Medlin v. Wilkins*, 60 Tex. 418; *Cook v. Dennis*, 61 Tex. 240; *Van Sickle v. Catlett*, 75 Tex. 409, 13 S. W. 31; *Sorley v. Matlock*, 79 Tex. 306, 15 S. W. 281. Helen M. Jones was the heir and devisee of Byrd Eastham. As such she took the legal title by devise and inheritance. The will disposed of the property in accordance with the statute of descent and distribution, but this fact does not affect the principle involved, as the will is not such a muniment of title as is required by the law of registration to be recorded in the record of deeds. The title did not vest in the executrix, but the possession held by her was in trust for the devisees under the will, and her possession cannot be considered as a break in the possession, for it was the possession of the devisee and in no sense adverse. Broadly stated, it was held by the court of chancery appeals of Tennessee in the case of *East Tennessee Iron & Coal Co. v. Ferguson's Heirs*, in an opinion adopted by the Supreme Court, that "the possession by the administrator is not in privity with that of the heirs of the decedent, and makes a

break in the possession"; and Vance's Heirs v. Fisher, 10 Humph. 212, was cited as authority, as also Marr's Heirs v. Gilliam, 1 Cold. 488, 505. But the decision was rested upon the common-law rule that the administrator has no right of control over the real estate of his intestate, holding that any authority which, as such, the administrator assumed to exercise over it, was an usurped authority, which could communicate no right whatever to the person in whose favor it was exercised. Under the statutes of this state the administrator is entitled to possession of the entire estate, real as well as personal. Rev. St. arts. 1867, 1869. The order of court setting apart the land to Helen M. Jones as the devisee of Byrd Eastham was not a deed or a link in the title necessary to be recorded in order to give notice. Helen M. Jones entered into possession of the entire tract of land, and claimed it as the heir and devisee of Byrd Eastham, and by the will and the partitions thereunder she became vested with the entire legal title as held by Byrd Eastham under the deed to him.

Since it appears from the undisputed evidence that the defendant Helen M. Jones has acquired the title to the land in controversy by five years' limitation, and that no other judgment could have been rendered than one in favor of the defendants, consideration of the several remaining assignments of error presented by the appellants is unnecessary.

The judgment is affirmed. Affirmed.

SOUTHERN KANSAS RY. CO. v. COOPER.

(Court of Civil Appeals of Texas. Feb. 28, 1908.)

COURT OF CIVIL APPEALS—JURISDICTION.

1. Const. art. 5, § 6, provides that the Court of Civil Appeals shall have appellate jurisdiction, under such restrictions as may be prescribed. Sayles' Rev. St. art. 996, provides that the Court of Civil Appeals shall have jurisdiction in civil cases of which the district courts have original or appellate jurisdiction, and of which the county court has appellate jurisdiction, when the judgment or amount in controversy, or the judgment rendered, exceeds \$100. Acts 22d Leg. 1891, p. 12, confers the civil jurisdiction of the county court of Roberts county on the district court. *Held*, that it was not the legislative intent that a cause originating in justice court in Roberts county, and involving less than \$100, could, after appeal to the district court, be carried to the Court of Civil Appeals, but the jurisdiction is governed by the general laws.

Appeal from district court, Roberts county; B. M. Baker, Judge.

Action by J. R. Cooper against the Southern Kansas Railway Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

J. W. Terry and H. E. Hoover, for appellant. L. C. Heare and C. Coffee, for appellee.

Opinion on Rehearing.

SPEER, J. Upon a former day of the term we dismissed this cause for want of jurisdiction to hear and determine the appeal.* We will here give our reasons for such holding, since none were filed upon the former decision:

The case originated in the justice court of Roberts county, and was an action by appellee to recover the sum of \$75 for the value of a mule alleged to have been negligently killed by the railroad company. After judgment in the justice court, an appeal was perfected to the district court of Roberts county; the civil jurisdiction of the county court of that county having been conferred, by act of the Twenty-Second Legislature, upon the district court (Acts 22d Leg. 1891, p. 12). The trial in the district court of said county resulted in a judgment against the railroad company for the sum of \$75, the amount sued for, from which this appeal is sought to be prosecuted. The question, then, is, has this court, under the Constitution and statutes of the state, jurisdiction of the appeal? By section 6 of article 5 of the Constitution it is provided: "Said Courts of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." These restrictions are found principally in article 996, Sayles' Rev. St., defining the appellate jurisdiction of the Courts of Civil Appeals, which article reads, so far as pertinent to this inquiry, as follows: "The appellate jurisdiction of the Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts: (1) Of which the district courts have original or appellate jurisdiction. (2) Of which the county court has original jurisdiction. (3) Of which the county court has appellate jurisdiction when the judgment or amount in controversy or the judgment rendered shall exceed one hundred dollars, exclusive of interest and costs." If this, then, be one of those cases "of which the district courts have original or appellate jurisdiction," we should entertain the appeal; but, if it be one of a class "of which the county court has appellate jurisdiction," there being less than \$100 involved, we are without such authority. If we look to the constitutional provisions defining the original and appellate jurisdiction of the district and county courts, it is plain the cause comes within paragraph 3 of the above article; that is, one of which the county court has appellate jurisdiction. This is the correct method of determining the question, unless jurisdiction is conferred upon us by the action of the Legislature in diminishing the

*No opinion filed.

civil jurisdiction of Roberts county, and conferring the same upon the district court. The contention is made that since said act, the appeal from the justice court being properly carried to the district court, and the latter court having appellate jurisdiction, this court necessarily has jurisdiction under article 996. The contention is not that the act diminishing the jurisdiction of the county court, and enlarging that of the district court, expressly conferred appellate jurisdiction upon us, but that by necessary implication it had such effect. It is unquestioned that but for said act we would have no jurisdiction, and we are of opinion that we are without such authority, notwithstanding the act. Section 22, art. 5, of the constitution, provides that the Legislature shall have power, by local or general law, to increase, diminish, or change the civil and criminal jurisdiction of county courts, and in cases of any such change of jurisdiction the Legislature shall also conform the jurisdiction of the other courts to such change. We are of opinion this language means that the act changing the jurisdiction of the county court must also make such provisions as are necessary to conform the jurisdiction of the other courts affected by the act to such changed conditions, and not leave the matter to mere implication. See *Erwin v. Blanks*, 60 Tex. 586. It may be that the language of the constitution quoted is sufficient authority for the Legislature to change the jurisdiction of this court and the Supreme Court by diminishing or increasing the jurisdiction of the county courts, but we think, if such change be attempted, it must be by express legislative act, and not left to implication. Of course, in the absence of all provision upon the question, the appellate courts would exercise jurisdiction over those cases of which jurisdiction is given by general law. Any other rule would violate the section of the organic law authorizing the change, and lead to most absurd ends. The power to increase the jurisdiction of the county court necessarily implies the power to decrease the jurisdiction of the court or courts affected by such increase. This power to diminish for the purpose of conferring upon the county court is not limited to affect only the justice court, but the original civil jurisdiction of the district court, as well, may be thus conferred upon the county court, with the result that under the letter of the statute (articles 996, 940), the jurisdiction of the Supreme Court would be completely ousted by implication, for in the civil cases appealed from the county court (with certain exceptions) our judgments are conclusive both on the law and the facts. On the other hand, in those cases where the jurisdiction of the county court might be augmented by conferring upon it the civil jurisdiction of the justice court, all cases, though the amount involved be never so small, could be appealed to the Court of Civil Appeals, for by the letter of the act

defining our jurisdiction we are to entertain civil cases of which the county court has original jurisdiction; and the result is plain in so far as those counties whose courts are thus affected are concerned. This court would not only have appellate jurisdiction over all their civil cases, but its judgments would be final, thereby defeating the evident express will of our legislators and framers of the organic law. If the doctrine as contended for by appellant in this case be correct, the consequences here mentioned may follow. It is no answer to say the Legislature has never exercised its power to such an extent. It is the power conferred, and not its exercise or nonexercise, which alone concerns us in arriving at a proper interpretation of the constitutional and legislative acts affecting the question before us. We are of opinion the act diminishing the civil jurisdiction of Roberts county, and conferring same upon the district court, being silent upon the question, was not intended to, and did not, affect this court, so as to give it jurisdiction over causes which it would otherwise have no authority to entertain, and that our jurisdiction is the same since as before said act. In other words, since said act we have jurisdiction over those cases appealed from the district court of Roberts county, of which said court, under general law, has original or appellate jurisdiction, and of which the county court, under general law, would have original jurisdiction, and of which the county court, under the same law, would have appellate jurisdiction, and the amount in controversy exceeds \$100, exclusive of interest and costs.

We are further of opinion that a proper interpretation of article 996 does not require of us the exercise of such jurisdiction. The central and controlling thought in the organization of our judicial system, from the most inferior trial court to the highest appellate tribunal, is, so far as it concerns the distribution of jurisdiction to the courts, the amount in controversy, where this is ascertainable. The lawmakers, in keeping with an unquestionably sound public policy, have adopted this graduated scale of jurisdictions, to the end that small matters of controversy may be speedily ended, and that the time of the higher courts may not be consumed in determining frivolous disputes. By all the canons of construction, we should not adopt an interpretation of a statute which will lead to injustice, inconsistencies, or absurdities, unless the language of the act clearly expresses such an intent, but adopt such interpretation as will give effect to the real intent of the lawmaking power, and will best harmonize with other acts and expressions bearing upon the same subject. As is said in *Sutherland on Statutory Construction*, sec. 241: "Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute. No clear-

er statement has been or can be made of the law, as to the dominating influence of the intention of a statute in the construction of all its parts, than that which is found in Kent's Commentaries: 'In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms. When the words are not explicit the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion.' If upon examination the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. * * *

The more literal construction ought not to prevail if it is opposed to the intention of the Legislature, apparent from the statute; and, if the words are sufficiently flexible to admit of some other construction by which the intention can be better effected, the law requires that construction to be adopted." Applying these principles, we think it clear that the Legislature meant to clothe the Court of Civil Appeals with power to hear and determine cases appealed from the district court, where, under the constitution and general laws, the cause is one of which that court has original or appellate jurisdiction, and not to authorize an appeal from the judgment of the district court in cases such as the one now before us. The language, "of which the district courts have original or appellate jurisdiction," should be interpreted to include that class of cases over which jurisdiction is conferred upon the district courts by general law, and not those cases entertained by virtue of a local law conferring extraordinary jurisdiction. A literal interpretation of the article would give to the Court of Civil Appeals appellate jurisdiction over the county court in all civil cases of which that court has original jurisdiction, whereas in fact a great number of said causes, by force of other acts, are appealed to the district court. We refer to probate cases. The same may be said of article 1383 of the statute. Articles 996, 1383, 2540, all contemplate that civil actions originating in the justice court shall not be appealed to the Court of Civil Appeals unless the judgment or amount in controversy shall exceed \$100, exclusive of interest and costs. Article 1669 of the statutes, authorizing appeals from the justice court to the district court, provides: "In all counties in which the civil and criminal jurisdiction, or either, of the county courts has been transferred to the district courts, appeals and writs of certiorari may be prosecuted to remove a case tried before a justice of the peace to the district court, in the same manner and under the same circumstances under which appeals and writs of certiorari are allowed by general law to

remove causes to the county courts." Other provisions direct that the trial, whether upon appeal or writ of certiorari, whether in the county court or the district court, shall be de novo. Sayles' Rev. St. arts. 359, 1294, 1343. All evidencing the legislative mind that an appeal to the district court should be in the same manner and under the same circumstances as though it had been taken to the county court. One of the circumstances incident to an appeal to the county court, where the amount in controversy or judgment rendered does not exceed \$100, exclusive of interest and costs, is the element of finality which attaches to the appeal and the judgment rendered upon it.

We are at a loss to give a single reason why the Legislature would confer upon the people of one county the right to carry their petty cases to the Court of Civil Appeals, and deny it in another, and it was evidently not within the contemplation of the Legislature when it passed the act diminishing the jurisdiction of the county court that such should be its effect.

We are aware that the views here expressed are not in harmony with the cases of Cadwallader v. Lovece (Tex. Civ. App.) 29 S. W. 666, and Emerson v. Emerson (Tex. Civ. App.) 35 S. W. 425. In the latter case it is suggested the "Legislature should remove such inconsistencies and inequalities." The case of Pevito v. Rodgers, 52 Tex. 581, which is relied upon for the holding in Davidson v. Patton, 57 Tex. 481, is not an authority, because the question of appeal where the amount in controversy was less than \$100 was not involved; there being more than that amount in controversy in that case. See G. & S. F. Ry. Co. v. Rowley (Tex. Civ. App.) 22 S. W. 182, and Allen v. Hall (Tex. Civ. App.) 60 S. W. 586. We do not feel inclined to adopt a rule which confessedly leads to inequalities and inconsistencies unless the language of the statute renders it clear that such was the intention of the lawmakers. Such, we think, is not the case. We think the interpretation we have given comports with reason, fairness, consistency, and, above all, does no violence to the legislative intent. Any other interpretation, we think, is pure literalism, at a sacrifice of the spirit and intention of the whole organic scheme of jurisdiction. We cannot entertain jurisdiction of an appeal where the cause originated in the justice court, and the judgment or amount in controversy does not exceed \$100, exclusive of interest and costs.

The motion for a rehearing is overruled.

BEARDSLEY v. THOMAS.

(Court of Civil Appeals of Texas. Feb. 14, 1903.)

ORDER APPOINTING GUARDIAN—CONCLUSIVE— NESS—NOTICE—PRESUMPTION.

1. In the absence of a contrary showing, it must be presumed that the mother had notice

of proceedings to appoint a third party guardian for her children, as without such notice the court would not have had jurisdiction to appoint the third party.

2. Order of a federal court in the Indian Territory appointing a third party guardian of certain children was conclusive on the mother, who was a party to the proceeding, on a subsequent petition by the third party, after his removal to Texas, for reappointment in that state, as to the fitness of the third party and as to the unfitness of the mother.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Application by S. M. Thomas to be appointed guardian of certain minors. Mattie Beardsley contested the application. Order appointing the applicant, and contestant appeals. Affirmed.

J. P. Cox and Galloway & Heflin, for appellant. F. B. Dillard, for appellee.

TEMPLETON, J. S. M. Thomas filed an application in the county court of Grayson county, Tex., to be appointed guardian of the persons of certain minors. Mrs. Mattie Beardsley, mother of the said minors, contested the application, and set up her rights as natural guardian; the father of the minors being dead. In bar of her said rights, the applicant pleaded that in April, 1899, he was appointed guardian of the persons of said infants by the United States district court for the Southern District of the Indian Territory; that he and the minors and the contestant then resided in that jurisdiction; that he was duly qualified under said appointment, and afterwards removed to Texas; that he brought his wards with him in order that they might be near their grandparents, who resided in Grayson county, and who were able and willing to assist him in raising and educating them. A copy of his application for said appointment was attached as an exhibit to the plea, and it appears therefrom that the appointment was sought on the ground that the contestant here was not, for certain reasons stated, a proper person to have the custody of the said minors. The contestant moved to strike out the plea in bar because the facts therein alleged were immaterial and irrelevant. The motion was overruled. The cause had reached the district court on an appeal from the county court, and a trial before the district judge resulted in an order appointing the applicant. The contestant has appealed from the said order.

The first assignment of error complains of the action of the court in overruling the motion to strike out the plea in bar. In the same connection, it is urged under another assignment that the court erred in permitting the applicant to introduce in evidence, over the objection of the contestant, the judgment of the United States court appointing him guardian of the said minors. The remaining assignments complain of the exclusion of testimony offered by the con-

testant. It appears that she offered testimony tending to show that it was not true, as charged in the application for the original appointment, that she was unfit to have the custody of her children, and that the applicant himself was not, at the time he was first appointed, a proper person to have the guardianship. The testimony was excluded on the ground that the unfitness of the contestant and the fitness of the applicant was determined by the judgment of the United States court. All of the assignments will be considered together, as they raise but a single question, namely, whether the said judgment is conclusive upon the contestant.

There is no statement of facts in the record. We will assume, in support of the judgment of the trial court, that it was shown that the United States court had jurisdiction of the proceedings filed therein, and of the parties thereto; that the application of Thomas to be appointed guardian was proved as alleged; and that the judgment was in due form and was regularly obtained. The application put in issue Mrs. Beardsley's rights as natural guardian. Thomas could not secure the appointment without showing that she was unfit to have the custody of the children, and it was necessary for her to have notice of the application. Woerner on Guardianship, pp. 90, 95. Without such application and notice, the court had not authority to declare her unfit and take from her the custody of her children. In the absence of a statement of facts, we must assume that on the trial hereof it was shown that she had legal notice of the first proceeding. She was therefore a party to that proceeding, and was bound by the judgment entered therein. She could not question the validity of the judgment, or set up her rights as natural guardian against it. The courts of this state will not retry the matters in controversy between the parties which were settled by the judgment rendered in the first contest. Am. & Eng. En. of Law (2d Ed.) p. 1022. Our conclusion is that the record before us does not show that the trial court erred in refusing to go behind the judgment of the United States court, and in holding that the said judgment was binding on the contestant. We do not desire to be understood as holding that the judgment of the federal court was conclusive upon the minors, and that our state courts would be precluded by it from appointing as their guardian some one other than Thomas, if their interests required such appointment. There is nothing in the record to indicate that the interests of the minors will be adversely affected by the appointment made, and, in the absence of a statement of facts, we will assume that the evidence justified the selection of the applicant as a fit and proper person for the office.

The judgment is affirmed.

DELESHAW et al. v. EDELEN.*

(Court of Civil Appeals of Texas. Feb. 7, 1908.)

JOINT JUDGMENT—PAYMENT BY ONE JUDGMENT DEBTOR—EFFECT—CONTRIBUTION—EXECUTION—WRONGFUL LEVY—INJUNCTION—PETITION—INSTRUCTIONS—VERDICT.

1. Where, after judgment had been rendered against three joint makers of a note, one of them paid the judgment creditor the entire sum due, and took an assignment of the judgment, such payment operated to extinguish the debt, notwithstanding an intention of the parties to the transfer that the judgment should be kept alive; and such purchaser was not entitled to execution against his co-obligors for contribution.

2. Averment in the petition in an action for wrongful execution that the levy on plaintiff's saloon had injured his business and trade was sufficient, in the absence of exception, to justify a charge submitting the profits lost as the measure of damages.

3. Where, in an action for wrongful execution, plaintiff had been compelled to employ attorneys, and had employed two firms, and made four trips from one town to another in looking after the case, an allowance of \$50 for attorney's fees as a part of punitive damages was not erroneous.

4. Petition charging that the judgment had been "paid off and satisfied in full," and praying that the injunction be made perpetual, and for general relief, was sufficient to justify a decree enjoining issuance of execution on the judgment.

5. Where, in a suit to enjoin collection of a joint judgment and to recover damages for the levy of execution thereon on the ground that it had been paid by defendant, who was one of the judgment debtors, the court charged that the judgment had been extinguished, such charge took from the jury the issue of validity of the judgment, and a verdict merely finding for plaintiff in sums certain for actual damages, vindictive damages, and expenses was sufficient.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Suit by W. T. Edelen against G. W. Deleshaw and others to restrain the collection of a judgment and recover damages for an alleged malicious levy of an execution. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Potter & Potter, for appellants. Stuart & Bell, for appellee.

STEPHENS, J. The City Bank of Whitesboro, Tex., recovered a judgment in justice court for \$131 against G. W. Deleshaw, E. T. Edelen, and H. E. Maxwell on a promissory note executed by them jointly, which was a substitute for a note previously executed by them as sureties for a son of G. W. Deleshaw. This judgment the bank transferred to G. W. Deleshaw upon his executing to it his individual note for the amount of the judgment, which was accepted as payment in full by the bank. Thereupon Deleshaw took out execution on the judgment, and had it levied on the property of W. T. Edelen, who brought this suit to enjoin the sale and to recover damages, both actual and vindictive; the levy resulting in closing the saloon of Edelen at Dexter, Tex., for a few hours. From a verdict and judgment in his favor this appeal is prosecuted.

The contention of Edelen was that Deleshaw was primarily liable to the bank for the payment of the note merged in the judgment, and that both he and Maxwell had signed it as sureties merely, and that Deleshaw had paid off and extinguished the judgment. On the other hand, Deleshaw contended that all were jointly and equally liable, and that in giving his note to the bank for a transfer of the judgment to him he intended to keep it alive, and use it to compel contribution from Edelen and Maxwell; the bank accepting his note in lieu of the judgment with that understanding. On the issue of suretyship the evidence was conflicting. Upon the other issue, while appellant admitted that the bank had accepted his individual note in full satisfaction of the judgment, as was shown by the written transfer offered by him as well as by entry on the justice's docket, he offered to prove the circumstances attending the transaction for the purpose of showing that it was the understanding and intention of both himself and the bank that the judgment should be kept alive for his benefit against his co-obligors. The court excluded this evidence, and instructed the jury that the issuance as well as the levy of the execution "was wrongful and illegal," and to those rulings error is assigned. The question thus raised is one upon which the authorities are at variance, the courts of New York and some other states holding that, "where one of several defendants against whom there is a joint judgment pays the other party the entire sum due, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction," while many other courts of equal authority, taking a broader view, give controlling effect to the intention of the parties. 2 Freeman on Judgments, sec. 472; Merchants' National Bank v. Great Falls Opera House Co. (Mont.) 57 Pac. 445, 45 L. R. A. 285, 75 Am. St. Rep. 490. The reasoning of the court in the case just cited, in which the two lines of decision are reviewed and the New York rule is rejected, meets with our approval, and accords with the views heretofore expressed by this court. Huggins v. White, 27 S. W. 1066; Beville v. Boyd, 41 S. W. 670, 42 S. W. 318. Our Legislature has also manifested disapproval of the New York rule in giving a surety who has paid the judgment an execution against his co-surety, thus keeping the judgment alive in such cases even when it is paid without any assignment of it, or any agreement or understanding that it shall be kept alive. Rev. St. art. 3816. In cases where the judgment may be kept alive by contract there would seem to be no necessity for legislative action, and none seems to have been taken. The general policy of our law to avoid a multiplicity of suits would seem to warrant, if not encourage, the making of a contract on the part of one paying off the judgment for a transfer of it to him-

*Rehearing denied February 23, 1908.

self so as to keep it alive for convenience in compelling contribution from his codefendant in the judgment; thus avoiding unnecessary litigation. But our Supreme Court, in the case of *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 302, 16 S. W. 1028, while not necessary to the decision of that case, as stated in the opinion of Justice Henry, seem nevertheless to have adopted the New York rule. This decision the trial court doubtless followed, and we feel constrained to approve his action, rather than reverse the judgment and remand the cause for a new trial in accordance with views of our own at variance with those expressed by the court of final jurisdiction. Seemingly in line, by way of analogy, with *Daugherty v. Bank*, is the more recent case of *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528, which adds to the constraint. *Contra*, *Beville v. Boyd*, *supra*.

The proposition under the seventh assignment, complaining of the charge of the court for submitting the loss of sales, or, rather, the profit so lost, as the measure of damages, challenges the sufficiency of the petition to warrant this charge. The allegations of the petition were quite general to the effect that the levy upon the saloon of plaintiff below had injured his business and trade; but, in the absence of special exceptions, they were sufficient to warrant the action complained of.

Under the thirteenth assignment it is contended that the jury should not have allowed the item of \$50 to cover attorney's fees as part of the vindictive damages, because the proof failed to show that plaintiff had paid or would be compelled to pay this amount to his attorneys. It did show, however, that he had been compelled to employ attorneys, and that he had employed two firms of lawyers, and made four trips to Sherman and Gainesville looking after the case, and the item allowed by the jury was admitted before them to be a reasonable attorney's fee. So we think there cannot be much in this contention, especially in view of the wide discretion given a jury in fixing the amount of vindictive damages. Whether or not the facts warranted any recovery of vindictive damages is not presented by the brief.

The next and last complaint is of the judgment, upon the ground that it went farther in enjoining the execution of the justice court judgment than was warranted by the pleadings and verdict. The petition charged that the justice court judgment had been "paid off and satisfied in full," and prayed that the injunction be made perpetual, and for general relief, which, we think, was sufficient. The verdict was as follows: "We, the jury, find for the plaintiff as follows: Actual damages against both defendants, \$15.00. Vindictive damages against defendant Deleshaw as follows: Attorney's fees, \$50.00; expenses, \$20.00." This verdict should,

we think, be treated, under the ruling and instructions of the court, as importing a finding that the judgment had been paid off and extinguished, else the jury could not have found any general verdict for plaintiff below, especially upon the issue of vindictive damages. *Pearce v. Bell*, 21 Tex. 688; *Jones v. Ford*, 60 Tex. 127; *Day v. Cross*, 59 Tex. 395; *Railway v. Henderson*, 86 Tex. 307, 24 S. W. 381. Upon the undisputed and admitted facts the court found, and in effect charged the jury, that the judgment enjoined had been paid off and extinguished. This charge took from the jury the exercise of any discretion upon that subject, and, as was said in the case last cited, was but "the declaration of the law by the court before the verdict, instead of upon the verdict." The verdict was returned in obedience to this instruction, and not in disregard of it, as was held in *Ablowich v. Bank*, 67 S. W. 79, 4 Tex. Ct. R. 394. If, however, the verdict be treated as a special one, and as limited to the fact and amount of damages, it would nevertheless be sufficient, since the statute on that subject supplies the deficiency complained of.

The judgment is therefore affirmed.

On Motion for Rehearing.

(Feb. 28, 1903.)

The proposition urged in this motion as one ignored in the original opinion, that Deleshaw was entitled to execution against Edelen under article 3816, Rev. St., giving execution to the surety who pays the judgment against his co-surety, was fully covered by the opinion of Justice Henry in the case of *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 301, 16 S. W. 1028, cited by us as authority for the disposition made of this appeal. The cases are parallel in this respect also; the original principal not having been a party to the judgment, and no adjudication of suretyship having been made in either case. The language of Justice Henry on this point was as follows: "We do not see how the issue of suretyship could have been properly made in a cause in which the principal was not sued. As it was not made and settled in the judgment, it could not be subsequently made so as to affect the right to issue execution on the judgment."

Motion overruled.

MADDOX v. HUDGEONS.*

(Court of Civil Appeals of Texas. Jan. 24, 1903.)

FALSE IMPRISONMENT—SHERIFF—RESPONSIBILITY—NONOFFICIAL ACTS OF DEPUTY.

1. A burglary having been committed, the sheriff went to the place. While he was absent a deputy sheriff stated to a constable, without authority, that the sheriff wanted him to assist in arresting the offenders. The constable arrested

*Rehearing denied February 28, 1903, and writ of error denied by supreme court.

plaintiff on suspicion, without warrant, and put him in jail, on directions of the deputy, where he remained nine hours, when he was released on the order of such deputy. The sheriff knew nothing of the transactions. By Rev. St. art. 4897, sheriffs are made responsible for the "official" acts of their deputies. Article 4906 authorizes the sheriff to summon assistance only when resistance is expected. Code Cr. Proc. art. 50, authorizes the receipt by the sheriff and confinement of a prisoner only when he is committed to jail by lawful warrant. *Held*, that the acts of the deputy were unauthorized, and not official, and the sheriff was not responsible therefor.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Action by W. L. Hudgeons against J. M. Maddox and others. From a judgment in favor of plaintiff, defendant Maddox appeals. Reversed.

Thos. D. Sparer, for appellant. Speer & Speer and Jas. A. Graham, for appellee.

CONNER, C. J. This is an appeal from a judgment in appellee's favor for damages for the sum of \$200 against appellant, the sheriff, and one Will McNeal, constable of Precinct No. 1 of Jack county, caused by an illegal arrest and false imprisonment. The evidence offered on the trial is not before us, the cause having been here submitted upon the trial court's conclusions of fact, to which appellee makes no objection. The suit was against said sheriff and the sureties on his official bond as such, and against said constable and the sureties on his official bond. The court found in favor of the several sets of sureties named, on the ground that appellee's arrest and imprisonment was "without any warrant or authority of law and without the semblance of the same." No appeal has been prosecuted by McNeal, and appellee has presented no cross-assignment of error to the action of the court in releasing the sureties.

The remaining facts may be stated briefly as follows: On July 16, 1901, a burglary was committed in a distant part of Jack county. On the following morning appellant was notified thereof, and immediately left Jacksboro for the place of the burglary. At the time one Walter Isbell was the acting and qualified deputy sheriff, who soon after the appellant's departure notified McNeal of the burglary, and told him that appellant wanted him (McNeal) to assist in arresting the parties committing the burglary. Soon thereafter, on the morning of July 17th, said McNeal, without direction on the part of Isbell, and without any warrant or authority of law whatever, arrested appellee Hudgeons and one Setser in the town of Jacksboro on suspicion alone, and forthwith took them to the sheriff's office, where said Isbell was. Isbell had received a description of the parties who were supposed to have committed the burglary, and McNeal, after arriving at the sheriff's office, inquired of Isbell if he (McNeal) should place appellee and Setser in jail. Isbell replied that he should. There-

upon McNeal, without other warrant or authority, took appellee and Setser to the jail. The jailer being absent, McNeal procured the keys from the jailer's wife, and locked appellee and Setser up in the jail, where they remained some nine hours, whereupon they were released by the jailer upon the order of Isbell. The jailer knew nothing of the imprisonment until noon of the day of said confinement, when he gave the imprisoned parties dinner, afterwards releasing them as stated. Appellee and Setser were entirely innocent of the crime charged. There was no reasonable ground for the suspicion upon which they were arrested, and the damages were in amount sufficient to support the verdict. It appears also that appellant, Maddox, had not directed Isbell to request McNeal's assistance, and knew nothing whatever of said arrest or imprisonment until after appellee's release as stated. It does not appear that the jailer was informed of the circumstances of the arrest or imprisonment, or that express demand for release was made of him by appellee on the jailer's return.

We have been unable to avoid the conclusion that the judgment as against appellant is unauthorized by the facts. By title 101, Rev. St., relating to sheriffs and constables, authority is given sheriffs to appoint deputies, and by article 4897 sheriffs are made responsible for the "official" acts of their deputies, and are given the same remedies against such deputies and their sureties as any person can have against the sheriff and his sureties. In the use of the term "official" in this statute, when construed with its connected clause, the Legislature must be presumed to have had knowledge of the well-defined distinction between official acts and acts done *colore officii*—a distinction upon which many of the apparently conflicting cases may perhaps be reconciled—and to have therefore intended to exclude responsibility for mere usurpation of authority on the part of their deputies. The deputy sheriff in question was in the performance of no duty imposed on him by law or by appellant in requesting McNeal's assistance. It is in case of resistance alone that authority is given to summon assistance, and no resistance or ground to so expect is here shown. Rev. St. art. 4906, and Code Cr. Proc. art. 45. Isbell, then, in summoning McNeal's assistance, was in no sense acting in the performance of an official act or duty. Appellee's illegal arrest was not even directed by Isbell, and it would hence seem clear that appellant is not liable therefor. Nor was Isbell in the performance of official duty in directing McNeal to place appellee in jail. Isbell was without authority or color of authority to direct McNeal to imprison, and such direction was no justification to McNeal in doing so. "When a prisoner is committed to jail by lawful warrant from a magistrate or court, he shall be placed in jail by the sheriff." Code Cr. Proc. art. 50. No warrant existed in the case before

us, nor did there exist any of the grounds authorizing an arrest without warrant. See title 5, c. 1, Code Cr. Proc. The Code makes it the specific duty of an officer making an arrest without warrant, when authorized, to take the accused "immediately" before a magistrate, whose duty it is, after an examination, to make an "order" committing the accused to the jail of the proper county, when the law and facts so require, and to issue warrant of commitment containing the requisites prescribed. See Code Cr. Proc. arts. 296-299. The jailer did not receive appellee. He merely found him in jail, and it nowhere appears, as before stated, that he was apprised of the illegal arrest and imprisonment by the constable or exercised any force to detain appellee. The entire performance seems to be substantially that of the constable, who acted without authority or color of authority, and it is difficult for us to see upon what distinction the sureties were released (of which appellee makes no complaint) and appellant held liable. It is entirely clear that if the action stated was official the sureties are liable.

In speaking of the liability of the sureties, Mr. Murfree on Sheriffs (New Ed.) sec. 46, says that the liability is limited to the sheriff's "official" acts. It is for the "official" acts of his deputies that he is made liable under our statutes. So it has been held in this state that the sheriff, as such, is not liable for money collected after the return day of an execution (*Hamilton v. Ward*, 4 Tex. 356); and so as to his sureties (*Haley v. Greenwood & Co.*, 28 Tex. 680; *Thomas v. Browder*, 33 Tex. 783; *Barnes v. Whitaker*, 45 Wis. 204). In *State v. McDonough*, 9 Mo. App. 63, it was held that where an officer goes out of the line of his official duty, and unlawfully and without warrant makes an arrest, though done *colore officii*, the sureties on his bond "for the faithful performance of his duties" are not liable. In *State v. Wade* (Md.) 40 Atl. 104, 40 L. R. A. 628, it was held that the sureties could not be held liable for malicious acts of a sheriff in permitting a prisoner to be mobbed. In the case of *Chandler v. Rutherford et al.* (by the Court of Appeals of the Indian Territory) 51 S. W. 981, it was held that a United States marshal was not responsible for the act of one of his deputies and posse, who, without warrant and without knowledge of the marshal, shot an innocent person, who was mistaken for a horse thief. See, also, *Hawkins v. Thomas* (Ind. App.) 29 N. E. 157, cited in the Indian Territory case. In *Dysart v. Lurty* (Sup. Ct. Okl.) 41 Pac. 724, it was held that a marshal was not liable for the acts of a deputy in seizing a stock of goods without warrant, and without the knowledge of his principal, and not in discharge of any duty imposed upon such deputy by law. In *Governor v. Pearce*, 31 Ala. 465, a sheriff and his sureties were held not to be liable for the

acts of a jailer who mistreated one committed to jail on a void warrant.

Other cases might be cited, perhaps, but we think the foregoing sufficient to illustrate our conclusion that in the case before us the sheriff was not liable. The acts of Isbell were without the knowledge or consent of his principal, he was not acting or purporting to act by virtue of any warrant, and not in the performance of any duty imposed by law. In other words, his conduct was not official. The case is not believed to be one of a mere abuse of an existing authority, as are the cases of *Huffman v. Koppelkom*, 8 Neb. 344, 1 N. W. 243; *Koppelkom v. Huffman*, 12 Neb. 98, 10 N. W. 577; *Clark v. Winn* (Tex. Civ. App.) 46 S. W. 915.

The judgment is accordingly reversed, and here rendered for appellant, but without disturbing the judgment as to other parties.

SPEER, J., disqualified and not sitting.

LOGAN'S HEIRS v. LOGAN et al.*

(Court of Civil Appeals of Texas. Jan. 24, 1903.)

TRESPASS TO TRY TITLE—LOST DEED—RECORD IN WRONG COUNTY—EVIDENCE—TAX SALE—REDEMPTION—TENDER.

1. In trespass to try title, plaintiffs filed an affidavit of the loss of their original deed, and that the copies of its record in another county, offered, were duly certified, and had been duly recorded in the county in which the land was situated. Rev. St. art. 4642, provides that every deed, or certified copies thereof, copied from the deed records of any county when the same has been regularly recorded, although the land mentioned may not have been situated in such county, may be recorded in the county where the land lies. Article 2312 provides that every instrument which is permitted to be recorded with the clerk of the county court, and which has been recorded, shall be admitted as evidence without proof of its execution. *Held*, that such certified copies were admissible as proof of the original deeds and of the proper recording thereof.

2. Where plaintiffs had asserted title to the land in controversy and paid taxes thereon for 40 years, and the deeds under which they claimed were lost, proof may be made that at the date asserted deeds of the character claimed had been spread on the deed records of a county other than that in which the land was situated, as a circumstance showing that deeds of this purported character were in fact in existence at the date of the record.

3. Under Rev. St. art. 5232n, providing that when lands are sold for delinquent taxes the owner or any one having an interest therein can redeem within two years on payment of double the amount paid, a tender of the proper amount within such time by the owner of land through his agent, to redeem from a tax sale, is sufficient, though the purchaser, to whom the tender was made, did not know who such agent represented.

Appeal from district court, Shackelford county; N. R. Lindsey, Judge.

Action by the heirs of William Logan against M. P. Logan and others. From a judgment in favor of the defendants, plaintiffs appeal. Reversed.

*Rehearing denied February 23, 1903.

A. A. Clarke, Jo. W. Akin, and C. W. Johnson, for appellants. J. R. Warren, for appellees.

CONNER, C. J. This suit was filed March 23, 1901, by appellants in the ordinary form of trespass to try title to two tracts of land, of 320 acres each, situated in Shackelford county, and known as surveys No. 400 and No. 1,555, respectively, of the T. E. & L. Co. survey. The defense included a plea of not guilty, and cross-bills for an affirmative adjudication in appellees. Appellants, who claim as the heirs of Wm. Logan, among other things offered in evidence duly certified copies from the deed records of Young county of what purported to be original deeds from the said Texas Emigration & Land Company to Wm. Logan, duly conveying the lands in controversy, but which, upon objection, were excluded, in consequence of which the judgment was for appellees.

As appears from the bill of exception, regularly taken to the exclusion of said copies, the principal objection urged thereto was that the original had not been regularly recorded in Young county, in that the land described therein was situated in the unorganized county of Shackelford, and not in Young county. It does not appear that Young county was the parent county, or very clearly, if at all, that by legislative acts Shackelford county was at the time of the purported record attached to Young county for purposes which would have authorized the record of the deed, although it does appear that Shackelford county was attached to the nearest organized county for purposes pertaining to the jurisdiction of the district court, and inferentially, perhaps, that Young county was such nearest organized county. But without going into the perplexing question of whether Young county was the proper place for the record of deeds to lands situated in the unorganized county of Shackelford, as is perhaps to be inferred was the custom at the period of the record in question, we nevertheless have concluded that the court was in error in excluding the copies mentioned.

From the bills of exception it is made to appear that proper affidavit, which was not controverted, of the loss of the originals had been duly filed among the papers of the case, and that the copies offered were properly certified to under the hand and seal of the clerk of the county court of Young county, and had also been duly recorded in the deed records of Shackelford county in 1902, and thereafter filed in the cause, and three days' notice thereof duly given appellees before the trial. The bill recites that the original deeds bore date September 5, 1858, and were filed for record December 20, 1859, and recorded in Young county on December 21, 1859, and that the deeds were "properly acknowledged for record at the time" of their

registration. The irregularity, if any, of the record of the original deeds specified in the objection to the copies mentioned, would seem, under the circumstances stated, to have been cured by the enabling act of 1895 (Rev. St. art. 4642), which is as follows: "Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the state where the same has been regularly recorded, although the land mentioned may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies, and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that time only: provided, however, that all certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record: and provided, further, that nothing in this article shall be construed to make valid any instrument which was at the time of its execution from any cause invalid." This, being a remedial statute, should be liberally construed in aid of the object sought to be attained by the lawmaking power.

No irregularity in the record of the deeds in question has been suggested or appears, save that it was perhaps not recorded in the proper county—a defect or irregularity which was expressly cured by the article quoted. By that article the copies offered in evidence were authorized to be recorded in Shackelford county. They were recorded there, and hence were admissible as evidence, under Rev. St. art. 2312.

If we are correct in the foregoing views, it of course disposes of the material question presented. We will add, however, that the evidence was also offered as ancient instruments, to which it was objected that the instruments were not shown to have come from the proper custody. While we are not prepared to hold that the copies offered were admissible as competent evidence for the particular purpose offered, yet it was shown in the evidence that appellants had asserted title and paid taxes on the lands in controversy since about the year 1860, and we do not see why, the originals being lost, proper proof, if any, might not be made that at the date asserted deeds of certain form and tenor had in fact been spread upon the deed records of Young county, as a circum-

stance tending to show that deeds of their purported character were in fact in existence at the date of the record, to be considered by the jury, together with all other evidence, in determining whether or not the Texas Emigration & Land Company had in fact made deeds to Wm. Logan, as asserted by appellants.

In view of another trial, we also add that while we disagree with appellants in the objections made to the foreclosure sale for the taxes of 1898, through which appellees claim, we nevertheless hold that the tender made appellees in redemption of such sale was sufficient under article 5232n, Rev. St. It is undisputed that the tender of a sufficient amount was made within the time required by law, and we cannot think that the mere fact that the tender was made through an agency not known by the purchaser to have any interest in the land could affect the question. The real owner is given the right by the statute to redeem, and we know of no law which required the owner to exhibit his evidences of right at the time of redemption.

In the instance before us appellants' agent in the town of Graham arranged with the bank at that place, by phone, to procure the bank at Albany, Tex., to make the tender, which was refused because the purchasers did not believe or understand that the bank at Albany had any interest in the lands in controversy. No reason appears why, if deemed material, proper inquiry would not have led to full disclosure of the parties appellant in whose interest the tender was really made.

Other questions need not be noticed, but for the error discussed in the exclusion of the testimony the judgment is reversed, and cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SMITH.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

SERVANT—INJURIES—NEGLIGENCE—FELLOW SERVANT—EVIDENCE—RULE EXCLUDING WITNESSES.

1. While in charge of a hand car, and of plaintiff and other hands who were moving the same under his direction and with his assistance, a railroad foreman, with those at his end of the car, quickly and recklessly, and without warning to plaintiff, who was at the other end, lifted their end, and threw the weight of the car on the end where plaintiff was; thereby inflicting the injury complained of. Held to be negligence on the part of the foreman and those assisting him at his end of the car.

2. Where, in an action for personal injuries, all the witnesses were placed under the rule, it was not an abuse of discretion to refuse to relax the rule in favor of defendant's medical experts, whose assistance defendant desired in aiding its counsel to cross-examine one of plaintiff's medical experts.

3. In an action by an employé against a railroad for injuries, it was proper for his counsel, on

cross-examination of certain of defendant's witnesses, to prove by them that they were in defendant's employ, and attended the trial on notice from it, and in the expectation that it would pay their expenses incurred in such attendance, and were not subpoenaed as witnesses, as such facts were proper to be considered in weighing their evidence.

4. In an action by an employé against a railroad for injuries, it was proper for plaintiff's counsel to ask defendant's foreman, on cross-examination, whether or not there was a general rule of the company that employes who violate its rules and are negligent are discharged, and that they have to get out, or do their best as witnesses for the company.

5. A railroad foreman, in charge of a hand car, and of plaintiff and other hands who were moving it under his direction when plaintiff was injured, did not lose his status as foreman or vice principal, and become a fellow servant of plaintiff, by assisting in moving the car.

Appeal from district court, Bell county; John M. Furman, Judge.

Action by Charles S. Smith against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Miller and Geo. W. Tyler, for appellant. J. B. McMahon, for appellee.

FISHER, C. J. Charlie Smith, plaintiff below, filed his first amended original petition in the district court of Bell county, Tex., July 20, 1900, wherein he claimed damages for personal injuries received in lifting a hand car from defendant's track while he was employed as a member of the bridge gang under J. B. Berry foreman; "that, when the car was about to be removed, the said Berry, with the other men, took hold of one side of the car, and ordered plaintiff and another one of the men to get on the opposite side, which order was obeyed, and in this manner undertook to remove said car; that plaintiff and the man lifting with him took hold of said car, and began to lift slowly and carefully, as they were bound to do, on account of the weight of said car, and, while they were so lifting, the said foreman and the men lifting on his side, negligently, recklessly, and without notice to plaintiff and his companion, raised their end of the car to such an elevation that the most of the weight was thrown upon plaintiff," etc. Defendant answered by general denial, and further alleged (1) that plaintiff's injuries were due to his own negligence in undertaking to remove the car as claimed, and in failing to protest to the foreman, or in not desisting from and refusing to further assist in the removal of the car, which negligence contributed to, and was the proximate cause of, the injury; (2) that the injury was caused by the other members of the gang, who were fellow servants with plaintiff; and (3) that plaintiff assumed the ordinary risk connected with his employment, and that it is usual for the bridge gang to ride upon a hand car, and to move it to and from the track as ne-

*Rehearing denied February 25, 1903, and writ of error denied by supreme court.

¶ 5. See Master and Servant, vol. 24, Cent. Dig. § 452.

cessity requires, and on the occasion in question it was removed from the track in the ordinary way, and, if there were more men lifting on the side opposite to plaintiff than on his side, the fact was plainly visible and open to him, and he assumed the risk of any danger to himself resulting therefrom. The case was tried before a jury on January 25, 1902, resulting in a verdict and judgment for plaintiff against the defendant for \$1,250.

There is evidence in the record which supports the averments of the plaintiff's petition. The evidence shows: That Berry was foreman at the time that the hand car was being removed, and that he was in charge and control of the same, and of the plaintiff and the other hands who were removing the same from the track, and that the same was being removed under his direction—he at the time assisting in the removal—and that he, with the others at his end of the car, quickly and recklessly, and without warning to the plaintiff, lifted and elevated their end of it, and threw the weight on the end where the plaintiff was, thereby causing the injuries alleged in his petition. Such conduct at the time was negligence upon the part of the foreman and those employes that were assisting him at his end of the car in moving the same from the track. That the sudden movement here complained of was at the direction of the foreman, Berry.

It was not reversible error to admit the evidence complained of in appellant's fourth assignment of error. If that testimony could be considered in the nature of admissions by the defendant of its liability, it would be admissible. If it could not be admitted or was not admitted for that purpose, it was harmless and immaterial, and was not calculated to influence the jury in reaching a verdict.

The evidence complained of in the sixteenth assignment of error was admissible. In our opinion, the allegations of the plaintiff's petition were sufficient to admit this testimony.

It is contended in the seventh assignment of error that Dr. Hodges, one of the surgeons in charge of the hospital at Houston, should have been permitted to remain in attendance during the examination of the witnesses. All the witnesses were placed under the rule. It is claimed by the appellant that Dr. Hodges' assistance was necessary, as a medical expert, in aiding the defendant's counsel in the cross-examination of Dr. Flewellen, one of the plaintiff's witnesses. We see no reason why the rule should be relaxed in favor of a medical expert, more than any other witness whose assistance might be valuable to counsel in aiding him in the cross-examination of the witnesses of his opponent. There was no abuse of discretion in the ruling of the court upon this subject.

It was proper for plaintiff, on cross-examination of defendant's witnesses Nelson, Berry, and Hodges, to prove by each of these

witnesses that they were in the employ of the defendant, and that they were not subpoenaed as witnesses, and that they attended the trial on notice from defendant's officers or attorneys, and expected the defendant to pay their expenses for the time spent in attendance upon the trial. These were facts proper to be considered by the jury in weighing the evidence of these witnesses. It was also proper to ask the witness Berry, on cross-examination, whether or not there was a general rule of the defendant company that employes who violate the rules and are negligent are discharged, and that they have to get out, or do their best as witnesses for the company. The witness, in answering this question, stated that an employe is not discharged every time, and that they are not discharged unless negligence is shown. The objection urged to the question, and the evidence in answer to it, is that it was immaterial and irrelevant, and calculated to prejudice the defendant's case in the minds of the jury, and that there was no proof of such rule or custom. The question asked was proper. The plaintiff could not offer evidence of such a rule until he proved that such a rule existed, and, if the witness knew that fact, he could testify that there was a rule, and what that rule was. It is not shown here that the rule was in writing, nor is complaint made that the plaintiff has not offered the best evidence upon that subject. If the witness knew that there was such a rule as inquired about, he could testify to that fact.

There was no error in refusing any of the special charges requested by defendant, as all of the issues that were proper to be submitted were covered by the charge of the court.

The charge complained of in the seventeenth and eighteenth assignments of error was proper. It is contended that Berry, the foreman, when he assisted in removing the car from the track at the time that the plaintiff was injured, occupied the position of a fellow servant, and, by reason of such assistance, lost his status of foreman or vice principal, for whose negligence the railway company would not be liable, as it would be one of the risks assumed by the plaintiff. This view of the question by appellant is not tenable. *St. Louis Southwestern Railway Co. v. Smith*, 70 S. W. 789, 5 Tex. Ct. Rep. 816.

We find no error in the record, and the judgment is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. FORT GRAIN CO.

(Court of Civil Appeals of Texas. Feb. 18, 1903.)
CARRIERS—RATES—INTERSTATE OR DOMESTIC
SHIPMENT—OVERCHARGE—BUR-
DEN OF PROOF.

1. If the final destination of goods shipped from a point without the state of Texas is a point

within that state, the shipment is an interstate one, and not subject to the commission rates of Texas, though not made on a through bill of lading.

2. The fact that plaintiff acquired title to the shipment from the original shipper after it had reached a point in Texas, but before it reached its final destination, would not make the shipment a domestic one.

3. In a suit against a carrier to recover the penalty for overcharges consisting in the excess of the interstate rate over the commission rates of Texas, the burden of proving that the shipment was a domestic shipment was on the plaintiff.

Appeal from district court, McLennan county; T. P. Stone, Special Judge.

Action by the Fort Grain Company against the Gulf, Colorado & Santa Fé Railway Company to recover the penalty imposed by statute for overcharges. Judgment for plaintiff, and defendant appeals. Reversed.

The theory on which plaintiff based its right of action was that the shipment in question was a domestic one, and that defendant, by charging the interstate rate, which was greater than the domestic rate, had subjected itself to the penalty.

Prendergast & Sanford and J. W. Terry, for appellant. Davis & Cocke, for appellee.

FISHER, C. J. The trial court instructed the jury as follows: "By 'interstate shipment' is meant freight that is shipped from one state through and into another on a bill of lading issued by the initial carrier to be carried through from the terminal point to the point of destination; and if you find that the bill of lading was issued to Connor Bros., and it was the intention of the parties that this shipment of freight was to be delivered at Copperas Cove and San Angelo, Texas, then it would be an interstate shipment under the law, and you will find as instructed above." This charge is complained of in appellant's ninth assignment of error. This definition of an interstate shipment is not accurate. The shipment may be interstate, although transported by virtue of numerous bills of lading. The original bill of lading upon which the goods were shipped mentioned Texarkana, Ark., as the terminal point. There is evidence to the effect that the goods were delivered at Texarkana, Tex., and were there rebilled, and a new bill of lading issued, upon which the property was finally transported to its destination. If the purpose and intention was, when the goods were shipped from St. Louis, that their final destination was Copperas Cove and San Angelo, it would be an interstate shipment, notwithstanding the transportation was not upon a through bill of lading. *Houston Navigation Co. v. Ins. Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17.

The twelfth assignment of error complains of the following charge: "You are charged, if you believe from the evidence that the Fort Grain Company only acquired title to the several shipments of corn shown in the evidence, after the same arrived at Texarkana, Texas, that they did not own said corn at any point outside the state of Texas, then the shipment made by it from Texarkana, Texas, to any point in the state of Texas would be such a shipment as would be subject to the rates fixed by the railway commission of Texas. And if you believe from the evidence that the defendant charged and collected, demanded or received, from plaintiffs, as freight charges, any greater rate, charge, or compensation than that fixed and established by the railway commission for the transportation of such freight, then you will find for plaintiffs, as damages, the amount of such overcharge, if any." This charge was erroneous. Acquiring title to the shipments of corn after their arrival at Texarkana was not the sole test by which to determine whether the shipments were or not interstate. If, when the corn was started, or before it reached Texarkana, it was the purpose and intention that the corn in question should be transported to its final destination—that is, Copperas Cove and San Angelo—the transportation would be interstate, and not domestic, although the plaintiff may not have acquired title until after the corn reached Texarkana, Texas.

The fourteenth assignment of error complains of the charge of the court to the effect that the burden of proof was on the defendant to establish by a preponderance of the testimony that the shipment in question was interstate. The plaintiffs, in their petition, sought to recover from the defendant on the ground that the shipment in question was domestic, and that by reason of the appellant demanding and receiving from the plaintiff the interstate rate, which was greater than the commission rates of Texas, it subjected itself to the penalties prescribed by the statute. In other words, plaintiff's case was predicated upon the proposition that the shipment in question was not interstate, but a domestic shipment from Texarkana, Tex., to Copperas Cove and San Angelo, Tex. Evidence of these facts was a part of the plaintiff's case, and the burden of proof was upon the plaintiff to establish the facts as pleaded. Therefore the charge complained of was erroneous.

We have carefully examined all of the remaining assignments of error, and reach the conclusion that they are not well taken. For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

LOW v. MOORE.

(Court of Civil Appeals of Texas. Feb. 18, 1903.)

FACTORS—WRONGFUL SALES—RECOVERY OF PROPERTY—PAYMENT OF VALUE—PRECEDENT DEBT—APPEAL—FINAL JUDGMENT.

1. Where plaintiff's agent, having possession of buggies for sale, sold one to defendant for such agent's precedent debt, without authority, defendant was not a purchaser for value, and plaintiff was therefore entitled to recover the value of the buggy, and damages for its detention.

2. Where, in an action by a principal to recover property wrongfully sold by his agent, the evidence as to value was conflicting, and the record did not show the amount to which plaintiff was entitled for the detention of the property, the appellate court, on reversing a judgment for defendant, could not render judgment absolute for plaintiff.

Appeal from McCulloch county court; Joe A. Adkins, Judge.

Action by W. G. Low against S. P. Moore. From a judgment in favor of defendant, plaintiff appeals. Reversed.

T. C. Wilkinson and Shropshire & Hughes, for appellant. W. E. Adkins and W. McShan, for appellee.

STREETMAN, J. Appellant brought this suit in the justice's court for the conversion of a buggy, and sought judgment either for the possession of the buggy, and damages for its detention, or for its value, with interest. Upon appeal to the county court, a jury trial was had, and from a verdict and judgment in favor of the defendant this appeal is prosecuted.

The following facts were shown: Appellant was living at Brownwood, Texas, and engaged one W. C. Hildebrand, who lived at Brady, Texas, to act as his agent in the sale of some buggies. The following agreement was executed: "Brownwood, Texas, May 15th, 1902. I, W. G. Low, this day agree to furnish W. C. Hildebrand a few jobs of spring work and wagons as long as satisfactory, with the express understanding that he sell them at Brady, Texas, and gives the said W. G. Low a note with lien on said vehicles with 10% interest and approved by W. D. Carothers, Brady, Texas, payable in cash or note not later than October 1, 1902, with 10% add to wagon sale above invoice price; 20% above invoice price of spring vehicles. The above 10% and 20% to be applied to the credit of W. C. Hildebrand when collected by said W. G. Low. [Signed] W. C. Hildebrand." Under this contract, Hildebrand took the buggy in question to Brady, Texas, and left it in the livery stable of appellee. Hildebrand owed appellee about \$160 on account; and appellee, not knowing of the agency, but supposing Hildebrand to be the owner of the buggy, bought it from him at an agreed price of \$87.50, and paid for it by crediting Hildebrand's account with that amount, to which arrangement Hildebrand agreed. Appellant, Low, ascertained these

facts, and demanded possession of the buggy, and, upon being refused, brought this suit to recover it. The only pleadings of the defendant were a general denial, and a special plea alleging a purchase for value in good faith from Hildebrand, and without knowledge of any title or claim on the part of appellant.

The court charged the jury as follows:

"That where a principal intrusts the possession of his goods with an agent, and a person deals with an agent as the principal, without knowledge of the agency, he may set off any claim he has against the agent before he is undeceived, in answer to the demand of the principal; and in this case, if you believe from the evidence that W. C. Hildebrand was the agent of the plaintiff, W. G. Low, and that said Low intrusted his goods with said Hildebrand, and that the defendant, S. P. Moore, purchased the buggy involved in this suit from said W. C. Hildebrand, not knowing that he, the said Hildebrand, was the agent of this plaintiff, then the defendant, Moore, would have a right to offset any claim he had against said Hildebrand in payment of said buggy.

"You are instructed that, in order to constitute a contract, it is necessary that the minds of the two parties must come together, and agree upon all the terms and considerations of the contract. A principal is liable for the acts of his agent done within the scope of his employment. An agent, notwithstanding private instructions, may, within the limit of his agency, bind his principal, unless the person or party dealing with the agent knew of such instructions. If either party must suffer from the acts of an agent, it must be the party whose agent he is. If you believe from the evidence that W. C. Hildebrand, acting as agent for plaintiff, W. G. Low, sold and delivered to defendant, S. P. Moore, the buggy in controversy, and that said defendant, Moore, knew at the time of such sale that W. C. Hildebrand was the agent of W. G. Low, and that said buggy was the property of W. G. Low, the plaintiff herein, then in that event you will find for the plaintiff the value of same, and the reasonable hire of same, per day, from the 10th day of June, A. D. 1902."

Appellant's first assignment of error assails that portion of the charge which authorizes the jury to offset plaintiff's claim with the indebtedness owing by the agent to the defendant, and this assignment is sustained. The propositions of law stated in the charge are correct, and are supported by abundant authority in cases where they are applicable, but they do not apply to the facts of this case. If an agent enters into a contract as though made for himself, and the existence of a principal is not disclosed, the principal may generally enforce the contract; and if he does so, and assumes the benefits of the contract, if the agent has been invested with the indicia of ownership, the principal must

take the burdens as well as the benefits of the contract. He must, in such case, take the contract subject to all the equities existing between the third party and the agent. These principles, however, are subject to the further rule that the principal may recover his own property, or its value, from third persons, when it has been transferred or disposed of by an agent contrary to his instructions or duty; and, to defeat the operation of this rule, the purchaser must show two things: (1) That the principal has invested the agent with the indicia of title to the property, or authority to make such disposition; and (2) that he bought the property in good faith, without notice, and paid a valuable consideration. It has been held in some cases that the mere possession of property, by whatever means obtained, is not a sufficient indication of ownership to create any rights in favor of a third person purchasing the property; and it is suggested that the principal or owner must do something more than merely deliver the possession of the property to the agent, before he can be prejudiced by an unauthorized sale by the agent. The facts in this case, however, do go a step further than the mere delivery of possession to the agent, and it might possibly be said that the agent was invested with the indicia of ownership. But the second requirement is not met. The appellee in this case did not pay anything which is, in law, deemed of value, when he purchased the buggy. As said in *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, the purchaser "must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real." A purchaser who simply credits the price upon a pre-existing indebtedness does not part with anything of value. *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248; *McKamey v. Thorp*, 61 Tex. 648. Hence the rule has been established that "where an agent, as such, having a general authority to sell, transfers his principal's goods to a third party in payment of his [the agent's] debt, the principal may, as a general rule, recover from the third party the goods so transferred, or the value thereof." Am. & Eng. Ency. Law, (2d Ed.) vol. 1, p. 1174. Many authorities are cited in support of this rule—among others, the case of *Warner v. Martin* (by the Supreme Court of the United States) 11 How. 224, 13 L. Ed. 667, in which it is said: "A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what

may be due to him, and without any tender to the pawnee for which the goods were pledged; or without any demand for such goods; and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor." So in the case of *Rodick v. Coburn*, 68 Me. 170, it is said: "If the owner of an article of personal property delivers it to another to sell, the latter has no right to deliver it to his creditor in payment of his own pre-existing debt; and, if he does so, the owner may maintain trover against the creditor without a previous demand." Many other cases are to the same effect. We are therefore of the opinion that, under the evidence in this case, the court should have instructed the jury to find for the plaintiff, leaving them only to ascertain the value of the buggy, and the damages to which plaintiff was entitled for its detention.

We are asked not only to reverse this case, but also to render judgment for appellant, but the evidence is not in such condition as to authorize us to do so. The plaintiff testified that the buggy was worth in the market from \$110 to \$120. It was sold, however, by Hildebrand, for \$87.50, and there was evidence to show that the cost price of the buggy was only \$82.50. We are also unable, from the record, to say precisely the amount to which plaintiff would be entitled for the detention of the buggy; the only evidence being that of the defendant, who testified that he hired out buggies at \$1 a day.

What we have said above will sufficiently indicate our views, without passing separately upon each assignment of error.

Because of the errors pointed out in the charge of the court, the judgment is reversed, and the cause remanded. Reversed and remanded.

FERGUSON v. SLATER, McMAHON & CO.

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

GUARDIAN AND WARD—ACTION AGAINST GUARDIAN—RECONVENTION—APPEAL—RIGHT TO ALLEGE ERROR.

1. Where defendant, sued both in his individual and representative capacities on a contract for threshing grain grown on land which he held as guardian for certain minors, pleaded damages for plaintiff's breach of the contract in his capacity as guardian, and there was no recovery against him in such capacity, he could not complain on appeal that the court erred in disposing of his plea in reconvention.

Appeal from Collins county court; J. H. Faulkner, Judge.

Action by Slater, McMahon & Co. against J. H. Ferguson. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

H. C. Ferguson, J. M. Pearson, and Abernathy & Beverly, for appellant. Abernathy & Mangum, for appellees.

Opinion on Rehearing.

TEMPLETON, J. On a former day of the term the judgment herein was affirmed without a written opinion. Appellant has filed a motion for rehearing, and insists upon same with such evident good faith and confidence that we feel constrained to notice briefly the principal grounds relied on for a reversal.

The case is this: Slater, McMahon & Co. sued Ferguson, as an individual and as guardian of the estates of certain minors, to recover a sum claimed to be owing to them on account of threshing a crop of grain. The grain was raised on lands belonging to Ferguson's wards. Ferguson, acting as guardian, had rented the lands to Holloman for \$3 per acre, money rent. Shortly afterwards he entered into partnership with Holloman, thereby becoming jointly interested with Holloman in the rental contract. In making this deal he was evidently acting in his individual capacity. After the crop had been raised and gathered, Holloman sold out his interest therein to Ferguson. Slater, McMahon & Co. were employed to thresh the crop, and threshed the bulk of it. It was claimed that Slater, McMahon & Co. breached their contract by failing to thresh the whole of the crop, and that damage resulted from the breach. Ferguson therefore refused to pay them the full amount demanded for the threshing which had been done, and this suit was accordingly instituted. Ferguson, as guardian, set up the alleged breach of contract, and pleaded the resulting damages in reconvention. On a jury trial the plaintiffs obtained judgment against Ferguson, as an individual, for the amount claimed. He was held not liable in his representative capacity.

It is earnestly contended that the suit of the plaintiffs was on an express contract for threshing a certain amount of grain at a certain price per bushel, and that the trial court erred in charging the jury to find for the plaintiffs the reasonable value of the work done which was not done under an express contract at an agreed price. We do not differ from counsel for appellant in regard to the law on this subject, but are of opinion that the construction placed by them on the pleadings of the plaintiffs is not admissible. The pleadings in the case are very voluminous, and it would serve no good purpose to state the same fully and in detail. There is some confusion of allegations in the pleadings of the plaintiffs, and the same cannot be commended as a clear, succinct, and orderly statement of the cause of action sued on. We think, however, that the pleadings fairly raise every issue which was submitted to the jury; and that, too, in a manner which apprised the defendant of the grounds upon which a recovery was sought against him. It does not appear that he was misled or injured by the form of the pleadings of the plaintiffs, and we would not be justified in reversing the judgment simply because the

said pleadings cannot be approved as models. The petition and the supplemental petitions, taken together, state every fact necessary to a recovery by the plaintiffs on a quantum meruit; and, while the facts might have been pleaded in a more orderly fashion, they are not stated in such form as to render the pleadings fatally defective.

Appellant lays great stress upon the proposition that the trial court erred in that paragraph of the charge wherein the guardian's plea in reconvention was submitted to the jury. The charge on this point is not free from the criticism that it is somewhat confusing, but it is unnecessary for us to determine whether the contention that there is error in the charge is well taken. Ferguson claimed damages only in his capacity as guardian, and, as there was no recovery against him in his representative capacity, it is immaterial whether his plea in reconvention as guardian was properly presented to the jury. If he was not liable, as guardian, for the threshing of the grain, then his wards had no interest in the threshing contract, and were not damaged by the breach thereof by the plaintiffs, if there was a breach. As he did not claim to have been damaged as an individual, he cannot, in his personal capacity, complain of the disposition made of the guardian's plea in reconvention.

Other questions are presented, but the case turns on those considered above. We find no reversible error in the record, and the motion for rehearing is therefore overruled.

TEXAS & P. RY. CO. v. BERRY.

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

RAILROADS—INJURIES AT CROSSING—STATUTES—APPLICATION—BLOWING WHISTLE AND SOUNDING BELL—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE—ASSUMPTION OF FACTS—STATEMENT.

1. Rev. St. art. 4507, requiring the bell on an engine to be rung and the whistle blown at a distance of at least 80 rods from a crossing, is inapplicable to a train backing from a switch track not 80 rods from the crossing.

2. In an action for injuries at a crossing, an instruction that if plaintiff, in crossing the track, had reached a place of safety, and, if she had remained there, would have escaped injury, and if she turned back suddenly because of the sudden approach of a train, and her act was that of an ordinarily prudent person under like circumstances, the fact that she may have stepped in the wrong direction, thereby suddenly placing herself in peril, would not defeat a recovery if her doing so was caused by defendant's negligence, was objectionable as a charge on the weight of evidence.

3. The instruction was also erroneous as assuming that plaintiff was placed in a perilous position by defendant's negligence, and was thereby induced to step in the wrong direction.

Appeal from district court, Van Zandt county; J. G. Russell, Judge.

Action by N. E. C. Berry against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

T. J. Freeman and N. M. Cate, for appellant. W. B. Wynne, for appellee.

BOOKHOUT, J. This is a suit by the appellee against the appellant to recover damages for personal injuries sustained by her in being struck and knocked down by one of the appellant's engines. A trial resulted in a verdict and judgment for the appellee, and the railway company appealed.

1. Edgewood is a station on the line of the Texas & Pacific Railroad in Van Zandt county. It has about 400 inhabitants and 10 business houses. The appellant maintains two tracks through the town; the northern track being defendant's main track, and the one next to it on the south being its passing track. The depot is south of both tracks. The business part of the town is north of the main track. There is a public road or street running south from the business part of town crossing the railroad right of way on the east side of the depot. A freight train ran into Edgewood coming from the east, and went in on the passing track, and came to a standstill, leaving the main track clear for the east-bound passenger train. The freight train was cut, so as to leave the crossing clear. The east-bound passenger train came in on the main track and stopped. The appellee got off this train, and went south over the crossing to the depot. After the passenger train had pulled out, the freight train was coupled up, and backed out of the side track east about 150 yards onto the main track. It was then started west on the main track. It being downgrade, the steam was shut off, and the train permitted "to roll down" by its own weight, and was running from four to six miles per hour when it reached the crossing. The appellee, when she saw the freight train back out, started from the depot to cross over to the business part of town. She had just cleared the north rail of the main track, when she was struck by the crossbeam of the engine of the approaching train. She was knocked down and injured. The track was straight, and she could have seen the approaching train had she looked. She says she did not hear any signal or noise, and that she did not look. The evidence is conflicting as to whether the bell on the engine was being rung. The evidence tends to show that a train rolling down as this was does not make very much noise. The court instructed the jury as follows: "And if you further find that the employés of the defendant operating said engine failed to blow the whistle of said engine and ring the bell of said engine at a distance of at least eighty rods from said crossing, or failed to keep said bell ringing until said engine crossed said public road, or stopped; and if you further so find that the failure of said employés to blow said whistle and ring said bell, or the failure of said employés to keep said bell ringing as aforesaid, was the prox-

imate cause of plaintiff being struck and injured—then you will find for the plaintiff, unless you find otherwise under the instructions hereinafter given you." The giving of this charge is assigned as error. The charge was not applicable to the case as made. When the freight train backed out from the passing track onto the main track, it did not reach a point 80 rods from the crossing, but only about 150 yards to a switch, where it cleared the passing track, and started west on the main track, and hence it could not have given the signal for a crossing required by article 4507 of the Revised Statutes. In such a case the statute does not apply. *Railway Co. v. Nycum* (Tex. Civ. App.) 34 S. W. 460.

2. It is insisted that the court erred in giving a special charge to the jury at the request of the plaintiff, reading: "You are further charged in this case that if you should find from the evidence that plaintiff, in crossing the track of defendant company, had gotten across the track, and reached a place of safety, and, if she had remained where she then was, that she would have escaped injury, and that she turned back suddenly toward the track upon the sudden approach of the train, and that the cause of her turning was the sudden approach of the train in close proximity to her, and that her act was such as an ordinarily prudent person might have been expected to do under like circumstances; and if you further find that the employés in charge of the train were guilty of negligence in operating the train, as the same has been defined to you—then I charge you that the fact that she may have stepped in the wrong direction, thereby suddenly placing herself in peril, would not defeat her recovery, if you find that her so doing was caused by the negligence of the defendant's employés." The charge is subject to the criticism that it is upon the weight of the evidence in telling the jury that "the fact that she may have stepped in the wrong direction, thereby suddenly placing herself in peril, would not defeat her recovery." It assumes that the appellee was placed in a perilous position by the negligence of the defendant, and that appellee was thereby induced to step in the wrong direction. If, by the negligence of the railway company, appellee was, without her fault, placed in a position of peril, and as a result thereof, in her effort to save her life, she started back across the track, the same would not necessarily amount to negligence on her part. *Railway Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *Railway Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956; *Railway Co. v. Oslin*, 63 S. W. 1039, 2 Tex. Ct. Rep. 1035. The issue as to whether, under all the facts, the plaintiff was guilty of negligence in failing to discover the approaching train, and, if not, whether she was placed in a position of peril by the negligence of the defend-

ant, which proximately caused her injury, should have been clearly submitted to the jury in a proper charge. *

For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

LANE & BODLEY CO. v. CITY ELECTRIC LIGHT & WATERWORKS CO.

(Court of Civil Appeals of Texas. Feb. 14, 1903.)

SALES — WARRANTY — BREACH — ACTION FOR PRICE — FOREIGN CORPORATIONS — RIGHT TO SUE — INTERSTATE COMMERCE.

1. In an action for the price of an engine, an answer setting up that the machine was warranted first-class, etc., but that it did not work properly, and that defendant was unable to discover the defect, was sufficient, though it did not show the defect.

2. A foreign corporation may sue on a note given for the price of machinery sold by it, where the transaction was one of interstate commerce, without having had a permit to do business in the state.

Appeal from district court, Fannin county; Ben. H. Denton, Judge.

Action by the Lane & Bodley Company against the City Electric Light & Waterworks Company. From a judgment for defendant, plaintiff appeals. Affirmed.

H. G. Evans, for appellant. R. M. Rowland, for appellee.

RAINEY, C. J. Appellant sued to recover on a promissory note for \$661, executed by appellee in part consideration for an engine. The note provided for interest and 10 per cent. attorney's fees, and a lien was given to secure said note, and a foreclosure was prayed for. Defendant admitted the execution of the note and lien, but reconvened for damages alleging failure of engine to comply with contract. Judgment was rendered for plaintiff for \$100, from which judgment plaintiff appeals.

The plaintiff excepted to defendant's answer on the ground that it did not sufficiently point out the defects in the machinery, and did not allege in what respect it did not comply with the contract. This exception was overruled and error is here assigned thereon. The part of the answer pertinent here reads: "That plaintiff agreed and warranted in said contract to deliver to defendant an engine fitted with all the latest improvements, and of good material and first-class workmanship, and one that would run smoothly, without noise or jar, or undue heating in any of the journals, and to be first-class in every respect. That plaintiff, at the time of the signing of the said contract, knew the purpose for which defendant was buying it, and the use it was to be put to. That the engine delivered by plaintiff to defendant did not comply with said contract, was not of good material and first-

class workmanship, did not run smoothly, without noise or jar, and was not first-class in every respect. That because of some defect in construction or material, the nature of which defendant has been unable to discover, the speed and power of the engine were irregular, and could not be regulated, causing an unnecessary waste of fuel and water, and causing the electric lights to vary greatly in brightness or intensity; sometimes being very bright, sometimes medium, and sometimes going nearly or quite out. That the — were made of common casting, when they should have been made of steel. That, if the engine had been according to contract, one and three-fourths cords of wood and 3,000 gallons of water per night would have been sufficient to run the machinery and do all the work required, but with this engine it was necessary to consume two cords of wood and 4,000 gallons of water per night, and even then the speed of the engine was very irregular, causing irregularities in the lights as aforesaid." The exception was properly overruled. The allegations of the petition point out with particularity in what respect the machinery failed to perform the function for which it was contracted to properly perform, and alleges that defendant was unable to discover the defect. The pleader is only required to plead with that certainty that the nature of the case is susceptible of. If the defect could not be discovered, the party should not be deprived of his right on that account. The plea was sufficient. *Railway Co. v. Haden* (Tex. Civ. App.) 68 S. W. 530. This case is a fair illustration of the justness of this rule. The evidence shows that the engine would not perform properly the functions the vendors warranted it to perform, and the particular defect in construction that caused the failure to perform could not be discovered, not only by defendant, but by two parties sent by plaintiff to remedy the defect.

The second and only other assignment of error attacks the verdict for want of evidence to support it. There is no merit in this assignment. The evidence is amply sufficient to show that the machine did not comply with the contract, and that plaintiff sustained the amount of damages awarded by the verdict.

Appellee presents cross-assignment of errors, which requires our consideration. It is contended that plaintiff alleges that it is a foreign corporation, but fails to allege and prove that it has a permit to do business in this state, and therefore plaintiff was not entitled to sue and recover anything on the note. This assignment is not well taken. There is nothing in the pleadings or proof to show that plaintiff was of that class of corporations that came within the purview of the statute, and required to secure a permit. The facts show a single transaction. Under the contract the machine was to be deliver-

* 2 See Corporations, vol. 12, Cent. Dig. § 2544.

ed "f. o. b. cars" Cincinnati, Ohio. As far as the evidence shows, the transaction was interstate commerce, and plaintiff had the right to sue. It is only in those cases where foreign corporations are required to secure permit under the statute that they are required to plead and prove the securing of a permit before they can maintain an action. This is not such a case.

Defendant complains of the judgment for allowing 10 per cent. attorney's fees on the amount of principal and interest of the note. This was error. Plaintiff was only entitled to attorney's fees on the difference between the amount of the note, principal and interest, and the amount of damages found in favor of the defendant. The difference between these was \$25.09. Ten per cent. attorney's fees on this amount is \$2.50, making the amount plaintiff was entitled to recover \$27.59, instead of \$100. The judgment will be reformed in this particular and affirmed.

Reformed and affirmed.

DAY et al. v. JOHNSON.*

(Court of Civil Appeals of Texas. Jan. 10, 1903.)

JUDGMENT AGAINST MINOR—SETTING ASIDE—EXECUTION SALE—VACATING—NOTICE—EVIDENCE.

1. Where, on an execution sale, the land was sold for a grossly inadequate price, the defendant was not called on to point out the property levied on, the writ was made returnable in 90 days instead of 60 days, as required by law, and the sale took place after 60 days, and the land levied on and sold was so described as to render it doubtful what land was covered by the levy and deed, and whether the land levied on was that which was sold, the court was justified in setting aside the sale.

2. Where defendant purchased land from the purchaser at an execution sale knowing of fatal irregularities in the execution sale, and that such sale had been set aside by the court because thereof, he cannot claim the land as an innocent purchaser.

3. Where a person, as next friend of a minor, instituted a suit to set aside an execution sale of his property, and was recognized by the court as such next friend, the minor is bound by the result of such suit.

4. Where an agreement for judgment was filed in an action and the court ordered "judgment as per agreement filed," the judgment entered is valid, though it does not recite that evidence was heard.

5. In an action by the next friend of a minor to set aside an execution sale of his land, the parties agreed that judgment should be entered for the minor for the recovery of the land and in favor of the defendant for a sum more than double the amount of his bid at the sale, and the same was declared to be a lien on the land. The minor had no means with which to pay such sum within the time specified by the judgment. The court ordered judgment pursuant to the agreement, and the land was sold thereunder. *Held* that, the next friend having failed to inform the court of the facts, and the judgment being improvident as to the minor, it should be set aside as to the parties thereto.

6. Where land was sold under an execution issued on a voidable judgment, findings that a purchaser from the one who bought at the execution sale knew that the judgment debtor claimed the land, and that the judge who ordered the judgment did not inquire into the terms of the agreement on which the judgment was ordered, are insufficient to show that he had notice of the facts which rendered the judgment voidable.

7. In an action brought by a next friend for a minor, an agreement was made that judgment be entered against the minor for a sum stated. In the judgment entered the agreement was recited in full, and it was adjudged that the defendant "do have and recover of and from plaintiff, F. H. J., and his next friend, J. H. K., the sum" named in the agreement. The order of sale under such judgment described it as a judgment against F. H. J. alone. *Held*, that there was no variance, the whole judgment showing that a personal judgment against the next friend was not intended.

Appeal and error from district court, Franklin county; J. M. Talbot, Judge.

Action by H. Foster Johnson against R. A. Day and others. From a judgment in favor of plaintiff, the defendant Day brings error, and defendant W. H. C. Davenport appeals. Reversed.

R. E. Davenport, Wilkins, Vinson & Moore, and Glass, Estes & King, for plaintiff in error. J. F. Jones, P. A. Turner, Chas. S. Todd, and R. T. Wilkinson, for defendant in error.

TEMPLETON, J. On March 26, 1883, W. A. Pogue recovered judgment in the justice's court of Precinct No. 1 of Franklin county against George Foster Johnson for the sum of \$94.83, with 12 per cent. interest from that date, and all costs, amounting to \$2.90. On February 6, 1884, execution was issued on said judgment, and on April 9, 1884, the said writ was levied on a tract of land described as follows: "440 acres of land belonging to Foster Johnson, situated on Denton creek, about 2½ miles west of Mt. Vernon, being a tract of land willed to Foster Johnson by his father, J. F. Johnson." There was a sale under the levy on May 6, 1884; Davenport & Son, a firm composed of W. H. C. Davenport and C. K. Davenport, becoming the purchasers on their bid of \$100. The sheriff's deed to Davenport & Son described 240 acres of the William Brown survey by metes and bounds as being the land sold under the writ. The execution was made returnable in 90 days, instead of 60 days, as required by law, and the sale took place more than 60 days after the issuance of the writ. The land in controversy was the separate property of George Foster Johnson, having been devised to him by his father. George Foster Johnson, together with his wife and minor son, Harold Foster Johnson, resided for a time on the land as their homestead. Johnson and his wife were divorced in December, 1883, the custody of the said minor and the use of the said land for homestead purposes being awarded to the wife. It seems that she at once married again, and moved off the prem-

*Rehearing denied February 28, 1903, and application for writ of error dismissed by supreme court for want of jurisdiction.

¶ 3. See *Infants*, vol. 27, Cent. Dig. § 321.

ises. The land, at the time of the sale, was worth many times the amount bid therefor by Davenport & Son. George Foster Johnson died intestate in June, 1884, leaving his said minor son as his only child and sole heir. He owned no property except said land. On December 11, 1885, J. H. King, as next friend of Harold Foster Johnson, filed in the district court of Franklin county a petition against Davenport & Son to set aside the said execution sale, and to cancel the said sheriff's deed. The facts above stated were alleged, and it was charged that the irregularities attending the sale rendered the same voidable, if not void, and that the said deed constituted a cloud on the minor's title, who, it was stated, was in actual possession of the premises. It was further charged that Davenport had cut and removed from the land timber of the value of \$1,250, and the plaintiff sought to recover that sum. There was a tender of the amount paid by Davenport & Son for the land, with legal interest, in case the court should hold that there could be no recovery without such payment. Harold Foster Johnson was six years and nine months old at the date of the institution of said suit, and had no legal guardian. Davenport & Son answered, denying generally the allegations of the petition, and pleading specially that they acquired title to the said land by virtue of the said levy and the sale thereunder. They set up no claim of lien against the land, but rested their defense on their claim of title. On September 17, 1887, the said King, as next friend for said minor, entered into a written agreement with Davenport & Son, by the terms of which judgment was to be entered in said cause in favor of the minor for the recovery of the land in controversy and in favor of Davenport & Son for \$209.25, and the same was declared to be a lien on the said land, and it was provided that, if said sum was not paid to Davenport & Son by the 1st day of July, 1888, an order of sale should be issued, and the land sold to satisfy such lien. The said agreement was filed in said cause, and on November 14, 1887, at a regular term of the court in which the suit was pending, the case was called for trial, and the judge of the court, at the instance of the parties, entered on his docket an order which reads thus: "November 14, 1887. Judgment as per agreement filed." The order appears to have been entered without any evidence being heard and upon the naked statement of the attorneys engaged in the cause that the agreement had been made, and that such order was desired. Judgment was entered in accordance with said agreement on the minutes of the court, the agreement being inserted in full. The judgment did not recite that the court heard any evidence, or was informed of the nature and terms of the agreement, and appeared to be based solely on the agreement and the order of the court directing judgment accordingly. The minutes of that term of the court were

signed by the judge presiding, and recite that the same were read and approved by the court. The said minor not having paid the sum adjudged against him, order of sale was, on July 10, 1888, issued on said judgment, and at the sale thereunder, which occurred on the first Tuesday in August following, Davenport & Son again became the purchasers on a bid made by them of \$225, and they received the sheriff's deed, which was promptly recorded. In 1896, W. H. C. Davenport conveyed his interest in the land by warranty deed to C. K. Davenport, who, in 1899, by like conveyance, sold and transferred the land to R. A. Day in consideration of \$1,250 cash. In March, 1900, Harold Foster Johnson arrived at his majority, and soon thereafter instituted this suit against the Davenports and Day. He sought to set aside the sale made under the execution issued out of the justice's court, and to cancel the sheriff's deed made to the purchasers at the sale thereunder, and to set aside the said agreed judgment rendered in the district court, and the sale under such judgment, and to cancel the sheriff's deed made to the purchasers at said sale. The issues involved were submitted to a jury, and upon their findings judgment was rendered in favor of the plaintiff. The defendant W. H. C. Davenport filed his appeal bond in due time, but the defendant Day did not, and has brought his case to this court by writ of error. The defendant C. K. Davenport has not appealed.

The irregularities attending the sale under the justice's judgment were certainly sufficient to justify the trial court in setting aside the sale and canceling the sheriff's deed. The land was sold for a grossly inadequate price; the defendant in the writ was not called on to point out property to be levied upon; the writ was made returnable at a time not permitted by law; and the land levied on and that sold was so described as to render it doubtful, if not hopelessly uncertain, what land was covered by the levy and deed, and whether the land levied on was that which was sold. The evidence and the findings show that the defendant Day had such notice of these irregularities as would preclude him from asserting the claim of innocent purchaser based on said sale and deed. He knew, at the time he bought, that the sale had been attacked, and that judgment had been entered in favor of the plaintiff, H. Foster Johnson, for the recovery of the land, subject to a lien in favor of Davenport & Son. His claim of innocent purchaser finds no sufficient support in the said sale and deed, and the trial court did not err in so decreeing. It follows, then, that when King, as next friend of the minor, instituted the suit against Davenport & Son, a good cause of action existed in favor of his ward. Under the practice which has prevailed in this state from an early day, King was justified in laying the minor's case before the court, and when the court recog-

nized him in the capacity in which he appeared, and permitted him to prosecute the suit, he became a proper representative of the minor, and his acts done in that relation, within the limits of his authority, were binding on his ward. *Cannon v. Hemphill*, 7 Tex. 184; *Railway Co. v. Styron*, 66 Tex. 421, 1 S. W. 161. The court in which the suit was filed had jurisdiction of the parties and of the matters involved. The action of the court in approving the agreement for judgment was presumably taken after the necessary investigation. The court was not required to hear evidence, and the judgment was not defective because it failed to recite that evidence was heard. The judgment was, on its face, authorized, and binding, and conclusive of the rights of the minor. We think, however, that, if the judgment was against the interest of the minor, and the facts which made it so were not disclosed to the court, and the court was thereby induced to approve the agreement for judgment, the minor would be entitled, as between the parties to the judgment, to have the same set aside. *Schneider v. Sellers* (Tex. Civ. App.) 61 S. W. 541. In *Cannon v. Hemphill*, supra, the court said: "It is true that, if the next friend does not lay his case properly before the court, by collusion, neglect, or mistake, a new bill may be brought in behalf of the infant." So, if the facts established by the appellee bring his case within the rule stated, he has shown himself entitled to a decree sustaining his bill of review against *Davenport & Son*. It appears from the record before us that the judgment in question was entered without any of the facts, except those disclosed by the agreement itself, being made known to the court. The agreement provided for judgment in favor of *Davenport & Son* for \$209.25, and for the foreclosure of a lien, which, it was declared, existed against the land in controversy to secure said debt. As a matter of fact, the pleadings of *Davenport & Son* set up no claim of debt or lien. The only theory on which such claim could have been based was that *Davenport & Son* were entitled to have repaid to them the amount of their bid at the execution sale, with legal interest, before the minor could have judgment for the recovery of the land. As the sale appears to have been void, and as *Davenport & Son* never obtained possession under their purchase, it would seem that there was no legal foundation for any such claim. But, even if the minor was bound to reimburse them for the sum paid on their bid, and the same constituted a lien on the said lands, still the agreement was unjust to the minor, since it charged him with an obligation to pay an amount considerably in excess of such sum. The minor had no means of paying the sum adjudged against him, and no prospect of obtaining the means of doing so before the day of sale, and the obvious and inevitable effect of the judgment

was to expose his land to sacrifice. The land was worth several times the amount of the lien fixed upon it by the judgment, but the lien was foreclosed against the entire tract, and no provision made for securing means to satisfy the lien. The agreement was manifestly improvident, and did not secure to the infant his legal rights. We are of opinion, therefore, that the trial court did not err in holding that, as between the parties to the said judgment, the minor plaintiff therein was entitled to have the same set aside.

As the judgment was not void, but merely voidable, the plaintiff in error, Day, must be held to be an innocent purchaser, unless at the time he bought he had notice of the facts which rendered the judgment voidable. The jury found, in response to a special issue submitted by the court, that Day had notice of the claim of Johnson to the land, and of the fact that the judge presiding when the judgment was entered did not inquire into the terms of the agreement. We are of opinion that notice of such facts did not, as a matter of law, amount to notice of the grounds upon which Johnson was entitled to have the judgment set aside. It may have been sufficient to require further inquiry on his part as to the existence of such grounds; but if such inquiry, if pursued with proper diligence, would not have led to a knowledge of the essential facts, it would not constitute the necessary notice. Day was justified in relying on the conclusive effect of the judgment, in the absence of notice of the very facts which made it voidable. Because the findings of the jury were not sufficient to show that he had such notice, the judgment against him was not warranted.

The judgment sought to be set aside provided that "defendants, *Davenport & Son*, do have and recover of and from plaintiff, Foster H. Johnson, and his next friend, John H. King, the sum of two hundred and nine dollars and twenty-five cents," while the order of sale described the judgment as being against Johnson alone. The trial court assumed that there was a variance between the order of sale and the judgment, and that the same constituted an irregularity, and submitted to the jury the issue whether such irregularity was calculated to affect the price the land brought at the sale. The question was answered in the affirmative, as was the further question whether Day had notice of the fact. We are of opinion that the trial court did not properly construe the judgment. The agreement for judgment was inserted in full in the judgment, and shows conclusively that King was suing as next friend, and that no personal judgment against him was contemplated. The judgment, considered as a whole, shows that it was intended only to bind the minor and his property, and that King was made a party to the judgment solely in his representative capacity. The variance between the judgment and the order

of sale constituted no such irregularity as would, when coupled with the inadequate selling price, be sufficient grounds for setting aside the sale.

The judgment is reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SHERRILL.*

(Court of Civil Appeals of Texas. Jan. 31,
1906.)

CARRIERS—INJURY TO PASSENGER ALIGHT- ING—INSTRUCTION.

1. A charge, in an action for injury to a passenger while alighting from a car, to find for plaintiff if defendant was guilty of negligence in failing (if it did) to provide a stool or some other means to enable plaintiff to alight in safety, and if the jury further find that such negligence of defendant (if it was negligent in any of these respects) was the proximate cause of plaintiff's injury, is not on the weight of evidence, as assuming that failure to provide a stool would constitute negligence.

2. Whether failure of a carrier to provide a stool for passengers in getting on and off trains is negligence is a question for the jury.

Appeal from district court, Rockwall county; J. E. Dillard, Judge.

Action by Mary E. Sherrill against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Miller and W. C. Jones, for appellant. W. H. Allen, for appellee.

TEMPLETON, J. This suit was brought by Mrs. Mary E. Sherrill against the Missouri, Kansas & Texas Railway Company of Texas to recover damages on account of personal injuries received while in the act of alighting from one of the company's passenger trains. On a jury trial she obtained judgment for \$5,000, and this appeal is prosecuted from such judgment.

It was shown on the trial that appellee was a passenger on one of appellant's trains, en route from Dallas to Royce; that the train reached Royce in the nighttime; that there was no depot building at Royce, and no landing place provided for passengers, the depot building having been theretofore destroyed by fire; that, when the train stopped at the station, appellee went out of the car in which she was riding, and down the steps of the car; that, with the assistance of one of the trainmen, she attempted to alight, and fell and was injured; that it was about 22 inches from the bottom step of the car to the ground; that no stool was provided for passengers to step off upon; that there were no lights about the landing place, except the lantern of the trainman, which imperfectly lighted up the premises.

Complaint is made of a clause in the charge of the court which reads thus: "And it is the further duty of the railway com-

pany to provide a stool or some other means to enable a passenger to step from the lower step of its car to the ground, when it is necessary for them to do so for the safety of the passenger." Complaint is also made of the paragraph of the charge wherein the rule just stated is applied to the facts, and the jury instructed that "if the defendant company was guilty of negligence in failing (if it did) to provide a stool or some other means to enable plaintiff to alight in safety from its car, and if they further find and believe that such negligence on the part of the defendant company (if it was negligent in any of these respects) was the proximate cause of plaintiff's injuries (if she was injured), * * * then it would be the duty of the jury to find for the plaintiff." It is urged against these charges that the same are upon the weight of the evidence, in that it is assumed therein that the failure to provide a stool would constitute negligence. The language of the charges confutes the criticism. By the preliminary charge it is made the duty of the company to provide a stool or some other means of assisting the descent of passengers only when it is necessary to do so in order to secure the safety of the passengers. In the charge applying the law to the facts, the question as to whether the failure to provide such means amounted to negligence on the occasion of the accident was pointedly left to the decision of the jury. It is further objected that the charge lays too much stress upon the issue, and presents the same so prominently as to indicate an opinion of the court thereon adverse to appellant. Save in the connection above set out, we find in the charge only one reference to the issue, and that in the paragraph wherein the defendant's side of the question was submitted to the jury. The matter does not appear to have been mentioned in the charge more frequently than necessary, and certainly was not presented in such manner as was calculated to unduly impress the jury with the importance of the issue.

Appellant complains of the action of the court in refusing to give a special charge which reads as follows: "It is not negligence in itself for a railway company to fail to provide a stool for passengers to get on and off its trains." It is too clear for controversy that the question is one of fact, which must be left to the determination of the jury. The requested charge was an invasion of the province of the jury, and was properly refused.

It is insisted that the verdict is not sustained by the evidence, and that it is excessive in amount. That the plaintiff was injured as alleged is abundantly established by affirmative testimony. That her injuries were of a serious and permanent character is shown by direct and positive evidence. If the witnesses for the plaintiff are worthy of belief, her case has been fully made out.

*Rehearing denied February 23, 1903, and writ of error denied by supreme court.

The question of their credibility has been settled by the jury, and the finding against defendant is conclusive.

The judgment is affirmed.

ST. LOUIS & S. F. RY. CO. v. TERRELL.
(Court of Civil Appeals of Texas. Feb. 7, 1903.)

CARRIERS—LIABILITY AS TO BAGGAGE.

1. Where a passenger's trunk is placed on the platform on the arrival of the train at 9 a. m., and, not being called for, is placed in the baggage room, whence it is stolen during the night—he not calling for it till late the next day—the carrier's liability is not that of a carrier, but only of a warehouseman.

Appeal from Lamar county court; Wm. Hodges, Judge.

Action by Jeff Terrell against the St. Louis & San Francisco Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

H. D. McDonald, Edgar Wright, and L. F. Parker, for appellant. Moore, Park & Birmingham, for appellee.

BOOKHOUT, J. This is a suit for \$182.50 for the loss of a trunk and its contents, delivered to defendant on the 29th day of September, 1901, for transportation from Arthur City, Tex., to Paris, Tex. The suit originated in the justice court. It was appealed to the county court, and therein tried before a jury on the 11th day of March, 1902; a verdict being rendered in favor of the plaintiff for \$182.50. Motion for new trial was overruled, notice of appeal given, errors assigned, and appeal perfected in due time.

Plaintiff and wife were changing their place of residence from Arthur City to Paris—a distance of 18 miles. Plaintiff told the agent of appellant at Arthur City that he was going to Paris, and would have two trunks to go along; that he had not made arrangements for accommodations at Paris, and did not want his trunks to reach Paris until Monday, September 30th, and asked him if he could hold the trunks, and send them to Paris on Monday, and that himself and wife would go to Paris Sunday, the 29th of September. The agent agreed to the request. Plaintiff and wife purchased tickets, and received checks for the two trunks. Plaintiff and wife reached Paris on the 29th, went to relatives, and finally secured rooms at the Buckner House. The trunks reached Paris about 9 o'clock a. m. Monday, September 30th. They were unloaded on defendant's platform, ready for delivery. Not being called for, they were placed in defendant's baggage room. On the following day, October 1st, about 5 o'clock p. m., the agent of the plaintiff presented the checks and demanded the trunks. One was found and delivered,

but the other could not be found. There is some evidence tending to show that the baggage room was burglarized the previous night, and the trunk stolen. It was to recover the value of the lost trunk and its contents that this suit was instituted.

One of the contentions of appellant company on the trial was that it performed its contract of carriage, by transporting the trunks to their destination, and there placing the same on its platform, ready for delivery, and, if liable at all, it was as warehouseman, and not as a public carrier. It sought to have this contention passed upon by the jury, by asking a special charge reading as follows: "If you believe from the evidence that plaintiff's trunk and its contents reached Paris, its destination, and that said trunk and its contents was on defendant's platform at Paris, and ready for delivery, after the arrival of defendant's train, you are instructed that it was plaintiff's duty to obtain possession of said trunk and contents within a reasonable time after its arrival, and that a reasonable time in which to obtain possession of said trunk and contents was immediately after the arrival of defendant's train, and while said trunk was on defendant's platform and ready for delivery; and if you find from the evidence that plaintiff failed to demand possession of said trunk and contents within a reasonable time, as it is above defined, and that said trunk and contents was stored in an ordinarily safe department or room of defendant, and that defendant exercised such care of said trunk as an ordinarily prudent person would have exercised under similar circumstances, then you are instructed that defendant would not be liable to plaintiff for the loss, destruction, or failure to deliver said trunk and its contents to plaintiff." This charge was refused by the court. The rule approved by the Supreme Court in reference to the baggage of a passenger is thus stated: "It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call for and receive it; and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into their baggage room and keep it for him, being liable only as warehousemen; and the reasonable time within which the owner must call for it is directly upon its arrival, making reasonable allowance for delay caused by crowded state of depot at the time; and the lateness of the hour makes no difference, if the baggage be put upon the platform." *Railway Co. v. Smith*, 81 Tex. 485, 17 S. W. 133. The requested charge, tested by the above rule, announced a correct principle of law, and was applicable to the case as made; and its refusal was error. The

¶ 1. See *Carriers*, vol. 2, Cent. Dig. §§ 1542, 1543.

trunk was transported by defendant company to its destination, and placed upon its platform for delivery, 32 hours before plaintiff sent for it. There is no contention that plaintiff was delayed in receiving the trunk by the crowded condition of defendant's depot. No satisfactory excuse is given by plaintiff for his delay in sending for the trunk. Under the undisputed facts, the company was not liable to the plaintiff on its contract of carriage, and the court should only have submitted the liability of the company as warehouseman. Under this holding, the other questions presented by appellant become immaterial in this case. If the company is liable as warehouseman, it does not matter whether or not the contents of the trunk came within the meaning of "baggage."

For the error indicated, the judgment will be reversed and the cause remanded.

ÆTNA INS. CO. v. EASTMAN.*

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

APPEAL—VERDICT—CONFLICTING EVIDENCE— POWER OF APPELLATE COURT— ACTION ON POLICY.

1. An appellate court has the power to set aside a verdict, even though there is evidence in its support, where it is of such a character as to convince it that injustice has been done.

2. In an action on a fire policy, providing against additional insurance, plaintiff testified that after he procured the additional insurance he notified defendant's agent. On a former trial he had testified that he had had no conversation with the agent after obtaining the additional insurance and before the fire, and his explanation of the contradictory statements was unsatisfactory. He had admitted to a third party after the fire that he had not notified the agent. The agent denied having received notice. No indorsement of the additional insurance appeared on the policy as required. *Held*, that a verdict for plaintiff would be set aside.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action by H. P. Eastman against the Ætina Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

F. M. Etheridge, for appellant. Looney & Clark, for appellee.

RAINEY, C. J. This is a suit to recover on a fire insurance policy for loss by fire. Judgment was rendered for plaintiff, and defendant appealed.

The policy provided against additional insurance, and this provision was violated by plaintiff. This violation is sought to be avoided by plaintiff on the ground that he notified one Magrill, defendant's agent, at the time, that he had procured such additional

insurance, and Magrill assented thereto. The sole issue presented on this appeal is whether or not such notification was given, appellant contending that the evidence is insufficient to support the verdict and judgment. The appellate courts of this state are reluctant to disturb a verdict where there is any evidence to support it, but they have the power and it is their duty to do so where the evidence is of such a character as to convince them that an injustice has been done. This is a case wherein we feel justified in exercising that power. The great preponderance of the evidence is against the contention of plaintiff that he notified Magrill that he had procured additional insurance on the property burned. Plaintiff, it is true, testified that he notified Magrill of taking out additional insurance after and on the day it was procured from one Henderson, the agent of another company. But on a former trial he testified that he had no conversation with Magrill after procuring said additional insurance and before the fire. He attempted on the last trial to explain this statement, but, to our minds, the explanation is far from satisfactory. He also, in effect, stated to Henderson just after the fire that he had not notified Magrill of procuring said additional insurance, and this he does not deny, but virtually admits same. Magrill denies emphatically that plaintiff had notified him. The policy sued on required an indorsement thereon if additional insurance was taken out. There was no such indorsement on the policy. This requirement can be waived, but the fact that there was no such indorsement is a circumstance of some consideration. There were other slight circumstances tending to depreciate plaintiff's testimony, but we deem it unnecessary to enter further into details. Plaintiff depends solely upon his own testimony as a basis for recovery. He is not corroborated by a single witness or a single circumstance. His statements are contradictory, which, taken with all the facts and circumstances of this case, renders his testimony too unreliable to form a sufficient basis for a verdict. The language of Judge Collard in *Easton v. Dudley*, 78 Tex. 236, 14 S. W. 583, is applicable here, viz.: "The evidence is no guide to the truth. Had the contradictory statements been made by two witnesses, one contradicting the other, the rule that there exists evidence to support the finding of the court would apply; but these statements are made by the same witness, which makes his testimony at least of little value—not enough to justify a reliable conclusion." *Ry. Co. v. Somers*, 78 Tex. 441, 14 S. W. 779; *Cherry v. Butler* (Tex. App.) 17 S. W. 1090.

The trial court erred in not granting a new trial, and the judgment, for the reasons stated, is reversed, and the cause remanded. Reversed and remanded.

*Rehearing denied February 23, 1903.

OWEN v. KUHN, LOEB & CO.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

BROKERS — ACTION FOR COMMISSIONS — FAILURE TO COMPLETE SALE — PARTNERSHIP — DEFAULT JUDGMENT — REFUSAL — TIME TO PLEAD.

1. Where notice was served on a nonresident, and, on the convening of court, plaintiff withdrew proof of service because not made before a proper officer, and some time thereafter filed an amended affidavit, it was not error to refuse to enter judgment by default for failure to answer four days after the filing of the amended proof of service, and allow such defendant until the next term to answer.

2. Plaintiff cannot complain that he was denied judgment by default, when the trial, subsequently had, demonstrated that he was not entitled to recover.

3. Rev. St. art. 1224, provides that service on one partner shall authorize judgment against the firm and the partner served; and article 1346 declares that where the citation has been served on some, but not on all, of the partners, judgment may be rendered against the firm and the partners actually served. *Held* that, where all the individual members of the firm answered, no judgment could be rendered against the firm by default, though the answers did not specifically appear to be for the firm's benefit.

4. Where a broker was only entitled to commissions in the event a sale of the land was actually consummated, and failure to consummate the sale was not due to the fault of his principals, he could not recover commissions.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by B. D. Owen against Kuhn, Loeb & Co. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Eugene Williams, for appellant. Leo. N. Levi and Clark & Bolinger, for appellees.

STREETMAN, J. Appellant brought this suit for commissions alleged to be due him on the sale for appellees of 246,000 acres of land in Pecos county, Tex. The trial was before the court without a jury. Judgment was for defendants. There are no findings of fact in the record, and we do not deem it necessary to make specific findings. The evidence being almost entirely documentary, and there being no conflict in the testimony, we simply refer to the entire statement of facts in the record, and shall only specifically refer to so much of the record as may be necessary to explain our views of the case.

Plaintiff sued two partnerships, described as the old and the new firms of Kuhn, Loeb & Co., and also the individual members of said firm. All the defendants were nonresidents of the state, and an original attachment was sued out and levied upon lands of the defendants in Texas. One of the defendants was Solomon Loeb. On September 28, 1901, a notice was served upon him as provided for nonresident defendants, but the affidavit required to show service was not made before a proper officer. Court met on

October 7, 1901, and about that time plaintiff withdrew the notice, and had the affidavit made before an officer named in the statute, and the notice thus amended was returned and filed in court December 9, 1901. December 13, 1901, this defendant having failed to answer, plaintiff asked for judgment by default; but the court refused to render such judgment, and allowed said defendant until the next term to answer. And at the next term said defendant did answer, and, upon a trial afterwards on the merits, plaintiff failed to recover judgment.

We think there was no error, under the circumstances, in refusing to render judgment by default, and, further, if there had been error, that plaintiff ought not to be heard to complain that he was denied a judgment by default, when the subsequent trial demonstrated that he was not entitled to recover.

Service was also had upon certain defendants who were members of the old and new firms of Kuhn, Loeb & Co., and each of the defendants who were served filed answers in the case, but they did not specifically answer for the firms. Plaintiff thereupon requested the court to render judgment by default against the firms, and the refusal of the court to award such judgment is assigned as error. Our Revised Statutes contain the following provisions:

"Art. 1224. In suits against partners, the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

"Art. 1346. Where the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served."

Construing these provisions, Judge Brown, in *Frank v. Tatum*, 87 Tex. 206, 25 S. W. 409, says: "Partnerships are not thereby invested with any of the characteristics of corporations; nor are they expressly or impliedly authorized to sue or be sued in their firm names, independently of their members." It would seem to follow inevitably from this proposition that where the individual members who have been served all answer, there could be no judgment by default against the firm. For this reason, and the further reason that the trial developed the fact that the plaintiff was not entitled to recover on the merits, we hold that no error is shown by this assignment.

We do not deem it necessary to discuss separately the remaining assignments of error. They all relate to the sufficiency of the evidence to sustain the judgment. From a careful consideration of the evidence, we conclude that the plaintiff was only to be

*Rehearing denied March 4, 1903, and writ of error denied by supreme court.

† 4. See *Brokers*, vol. 8, Cent. Dig. §§ 81, 94.

entitled to his commissions in the event that the sale of the land was actually consummated, and that the facts authorize the conclusion that the failure to consummate the sale was not due to the fault of appellees.

The judgment is therefore affirmed.

SHUTE & LIMONT v. McVITIE et al.*

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

MASTER AND SERVANT—DISCHARGE OF SERVANT—RIGHTFUL DISCHARGE—RECOVERY BY SERVANT—VALUE OF SERVICES—ACTUAL VALUE TO EMPLOYER.

1. An agent for foreign cotton dealers failed to write to certain parties soliciting business, as requested by the dealers, failed to remit to them money in a bank to their credit, and drew a check on the bank for the amount of his salary for the remainder of his term of employment. His excuse for not writing the letters was that it was not probable they would have been of any avail, and his reason for not remitting was that the money was needed to protect a purchase of cotton, while as a fact plaintiff's bank would have paid for the cotton on a draft with bill of lading attached. *Held*, that the cotton dealers were warranted in discharging him.

2. One employed by cotton dealers to conduct a branch office, and who had an interest in the profits, but contributed nothing to the capital of the concern, and bore no share of losses, was not a partner.

3. Where a servant employed for a certain compensation for a certain term is rightfully discharged, he is entitled to recover the difference between the value of his services and any sums paid him, not exceeding the salary contracted to be paid, less damages occasioned by his breach of the contract.

4. The true measure of compensation due the servant is the value of his services required of him and performed according to the contract, and the fact that his services have not been profitable to the employer has no bearing in determining the compensation.

5. Where an agent was employed by cotton dealers for the cotton season, and before the close of the season he was rightfully discharged, the measure of compensation to which he was entitled was not his full salary, though no considerable work remained to be done by him after the time of his discharge.

6. Where a servant who has been discharged sues for compensation due him, and the master puts in a plea in reconvention for damages, it is not error to refuse to submit issues raised by such plea, where the evidence furnishes no basis for measuring and computing such damages.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by James A. McVitie and others against Shute & Limont. From a judgment for plaintiffs, defendants appeal. Reversed.

A. L. Beaty, for appellants. Galloway & Templeton, for appellees.

TEMPLETON, J. Shute & Limont, of Liverpool, England, are dealers in cotton. They had an office in Sherman, Tex., and in the summer of 1900 employed Jas. A. Mc-

Vitie as their agent to take charge of said office. He was to receive a salary of \$1,800 for the term of his service. The contract of employment was not in writing, and there is a controversy as to whether the term was for a year or only for the cotton season. The term began on September 1, 1900, and on the 6th day of February following McVitie was discharged by his employers. At the time he was discharged he had been paid \$825. This suit was brought by him against Shute & Limont to recover the sum of \$975, the balance of his salary for the term, it being alleged that he was discharged without cause. A writ of garnishment was issued and served on the Merchants' & Planters' Bank. Shute & Limont answered, justifying the discharge, and reconvened for damages alleged to have been sustained by reason of the mismanagement of their business. The garnishee answered that Shute & Limont had on deposit with it the sum of \$1,065, and tendered the same in court. A trial before a jury resulted in a judgment in favor of the plaintiff for the amount claimed by him, and the defendants have appealed.

The court instructed the jury, in substance, that, if the plaintiff managed the business in his charge as agent in compliance with the terms of his contract, and with reasonable diligence, and in such business-like manner as an ordinarily prudent and diligent man would have conducted and managed the same, then the discharge was wrongful. Special charges were requested by the defendants to the effect that plaintiff was, in legal contemplation, the servant of the defendants, and bound to obey their instructions regardless of his opinion. These charges were refused. Another special charge, to the effect that the evidence showed that plaintiff was rightfully discharged, was requested by the defendants, and refused by the court. Complaint is made of the action of the court in giving the said charge and in refusing the said special charges. It is insisted that the evidence showed conclusively that the plaintiff disobeyed the instructions of his employers, and neglected the business, and that he was, therefore, rightfully discharged. It is further insisted that, as the contract was verbal, and the plaintiff's duties as agent were not agreed on, he was bound to conduct the business as directed by his employers, and that, as he did not do so, but carried on the business according to his own judgment instead, the defendants were justified in discharging him. The specific grounds of complaint urged by Shute & Limont against McVitie are: (1) That he was directed to correspond with Arnold, Karberg & Co., of New York, agents for the United States of Samuel & Co., of Kobe, Japan, with a view of securing orders for the shipment of cotton to Japan, and that he failed and neglected to do so, but represented to his employers that he had done so. (2) That he was instructed to correspond with E. De

*Rehearing denied February 23, 1903.

¶ 1. See Partnership, vol. 33, Cent. Dig. §§ 24, 25.

Lattre, of Lille, France, with whom arrangements had been made by the firm for the transaction of business in their line, and that he neglected and failed to do so until after long and unreasonable delay. (3) That he was instructed to correspond with a Mr. Eagle, of England, Ark., and to endeavor to bring about some business dealings with him; but that he disobeyed his instructions, and did not write to Eagle until in January, 1901, though he represented to his employers that he had done so. (4) That on February 1, 1901, Shute & Limont had on deposit in bank at Sherman the sum of \$5,800, and on that day cabled him to remit, out of said funds, the sum of \$4,500, to Hubbard Bros. & Co., of New York; and that he at first refused to obey said instruction, but finally did remit the sum of \$4,000 only. (5) That on February 4, 1901, he drew a check in the name of his employers, in his own favor, against the fund in bank at Sherman, for \$975, balance claimed on salary, which was not due, and had not been earned, payment of which check was stopped by cable. There are some minor grounds of complaint, but the same need not be noticed.

The evidence showed that John J. Shute, of the firm of Shute & Limont, had visited Japan, and arranged with Samuel & Co. to correspond with the Sherman office with a view of bringing about some business transactions between the two firms; that Samuel & Co. wrote McVitie that they had placed their interests in this country in the hands of Arnold, Karberg & Co.; that Shute & Limont repeatedly urged McVitie to write said firm, but that he did not do so until January 5, 1901; that he represented to Shute & Limont that he had written, when he had not done so. McVitie's explanation of his conduct in respect to this matter is that he did not have sufficient information as to how the business of importing cotton into Japan was carried on to enable him to conduct such business, and that his request of Shute & Limont for the necessary information was disregarded; that letters received by him from Samuel & Co. and other parties in Japan showed that no business could be done with that country; that he did not personally write or dictate all his letters, and supposed that letters had been written as represented. Very similar conditions were shown and explanations made in regard to the correspondence with De Lattre and Eagle. In respect to the other matters of complaint it was shown that on February 1, 1901, Shute & Limont cabled McVitie to remit \$4,500 to Hubbard Bros. & Co.; that McVitie replied that he had bought 200 bales of cotton, and could not remit; that Shute & Limont answered this message, asking why he could not remit, and saying that it was imperative that he obey instructions, and directing him to buy no more cotton until further orders. McVitie responded that he could not remit until the cotton was shipped. Shute

& Limont then sent him a cable message, which reads thus: "Follow our instructions precisely. It is imperative." McVitie then remitted \$4,000, and notified Shute & Limont that he had done so. He then drew a check in his own favor for \$975. An employé in the office at Sherman cabled notice of this fact to Shute & Limont, who replied to him by message as follows: "Authorize you sign procurative. Hereby cancel McVitie's. Advise all banks and debtors instantly. Advertise papers. Unless McVitie apologizes, pay and dismiss him instantly under counsel's advice." The reply was: "If reinstated, would be impediment to business. Counsel advises can discharge without liability." Shute & Limont responded: "Follow counsel's advice. Discharge." McVitie was accordingly discharged. Payment of the check had been estopped by wire to the bank. McVitie's explanation of these transactions is that he had bought 200 bales of cotton, and thought the money in bank would be required to protect his purchase; that, when he found that it would not, he remitted \$4,000; that he did not remit the whole amount because he desired to retain under his control a sum sufficient to cover his salary and contingent expenses; that Shute & Limont were nonresidents, and owned no property in this state, and that they had expressed themselves as being dissatisfied with him, and had given him reason to believe that they intended to discharge him; that he did not seek to cash the check in his own favor, and withdraw the money from the bank, but only sought to place the money out of reach of Shute & Limont until he could come to an understanding with them. The evidence further showed that, in addition to his salary, McVitie was to receive one-third of the net profits of the business done by the Sherman agency, he not to be responsible for any losses. No profits were realized. As stated above, the contract was not in writing, and it appears that the duties of his position were agreed upon only in a very general way.

We think it must be held that the facts justified the discharge. There is no question that McVitie disobeyed his instructions to correspond with Arnold, Karberg & Co. with De Lattre, and with Eagle. In view of the numerous letters written to him by Shute & Limont on the subject, he had no right to rely on his assumption that letters had been written from his office to the said parties, but it was his duty to see that letters were written. He ought not have represented that such letters had been written without informing himself as to the fact. He cannot excuse himself by showing that, if the letters had been written, they would not probably have availed anything. The building up of trade relations with Samuel & Co. and with De Lattre was important. Mr. Shute had visited Japan and France with that object in view, and, having gone to so much

trouble and expense to secure business in those countries, it is but natural that his firm should feel the deepest interest in obtaining some substantial results from their efforts. It is a poor answer to the failure to co-operate with them in that behalf to say that nothing could probably have been accomplished. McVitie owed it to his employers to obey their instructions, and do what he could to bring about the desired result. Less than this he could not properly do, and his neglect of duty cannot be excused.

The conduct of McVitie in failing to make the remittance to Hubbard Bros. & Co., as directed, and in attempting to impound, for his security, part of the money in bank, is indefensible. His cotton purchase did not necessitate the use of the deposit. The bank would have paid for the cotton on draft with bill of lading attached, without requiring a margin. He could have ascertained the fact sooner than he did, and should have remitted the entire amount at once. He was not authorized to hold any part of the deposit to secure himself. He had accepted employment without requiring security, and could not properly obtain it by the method pursued. Shute & Limont had not breached their contract with him, and had not done anything which would serve as a basis for any legal complaint. It is evident that, after the transactions in question occurred, it was impossible for the relations of the parties to continue. The discharge of McVitie was inevitable.

It is insisted, however, that McVitie was not a mere servant of Shute & Limont, but was manager of their Sherman office, and was interested in the profits of the business. It is urged that he was, therefore, vested with authority to manage the business according to his discretion, and that, unless there was an abuse of discretion, and injury resulted therefrom, the discharge was wrongful. While it is true that McVitie was not a mere servant of Shute & Limont, we think it must be conceded that he was an agent or employé, and not a partner in the true sense. His interest in the business was limited to the net profits, and was contingent, and was in the nature of wages. He contributed nothing to the capital stock of the concern, and was not responsible for any losses. Clearly, he possessed only such powers and was vested with only such discretion as was conferred on him by Shute & Limont. Authority to manage and control was in them, except as limited by the contract of employment. It is not contended that the contract in terms gave McVitie authority to conduct the business contrary to the wishes of his employers, and there is nothing in the powers conferred on him by the contract from which such authority can be implied. It follows that it was his duty to carry on the business as directed by Shute & Limont, and that he might exercise his discretion only as to mat-

ters concerning which he had no instructions. Our conclusion is that the court erred in submitting to the jury the issue as to whether the discharge was wrongful, and in not instructing the jury that he was rightfully discharged.

We do not desire to be understood as reflecting in the least upon the character or integrity of the appellee. His neglect of duty arose, no doubt, from a misconception of his true relation to his employers, and his inconsiderate conduct in handling the funds in bank to a fear that he might be discharged, and lose his salary. But he has shown no legal excuse for his actions, and cannot complain of the consequences. By his pleadings in the court below, the appellee raised the issue that his services, up to the time of his discharge, were reasonably worth much more than the sum he had been paid. If such is the case, he is entitled to recover the difference between the value of his services and the amount paid, not to exceed the salary contracted to be paid, notwithstanding the fact that he was rightfully discharged. The ancient rule that the servant or employé who is discharged for good cause forfeits his right to compensation for the service rendered, does not prevail in Texas. This proposition is conceded by appellants, but it is contended that the true measure of compensation is the reasonable value, to the master, of the services performed, and that, as the business of the Sherman office was conducted at a loss, appellee is entitled to nothing. The contention cannot be sustained. If McVitie performed services in the line of his employment, and in the manner contemplated by the contract, the fact that no money was earned for his employers by his labor would not prevent him from recovering the value of his services, less the damages occasioned by his breach of the contract. The fact that his employers engaged him at work which proved unremunerative to them was their affair, not his. It seems that, if he had fully performed his contract, his employers would have received no benefits; that is, that no profits would have been earned in the business. He would, nevertheless, have been entitled to his salary. Having partially performed the contract, he is entitled to the value of the services required of him and performed according to the terms of the contract, regardless of whether his employers made or lost money in the business in which they engaged him. The right of a servant who has breached his contract, the contract being entire, to recover the value of the services performed, is based upon the idea that it would be inequitable to permit the employer to receive and appropriate to his own use the benefits of the servant's labor without rendering compensation. If the master chooses to employ the servant at labor which turns out not to be profitable, he cannot be heard to say that he received no benefits from the work done by the servant. He is conclusively pre-

sumed, in such case, to have been benefited by the servant's labor to the extent of the reasonable value of the services performed. Any other rule would enable the employer to take advantage of every breach by the employe, and bring about a forfeiture of wages earned. Forfeitures are not regarded with favor by our laws, and none can be permitted here. Appellants were entitled to have the contract performed in its entirety, and, if the expense incurred in having the contract completed, when added to the reasonable value of the services rendered by appellee, exceeded the sum contracted to be paid, the excess may be regarded as damages resulting from the breach, and should be deducted from the wages earned by appellee. It is not believed that our holding is in conflict with the general rule. The construction adopted is necessary to make the rule applicable to the facts of this case and accomplish the purposes of the law.

Appellee contends that he was employed only for the cotton season; that the season was practically over when he was discharged; that the contract was, therefore, fully performed, and he had earned, and was entitled to recover, the whole of his salary. We do not think the evidence raises the issue. It is beyond dispute that the season had not ended when the discharge took place, and it follows that the term of employment, assuming that it was for the season only, had not expired. Appellants were entitled to the services of appellee until the end of the term, and it cannot be said that the contract was performed until the term had ended. Whether any considerable work remained to be done is not material on this issue. Unquestionably, appellee could not, at the time of his discharge, have abandoned work, and sued on the contract as fully performed. He cannot do so indirectly in this proceeding. The court refused to submit to the jury the issues raised by appellants' plea in reconvention for damages. As the evidence furnishes no basis for measuring and computing the damages claimed, no error is disclosed.

The judgment is reversed, and the cause remanded.

WASHINGTON LIFE INS. CO. v. BERWALD.

(Court of Civil Appeals of Texas. Jan. 10, 1903.)

LIFE INSURANCE—MATURITY OF PREMIUMS—EXTENDED PREMIUMS—NOTICE—NONRESIDENTS—STATE AGENTS—AUTHORITY TO EXTEND PREMIUMS—ABANDONMENT OF POLICY—EVIDENCE—HARMLESS ERROR.

1. Notwithstanding a provision in a life policy that only the president, vice president, or secretary shall have power to waive forfeitures or make agreements for the extension of premiums, if the company actually authorizes some other officer or agent to extend a premium, it will be bound by his act in doing so.

2. A statute of New York provided that no life insurance company doing business in the

state should, within one year after default in the payment of any premium, declare forfeited or lapsed any policy thereafter issued or renewed, unless a written or printed notice had been duly addressed and mailed to the insured at his last known post-office address "in this state." A life policy issued by a New York company to a resident in Texas provided that it should be governed by the laws of New York. *Held*, that the company could not declare the policy forfeited unless notice of the premium had been mailed the insured at his last known address in Texas.

3. Under the statute, the company is required to give notice of the time of maturity of a premium as fixed by an agreement for an extension thereof.

4. It being in issue, in an action on a life policy, whether the state agents of the company agreed to extend a certain premium, and whether they had authority to do so, testimony that at the time the policy was issued they stated that they would accommodate insured with respect to the payments was admissible, and was not objectionable as an attempt to contradict a provision in the policy that only the president, vice president, or secretary could waive forfeitures or grant extensions, etc.

5. Where, in an action on a life policy, it was in issue whether the state agents of the company had authority to grant an extension of a certain premium, and the case was submitted to the jury on the theory that assured was bound to take notice of a stipulation in the policy limiting the authority of agents, any error in admitting testimony that assured could not read or write the English language, except to sign his name, was harmless.

6. Testimony that the state agents frequently granted extensions of premiums to other policy holders was admissible, as tending to show authority in them to grant extensions, notwithstanding a provision in the policy that only the president, vice president, or secretary should have such authority.

7. Premium on a life policy became due November 21st, and was extended one month. No notice of maturity of the premium as extended was given, as required by the policy. On December 14th insured took out a policy in a new company, the latter's agent stating that insured said he was going to drop the old policy. This was controverted by a relative of insured. The new policy recited that insured carried insurance in the old company. The old company had no knowledge of any intention on insured's part to give up the policy. *Held* not to show abandonment of the policy by insured, even if abandonment would have excused the company's failure to give the required notice.

Error from district court, Dallas county; Richard Morgan, Judge.

Action by Rosa Berwald against the Washington Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. M. Etheridge, for plaintiff in error. W. P. Finley and Israel Dreeben, for defendant in error.

TEMPLETON, J. On November 21, 1898, the Washington Life Insurance Company, a New York corporation, issued a policy of insurance in the sum of \$2,000 on the life of Louis Berwald, payable, in the event of his death, to his wife, Rosa Berwald. The assured died on March 30, 1900, without having paid the second annual premium, which matured on November 21, 1899. The beneficiary brought suit on the policy, and, on a

jury trial, obtained judgment. The defendant pleaded the failure to pay the premium, and a clause of the policy providing that such failure should operate as a forfeiture. In avoidance of these facts, the plaintiff pleaded that, by the terms of the policy, the contract was to be governed by the laws of the state of New York; that, by a statute of that state, no policy of insurance could be declared forfeited unless notice of the maturity of the premium was given to the assured; that such notice was not given in this case; that, when the premium in question fell due, the company, acting through one Leon Blum, a duly authorized clerk of Reinhardt & Son, the representatives, in this matter, of the company, extended the time for the payment of the premium 30 days; that the notice required by the statute of the state of New York was not given to the assured of the expiration of the time for which the extension was granted. The defendant denied the waiver, and pleaded a provision of the policy to the effect that only the president, vice president, or secretary of the company had authority to make such waiver. The evidence showed that notice of the maturity of the said premium was mailed by the company to the assured at his post-office address, at Dallas, Tex., as required by the statute of the state of New York, but was not conclusive on the issue as to whether the notice was actually received by the assured. It further shows that, when the premium fell due, Leon Blum, a clerk of Reinhardt & Son, the state agents for Texas of the company, presented the account therefor to the assured, and demanded payment; that the assured asked for an extension for 30 days, to which Blum assented; that Reinhardt & Son held the receipt for the premium until February 9, 1900, when they returned the same to the company as not collectible; that the assured died without having paid, or offered to pay, the said premium. The defendant did not attempt to show that it gave notice, as required by the laws of the state of New York, of the maturity of the premium, at the time fixed by the agreement for the extension. The evidence was sufficient to warrant the conclusion that Reinhardt & Son had authority from the company to grant such extensions, and that Blum was acting for them, and under their directions, in granting the extension in question. The court instructed the jury that the failure to pay the premium would preclude a recovery by the plaintiff, unless the company failed to give notice to the assured when the premium would mature, or unless Blum agreed with the insured to extend the time for payment of the premium, and had authority from Reinhardt & Son to grant such extension, and Reinhardt & Son had authority from the company to extend the time for the payment of the premium.

The defendant requested the court to instruct the jury to return a verdict in its fa-

vor, and the refusal of the court to so charge the jury is made the basis of the first assignment of error. The first proposition presented under this assignment is to the effect that, even if Reinhardt & Son agreed to extend the time for the payment of the premium, their action in doing so was not binding on the company, for the reason that the policy provided that only the president, vice president, and secretary of the company were authorized to waive forfeitures or make such agreements, and that as there is no question that the statutory notice of the maturity of the premium was mailed to the assured, and that neither the president, vice president, nor secretary of the company agreed to the extension, the policy became forfeited when the premium was not paid on the day it originally matured, and the defendant was therefore entitled to a peremptory instruction. We have had occasion recently to consider a similar question, and held that notwithstanding such a clause in a policy of insurance, if the company in fact empowered some officer or agent other than those named in such clause to act for it, such officer or agent became the representative of the company in respect to the matters committed to his charge, and his acts done in that behalf were binding on the company. *Association v. Findley*, 68 S. W. 695; *Insurance Co. v. Phillips*, 70 S. W. 603. We see no good reason for reversing our said holding, and are of opinion that, if the plaintiff in error deputed Reinhardt & Son to represent it in the matter of granting an extension to Louis Berwald, it should not be permitted to disavow their acts done in pursuance of the authority conferred on them. The contention of plaintiff in error is not well taken. *Insurance Co. v. Lee*, 73 Tex. 646, 11 S. W. 1024; *Assurance Soc. v. Oliver* (Tex. Civ. App.) 53 S. W. 594.

There is no question that the contract of insurance must be construed according to the law of the state of New York. The statute of that state relating to notice, which was pleaded and relied on by the plaintiff in the court below, reads as follows: "No life insurance company doing business in this state shall within one (1) year after default in the payment of any premium, installment or interest, declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest or installment, or any portion thereof required by the terms of the policy to be paid within one (1) year from the failure to pay such premium, interest, or installment, unless a written or printed notice, stating the amount of such premium, interest, or installment or portion thereof, due on such policy, the place where it shall be paid and the person to whom the same is

payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation at his or her last known post office address in this state, postage paid by the corporation or by any officer thereof, or person appointed by it to collect such premium at least fifteen (15) and not more than forty five (45) days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, or installment or portion thereof then due shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited, or declared forfeited, or lapsed, until the expiration of thirty (30) days after the mailing of such notice. The affidavit of any clerk, officer or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one (1) year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed that forfeiture ensued." Laws 1897, c. 218, § 2. The second proposition presented under the first assignment of error is that the said statute is applicable only where the assured has a post-office address in the state of New York, and that the court erred in assuming in the charge given to the jury that the statute applied in this case, as the assured had no post-office address in said state. It is true, as contended by the plaintiff in error, that the said statute provides only for the mailing of notice to the assured "at his last known post office address in this state"; that is, at his post-office address in the state of New York. Considered simply as a statute, the act of the Legislature of New York was without effect beyond the limits of that state. The Legislature of New York, in enacting the statute in question, did not attempt to regulate contracts between insurance companies and citizens of other states. It is only by contract between the parties that the said statute can be made operative in such cases. When an insurance company—the same being a New York corporation, as in this instance—issues a policy of insurance to a citizen of Texas, and the policy provides that the same

shall be governed by the laws of New York, the said statute becomes a part of the contract. It must be held, therefore, that in such case the company contracts to give notice to the assured as to when his premiums will fall due, and the effect of a failure to pay the same. It contracts to give such notice in writing, by mailing same to the assured at his last-known post-office address. The words "in this state," when written into the contract, and considered as a part thereof, and not merely as a part of the statute of the state of New York, must be held to mean the state of the residence of the assured. Any other construction of this statute, when considered as a clause of the contract, would render the same meaningless and of no effect. That such construction was intended by the parties in this case is evidenced by the action of the company in mailing to the assured at his post-office address at Dallas the notice required by the said statute. The notice mailed reads thus: "As required by law, we hereby notify you that the premium of \$60.70 on policy No. 106,505 will be due on the 21 day of Nov., 1899 (if said policy be then in force), and if not paid when due the policy and all premiums thereon will become forfeited and void, except as to the right to a surrender value or paid up policy as provided by statute. * * * This notice is sent because the law of this state compels it and in no way does it impair or invalidate the policy contract." The company thus recognized the statute as constituting a part of the contract, and construed the contract as requiring it to mail the notice to the assured at his post-office address, at Dallas. This might not be conclusive of the question, but it is certainly persuasive and admissible in the way of argument. We conclude that the plaintiff in error was not entitled to a peremptory instruction on the theory that the said statute does not apply to this case.

The plaintiff in error further contends that, even if the said statute is applicable to this case, it was bound only to give notice of the time of the maturity of the premium as fixed by the policy, and was not required to give notice of the time of maturity as fixed by the agreement for the extension. It is sufficient to say that the question has been settled adversely to the contention insisted upon, by the Court of Civil Appeals of the Second District in *Insurance Co. v. Orlopp*, 61 S. W. 336, and by our Supreme Court in *Insurance Co. v. English*, 67 S. W. 884.

A further contention is that the granting of the extension simply had the effect to suspend the forfeiture until the termination of the period of extension, and that it was necessary for the assured, in order to prevent a forfeiture, to comply with the condition upon which the extension was granted, and that, as he failed to do so, the policy became forfeited. This contention is practically settled against the plaintiff in error by the decisions

just referred to, since if the company was bound to give notice of the time of the maturity of the premium, as fixed by the agreement for the extension, before it could insist upon a forfeiture, there could be no forfeiture until the notice had been given. The doctrine insisted upon may be applicable in some cases, but not in a case like this, where, under the contract of insurance, the giving of notice is a prerequisite to the right to claim a forfeiture.

Our conclusion is that the trial court did not err in refusing to charge the jury to return a verdict for the defendant, and the first assignment of error is therefore overruled.

The plaintiff in error complains of the action of the trial court in permitting Harry Berwald, a witness for the defendant in error, to testify that when I. Reinhardt, a member of the firm of Reinhardt & Son, solicited Louis Berwald to take out the policy, he said to him that "we have got an office here, and we can transact business for the company in connection with the general office, and we can accommodate you; and I know how men are in business, sometimes—sometimes they have money, and sometimes they have not—and we can accommodate you"; that he talked considerable on that point; he said he had indulged people, and he could extend to them accommodations at times, when they needed it. The objection to this evidence was that it was sought thereby to vary the terms of the written contract, and there was no plea that the contract had been superinduced by fraud, accident, or mistake. We do not understand that such was the purpose of the testimony. Reinhardt & Son were the general agents for the company for the state of Texas, and had their office in the city of Dallas, where Berwald resided and did business. It was a material issue on the trial whether Reinhardt & Son, when the premium fell due, agreed with Berwald to extend the time for the payment thereof, and whether they had authority to do so. If, as shown by the evidence complained of, I. Reinhardt, when the policy was issued, stated that he frequently granted such favors to his customers, the same tended to corroborate the evidence offered by the defendant in error to show that the extension was in fact granted. And if, as shown by this testimony, Reinhardt & Son were in the habit of conceding such accommodations to their local customers holding policies in said company, the same tended to show authority on their part to do so. It should be remembered that there was no question as to the fact that Reinhardt & Son were the state agents of the company, and that the said statements were made in the conduct by them of the company's business. Of course, the statements did not bind the company to grant the extension, and the court, in the charge to the jury, did not authorize the jury to consider the evidence

for that purpose. The evidence was relevant on other issues, and the objection that it tended to vary the written contract was properly overruled. If the evidence was not admissible for the purposes for which it was offered, the objection urged did not cover the grounds upon which it should have been excluded.

The plaintiff in error complains of the action of the court in permitting the said witness Harry Berwald to testify that the assured, Louis Berwald, could not speak or write the English language, except to sign his name. In view of the charge of the court, this evidence related to an immaterial issue, and the error, if any, was harmless. In the absence of fraud, which was not shown, the assured was bound to take notice of the stipulation of the policy limiting the authority of the company's agents, and the case was submitted to the jury on that theory. The evidence in question cannot have affected the verdict on the issues as submitted, and no injury can have resulted to the plaintiff in error from its introduction.

The plaintiff in error complains of the action of the court in permitting the defendant in error to prove by one Hurst that he held a policy in the said company, and that Reinhardt & Son extended the time for the payment of his premiums. The evidence was not admissible for the purpose of establishing a custom that would destroy the binding effect of the provisions of the policy, and the court, in the charge given to the jury, recognized this rule, and treated the stipulations contained in the policy as binding on the assured, unless waived by the company, acting through its duly authorized agents. The testimony of Hurst, taken in connection with that of Sidney Reinhardt and Leon Blum, tended to show that Reinhardt & Son frequently granted such extensions, and that their action in doing so was acquiesced in and ratified by the company. Such course of dealing is indicative of authority on the part of Reinhardt & Son to act for the company in respect to such matters, and we are of opinion that the testimony of Hurst was admissible for such purpose.

One other question remains to be considered. It was alleged in the answer filed in the trial court by the plaintiff in error that "the assured not only voluntarily, but purposely and designedly, declined to pay the said premium due on November 21, 1899; that he expressly declined to pay the same for the reason that he desired to terminate his previous policy contract with this defendant; that he expressly declared that he desired to terminate such previously existing contract, and that he desired to take out insurance in another company in lieu of the insurance he had with this defendant; that, in pursuance of such purpose and design on the part of the said Berwald, he did, on or about the 14th day of December, 1899, apply for and obtain from the Pacific Mutual Life Insurance Com-

pany of California a policy in the sum of \$2,000; that said Berwald stated, as a reason why he declined to pay said premium, that he preferred the said policy of the said the Pacific Mutual Life Insurance Company of California; that he obtained said policy in the sum of \$2,000 in the said last-named company; and that the same was paid." On the trial the plaintiff in error requested a special charge which reads thus: "If, from the evidence, you find that Louis Berwald took out a policy in the Pacific Mutual, and that he did so with the intention of abandoning the policy herein sued on, and that he did so abandon the policy herein sued upon, then you will return a verdict for the defendant." This charge was refused, and the issue raised by said plea was not submitted to the jury. This action of the trial court is assigned as error. The defendant in error insists that the plea above quoted sets up no defense to the action on the policy. It is unnecessary for us to decide that question, as the evidence was not such as to require the submission of the issue attempted to be raised by the plea. It was shown that on December 14, 1899, Berwald took out a policy for \$2,000 in the Pacific Mutual Company, and that after his death the same was paid to his wife, who is the defendant in error herein. Harry Cerf, the agent who solicited said insurance, testified that Berwald told him at the time that it was his intention to take that policy in lieu of the one he had in the Washington Life Insurance Company, which is the policy sued on herein, and to drop the said last-named policy. On the other hand, this testimony was controverted by Harry Berwald, and it was shown that in the application for the Pacific Mutual policy it was stated that the applicant was insured in the Washington Company for \$2,000. The evidence is uncontradicted to the effect that when the premium fell due on the policy in suit on November 21, 1899, and Blum presented the account therefor, Berwald asked for an extension for 30 days. The verdict establishes the fact that the extension was granted, and there was no attempt to show that the notice required by the policy of the maturity of the premium as extended was given. It is conceded that the company knew nothing of the intention of Berwald to abandon the contract, if he had such intention, until after the extension had expired. It is beyond controversy, therefore, that in granting the extension, and in failing to give notice, the company was not influenced by the secret intention of Berwald to abandon the contract, if such intention existed. The evidence suggests the theory that there may have been an intention on Berwald's part to abandon his insurance in the Washington Company, but it shows conclusively that the company did not know the fact, and did not act thereon; that there was no mutual agreement between the parties to the contract to abandon the contract; that Ber-

wald received no consideration for such abandonment; and that the company sustained no injury on account of the intention of Berwald to abandon the contract, if he had such intention. The company might have terminated its liability on the policy by refusing to grant the extension, or by giving the notice required, or by agreement with Berwald, or by knowing and acting upon his intention to abandon the policy. None of these events occurring, it cannot be held that Berwald abandoned the contract of insurance, and the action of the trial court in refusing to submit the issue to the jury must be approved.

The judgment is affirmed.

On Rehearing.

(Feb. 28, 1903.)

Plaintiff in error requests us to correct certain of our findings of fact, and to make a number of additional findings. Complaint is made of the statement in the opinion that Blum presented to Berwald an account for the premium. The statement is not literally correct. Blum had the official receipt for the premium when he demanded payment thereof, and tendered the receipt on condition that the premium was paid. We find no other inaccurate statement in the opinion.

We are especially urged to make additional findings on the issue relating to the abandonment of the policy by Berwald. Our findings upon that issue are believed to cover every material fact pertinent to the issue as raised by the special plea and as presented by the requested charge.

Except as indicated above, the motion to correct our findings of fact and for additional findings is overruled. The motion for rehearing is also overruled.

HOME MUT. INS. CO. v. NICHOLS et al.*
(Court of Civil Appeals of Texas. Jan. 31, 1903.)

INSURANCE—TRANSFER OF PROPERTY—CONSENT OF INSURER—NECESSITY OF WRITING—CONDITIONS—BREACH BY ORIGINAL HOLDER—DEFENSES.

1. Where an insurance agent had authority to consent on behalf of the insurer to a transfer of the property, and did orally consent to such transfer, such consent was binding on the insurer, though the policy provided that no agent should have power to give any permission affecting the insurance under the policy, unless in writing and attached thereto.

2. Where an insurance company consented to the transfer of the property insured, and to an assignment of the policy, a breach of condition by the original holder was no defense to an action by the transferee for a loss occurring after the transfer.

Error from district court, Dallas county: Richard Morgan, Judge.

Action by J. H. Nichols and others against

*Rehearing denied February 28, 1903.

¶ 2. See Insurance, vol. 28 Cent. Dig. § 1089.

the Home Mutual Insurance Company. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

Alexander & Thompson, for plaintiff in error. K. R. Craig and Fitzhugh & Smith, for defendants in error.

TEMPLETON, J. Suit by J. H. Nichols, B. S. Wathen, W. M. Luck, and J. E. Luck against the Home Mutual Insurance Company on a fire insurance policy in the sum of \$1,000, issued on August 5, 1900, by the said company to W. M. Luck and J. E. Luck. The insurance covered a certain mill property, which was destroyed by fire on June 21, 1901, during the term of the policy. A trial before the court without a jury resulted in a recovery by the plaintiffs, and the defendant has appealed.

At the time of the issuance of the policy the property was incumbered with a lien in favor of Miss Virginia Green; the lien being evidenced by a deed of trust, with C. J. Green as trustee. The company knew of the existence of the lien, and there was a rider attached to the policy, making the loss, if any, payable to C. J. Green, trustee, as his interest might appear. The debt having matured, the trustee, in accordance with the provisions of the deed, advertised the property for sale. On June 3, 1901, the day before the sale was advertised to take place, the Lucks sold the property, and assigned the unexpired policy to Nichols. Wathen furnished Nichols the money to pay off the Green debt, and took a deed of trust on the property to secure the amount so advanced. The policy had been left by the Lucks with the company's agents for safe-keeping, and they authorized Nichols to go to said agents and have the necessary changes made. On the said 3d day of June, Nichols, accompanied by C. J. Green and Wathen's attorney, saw the company's agent, and notified him of the facts aforesaid, except the fact that the property had been advertised for sale. He exhibited the deed from the Lucks to himself, and his deed of trust to Wathen, and requested the agent to make such indorsements on the policy as were necessary to effect a transfer of the insurance. This the agent agreed to do, and Nichols went off to get some revenue stamps to put on his deed. He returned shortly, and the agent handed him the policy. A loss-payable clause in favor of Wathen had been attached to the policy, but the assent of the company to the transfer to Nichols had not been indorsed thereon. Nichols, supposing the proper indorsements had been made, did not examine the policy, and delivered the same to Wathen's attorney, who handed it to Wathen's clerk. Neither Nichols nor Wathen knew that the indorsements had not been made until after the loss occurred. The said agent of the company had authority to issue policies and to assent to the transfer of the insured property. Nichols and Wathen knew that the property had been advertised for

sale under the deed of trust to Green, but had no fraudulent purpose in not notifying the company's agent of the fact. It was not shown whether the company knew, in fact that the trustee had advertised a sale.

The policy contained a clause providing that the same should be void if, with the knowledge of the assured, notice of sale should be given of the insured property by virtue of any trust deed, or if any change should take place in the title of the subject of insurance. The policy further provided: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto; and no agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as are by the terms of this policy the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or other representative, shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting this insurance under this policy exist or be claimed by the assured unless so written or attached." The plaintiff in error contends that the advertisement of sale under the trust deed, and the transfer of the property to Nichols, constituted breaches of the conditions of the policy, and the contention is admitted by the defendant in error to be well taken. The plaintiff in error presents the further contention that, as the assent of the company's agent to the transfer to Nichols was not indorsed on the policy as required by the provisions of the policy, the same was not binding on the company, and will not prevent a forfeiture. In support of this contention the plaintiff in error cites a decision by the Supreme Court of the United States in the case of Assurance Co. v. Building Association, 22 Sup. Ct. 133, 46 L. Ed. 313. In that case the property insured was covered by other insurance at the time the policy there sued on was issued. It was provided that the existence of such other insurance should render the policy null and void. When he took out the policy, the assured gave notice to the agent of the company who issued the policy of the existence of the other insurance, but no indorsement in respect thereto was entered on the policy. There was a provision of the policy relating to the authority of the agents of the company, and the manner of evidencing the assent of the company to waivers of conditions of the policy, similar to that quoted above from the policy in suit herein. In an opinion by Justice Shiras, in which the question was exhaustively considered, it was held that the policy was void. It is plausibly argued by the plaintiff in error here that the decision cited should control in this case.

We think, however, that there is a broad distinction between the facts of that case and those of the one at bar. In the case before us the assent of the company to the transfer of the insured property was subsequent to the issuance of the policy. That it lay in the power of the parties to the policy contract to make such changes therein as they might agree upon after the execution of the contract is too clear for argument. It is equally clear that they were not irrevocably bound by the stipulation contained in the policy that their future contracts relating to the insurance in question should be in writing. *Insurance Co. v. Earle*, 33 Mich. 153, cited and approved in *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63. The rule that all preliminary negotiations will be treated as having been merged into the written contract, and prohibiting proof of contemporaneous parol agreements which affect the written instrument, has no application here. Beyond question, the company could, by agreement in parol made subsequent to the execution of the policy contract, legally assent to a transfer of the insured property, notwithstanding the provision of the contract that such assent, to be binding, should be in writing. The real issue, then, is not whether the company could bind itself by its assent verbally given, but whether the agent who acted for it in the transaction had authority to so bind it. This particular agent had been appointed by the company to act for it in the matter of assenting to such transfers. The question, then, is not whether he was authorized to bind the company by his acts done in that behalf, but whether his acts done were binding if not done in the prescribed manner. He held the commission of the company to represent it in the matter of agreeing to the change in ownership of the insured property. His power and discretion in making such agreement were not limited. The limitations of the policy affected only the means by which his action was to be evidenced. It was provided by the contract that such agreement, to be valid, should be reduced to writing. But we have seen above that the company itself could waive the provision. As the company is a corporation, it can act only through its officers and agents. The authority to make the waiver necessarily resides in some of its officers or agents. In what officer or agent of the company can the authority be more fitly vested than the one who has been deputed by the company to deal with the assured, and to represent it in that relation? Undoubtedly, none; and, when the company puts him up as its representative, it cannot deny his acts. He may not exceed the limits of his authority, but, within its limits, his acts are those of his principal.

The clause of the policy relied on by appellant was not intended as a limitation of his authority to contract in behalf of the

company, but its purpose was to require him to contract in writing; and we have already seen that this would not prevent the company from binding itself by parol, and was not, in fact, a limitation of the power of the agent. It is significant that the clause under consideration declares that no officer, agent, or other representative of the company should have authority to make such agreement, except in writing. If no officer, agent, or other representative of the company could bind it by verbal agreement, then the company could not be bound in that manner—a conclusion which is not admissible. The company could not in this way deprive itself of its fundamental right and power to make contracts. It is too well settled to require a citation of authorities that a contract in writing may be altered or discharged by an agreement in parol. Our conclusion is that the contention of the plaintiff in error is not well taken, and that the assent of its agent to the transfer to Nichols was binding on the company, notwithstanding the provision of the policy requiring the assent to be indorsed on the policy. The failure to make the required indorsement being due to the oversight or negligence of the company's agent, and being in no way chargeable to the assured, and the assured having paid a valuable consideration for the policy, by permitting the company to retain the unearned premium, and having received and held the policy in the belief that he had procured valid insurance, the company is precluded from now asserting the invalidity of the policy. The company, through its said agent, had knowledge of the facts aforesaid, and, not having repudiated his acts, must be held to have ratified the same, and to be bound thereby. *Morrison v. Insurance Co.*, supra. We have been led into a discussion of this question by the insistence of the plaintiff in error that the conclusion we have reached is in conflict with the decision of the Supreme Court of the United States, cited above. That our holding is in harmony with the decisions of our state Supreme Court is not controverted. The *Morrison* case, supra, the *Lee* case, 73 Tex. 643, 11 S. W. 1024, and the *Wagner* case, 92 Tex. 549, 50 S. W. 569, are decisive of the question. It is unnecessary to consider whether there is a conflict between the rule announced by the state court and that laid down by the United States court, as the facts of the case at bar clearly distinguish it from the case decided by the court at Washington, and the cases do not necessarily turn upon the application of the same legal principles.

It is urged that the breach of the condition of the policy growing out of the advertisement of the insured property for sale under the trust deed should be held to operate as a forfeiture. The answer to the proposition is that the breach occurred before the policy was assigned to Nichols, and

that it cannot affect his contract with the company. The rule is thus stated in 2 May on Insurance, sec. 378a: "By a sale of the property, and an assignment of the policy with the company's consent, a new contract arises, which may be enforced without regard to what occurred before the transfer, if the assignee is innocent of fraud. A past breach of condition by the original policy holder * * * cannot be set up, even though the breach was unknown to the company at the time of assent." The rule stated was followed by this court in Insurance Co. v. Gunter, 35 S. W. 715, and the case distinguished from the case of Association v. Flournoy, 84 Tex. 682, 19 S. W. 793, 81 Am. St. Rep. 89, where a different rule was applied. What was said in the Gunter Case is sufficient to dispose of the question, and renders a further discussion thereof unnecessary.

The judgment is affirmed.

ZEPEDA v. HOFFMAN.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

LIMITATIONS—ADVERSE POSSESSION—CHARACTER OF POSSESSION.

1. Limitations do not run in favor of one in possession of land, as against the state.

2. Where acts done on land are such as to give unequivocal notice of a claim thereto adverse to all others, accompanied by actual possession, exclusive in character, limitations run in favor of the adverse possessor from the time occupancy commenced, whether the land be inclosed or not.

3. Where land was not inclosed, and one actually occupied a part thereof, limitations did not run in his favor as regards that portion of the land not actually occupied, in the absence of any showing that the occupancy and use of the remainder had been exclusive.

Appeal from district court, Bexar county; Jno. H. Clark, Judge.

Action by Jacob Hoffman against Victoriano Zepeda and wife. From a judgment for plaintiff, defendant above named appeals. Affirmed.

Bell & McAskill, for appellant. Webb & Goeth, for appellee.

JAMES, C. J. Plaintiff, Hoffman, alleged that he is and was on March 31, 1901, owner and in possession of certain land in his inclosure, the same being all of survey 2½, in name of J. P. Alexander, and parts of surveys 176 1/10, H. Dohme, and No. 1, John B. McMichel; that on April 1, 1901, defendants Victoriano Zepeda and his wife, Catarina Zepeda, caused plaintiff's fence surrounding his said land to be cut; that plaintiff repaired it, and on April 7th defendants again cut it; that they threaten to again cut and destroy it, which threats he fears they will carry into effect; that defendants have

been and are committing acts of trespass on plaintiff's said land, cutting wood therefrom, etc., to plaintiff's damage in certain sums; and that said acts were maliciously and oppressively done, for which he asks exemplary damages in a certain sum, and prays for injunction and damages. It is not deemed necessary to state the pleadings further, except that defendants disclaimed as to the land described in the petition, except as to such as might conflict with the Thomas Perez 160-acre survey, No. 406½, which survey was conveyed by Thomas Perez to Victoriano Zepeda in 1883, and which was paid for with the separate funds of defendant Catarina Zepeda. As to this tract they also pleaded title by limitations. Plaintiff, in turn, pleaded res adjudicata. It was admitted that plaintiff's title was from the state; that the Dohme title dated from May 24, 1874, the McMichel title from January 7, 1884, and the Alexander title from January 17, 1901. It was also admitted that title to same "is good in plaintiff, and was so on March 31, 1891, and since then in all the land, except in so far as same may be defeated by the claim of title of defendants to the Perez land described in the answer, or in so far as defendants might establish superior title in themselves by possession or other rights pleaded in their answer."

The following matters were in issue: Did defendants show the existence of title under the state to the Perez pre-emption survey? or a title by limitations, as against plaintiff's admitted title?

The evidence fails to show that title was obtained from the state to the tract described in the answer as purchased by defendants from Thomas Perez.

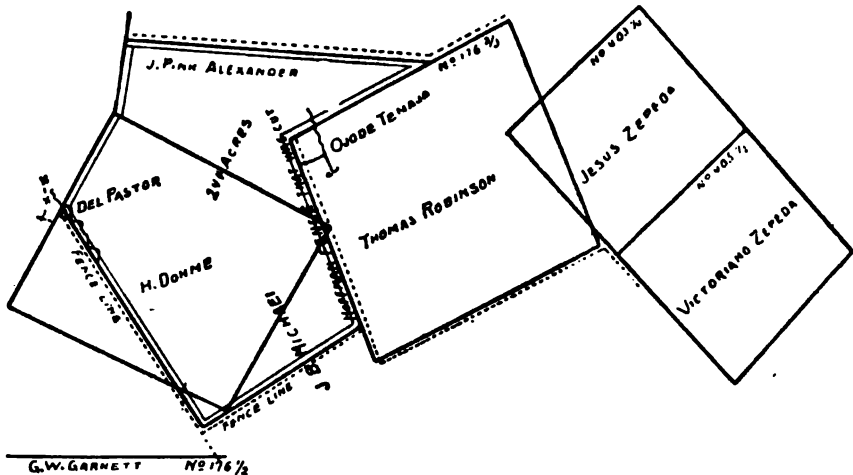
As to limitations, the facts are substantially that the land described in the deed from Perez to Victoriano Zepeda conflicted in part with a superior survey known as the Thomas Robinson survey, owned by defendant, and upon that part of the Perez tract in conflict with the Robinson defendants had all their improvements. The witness Modesto Torres testified that Zepeda pastured his cattle on the land, and had a field on it, and had been getting wood there ever since he bought it from Perez; that he moved on the land about 17 years ago; that the improvements made by Zepeda are all on such part of the land as is also covered by the Thomas Robinson survey owned by Zepeda. Victoriano Zepeda testified that he moved on the Perez land about 1883; that it has been his home ever since then; that he has ever since used the land for a pasture for his cattle; got water from the Pastores Spring, at the northwest corner of the Perez land, at a place not on the Robinson land; that he did not remember the date he moved on the land—it was about 17 years ago (the trial was in 1902); that his improvements are entirely within the Robinson survey, which he owned. Jesus Zepeda testified that he

*Writ of error denied by supreme court.

¶ 2. See Adverse Possession, vol. 1, Cent. Dig. § 100.

was one of the chain bearers when Thomas Perez had the land surveyed for a pre-emption. Perez lived there about three years. Victoriano Zepeda bought it in 1893, and moved on it. He got water from the Pastores Spring for home use, and watered his cattle there. He grazed his cattle on the land. He cut wood on the Perez land for home use and for market. The improvements made by Victoriano Zepeda are on the land included in the Thomas Robinson survey, and also the Perez survey.

It was embraced in an admission that the improvements made by Victoriano Zepeda were upon land covered by the Robinson survey and the Perez claim, and not upon land described in plaintiff's petition, and also, substantially, that defendant had committed the acts charged, and that plaintiff was entitled to the injunction prayed for, unless said land is owned by defendants. There is a sketch, made a part of the judgment, which is omitted from the original transcript, but an agreement has been filed to save a writ of certiorari, which makes a transcript heretofore filed for an affirmance on certificate a part of the record in this appeal, which shows the judgment and the map which is a part of it. We here copy the map, the dotted lines being added by us in order to show approximately the situation of the Perez tract with reference to the adjacent surveys:



From this sketch it will be noticed that the Perez tract overlapped in part the Robinson, the Dohme, the McMichel, and the G., C. & S. F. Ry. Co. surveys. It also shows the position of the Pastores Spring, which one of defendant's witnesses states is at the northwest corner of the Perez boundaries; but this is evidently a mistake, as the sketch shows this spring to be the southwest corner, and within the conflict of the Perez with the Dohme survey.

As to the Alexander tract, defendants clearly have no title by limitations, because it

appears that until 1901 it was state land, and against the state the statute does not run.

Did defendants show such possession of the portions of the Dohme and McMichel surveys, over which the lines of the Perez extended, as would support a claim of title by limitations? Zepeda's use of part of the Perez tract (that conflicting with the Robinson) was undoubtedly sufficient in character to satisfy the statute, and constituted constructive possession to the whole, under ordinary conditions. *Taliaferro v. Butler*, 77 Tex. 578, 14 S. W. 191; *Cantagrel v. Von Lupin*, 58 Tex. 570. But this doctrine of constructive possession ceases to apply where the boundaries in defendant's deed conflict with an older or superior survey. *Parker v. Baines*, 65 Tex. 605; *Turner v. Moore*, 81 Tex. 209, 16 S. W. 929, and cases there cited; also *Allen v. Boggess*, 94 Tex. 85, 58 S. W. 833. In such a case actual possession must exist with regard to what is thus in conflict.

It is observed that defendant's evidence shows that the Zepedas had all their improvements on that corner of the Perez tract which lay over the Robinson survey, and we infer from this that they had no fences on the remainder; that they used the tract generally for grazing their cattle and cutting timber thereon; and that they used the Pastores Spring for stock water and for their homestead purposes. The map shows another spring on the corner of the tract, where the

improvements are situated, and a proper inference is that that spring was also used by them for said purposes. We find no evidence that the deed from Perez to Zepeda was ever recorded, although that fact was alleged by defendants. If it might be said that there was some evidence that the Zepedas had the land fenced, there was none to show how long it had been fenced. The statute relied on was that of 10 years.

Under the decisions in this state this evidence is not sufficient to show actual possession of the land inside the conflict with

the Dohme and McMichel surveys, such as the statute contemplates. *Fuentes v. McDonald*, 85 Tex. 135, 20 S. W. 43; *Sellman v. Hardin*, 58 Tex. 86; *Murphy v. Welder*, 58 Tex. 241. As is stated in *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571, where the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession exclusive in its character, then limitations will run in favor of the person so asserting adverse claim and enjoying an exclusive possession from the time such occupancy began, whether the land be inclosed or not. The testimony does not approach these requirements. And there was no attempt to show that what use defendants had made of the land outside of that actually occupied by them had been exclusive, nor its extent. We therefore conclude that the testimony warranted finding against defendants' claim of title by limitations to any of the land described in the petition, and that under the agreements plaintiff was entitled to the injunction.

It is not necessary, in this view of the case, to investigate alleged error in reference to the issue of *res adjudicata*. The case was tried by the judge without jury, and there are no conclusions on file. In this state of the record the judgment should be affirmed, if correct on any theory of the evidence. *Walker v. Cole*, 89 Tex. 323, 34 S. W. 713

Affirmed.

On Motion for Rehearing.

(Feb. 25, 1903.)

We find that we were in error in stating in respect to the Alexander survey that title thereto from the state emanated in 1901. The date was 1891. This, however, makes no difference in our conclusions. What is said in the original opinion as to the conflict of boundaries and character of possession, in reference to the issue of limitations, applies to the land covered by the Alexander patent as well as to that included in the Dohme and McMichel surveys.

The motion is overruled.

ST. LOUIS S. W. RY. CO. v. DUCK.*

(Court of Civil Appeals of Texas. Jan. 31, 1903.)

CARRIERS—INJURIES TO PASSENGERS—FAILURE TO HEAT CARS—PROXIMATE CAUSE.

1. Plaintiff, two years of age, was about to be taken by his mother on one of defendant's trains which left their place of residence early in the morning. Plaintiff was asleep when his parents got ready to start, and was taken to the depot, a distance of $2\frac{1}{2}$ blocks, in a baby buggy. The weather was cold, but plaintiff, before boarding the cars, was wrapped up, and was warm. The cars were cold, and without

fire, and plaintiff contracted a severe cold, resulting in a serious disease of the head. *Held*, that the evidence warranted a finding that plaintiff's injuries were the result of defendant's negligence in failing to heat its cars, and not the result of his parents' negligence in taking him to the depot.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action by Warren Duck against the St. Louis Southwestern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Appellee, Warren Duck, by his father, as next friend, brought this suit in the district court of Hunt county to recover damages for personal injuries alleged to have been sustained by him while a passenger on one of defendant's trains. Appellant answered by general and special exceptions, general denial, and specially pleaded matters unnecessary to be set out herein. The cause was tried by the court without the intervention of a jury, and resulted in a judgment in favor of appellee for \$375, from which judgment defendant prosecuted an appeal. The court filed conclusions of fact, in which he found, among other things, that: "The plaintiff is a minor, and was at the time of the injury two years old, and lives in Greenville, with his father and mother; that plaintiff's mother, wishing to visit her relatives in Kentucky, secured a first-class ticket from defendant's agent at Greenville, entitling her and plaintiff to passage from Greenville to Paducah, Ky., and on the night of December 19, 1899, plaintiff and his mother became passengers on one of defendant's regular passenger trains at Greenville, Texas. The weather was very cold and disagreeable, and the car in which they were forced to ride was without fire, was cold and uncomfortable, which facts were made known to the servants of defendant in charge of its train; and that by reason of the cold and uncomfortable condition of said car, the plaintiff, soon after boarding said train, and before it reached Texarkana, contracted a severe cold, which resulted in fever, the cold settling in plaintiff's head and ear, causing purulent otitis media and inflammation of the mastoid process, from which the plaintiff was sick for several weeks, and under the treatment of physicians, and necessitated a surgical operation to relieve the trouble in the head and ear. Prior to the night of December 19, 1899, the plaintiff was a stout and healthy child. The defendant was guilty of negligence in permitting the car in which the plaintiff rode to be cold and without fire, and plaintiff's injuries were the direct and proximate result of said negligence. As a result of plaintiff's injuries, he suffered great physical pain." We adopt the above finding, and further find that appellee's injuries were not the result of negligence on the part of his parents, and that the appellee sustained damage in the amount of the judgment.

*Rehearing denied February 28, 1903, and writ of error granted by supreme court.

E. B. Perkins and Perkins & Craddock, for appellant. Montrose & Starnes, for appellee.

BOOKHOUT, J. (after stating the facts). It is insisted that the evidence fails to show that the injuries complained of by appellee (plaintiff below) were caused by the negligence of the defendant, but that the evidence does show that the said injuries were the result of the contributory negligence of plaintiff's parents in not using proper care in taking plaintiff from their residence to defendant's depot in the city of Greenville. The appellee was a minor, about two years old, at the time he received his injuries. His parents lived in the city of Greenville, about 2½ blocks from appellant's depot. About 1 o'clock on the morning of December 20, 1899, appellee was taken from their residence to appellant's depot, where he and his mother took passage on one of appellant's trains, bound for Paducah, Ky. The appellee had not been put to bed prior to starting, but was asleep when his parents got ready to start. He was carried to the depot in a baby buggy. The weather was cold and disagreeable. Appellant insists that the injuries to appellee were caused by his being taken up out of a warm bed, in the nighttime, where he had been sleeping with his clothes on, and in carrying him in an open vehicle to its depot in the middle of the night. There was evidence that at the time appellee was taken to the depot he was all wrapped up, and was warm. The evidence was sufficient to support a finding that appellee's injuries were not the result of his exposure to cold in going to appellant's depot, but that they were the result of his exposure to cold after becoming a passenger on appellant's train. The evidence shows that appellee's injuries were not caused by his being exposed to the cold by his parents. Appellant insists that the evidence shows that it used ordinary care in keeping its cars clean, warm, and comfortable, and that there is no evidence sustaining the court's finding that it was negligent. The evidence was sufficient to justify the conclusion that the defendant did not exercise proper care in keeping the car in which appellee was compelled to ride warm and comfortable. *Arrington v. Railway Co.*, 70 S. W. 551, 6 Tex. Ct. R. 69; *Railway v. Campbell*, 69 S. W. 451, 5 Tex. Ct. R. 756. The evidence shows that the car was very uncomfortable, and that, as a result, appellee contracted a cold, which settled in his head and ears, causing purulent otitis media and inflammation of the mastoid process. Plaintiff was compelled to undergo a surgical operation to obtain relief from said injuries, and has sustained damages in the amount of the judgment.

We conclude that there is no error pointed out by appellant in the assignments of error copied in its brief, and that the judgment of the trial court should be affirmed.

BIRDWELL v. BURLESON et al.*

(Court of Civil Appeals of Texas. Dec. 17, 1902.)

HOMESTEAD—TEMPORARY REMOVAL—ABANDONMENT—PARTITION DECREE—POSSESSION—ASSIGNABLE ESTATE.

1. That a father removed from his agricultural homestead to a neighboring village to educate his children, with the intention of returning and occupying the homestead, did not constitute an abandonment.

2. A tract of land was devised to defendant's wife for life, remainder to her children. The land was occupied as a homestead by defendant and his family until after the wife's death, when it was partitioned into eight parcels, the eighth being decreed to defendant, and the sixth, which contained the buildings, to one of his minor children. No guardian having been appointed for any of the children, defendant continued to occupy the buildings, and rented the several tracts with his own, using the proceeds for the support of the family. *Held*, that defendant's possession of tract 6 was rightful, and was sufficient to sustain an exemption of tract 8 and of that part of tract 5 which he inherited through the death of the child to which such tract was awarded, as defendant's homestead.

On Rehearing.

3. It is not necessary that a debtor should hold an assignable interest in land in order that he may claim it exempt from execution as his homestead.

Appeal from district court, Hays county; L. W. Moore, Judge.

Action by W. S. Birdwell against D. C. Burleson and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Will G. Barber and P. N. Springer, for appellant. O. T. Brown, for appellees.

STREETMAN, J. Appellant brought this suit to recover one tract of 20.83 acres of land, and an undivided half interest in a tract of 32¾ acres. Upon trial, without a jury, the district court rendered judgment for appellee.

We find the facts necessary to a decision of the case, as follows: The land in controversy was part of a tract of 236 acres, formerly owned by Martha J. Weir. Mrs. Weir, by her will, gave the 236 acres to her daughter, Louisa Burleson, wife of appellee, for her life, with remainder to her children, in equal shares. Mrs. Louisa Burleson died March 18, 1894, and left surviving her husband (appellee) and eight children, Cornelia, Joseph, Sallie, Martha J., Stephen, Lou, Lizzie, and Mary. Prior to the death of Louisa Burleson, she and her husband and children resided on said tract of 236 acres, using the entire tract as a homestead. After her death, appellee and the children continued to occupy and use the tract in the same manner. In July, 1894, Joseph Burleson died, unmarried, intestate, and without issue, and appellee inherited from him an undivided one-

* 1. See *Homestead*, vol. 25, Cent. Dig. § 317.

*Writ of error denied by supreme court.

sixteenth of said 236 acres. In October, 1894, appellee, with his minor children, moved to the town of Buda, about $2\frac{1}{2}$ miles from the land, for the purpose of sending the children to school. Up to this time all of the interests were undivided, but in 1896 some of the elder children threatened to sue for partition, and appellee caused a partition suit to be instituted in the name of Martha J. Burleson; and on September 23, 1896, a decree was rendered, making partition of the land. It was divided into eight lots or tracts, and allotted to the several owners in the manner shown by the following sketch:

1.

21 acres.

Armstrong Minors.

2.

21 acres.

Cornelia A. Cole.

3.

21 acres.

Martha J. Burleson.

4.

21 acres.

Stephen M. Burleson.

5.

 $22\frac{1}{4}$ acres.

Lou Burleson.

6.

Dwelling.

 $25\frac{1}{2}$ acres.

Mary Burleson.

7.

 $22\frac{1}{4}$ acres.

Lizzie Burleson.

8.

 $20\frac{2}{100}$ acres.

D. C. Burleson.



By this decree, lot No. 8, containing 20.83 acres was set apart to appellee, and he was divested of all right, title, and interest in the remainder of the 236 acres. The dwelling house and all outhouses were situated on lot No. 6, which was set apart to Mary Burleson, the youngest child. Stephen, Lou, Mary, and Lizzie were at that time minors, and their father, D. C. Burleson, continued to rent their parts and his together, and used the rents for the support of the family. On December 28, 1896, Lou Burleson died, unmarried, intestate, and without issue, and appellee inherited from her an undivided half interest in lot 5. Appellee continued to live with the remaining minor children at Buda

until the trial of this case. He continued to exercise the control and management of their part of the land, renting it together with his own, and using the rents all alike for the support of the family. It was his intention all the time, when he had finished sending the children to school to return to the farm and live in the house on lot 6, using the other tracts in connection with it as a homestead for the family. If the children should marry, and he could no longer live in the house on lot 6, it was his intention to exchange his part of lot 5 for land adjoining lot 8, and live there. At the time of the partition, parts of lots 5 and 8 were in cultivation. After that no further improvement was made on either lot. The children have never had a guardian of their persons or estates. Appellee never acquired any other homestead. On December 3, 1897, D. M. Reagan obtained a judgment in a justice's court in Hays county against D. C. Burleson for \$72. On December 14, 1897, an abstract of said judgment was duly recorded and indexed in Hays county. May 6, 1898, an execution was issued on said judgment, which was levied on lot 8, and an undivided half of lot 5, and on June 7, 1898, said lot 8 and half of lot 5 were regularly sold under said execution to appellant, W. S. Birdwell, for \$25, and a proper conveyance of said land was executed and delivered to him by the sheriff.

Upon these facts the district court rendered judgment for appellee. There are no findings of fact or law in the record, but the judgment necessarily involves the finding that both tracts of land were exempt as homestead, and the only question presented on this appeal is whether such finding was warranted by the facts. Appellant contends that whatever homestead rights appellee had in the 236 acres prior to the partition were by that decree limited to the tract allotted to him, and designated as "Lot 8"; and that decree, together with his removal to the town of Buda, operated as an abandonment of all the rest of the tract. He maintains that the undivided half interest in lot No. 5, being acquired afterwards, while appellee was not residing on the tract, and there being no evidence of acts of preparation to use it as a homestead, it never became impressed with the homestead character. As to lot 8, it is insisted that by the decree and the removal of appellee he had divested himself of all interest in lot 6, on which the dwelling was situated, and, as there was no dwelling on lot 8 or lot 5, and appellee did not intend to build a dwelling on either of said lots, his intention to return and occupy the house on lot 6, if permitted to do so, was not sufficient to preserve the homestead character of lot 8. Appellant relies upon the case of *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292, and others, which hold that it is not 200 acres of land belonging to the head of a family which is exempt, but the homestead; and

that there must be a homestead over which the Constitution may throw its shield, and not land, merely, upon which the owner may or may not put his cabin, mansion, or improvements. As bearing more particularly on the interest in lot 5, appellant cites the case of *Brooks v. Chatham*, 57 Tex. 31, and others, which hold that, where land is acquired, a mere intention on the part of the owner is not sufficient to make it his homestead, but that such intention must be evidenced by acts of preparation to use it as a homestead. If we should agree that the facts showed a complete abandonment of lot No. 6, upon which the dwelling and out-houses were situated, so that appellee could have no homestead rights in it, then these questions would become important in the decision of the case. It therefore becomes necessary to determine the nature and extent of appellee's rights, at the time of the levy and sale, in lots 6 and 5. It cannot be doubted that prior to his removal from the premises, and before the partition, he had an undivided interest in the whole 236 acres, and that this was exempt as a homestead (*Luhn v. Stone*, 65 Tex. 439; *Clements v. Lacy*, 51 Tex. 639); nor can it be claimed that his removal to the neighboring village to educate his children, with the intention of returning to occupy the place, operated as an abandonment (*Thomas v. Williams*, 50 Tex. 269; *Aultman v. Allen*, 12 Tex. Civ. App. 227, 33 S. W. 679). The decree of partition giving him lot 8 as his entire share, and divesting him of all title and interest in the remainder, presents the serious question. After this decree, what were his rights, as far as lots 5 and 6 were concerned? They became the property of his two minor children, who were part of his family, and who had no guardian of their persons or estates. As their father and natural guardian, he took the actual management and control of the premises, rented them out together with his own lot, and used the proceeds as a fund for the support of the family. By his tenants he was thus in actual possession and control of the premises. We do not see that his position was in any respect different from what it would have been had he never removed from the premises, but continued to reside there, and partition had been made during such residence.

The question thus presented has not been decided by the courts of our state, so far as our investigation has discovered. Briefly stated, the question is whether a father, residing with his minor children upon land, the legal title to which is entirely in the children, and managing and controlling such land, and using the proceeds for the support of himself and the family, has such interest in the land as will form the basis of a homestead exemption. It is true that he has no legal title to the land. If some one else were appointed guardian, he could be entirely ousted from the occupancy of the premises.

Yet, he is in possession, and his possession is in no wise unlawful or wrongful. On the other hand, it is just what we should expect a father, under the circumstances, to do. He cannot be said to be an intruder or bare trespasser. We think it must be conceded under such circumstances, that he is in actual, peaceable, and lawful possession of the premises. Assuming that he occupies this relation to the property, while there are no decisions of our own state upon the question, the courts of other states have directly passed upon it. The statute of Mississippi exempts from forced sale the homestead "owned and occupied as a residence," not to exceed 80 acres. In the case of *King v. Sturges*, 56 Miss. 606, the plaintiff in error claimed that a 40-acre tract which had been sold under execution was exempt as a homestead. There was no house on it, but he dwelt in a house built on high land, belonging to the railroad company, immediately adjoining it; and this house is distant from his own line less than 300 yards. This was the condition of affairs when he purchased, and his vendor had built the house, and so occupied it and the land for several years previous to his purchase. He was a man of family, owned no other land than this, and cultivated and derived his subsistence from it. In determining whether it was exempt or not, Associate Justice Chalmers, of the Supreme Court, says: "Eighty acres are by law exempt, provided they are actually occupied as a homestead. In this instance, if we connect with his own tract the railroad land occupied by him, he will still have less than eighty acres. What the nature of his tenure of the railroad land is does not appear, nor is it perhaps material, since any right in the land actually occupied as a homestead will support a claim to exemption. In this instance the occupancy seems to have continued for several years, and to have been acquired with the title to the forty-acre tract. We must conclude that it is permissive on the part of the railroad company, and constitutes at least a tenancy at will; so that plaintiff in error may be regarded as actually occupying as a homestead a tract in solido of eighty acres or less, as to a portion of which he is owner in fee, and as to the remainder a tenant at will, or perhaps from year to year. Inasmuch as any interest or tenure, save that of a mere intruder or trespasser, will support a right of exemption, we conclude that plaintiff in error was, within the meaning of the statute, in such actual possession of the locus in quo as to constitute it his homestead." In *Pendleton v. Hooper*, 87 Ga. 108, 13 S. E. 313, 27 Am. St. Rep. 227, Chief Justice Bleckley in delivering the opinion of the Supreme Court upon almost the precise question under investigation, said: "The premises in controversy consist of six acres. Hooper was in possession when the judgment against him was rendered, and has

remained in possession ever since. He parted with the paper title by a voluntary conveyance made to several persons, some of them minors, on the day the judgment was rendered, and at an hour subsequent to its rendition. The lien of the judgment was made neither better nor worse by this conveyance. Had he parted also with possession, and never resumed the same, his ownership of the property would have been at an end; but, as he retained possession, he is still the owner against all the world, except his donees. They may choose never to disturb him or assert any title against him. That possession of land imports ownership is familiar law. [Citing 2 Black. Com. 196; *English v. Register*, 7 Ga. 391.] Naked possession is the lowest and most imperfect degree of title, but it is nevertheless enough to hold off creditors, where exemption is claimed under section 2040 of the Code, and where the terms prescribed in section 2041 are complied with. Here there was a compliance with these terms pending the levy, and whilst Hooper was in possession. It is not disputed that he was the head of a family, or that he would be entitled to the exemption if he had not divested himself of all title except possession. But he retained the very thing which the law of exemption is solicitous to protect. It cares not how little the debtor may have, so long as he remains in its actual enjoyment. The exempt land is 'for the use and benefit of the family of the debtor.' So says the Code. The exemption does not depend on the quality or duration of the estate which the debtor has in the land. A tenancy at will or at sufferance will protect it from levy and sale as his property, equally with an estate in fee simple. The exemption attached to the land, not merely to his estate in it. Our exemption laws do not cut up exempt property into divers estates, but protect the physical thing as a whole from levy and sale, so long as the exemption continues. * * * Even were he a trespasser relatively to his donees, he would, whilst in possession, be owner relatively to his creditors." Quotations might be multiplied from other courts to show that mere possession of land, with no greater title, is sufficient interest to support the homestead exemption. The question is discussed in the following cases, in addition to those above mentioned: *Watson v. Saxor*, 102 Ill. 585; *Hogan v. Mannus*, 23 Kan. 551, 83 Am. Rep. 199; *McGrath v. Sinclair*, 55 Miss. 89.

As we have stated above, our courts have not been called on to decide whether mere possession, without other title, will support the homestead exemption. In *Warhumd v. Merritt*, 60 Tex. 24, it is said that one occupying land only as a tenant could not claim the homestead exemption; but in that case the right was attempted to be asserted against the landlord. In *Williams v. Wethered*, 37 Tex. 130, it is said that a mere tenant at

will could not claim a homestead in the land occupied by him; but, even if this decision is to be taken as authority, the question does not seem to have been necessary to the determination of that case, as the parties appear to have really acquired homestead rights in other property. A question very similar to this was suggested, but not answered, by Chief Justice James, of the Court of Civil Appeals, Fourth District, in *Anderson v. Carter et al.*, 69 S. W. 78, 5 Tex. Ct. Rep. 501. While some expressions of the Court of Civil Appeals in *Hampton v. Gilliland et al.*, 23 Tex. Civ. App. 87, 56 S. W., 572, might indicate that the court did not believe a tenancy at will would support the homestead exemption, yet in that case the homestead right was not asserted against creditors, but was claimed by a surviving wife against other heirs. These cases indicate more strongly than any others we have examined a leaning against the homestead claim based upon mere possession. On the other hand, the benefit of the exemption has been extended by our courts to various cases, which, in principle, so far as we can see, are not different from this case. In *Cullers v. James*, 66 Tex. 494, 1 S. W. 314, a house was held exempt as the home of the family or place of business, although the owner had no interest or estate in the land on which it stood. It is said: "If he occupies it with his family, it is their home. He may be compelled to move it from one lot to another, as fast as legal process can oust him, still, though ambulatory, unsatisfactory, and in all its appointments mean. Though it advertises the thriftless poverty of its proprietors, and is a caricature of the princely possibility of the exemption laws, it is the home of a family, and is embraced in the spirit and purpose, if not the letter, of the Constitution." See, also, *Luck v. Zapp*, 1 Tex. Civ. App. 528, 21 S. W. 418. It has been held that a homestead may exist in an estate for life (*Silverman v. Landrum* [Tex. Civ. App.] 56 S. W. 107); a leasehold interest (*Wheatley v. Griffin*, 60 Tex. 209; *Phillips v. Warner* [Tex. App.] 16 S. W. 423; *Brewing Ass'n v. Smith* [Tex. Civ. App.] 26 S. W. 94; *Moore v. Greer*, 69 S. W. 201, 5 Tex. Ct. R. 482), or an equitable interest (*Lee v. Willbourne*, 71 Tex. 500, 9 S. W. 471).

Bearing in mind the liberal policy which should prevail in the construction of our exemption laws, we believe that, where property is rightfully and peaceably held in possession, and occupied as the home of the family, it should be exempt from forced sale, even though that possession be merely permissive. We therefore conclude that after the partition of the 236 acres appellee D. C. Burleson, under the facts, had such possession of lot 6, on which the dwelling was situated, and also of lot 5, set apart to Lou Burleson, as, considered in connection with the former use of the premises and his future intentions, made it in law his home-

stead. Having, therefore, such interest in the dwelling as would authorize him to claim it as a home, it follows that he could claim lot 8, set apart to him, as land adjacent to the dwelling, and used for homestead purposes. It also follows that, having already an interest in lot No. 5 sufficient to make it a homestead, the exemption would not be defeated, but rather strengthened, by his inheritance of an undivided half interest in this lot upon the death of his daughter Lou Burleson. We therefore conclude that there was no error of the lower court in holding both tracts in controversy exempt as homestead, and the judgment of the district court is affirmed.

Affirmed.

Opinion on Rehearing.

(March 4, 1903.)

Appellant has filed a motion for rehearing, supported by a very able argument. The principal proposition contended for in the motion and argument is that a homestead, under the Constitution and laws of Texas, cannot exist in favor of one who does not own some assignable interest in the land. As the principal reason for this proposition, it is insisted that without such assignable interest a creditor who levied upon the homestead could acquire nothing by his execution sale, and there could be no reason for protecting from forced sale an estate which needed no protection. The conclusion that we are asked to deduce from these propositions is that a homestead cannot exist based upon a mere possession of land, whether under a tenancy at will, or by sufferance, or otherwise, without some legal title. It is not to be denied that this line of reasoning has been followed by some courts, and there are expressions in some of the opinions of our Courts of Civil Appeals which indicate similar views (see *Roberts v. Trout* [Tex. Civ. App.] 35 S. W. 323; *Hampton v. Gilliland*, 23 Tex. Civ. App. 87; *Loessin v. Washington*, Id. 515); but we do not believe the decision of the question involved in this case was necessary to a determination of any of the cases cited; and, if so, we are unable to agree that in a contest with a creditor it is necessary that the debtor should own an assignable interest in the land in order to assert homestead rights. If we are to follow the decisions of our Supreme Court, the contrary conclusion is inevitable. Numerous decisions are to the effect that a homestead may be asserted in a leasehold estate. *Wheatley v. Griffin*, 60 Tex. 209; *Phillips v. Warner* (Tex. App.) 16 S. W. 423; *Brewing Ass'n v. Smith* (Tex. Civ. App.) 26 S. W. 94; *Moore v. Greer*, 69 S. W. 201, 5 Tex. Ct. R. 482. And we think this question in this state may be considered as settled. Yet it is equally well settled that a leasehold estate, under our law, is not assignable, and cannot be sold under execu-

tion, and by our Supreme Court is put upon exactly the same footing, with respect to its assignability, as a tenancy by sufferance or at will. *Moser v. Tucker* (Tex. Sup.) 26 S. W. 1044. It is also decided that a homestead may exist in a house situated upon land to which the head of the family has no title or interest whatever, and that it is embraced in the spirit and purpose, if not the letter, of the Constitution. *Cullers v. James*, 66 Tex. 494, 1 S. W. 314. An examination of the cases which uphold a homestead interest in leasehold estates, and the authorities upon which they are based, discloses the fact that it is not simply a sale of the homestead estate which is inhibited by the Constitution, but that it prohibits any interference by judicial process with the possession of the premises. Upon this theory alone can the decision of Judge Gaines in *Coates v. Caldwell*, 71 Tex. 22, 8 S. W. 922, 10 Am. St. Rep. 725, be upheld, and the decision is expressly put upon that basis. In that case creditors levied upon matured crops grown upon the homestead. They were no longer part of the realty, and there was no law exempting them from forced sale. The homestead itself was not sought to be subjected to execution. But the execution was unlawful, because its enforcement would interfere with the possession of the homestead. It follows from this that, when there is such possession of premises as would be interfered with by the enforcement of judicial process, the Constitution will protect such possession. Upon this theory alone can the decisions be sustained which protect from forced sale crops, either growing or matured, upon leased premises; and from this proposition it follows that, whether the tenancy be for a term of months or years, or simply at will or sufferance, if there be an actual, peaceable, rightful possession of the premises, which would be disturbed by the execution of judicial process, such possession is sufficient to support a homestead exemption. For example, if, in this case, Burleson having just such possession and title as he did, instead of cultivating the farm by tenants, had planted a crop himself for the support of himself and family, and appellant had levied upon it, we think it can hardly be doubted that he could have defeated the execution because it interfered with his possession of the homestead. We are thus forced to the conclusion that an assignable interest in the land is not necessary as a basis for homestead rights; but, as held in the original opinion, the exemption may be asserted by one who, not being an intruder or trespasser, is in the actual, peaceable possession and control of the premises.

It is urged that this doctrine must lead to unreasonable results, in illustration of which several questions are suggested. Among others, it is asked whether, if Burleson should remarry, a conveyance by him-

self and wife, with separate acknowledgment, would be necessary to divest him of his homestead estate. Certainly not. The Constitution and Statutes provide that a sale and conveyance of the homestead must be made by the husband and wife; but they do not provide that a homestead may not exist in property for which no written conveyance is necessary, as a leasehold for less than 12 months, or a house which is really personal property—as in *Cullers v. James*, cited above; and in such case no written conveyance by husband and wife can be required. So, where land is simply held by sufferance, or at will, the possession may be terminated by the owner of the property, or by the act of the tenant in moving off the premises. They have no interest that could be assigned, and, of course, no conveyance by either husband or wife would be necessary to divest them of their possession; but it by no means follows that they cannot, so long as they remain in possession, assert their homestead rights.

All the other questions suggested are really involved in the one inquiry—whether an assignable interest is necessary to support the homestead exemption. In view of the decisions in our state, as well as the policy which has prevailed, and ought to prevail, in the construction of our Constitution and laws upon this subject, we are unable to reach any other conclusion than that announced in our original opinion.

The motion for rehearing is therefore overruled.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BOWLES et al.*

(Court of Civil Appeals of Texas. Feb. 7, 1903.)

RAILROADS—COLLISION WITH PERSON ON STREET—NEGLIGENCE—DAMAGES—EVIDENCE—INSTRUCTION—AGE—OPINION—CONTINUANCE—BILL OF EXCEPTIONS—RULE OF COURT—NEW TRIAL.

1. Whether one who, while crossing a street, in which were railroad tracks, on a crossing, within a few feet of which cars were standing, was struck by them, they being suddenly thrown on the crossing by cars being hurled against them by an engine 625 feet away, was guilty of contributory negligence, is a question for the jury, there being evidence that the moving cars were making little noise, and were backed into the standing cars with great force, and a conflict as to whether the engine bell was rung.

2. To leave cars in a street so near a crossing that a coupling therewith cannot be made without forcing them onto the crossing, and to make the coupling without seeing whether the crossing is clear, is negligence.

3. An instruction, in an action for death, that the measure of damages is such sum as would represent the value of deceased's future earnings, which plaintiffs, his daughters, had a reasonable expectation he would have contributed to them had he lived, and in determining the amount of damages sustained by them the jury may consider deceased's earning capacity,

his age and life expectancy, is not capable of the construction that plaintiffs may be allowed all deceased's future earnings.

4. The opinions of a daughter, and of another, who had known deceased a long time, as to his age, are admissible; the daughter testifying that deceased did not know his age exactly, and that his age was not in the family Bible.

5. In an action for death of a father, testimony that one of the daughters had separated permanently from her husband, and that she, accompanied by her children, was on her way to live with and be supported by her father when he was killed, and that the husband of another daughter was dying with consumption, and unable to support her, is admissible on the question of the amount he would have contributed to their support.

6. The rule providing that, in the absence of a bill of exceptions, the overruling of applications for continuance will not be reviewed, is not in conflict with the statute.

7. A ground of the application for continuance being that S. was an important witness as to the age of deceased, and it not being contended on the motion for new trial that he knew any fact relating to any other issue, the application for continuance may not be abandoned, and the question raised on motion for new trial on the ground of newly discovered evidence that S. had seen the family Bible of deceased, which showed deceased's age.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by George R. Bowles and others against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. B. Perkins and Glass, Estes & King, for appellant. P. A. Turner, W. H. Arnold, and B. J. Stuart, for appellees.

TEMPLETON, J. On February 15, 1902, H. W. Allen was struck and killed by the cars of the St. Louis Southwestern Railway Company of Texas. He left four married daughters, who, in conjunction with their husbands, brought this suit against the company to recover the damages sustained by them on account of the death of their father. A jury awarded them the sum of \$5,000. The accident occurred while appellant was crossing Front street, in the city of Texarkana. The street runs east and west. The railroad tracks also run east and west, and are laid in the street. Appellant's depot is situated north, and the Union Depot south, of the tracks, about 60 feet intervening between the two depots. The west end of the Union Depot is directly opposite appellant's depot, but the Union Depot extends much farther east than appellant's depot. There is a plank walk, 10 or 12 feet wide, extending across the street from the west end of the Union Depot to appellant's depot. The walk was constructed originally for convenience of the railway companies in transferring baggage, mail, and express from one depot to the other, but it had been long and continuously used by the public generally as a footway, with the knowledge and acquiescence of the companies. The street was one of the public streets of the city. The plank walk crossed

*Rehearing denied February 28, 1903, and writ of error denied by supreme court.

¶ 4. See Evidence, vol. 20, Cent. Dig. § 2235.

three railroad tracks. The first track, which was located just south of appellant's depot, was appellant's main track. The second, or middle, track was appellant's passing track. A short distance east of the depot there was a switch, where the two tracks came together. There was another switch 550 feet west of the plank walk, where the tracks came together again. The view in both directions was not obstructed by any change in the course or by any structure. The third track, which was located just north of the Union Depot, was a track of the Texas & Pacific Railway Company. The main tracks of that company and of the Iron Mountain Company are located south of the Union Depot. The depot of the Kansas City Southern Railway Company is located on the north side of Front street, north of and opposite appellant's depot. Allen lived at Ashdown, Ark., a station on the Kansas City Southern Railway about 20 miles north of Texarkana. One of his daughters, Mrs. Spry, lived at Marshall, Tex., a station on the Texas & Pacific Railway south of Texarkana. She desired to go to her father, and notified him to meet her at Texarkana. He went there for that purpose, and, shortly before the Texas & Pacific train on which he expected his daughter was due to arrive, went to the Union Depot. He stayed in the sitting room at the east end of the depot a few minutes, and then went out at the south door of said room. He was next seen, so far as the evidence shows, on the plank walk on Front street. He was traveling north, and had about reached appellant's main track. As he was crossing the track, some box cars, which were standing just west of the walk, were bumped into by a train of freight cars coming up the track from the west. The collision impelled the cars across the walk. The cars struck Allen, ran over him, and killed him. The cars which struck Allen had been placed on the main track a few minutes before the accident occurred. There were four of them, and they were loaded with merchandise. They were stationed just west of the plank walk, and scarcely far enough to clear the crossing. There was no engine attached to them. The crew which was handling them, after placing them in the position stated, had pulled their engine back on the passing track and west down said track past the switch west of the depot. There were 13 cars attached to the engine, 10 of which were loaded. The engine was at the west end of the train. After pulling past the said switch, the train was backed in on the main track and against the four cars which had been left on the said track. The collision caused the accident. When the car struck Allen, the engine was about 625 feet west of the plank walk. The cars were being moved so as to get them in a proper position for unloading.

The evidence is sufficient to warrant the conclusion that the operatives of the train

were guilty of negligence in bumping into the standing cars, and forcing the same suddenly across the walk, without having taken the proper precautions to ascertain whether the way was clear. And we think it is sufficient to justify the finding of the jury that Allen was not guilty of contributory negligence. It is true that his purpose in going across the street was not shown. He does not appear to have had any business at appellant's depot, but he may have been going over to the Kansas City Southern Depot to see about tickets, or something connected with his trip home. At any rate, no matter what his purpose was, he was on a public street, and on a much-used walk. He was where he had a right to be, and was neither a trespasser nor a licensee. He must have seen the car he attempted to pass; but, as there was no engine attached, he may reasonably have concluded that he could cross the track in safety. He was justified in assuming that the cars would not be suddenly backed over the crossing without full warning being given. He may not have observed the cars backing up, or, if he did, may not have had reason to suppose that they would be hurled against the standing cars in the manner they were. There was evidence tending to show that the moving cars were making little noise, and that they were backed into and against the standing cars with great force. If the bell was ringing—about which there is a conflict in the evidence—the engine was at such distance from the walk that Allen may not have heard the same. There was no employé of the company at the crossing to warn him that the coupling was about to be made. The question of negligence or not on the part of Allen was properly left to the decision of the jury, and their finding is conclusive. *Railway Co. v. Lee*, 70 Tex. 500, 7 S. W. 857; *Railway Co. v. Boozer*, 70 Tex. 536, 8 S. W. 119, 8 Am. St. Rep. 615; *Railway Co. v. Crosnoe*, 72 Tex. 83, 10 S. W. 342; *Railway Co. v. Lowry*, 61 Tex. 154; *Railway Co. v. Dyer*, 76 Tex. 160, 13 S. W. 377; *Railway Co. v. Graves*, 59 Tex. 332; *Railway Co. v. Wilson*, 60 Tex. 144. Appellant's assignments of error which urge the contention that the evidence fails to establish liability are overruled.

One paragraph of the court's charge to the jury reads thus: "If you believe and find from the evidence that on the 15th day of February, A. D. 1902, defendant had some box cars standing on the north track, or track nearest its said depot, and west of said plank crossing, without any engine attached to them, and that while H. W. Allen was walking along said plank crossing, going north from the west end of the said Union Depot to the depot of defendant, and that just as he got about the middle of the railroad track on which said box cars were standing the servants of the defendant in charge of one of its engines attached to other freight cars, west of said crossing,

backed said freight cars east on the track where said box cars were standing, and struck said box cars with great force, and suddenly moved said box cars east against the said H. W. Allen, and knocked him down, and passed over him, and killed him, as alleged in plaintiff's petition; and if you further find from the evidence that the servants of defendant in charge of said engine and cars failed to exercise ordinary care to observe the said H. W. Allen in attempting to pass over said railroad track along said plank crossing, and to avoid striking and injuring him; and if you find that the placing and leaving of said box cars on the railroad track without an engine attached to them, and the striking of them with the other cars and engine as alleged, if so struck, and the failure, if any, on the part of the defendant's said servants to use ordinary care to observe said Allen in attempting to cross said railroad track, was negligence, and that, but for such negligence, if any, the said H. W. Allen would not have been struck by the said cars and killed; and if you further find from the evidence that plaintiffs have suffered any pecuniary damages by reason of the said Allen's death, then you will return a verdict for plaintiffs against the defendant for such sum, as actual damages, as the evidence may show them entitled to under the instructions hereinafter given you." Complaint is made of this paragraph of the charge on the ground that appellant had a right to leave the cars standing on the track, and to couple the other cars onto them, and that it was not negligence, in law or in fact, to do so. That appellant had a right to leave the cars on the track and to make the coupling cannot be doubted. But if the cars were left so near the crossing that the necessary coupling could not be made without driving the cars upon and over the crossing, it was negligence to make the coupling without taking the proper precautions to see that the crossing was clear. The position in which the cars were left and the making of the coupling cannot be left out of consideration in determining whether there was negligence. The necessity of seeing whether the crossing was clear arose from the fact that the coupling could not be made without forcing the cars over the crossing. The proposition was correctly presented in the charge, and the complaint of appellant is not well taken. It is further urged that the pleadings did not raise the issue in the form it was submitted. The facts were fully stated in the petition, and it was alleged that appellant's servants exercised no care to ascertain whether the crossing was clear before making the coupling. We think the petition fairly raised the issue that was submitted to the jury. The contention of appellant is presented in other forms, but what has been said is sufficient to dispose of the question in all its phases.

Another paragraph of the charge reads

thus: "If you find that the plaintiffs are entitled to recover, then you will apportion the sum so found among them in such sums as you may determine each is entitled to receive; and you are instructed that the measure of damages, if plaintiffs are entitled to recover, is such sum as would represent the worth or value of the future earnings of the deceased, Allen, which his daughters, who are plaintiffs herein, had a reasonable expectation he would have contributed to them had he lived, and in determining the amount of damages, if any, sustained by them on account of the death of the said H. W. Allen, you may consider said Allen's capacity for earning money, his age at the date of his death, and the probable expectancy and duration of his life." Complaint is made of this paragraph of the charge on the ground that the same is misleading, in that it is calculated to cause the jury to believe that they might allow the plaintiffs all of the future earnings of the deceased, and not merely that part of his future earnings which he would have contributed to their support had he lived. It is conceded that the court was attempting to follow the rule laid down in approved cases, and that the charge may be construed as intended by the court; but it is urged that the charge is susceptible of the construction stated above, and that the jury may have so understood it, and based their finding upon the entire future earnings of the deceased, and not upon the portion thereof he would have contributed to the plaintiffs. The charge is not capable of such construction without departing from the clear intent and meaning of the language used. The charge informed the jury that the measure of damages was such sum as would represent the present worth or value of the future earnings of the deceased which he would have contributed to the plaintiffs had he lived. The charge cannot be construed to mean that the jury was authorized to allow the plaintiffs the entire future earnings of the deceased, regardless of whether he would have contributed his whole earnings to their support, without ignoring the limitation expressed in the charge. The charge being open to but one construction, it cannot be held to have been misleading. It stated the true measure of damage in unambiguous language, and no other instruction on that issue was necessary.

The age of the deceased was a material issue. Two witnesses testified upon that issue. Mrs. Spry, one of his daughters, testified that her father did not know his own age exactly, but from what he had told her regarding his age he was about 63 years old; that about 10 years before he died he spoke of writing to relatives, and learning his exact age, but whether he ever did so the witness did not know; that his age was not then of record in the family Bible. She gave it as her opinion, judging by her knowl-

edge of him, and by what he had told her, and by his appearance, that he was 60 to 63 years old at the time of his death. Another witness testified that he had known the deceased a long time, and gave it as his opinion, based on his knowledge of the man and on his appearance, that Allen was between 60 and 65 years old at the time he was killed. Appellant objected to the opinions of these witnesses on the grounds that there was better evidence, and that it was not a matter about which the opinions of witnesses could be received. It is insisted that in proving age the record of births in the family Bible is the best evidence. Such record is hearsay, but if it appears to have been properly kept, and comes from the right custody, it is admissible, because of the necessities of the case. It is not the best evidence, and is not required to be produced or accounted for before other testimony can be introduced. The witnesses who gave their opinions as to the age of the deceased had long been familiar with the deceased, and testified fully as to his appearance. We think, under the circumstances shown, that the opinions were properly received.

The plaintiffs were permitted to prove, over objections by defendant, that Mrs. Spry had separated permanently from her husband, and that she, accompanied by her children, was on her way to Ashdown, where she was to live with her father, and be supported by him, when he was killed. The plaintiffs were also permitted to show that the husband of Mrs. Westbrook, one of the daughters, was dying with consumption, and was confined to his bed, and unable to earn a support for his wife. The objections to all this testimony were properly overruled. Any evidence tending to show the amount which the deceased would have contributed to the support of his daughters was admissible. The testimony which defendant sought to have excluded showed the necessities of Mrs. Spry and Mrs. Westbrook, and their reliance on their father for support, and their grounds for expecting assistance from him.

As stated above, the jury awarded the plaintiffs the sum of \$5,000. It was apportioned as follows: To Mrs. Spry, \$2,000; to Mrs. Westbrook, \$1,500; to Mrs. Gentry, \$1,000; to Mrs. Bowles, \$500. It is insisted that the verdict is excessive. That this is true as to Mrs. Bowles there can be no doubt. She lived at a distance from her father, and was married to a man who is able to care for her, and who does care for her. Since her marriage, she has received nothing from her father. The necessities of her sisters would have probably consumed all the surplus earnings of the deceased, and no reasonable probability of more than nominal contributions to Mrs. Bowles was shown. There is no doubt that, had Allen not been killed, the other plaintiffs would have received substantial aid from him. He was bound to them by the closest of ties, and had no other claims

upon him. He was somewhat aged, but was a stout, robust, healthy man. He was earning about \$85 per month. The greater portion of his earnings would have been expended for the support and maintenance of his said three daughters, and his life expectancy was such that we cannot say that the jury have overestimated the amount they would have received. Considering his age, the verdict is rather large, but we would not be justified in setting it aside.

One other question remains to be considered. The defendant in the court below presented an application for continuance, which was overruled by the court. The order overruling the application shows that the defendant excepted thereto; but the exception was not preserved by a bill. Appellant attacks the rule which provides that, in the absence of a bill of exceptions, the action of the trial court in overruling applications for continuance will not be revised; and presents an able argument in support of the contention that the rule is in conflict with the statute, and should not be followed. We think, however, that the rule is not in conflict with the statute, as contended, and that it is based upon sound reason, and is settled by authority. The rule has been applied since the adoption of the present statutes and rules of court. It is supported by an unbroken line of decisions, and the question cannot be regarded as an open one. *Campion v. Angler*, 16 Tex. 93; *Harrison v. Cotton*, 25 Tex. 54; *Morris v. Files*, 40 Tex. 379; *Railway Co. v. Hardin*, 62 Tex. 373; *Railway Co. v. Mallon*, 65 Tex. 116; *Phillipowski v. Spencer*, 63 Tex. 605; *Bonner & Eddy v. Whitcomb*, 80 Tex. 181, 15 S. W. 899; *Waites v. Osborne*, 66 Tex. 649, 2 S. W. 665; *Railway Co. v. McAllister*, 59 Tex. 361; *Railway Co. v. Cannon* (Tex. Civ. App.) 29 S. W. 689; *Strain v. Greer County* (Tex. Sup.) 19 S. W. 513; *Railway Co. v. Dunn* (Tex. Sup.) 17 S. W. 822. It is pertinent in this connection to consider one of the grounds of the defendant's motion for a new trial. It was set up in the motion that, subsequent to the trial, the defendant learned for the first time that it could prove by one Sullivan that he had seen the family Bible of the deceased, and that the record of births therein contained showed that Allen was born in October, 1835, which would make him over 66 years old at the time of his death. One ground of the motion for continuance was that the defendant desired time to procure the testimony of the said Sullivan, by whom it expected to prove that Allen was 67 years old when he was killed. In view of the application, the testimony cannot be held to be newly discovered. It appears from the application that the defendant knew at that time that Sullivan was an important witness on the issue relating to the age of the deceased, and it is not contended, in the motion for a new trial, that he knew any fact relating to any other issue. Under these circumstances, the defendant could not

abandon its application, and raise the question, after trial, in the form it is presented.

The judgment is excessive to the extent of the sum awarded to Mrs. Bowles, but we find no other error in the record. The judgment will therefore be reformed so as to exclude that sum from the amount recovered by the plaintiffs, and, as reformed, will be affirmed.

Reformed and affirmed.

TEMPLE et al. v. FERGUSON et al.

(Supreme Court of Tennessee. Jan. 24, 1903.)

TRUSTS—ACTIVE TRUST—TITLE OF TRUSTEE—TRUST FOR MARRIED WOMAN—DEATH OF HUSBAND—ABSOLUTE TITLE IN BENEFICIARY.

1. Conveyance of property in trust for the separate use and benefit of a married woman creates a special and active trust.

2. Conveyance of property in trust for sole and separate use of a married woman is not within the statute of uses.

3. Where property is conveyed to a trustee for the sole and separate use of a married woman, title vests absolutely in her on the death of her husband.

4. Where property is granted to one, "his heirs and assigns, forever," as trustee for the sole and separate use and benefit of a married woman, the trustee does not take a fee, but merely an estate coextensive with the life of the husband.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Suit by C. L. Temple and others against W. H. Ferguson and others. From a decree of the court of chancery appeals affirming a decree dismissing the appeal, complainants appeal. Affirmed.

Jas. L. Watts, for appellants. Smith & Maddin, for appellees.

McALISTER, J. The controversy in this case is over a tract of land comprising 12 acres, situated in the Nineteenth civil district of Davidson county. It is claimed by complainants as heirs at law of Mrs. Anne Tennessee Temple, and by defendant as devisee under the will of Mrs. Temple. The settlement of the controversy depends upon the proper construction of a certain deed of settlement. It appears from the record that on the 26th of October, 1861, J. E. Gleaves, clerk and master of the chancery court of Davidson county, conveyed to John Taylor, trustee for Mrs. Anne Tennessee Temple, wife of C. L. Temple, the tract of land in question. The conveyance was made upon the direction of C. L. Temple, the husband. It conveyed "to the said John Taylor, as such trustee of Anne Tennessee Temple, and his heirs and assigns, forever, a certain tract or parcel of land in the county of Davidson and state of Tennessee, and on the south side of Neeley's Bend Turnpike, civil district No. 19, bounded as follows: * * *. To have and to hold the said real estate, with all the hereditaments and appurtenances thereto belonging, to the said John Taylor,

his heirs and assigns, forever, as trustee, however, of Anne Tennessee Temple, and for her sole and separate use and benefit." John Taylor, the trustee, died many years ago, and no successor to him was appointed. C. L. Temple, the husband, also died, leaving his wife, the said Mrs. Anne T., surviving him. Mrs. Temple died in 1902, leaving a last will and testament, in which she devised the land in question to her granddaughter, Mrs. Bettie L. Ferguson. The present bill was filed by the four sons of C. L. and Anne Tennessee Temple, claiming the land by inheritance, and seeking to remove the devise made to Bettie L. Ferguson as a cloud on their title. The theory of the bill is that Mrs. Anne T. Temple was not vested with such title as she could convey by will or otherwise. Complainants allege that upon the death of John Taylor, trustee, the legal title to the land descended to his heirs, and the bill prays that the title be divested out of them, and that the land be sold for partition among the complainants as heirs of Mrs. Temple. A demurrer was interposed on behalf of defendant Bettie L. Ferguson, which was sustained by the chancellor, and the bill dismissed. The court of chancery appeals affirmed the decree of the chancellor.

The first question for determination is whether the conveyance to John Taylor, trustee, created an active or a mere naked, dry trust. The law is now well settled in this state that when the trust is created, and the property conveyed to a trustee to hold for the separate use and benefit of a married woman, an active trust is thereby created. As stated by Justice Lurton in *Jourimou v. Massengill*, 86 Tenn. 81, 5 S. W. 719: "Trusts for the protection of the estates of married women during coverture against their husbands and his creditors, and the wife and her extravagance, as well as her contracts, are made every day. Such trusts are sustained upon the ground that they are intended to protect the estate during coverture, and are hence held special and active. Such a trust is not within the purview of the statute of uses, and is not executed by the statute."

The next question that arises is, what effect did the death of C. L. Temple, the husband, have upon the trust estate? The record discloses that the husband, C. L. Temple, died many years ago, and his widow did not contract a second marriage. As already stated, the property in question was conveyed by John E. Gleaves, clerk and master, to Taylor, trustee, upon the direction of C. L. Temple, the husband, and for the purpose of creating a separate estate in the wife, free from the marital rights of the husband. It is unnecessary to consider the question whether this trust would have applied to a second marriage, for no other marriage was contracted. What, then, was the nature of the trust estate at the date of the

death of C. L. Temple? In *Beaufort v. Collier*, 6 Humph. 487, 44 Am. Dec. 321, Judge Green quotes with approval the following language of Lord Langdale, used in *Tullett v. Armstrong*, 1 Beavan, 1, to wit: "Whether the gift to her separate use be made with or without the power of alienation, the restraint is annexed to the separate estate only, and the separate estate has its existence only during the coverture. While the woman is discovert the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage." In *Brown v. Foote*, 2 Tenn. Ch. 280, Judge Cooper said, viz.: "There seems to be no conflict in the authorities upon this point, and Mr. Perry lays it down as law, for which he cites a number of cases, that property conveyed to a married woman, to her sole and separate use, becomes absolutely hers, and may be sold by her as soon as her husband dies; or creditors may seize it for her debts. Perry on Trusts, vol. 2, sec. 652, Second Edition. So, in *Pooley v. Webb*, 3 Cold. 603, it was held that the separate estate exists only during coverture, being suspended when the feme becomes discovert; and upon becoming discovert the feme possesses the same power of disposition over her property as other persons."

The next question that arises is in respect of the extent of the title of the trustee, and the quantity of estate he took in this land. Where there is no remainder over, or other estate, to be preserved by the trustee, does his title descend to his heirs? We think the question is answered in the leading case of *Ellis v. Fisher*, 3 Sneed, 231, 65 Am. Dec. 52, viz.: "The established doctrine is that trustees take exactly that quantity of interest which the purposes of the trust require. The question is not whether the testator (or grantor) has used words of limitation, or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate; and therefore a devise to trustees may be either restricted or extended, as the nature and purposes of the trust require. Although the devise be expressly to the trustees and their heirs, it is well settled that if the duties imposed on them, or the purposes of the trust, require only an estate pur autre vie to be vested in them, their legal interest will be cut down to that extent, notwithstanding the express limitation to them in fee. This construction has been held to prevail even in the case of a deed by necessary implication arising from the object of the trust in connection with the nature of the subsequent limitations," etc. In *Smith v. Metcalf*, 1 Head, 64, it was said, viz.: "It is well settled that an estate coextensive with the duties to be performed will vest in the trustee, and he will take exactly that quantity of interest which the

purposes of the trust require, which, being executed, the trust estate ceases." Again, in *Rogers v. White*, 1 Sneed, 68, the headnote is, viz.: "Where an estate is settled upon a trustee for the sole use and benefit of a feme covert, free from the use, control, or creditors of the husband, the interest of the trustee continues no longer than the purposes of the trust demand. The object being to protect the property against the marital rights of the husband, upon his death all the purposes of the trust are accomplished." We are therefore of opinion that upon the death of C. L. Temple the purpose of this trust was accomplished, the legal title of the trustee extinguished, and the whole title, legal and equitable, became vested in Mrs. Temple, with full power of disposition as a feme sole. It follows that the devise of this property by Mrs. Temple to her granddaughter was valid, and that complainants are not entitled to recover.

The decree of the court of chancery appeals, as well as that of the chancellor, in dismissing the bill, is affirmed.

STATE v. DALTON.

(Supreme Court of Tennessee. Feb. 27, 1903.)

CRIMINAL LAW—REMISSION OF SENTENCE—ORDER AT SUCCEEDING TERM—POWER OF COURT—INVASION OF PARDONING POWER.

1. Const. art. 3, § 6, vests the pardoning power solely in the Governor. Shannon's Code, § 7226, authorizes the several courts in which a cause is finally adjudged, either before or after final judgment, for good cause, to release defendant from the whole or any part of fines or forfeitures accruing to the county or state. Section 7423 empowers the board of workhouse commissioners to discharge convicts for good conduct or physical disability. *Held*, that after conviction and final sentence to confinement in the workhouse, from which there was no proceeding in error, the court had no power at a succeeding term to remit the remainder of the imprisonment during accused's good behavior, and to release the costs, such order being neither justified by the statutes nor allowable under the constitution.

Appeal from circuit court of Wilson county; R. P. McClain, Special Judge.

West Dalton was convicted of larceny, and from an order remitting a portion of his sentence and releasing costs taxed against him the state appeals. Reversed.

Ohas. T. Cates, Atty. Gen., for the State.

SHIELDS, J. This case involves the power of a judge of the circuit court to remit the punishment imposed upon a convict upon trial and conviction at a former term of the court to that at which it was rendered. The defendant, West Dalton, was indicted and arraigned at the May term, 1902, of the circuit court of Wilson county, upon a charge of petit larceny, and, entering a plea of guilty, his punishment was fixed by the jury impaneled for that purpose at confinement and hard labor in the workhouse of the county for 11 months, and a judgment to this effect, and

of infamy, and for the costs was rendered against him, from which there was no proceeding in error. At the succeeding September term of the court, a special judge presiding, an order, reciting that the prosecutor consented thereto on account of sickness in the family of the defendant, was entered "remitting the remainder of the imprisonment during the good behavior of the defendant," and releasing the costs, and the case is now before us upon a proceeding impeaching the validity of this action of the court.

This order remitting the unexpired portion of the imprisonment and releasing the costs adjudged against the defendant is absolutely null and void. The judgment entered against the defendant at the May term of the court was final, and nothing more remained to be done. The court did not and could not reserve the right to set aside or alter it, and upon the adjournment of that term sine die the parties were discharged from its further jurisdiction, and it was divested of all control over them and the case. It could do nothing at a subsequent term affecting the judgment rendered. The action of the court in this case was, in substance, an attempt to exercise the pardoning power, which, by the Constitution (article 3, § 6), is vested solely in the Governor of the state. The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved. The circuit judge's action in remitting the imprisonment and releasing the costs adjudged against the defendant cannot be sustained under section 7226 of Shannon's edition of the Code, or Act 1891, c. 123, § 18 (Shannon's Code, § 7423), authorizing the discharge of convicts confined in workhouses under certain circumstances. The authority given judges by the first statute is confined, upon a proper construction of this act, to the term of the court at which the judgment was rendered, and the power to discharge inmates of the workhouse is confined by the latter statute to the workhouse commissioners. If, however, these statutes could be construed to cover the case at bar, we would hold them to be in contravention of Article 3, § 6, of the Constitution, and inoperative and void, as an attempt to vest in judges and workhouse commissioners the pardoning power, which, as said, cannot be constitutionally vested in any form or to any extent in any other officer but the Governor. Any and all attempts of the Legislature to vest this power in any officer, board, or commissioners to any extent, or in any form, advisory or otherwise, or to regulate its exercise, is in violation of the provision of the

Constitution referred to, and an absolute nullity.

Nor can the action of the court be sustained upon any supposed control of the court over its records. So long as the court remains in session, the record is in the breast of the judge, and all judgments entered at that term may be vacated or modified upon any subsequent day of the term, but upon final adjournment the power of the court over the record is gone. This is the rule governing final judgments of all courts of record, save certain proceedings authorized by statute to correct errors resulting from clerical mistakes, which it is not claimed apply to this case. After the parties to the cause have been dismissed by final judgment and adjournment of that term, the court has no more jurisdiction of them and of the case upon the merits than where no suit has been instituted or process served. Any order or judgment made at a subsequent term affecting a final judgment unquestioned by proceedings in error, except in the cases mentioned, is *coram non iudice*, and a nullity. *Van Bibber v. Sawyers*, 10 Humph. 81, 51 Am. Dec. 694; *Bank v. Fowlkes*, 4 Sneed, 462; *Johnson v. Tomlinson*, 13 Lea, 604. A judgment at a subsequent term, vacating one entered at a former term of the court by consent of parties given in open court, is void. *Anderson v. Thompson*, 7 Lea, 560. These are all civil cases, it is true, but the principle applies with equal force to criminal cases. The state has the same right to insist upon the execution of judgments rendered in criminal cases prosecuted by its officers as other litigants have in those recovered by them, and public policy forbids the unauthorized interference of any one to prevent the execution of judgments secured by the state for the punishment of crime. All proceeds reviewing or modifying final judgments of courts in criminal cases other than by proceedings in error or by the chief executive, tend to render punishment for crime less certain, and embarrass the administration of the criminal law.

The order remitting the unexpired punishment of the defendant and releasing him from costs adjudged against him is reversed, and the case remanded, that the former judgment of the court may be executed.

CUMBERLAND TELEGRAPH & TELEPHONE CO. v. DOOLEY.

(Supreme Court of Tennessee. Feb. 14, 1903.)
NEGLIGENCE — FIRE — EVIDENCE — ADMISSIBILITY — OPINION EVIDENCE — DAMAGES.

1. Where plaintiff's property was destroyed by fire, which, starting in another building, was communicated to defendant's, and thence to plaintiff's, and he alleged that there was a sufficient force to have extinguished it before it reached his property had it not been for a public announcement that defendant had dynamite stored in its building, which caused the people to cease their efforts to check the fire, and an explosion

of such dynamite, which broke a solid brick wall situated between defendant's and plaintiff's buildings, it was permissible to show, without regard to the question of agency, that while the building was in flames, and shortly before the explosion, two of defendant's employes cried out that there was dynamite, and warned the people to get away.

2. The admission of testimony of two witnesses, not shown to be experts, that they could, with the apparatus at hand, have stopped a fire at the time of an explosion, had it not occurred, was error.

3. In an action by one whose property has been destroyed by fire, for the use of the insurers who have paid his loss, against the one by whose negligence or wrong the destruction occurred, the measure of damages is the damage resulting from the fire, not, however, exceeding the amount paid on the loss by the insurers.

Appeal from circuit court, Wilson county; W. C. Houston, Judge.

Action by one Dooley against the Cumberland Telegraph & Telephone Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Cantrell & McMillan, W. L. Granberry, McClain & McClain, and A. A. Adams, for appellant. E. E. Beard, N. G. Robertson, and J. C. Sanders, for appellee.

BEARD, C. J. This suit was brought by the defendant in error, Dooley, for the use of certain insurance companies, to recover the amounts paid to him by these companies for losses sustained in a fire which occurred in January, 1901, to property covered by their policies; the insistence being that the losses resulted from the negligence of the plaintiff in error. The theory of the defendant in error is that the fire, originating in another building, was finally communicated to the one occupied by the Cumberland Telegraph & Telephone Company, and that there was a sufficient force of men, with all proper appliances, to have confined and extinguished the fire before it reached the property of the defendant in error, which was the second house removed from that of this company, had it not been for a public announcement that the company had stored in its building a large quantity of dynamite, followed immediately by its explosion, which so alarmed the parties engaged in endeavoring to check the fire as to cause them to cease their effort; and, further, that the force of the explosion was sufficiently violent to break a solid brick wall separating the telephone building from the one adjoining, thus making easy communication to the latter, which was destroyed, at the same time inflicting serious injury upon the building of the defendant in error and the stock of merchandise contained therein. The trial resulted in a verdict and judgment for the plaintiff below. An appeal in the nature of a writ of error has been prosecuted to this court by the telephone and telegraph company.

Several assignments of error are made. First it is insisted the trial court was in er-

ror in permitting certain witnesses to testify that while the telephone building was in flames one of its employes escaping therefrom a little while before an explosion took place cried out to the assembled crowd that there was dynamite in the building, and warned the people to get away; and also that another employe on the outside of the crowd gave a similar alarm. We think, independent of and without regard to the doctrine of agency, this testimony was competent; not to show as a substantive fact that there was dynamite in the building, but as one of the two incidents which it is averred in the declaration produced a panic among the parties endeavoring to extinguish the fire, and occasioned their immediate dispersion and abandonment of further effort. The circuit judge expressly limited the evidence to this point, and, with this limitation as to its scope, there was no error in its admission.

Next it is assigned for error that the trial judge permitted the following questions to be put to and answered by the witnesses Hatcher and McMinoway. Each of these witnesses was asked, "Could you or not, with the apparatus there at hand, have stopped and controlled the fire at the time of the explosion, had it not occurred?" to which each witness replied, "Yes, sir." These parties were at the time of the explosion handling a hose attached to a hydrant, and unwinding it from a reel, were preparing to throw a stream of water upon the telephone building, which was then on fire. Upon the explosion, however, they abandoned their apparatus, and retreated to a place of safety. Hatcher and McMinoway were not introduced as experts. There is no claim that they qualified as such. Nor is there any indication that they had opportunities which were not open to, or that they were possessed of facts not equally within the knowledge of, every other spectator of this fire. The handling of the hose as volunteers certainly did not qualify them in any superior degree to determine the effect of the effort which they were about to make to extinguish the fire when driven to retreat by the explosion. If they were entitled to express an opinion in this regard, we see no reason why it would not have been equally competent for any number of persons, who may have been watching their effort and its abandonment, to have done the same thing. We thus would have had witnesses with mere conjectural or speculative opinions dogmatically settling an issue the jury were called on to try. This cannot be done. *Bruce v. Beal*, 99 Tenn. 303, 41 S. W. 445.

On questions of science or trade, where skill and experience are the essential elements of knowledge, expert witnesses are permitted to give opinions. Outside the area of expert testimony there are many cases where, from their very nature, nonexpert witnesses are permitted to express an opinion. The admissibility of such testimony

rests on the ground of necessity. The facts from which the conclusion of the witness is drawn are of so latent or impalpable a character that it is impossible to present them in a tangible or intelligible form to the jury. This being so, necessarily they must be given by the witness as conclusions reached by or impressions made on him, or they will be lost altogether to consideration. Within this class of cases may be found those of identity, resemblance, apparent condition of the body or mind, intoxication, sickness, duration, distance, dimension, and velocity, and others mentioned by the text-writers. Wharton on Ev. sect. 512; 1 Greenl. on Ev. sect. 440. While it is true the line between non-expert opinion which is competent and that which is incompetent is not well defined, we can see no reason why the present case should be placed in the class where such testimony has been adjudged competent. Every fact constituting an element in the opinion of those witnesses was capable of being presented to the jury. The condition of the fire, the amount of pressure upon the water, the capacity of the hose to receive water, and the size of the stream which it would discharge, the effect of such stream on a burning house, the ability and willingness of these parties to serve the hose, the character of the night at the time—whether windy or not—and the actual result of the explosion in the dispersion of the crowd, might have been presented to the jury, so that they, equally with these witnesses, could have formed an intelligent opinion upon the issue they were sworn to try. Many authorities supporting this view might be cited, but we content ourselves with referring to *Otis v. Thorn*, 23 Ala. 469, 58 Am. Dec. 303; *Montgomery W. P. R. R. Co. v. Edmonds*, 41 Ala. 667; *Tuttle v. City of Lawrence*, 119 Mass. 276; *Duer v. Allen*, 96 Iowa, 36, 64 N. W. 682; *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986; *Gibson v. Hatchett*, 24 Ala. 201; *Darling v. Thompson*, 108 Mich. 215, 65 N. W. 754; *L. N. O. & T. Ry. Co. v. Natchez*, 67 Miss. 399, 7 South. 350. In *Gibson v. Hatchett*, *supra*, a building having been consumed by fire which entered through an aperture in one of the walls, it was held improper for a witness to state the house might have been saved if the aperture had been closed, and in *Louisville, N. O. & T. Ry. Co. v. Natchez*, *supra*, an action for burning cotton by sparks from an engine of the railway company, where the cotton was loaded in flat cars, without covering, the opinion of a witness as to whether or not it would have been burned had it been loaded in box cars, or covered, was ruled to be incompetent. We think, on principle, as well as authority, the opinion testimony in this case constituted reversible error.

Again, it was assigned for error that the trial judge improperly instructed the jury as to the measure of damages in the event they should find for the plaintiff below.

His charge on this point was in these words: "If you find for the plaintiff, you will say * * * how much he should receive. In that event you will look to the proof, and determine the amount that the insurance companies paid for the injury he had actually done to his property by the fire as alleged." We think this charge was calculated to mislead the jury. As a matter of fact, it evidently did not do so, and would not, therefore, constitute of itself reversible error. But as there must be a retrial of this case on this point, it is proper to say that the true measure of damages in the event of a recovery by the plaintiff below is the damage resulting to him from the fire on his building and stock, not, however, to exceed the amount paid him on this loss by the insurance companies.

The judgment below is reversed, and the case is remanded for a new trial.

GREEN v. CUMBERLAND COAL & COKE CO.

(Supreme Court of Tennessee. Feb. 27, 1903.)

ADVERSE POSSESSION—CHAMPERTY—LANDS HELD ADVERSELY—CONVEYANCE—EXTENT OF POSSESSION—COLOR OF TITLE—EJECTMENT—CHAMPERTOUS DEED—EFFECT—PLEADING IN AVOIDANCE.

1. A sale of lands held by the grantor under a perfect title, but in adverse possession of another at the time, is a sale of a pretended title, within Shaanon's Code, §§ 3171, 3172, prohibiting such sales as champertous, without regard to the length of such adverse possession.

2. A conveyance of lands held adversely is a nullity, and may be disregarded by the vendor in ejectment to recover the land from a third party without pleading the invalidity of such conveyance.

3. Where defendant was in actual possession of a part of the land in controversy under an assurance of title, claiming the entire tract, defined by boundaries specified in such conveyance, it held constructive possession to the extent of the boundaries specified in its assurance of title, and hence a deed by plaintiff to the entire tract while defendant so held was champertous and void as to the whole tract, and not merely as to that part of which defendant had actual possession.

Appeal from chancery court, Cumberland county; T. J. Fisher, Chancellor.

Ejectment by E. A. Green against the Cumberland Coal & Coke Company. From a judgment in favor of plaintiff, affirmed by the Court of Chancery Appeals, defendant appeals. Affirmed.

McNutt & Fisher, for appellant. Wright & Wright, for appellee.

SHIELDS, J. This is an ejectment bill, brought to recover a tract of land lying in Cumberland county. The chancellor granted the complainant a decree, which was affirmed by the Court of Chancery Appeals, and the defendant has appealed to this court, and assigned errors.

The pleadings are very brief. The complainant charges that he is the owner and en-

titled to the possession of the land recovered by grant 14,369 from the state of Tennessee to Richard Burk, describing it by metes and bounds, and that the defendant unlawfully ejected him therefrom, and withholds possession from him. The answer admits possession of respondent, denies all other allegations of the bill, and avers the defendant has the better title. On the hearing it appeared that the grant to Richard Burk, No. 14,369, was superior to the one under which the defendant claimed, and the complainant connected himself therewith by a perfect chain of title. But it also appeared that in 1896, previous to the institution of this suit, complainant conveyed the lands in controversy to Joseph S. Ricker. The defendant, however, was at the time the conveyance was made in possession of the premises, having a few acres inclosed under fence, and claiming to certain boundaries covering the entire tract, defined in an assurance of title purporting to convey the fee, under which it claimed and was asserting title. All the land other than the few acres referred to was uninclosed and wild. The Court of Chancery Appeals found these facts, and held that the possession of the land was held adversely to the complainant at the time of his conveyance to Joseph S. Ricker, and that this conveyance, which was relied upon by the defendant to show that complainant had parted with his title to the premises sued for, was champertous, and wholly void, and the complainant, having deraigned the superior title from the state, was entitled to recover the entire tract.

The errors assigned raised these questions:

1. That the champertous character of the conveyance by complainant to Joseph S. Ricker cannot be looked to or considered by the court in order to avoid it, because there is no pleading attacking it upon this ground; and also because the complainant cannot rely upon his own unlawful act to invalidate his deed. The law is otherwise. The statute prohibiting the sale of pretended titles to lands makes the sale of land utterly void where the seller has not by himself, agent, tenant, or ancestor, been in actual possession, or taken the rents and profits, for one whole year next before the sale. Code (Shannon's Ed.) §§ 3171, 3172. A sale of lands held under a perfect title, but in the adverse possession of another at the time, is a sale of a pretended title, within this statute, and no particular length of possession is necessary to make the sale void. *Whitesides v. Martin*, 7 Yerg. 397; *Kincaid v. Meadows*, 3 Head, 180-192; *Fain v. Headerick*, 4 Cold. 334. A conveyance of lands adversely held is a nullity, and may be so treated by both parties and strangers. The title to the lands conveyed remains in the conveyor, and the vendee cannot maintain an action for breach of the covenants in the conveyance. The vendor may disregard his deed, and sue in his own name for the lands; and, if the de-

fendant proves the conveyance for the purpose of showing that he has parted with his title, as he may do in the chancery court under a general denial of title in the complainant, or under the general issue in ejectment at law, he may show its champertous character, and consequent invalidity in avoidance. This may be done without any pleading specially raising the question. *Key v. Snow*, 90 Tenn. 663, 18 S. W. 251; *Wilson v. Nance*, 11 Humph. 190; *Fowler v. Nixon*, 7 Heisk. 729; *Saylor v. Stewart's Heirs*, 2 Heisk. 510.

2. That the deed to Joseph S. Ricker was only void to the extent of the few acres held by defendant under inclosure at the time of its execution, that being the extent of the actual possession, which was necessary to render the deed void under the statute invoked; constructive possession being ineffectual for this purpose. Actual possession, when the premises are susceptible of it, must, as a general rule, be by inclosure of the land by fences or like improvements, so as to make the occupation visible, notorious, continuous, and adverse, and thus constitute notice of the claim and possession of the occupant to the public; but there are exceptions to the rule where the land is not suitable for cultivation, and the occupant exercises dominion over it, which is possession, when accompanied with the necessary requisites, and asserted in an equally positive manner for other purposes, such as digging ore, mining coal, quarrying stone, and other similar purposes for which the land is alone or most adapted and valuable. *Pullen v. Hopkins*, 1 Lea, 741; *West v. Lanier*, 9 Humph. 762; *Copeland v. Murphey*, 2 Cold. 64; *Cooper v. Great Falls Co.*, 94 Tenn. 588, 80 S. W. 353. Neither residence on nor cultivation of the land is necessary to constitute actual possession. *Creech v. Jones*, 5 Sneed, 633. Constructive possession exists where the land is in a wild state, and wholly unoccupied, or where one is in actual possession under some character of assurance or claim of title defining boundaries of a portion of the land, claiming to the extent of the boundaries defined in the written instrument. Where there is no part of the land in actual possession, the constructive possession is with the party holding the superior legal title; but where a portion of the land is in actual adverse possession, the party so holding has constructive possession of all the premises outside of his inclosure to the limits of his claim or assurance of title, and such constructive possession is superior to that which results merely from the ownership of the legal title, and is sufficient to put in operation the statutes of limitation to the entire tract. *West v. Lanier*, 9 Humph. 771, 772; *Rutherford v. Franklin's Lessee*, 1 Swan, 324; *Brown v. Johnson*, 1 Humph. 264. It is therefore evident that the actual possession of the defendant was confined to his inclosure, and his possession of the remainder of the tract

was only constructive. This character of constructive possession, connected as it always is closely with actual possession, and generally actual occupation of some part of the land, is clearly within the policy of the statute against champertous sales, and will render a conveyance of land so held null and void. *Pickens v. Delozier*, 2 Humph. 400; *Mitchell v. Churchman's Lessee*, 4 Humph. 218. If the defendant had been a mere trespasser, the conveyance would have been void only to the extent of his actual possession; but he was in possession under an assurance of title of part, claiming to defined boundaries covering the whole tract. *Dyche v. Gass' Lessee*, 3 Yerg. 397.

We are therefore of opinion that the deed to J. S. Ricker was wholly void, and presents no obstacle to a recovery by complainant. The decree of the Court of Chancery Appeals is affirmed, with costs.

PINNELL v. MEAKS.*

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

LOST NOTE—JUDGMENT FOR PLAINTIFF—NECESSITY OF BOND—FACTS SHOWN BY RECORD.

1. On appeal from a judgment on a lost note by defendant the bill of exceptions recited: "It is admitted he executed a note. Counsel for plaintiff offered the note in evidence." Plaintiff testified that he had given a note to the attorney to sue on, and he had misplaced it. *Held*, that from the whole record it was evident that the note was not introduced, and was still lost, when the judgment was rendered.

2. Under Rev. St. 1899, § 457, a note is not negotiable, though for value received, unless payable to the payee named, or to order, or to bearer. Sections 744 and 745 require that plaintiff, before judgment on a lost negotiable note, shall give a bond. *Held*, that in an action on a lost note, where no bond was given, and no affirmative showing of negotiability made, it will be presumed on appeal, as against error in the trial court, that the note was nonnegotiable.

Appeal from circuit court, New Madrid county; H. C. Riley, Judge.

Action by W. W. Pinnell against W. A. Meaks. Judgment for plaintiff, and defendant appeals. Affirmed.

Robt. Rutledge, for appellant. W. H. Miller, for respondent.

GOODE, J. This litigation originated before a justice of the peace as an action on a lost note. There was a judgment by default before the justice, from which an appeal was taken to the circuit court, where a trial was had, which again resulted in a judgment for the plaintiff.

The defense seems to have been, as well as we can gather from the evidence, for no instructions were asked, that the note had been paid by a sale of some mortgaged property. The particular note in suit came to be given in this way: One George Corbin owed

the plaintiff, Pinnell, a debt, which was secured by a chattel mortgage on some mules, horses, and stock belonging to Corbin. Corbin was either a subtenant or a co-tenant of defendant, Meaks, in farming operations. Pinnell was about to foreclose his chattel mortgage on the stock, which would have hindered the farming operations of Meaks and Corbin; so the former, to gain time, and prevent Pinnell from taking immediate possession of the animals, gave Pinnell a note for \$50, secured by a mortgage on some piling. The result was that Pinnell let the mules and horses stay in the possession of Corbin to enable Corbin and Meaks to go on with their crop. Pinnell got nothing out of the piling on which Meaks gave him the mortgage to secure the note in suit, for it was sold under an execution by the New Madrid Banking Company. Meaks, however, contends that enough was realized by selling the property of Corbin under the chattel mortgage to fully pay all Corbin owed him as well as what Meaks owed. This, however, was an issue of fact, about which the evidence is contradictory, and was settled in plaintiff's favor by the jury.

The main point relied on for reversal is that no bond was required of the plaintiff before judgment was rendered in his favor on the lost note, as the statutes require, and this contention seems to be borne out by the record. Respondent insists the bill of exceptions shows the note was offered in evidence, and that, therefore, it must have been found before the judgment was rendered in the circuit court. The bill of exceptions contains this recital: "It is admitted he executed a note. Counsel for plaintiff offered the note in evidence." That the note was not introduced in evidence, nor found at the time of the trial, conclusively appears from the testimony of the plaintiff himself, as the last question he was asked while on the witness stand was, "Where is the fifty-dollar note you made affidavit you lost?" to which question he answered: "I gave it to Mr. Fisher to sue on, and he misplaced it. I gave it to him quite a while ago." No fair interpretation can be given to the whole record but that the note was not introduced, and was still lost, when the judgment was rendered. It does not, however, conclusively appear from the evidence that the note was negotiable, and the sections of the statutes referred to only require a bond when a suit is founded on a negotiable instrument. Rev. St. 1899, §§ 744, 745.

Appellant insists that the affidavit of respondent, made when he brought this action, shows it was a negotiable instrument, because he swore it contained the words "for value received." But that term alone is not sufficient to constitute a negotiable instrument. It must further appear that the instrument was payable to the payee named, or order, or to bearer. Rev. St. 1899, § 457; *Davis v. Helm* (St. L.) 34 Mo. App. 332.

*Rehearing denied March 3, 1903.

Presuming in favor of the circuit court's judgment, instead of against it, as the law compels us to do in the absence of an affirmative showing of error, we must presume the court found the facts warranted it in entering judgment in this case without a bond. *Byrne v. Carson* (K. C.) 70 Mo. App. 126; *Mumford v. Keet* (St. L.) 71 Mo. App. 535.

No point was made about the failure to give bond in the court below in the motion for new trial or elsewhere, but we do not find it necessary to consider whether that is fatal to the assignment on appeal.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

CITY OF SPRINGFIELD *ex rel.* UPDERGRAFF *v.* MILLS *et al.**

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

MUNICIPAL IMPROVEMENTS—CONTRACT FOR CONSTRUCTING SIDEWALK.

1. One enters into an approved contract and bond within 10 days from acceptance of his bid, for construction of a sidewalk, as required by ordinance, his contract and bond being filed and approved within 10 days after publication of an ordinance accepting the bid, and providing that it should be in force from and after approval by the mayor and publication.

2. That a city lets the work to a contractor for constructing a sidewalk within the time in which the property owner was allowed to construct it himself does not affect the validity of the tax bill for the improvement, the property owner not having availed himself of the right to put down the walk, and the contractor having done the work after his time therefor had expired.

Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Action by the city of Springfield, on the relation of W. R. Updergraff, against F. T. Mills and others. Judgment for plaintiff. Defendant Mills appeals. Affirmed.

A judgment was entered in the circuit court of Greene county for \$22.15 for the construction of a second-class sidewalk, four feet in width, on the north side of Locust street, in the city of Springfield, Mo. The work was done by a contractor by the name of Boyle, who assigned the tax bill to the relator, Updergraff. These defenses were interposed: First, by an ordinance of the city of Springfield, the council of that city was authorized to grant the property owners permission to construct sidewalks in front of their property, and said council on November 15, 1898, granted appellant permission to construct a walk in front of his property within 30 days from that date, yet, notwithstanding this permission, the council on November 16, 1898, accepted a bid from the plaintiff's assignor, Boyle, for the same work, and on November 28th entered into a con-

tract with Boyle, the latter having full knowledge of the permission theretofore granted to appellant to build the walk himself; second, that the tax bill was void because Boyle failed to enter into a written contract and bond with the city for the performance of the work within 10 days after the acceptance of the bid, as the city ordinances required him to do; third, the bill was void because the contract for the work made November 28th provided that it should be completed within 60 days from said date, and Boyle failed to complete it within that period. It should be stated that other persons owned lots on either side of Locust street which would be bordered by the contemplated walk, and the city council had given permission to some of those persons November 1, 1898, to construct walks in front of their property within 30 days from that date. The appellant contends that Boyle did not finish the two walks on either side of Locust street within 60 days from the date of his contract, as he was bound to do, regardless of the permission granted to the owners to construct their own walks.

John Schmook, for appellant. White & McCammon, for respondent.

GOODE, J. (after stating the facts). We will take up the points raised on this appeal as they are stated by the appellant. Is the tax bill void for failure to enter into an approved contract and bond within 10 days from the acceptance of the bid? In answering this question regard must be paid to certain facts in evidence. Boyle's bid was accepted by the council by an ordinance passed November 15th, which provided that it should be in force from and after approval by the mayor and publication. It was approved by the mayor November 16th, and published November 19th. Boyle, therefore, had until the 29th to file his contract and bond. The circuit court found he completed his bond and contract November 23d, and deposited it with the city clerk on that day, but, on account of the absence of the mayor, it was marked "Filed" on the 25th, and was approved by the mayor on the 28th. Those facts settle beyond controversy that the bond and contract were filed within the time the ordinance required them to be.

What was the effect on the tax bill of letting the work while the time in which Mills might do it himself was still running? The time allowed Mills for completing the walk, if he chose to build it, expired on the 15th of December, as he had to build it within 30 days from the date permission was granted him. The circuit court found Boyle constructed the walk in front of Mills' property some time after December 20th, and after the expiration of the time in which Mills was permitted to do it. Said court also found Boyle completed all the work on said street, including the work in front of the appellant's property, within the 60 days

*Rehearing denied March 2, 1903.

allowed by the contract. It thus appears that Boyle did not begin work in front of Mills' property until after the time in which Mills might build the walk had elapsed, and notwithstanding that late beginning it was completed within the 60 days' limit. The only ground for appellants' contention that the work was not completed in the time given is that some of the property owners did not finish in front of their lots, but that fact cannot prejudice the contractor or his assignee. It doubtless would be better for city councils to refrain from letting contracts for improvements to some one else when they have granted permission to property owners to make the improvements until after the time in which the property owners may make them expires. But certainly no harm was done by the irregular way in which this work was let, inasmuch as Mills did not avail himself of the right to put in the walk. We cannot vacate tax bills for trivial irregularities. *Cole v. Skrainka*, 105 Mo. 300, 16 S. W. 491.

As to the time in which the work had to be finished to render the tax bills valid, that was unquestionably 60 days from the letting of the contract. The above recitals from the finding of the circuit court show Boyle did finish all the walks on the street within that time, or that said court so found, and its finding is conclusive as to the facts, and, in truth, the appellant has set out no evidence for us to review. Appellant has much law on his side in regard to the avoidance of a tax bill by the failure of a contractor to complete the ordered improvement within the time limited by the contract, but no facts on which to avoid this tax bill, conceding him all the law he claims.

The judgment is therefore affirmed.

BLAND, P. J., and REYBURN, J., concur.

HIATT v. FRATERNAL HOME.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1908.)

FRATERNAL BENEFICIARY ASSOCIATIONS — MEMBERSHIP — NECESSITY FOR INITIATION — CERTIFICATES — VALIDITY — ESTOPPEL — AGENCY.

1. Rev. St. 1899, § 1408, by requiring fraternal beneficiary associations to have a lodge system, intends that no person shall become a member of such an association until he has been initiated into one of its lodges.

2. Until one has been initiated into a local lodge of a fraternal beneficiary association, the association cannot rightfully issue a benefit certificate to him.

3. Where, by the by-laws of a fraternal beneficiary association, its certificates were not binding until countersigned by the secretary and president of the local lodges, and a certificate was not so countersigned until after the beneficiary therein had deceased, the certificate was void.

4. Where a deputy organizer of a fraternal beneficiary association had no authority either under his appointment by or contract with the supreme lodge, or under his appointment by a

local lodge, to deliver certificates of insurance or to collect dues and assessments, an arrangement made by him with the secretary of a local lodge, whereby he was to perform these duties, was not binding on either the supreme or local lodge.

5. Where the secretary pro tem. of a local lodge was induced to accept the money of an applicant for insurance after his decease, and immediately on ascertaining the fraud tendered the money back to the party paying it, who would not receive it, and there was no administrator of the deceased's estate to whom it could be tendered or paid, and the secretary kept the money ready for the rightful claimant, whenever he appeared, the lodge was not estopped to deny the contract of insurance.

Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Action by Ellen O. Hiatt against the Fraternal Home. Judgment for defendant, and plaintiff appeals. Affirmed.

The defendant is a fraternal beneficiary society organized under article 11, c. 12, Rev. St. 1899. The order has a lodge system, with supreme and subordinate lodges, a ritualistic form of lodge work, a secret initiatory ceremony, with signs and passwords, and a representative form of government. Its supreme executive authority is vested in the supreme lodge. This body has a supreme president and a supreme secretary and medical examiner. The principal business office of the order is located at Hamilton, Caldwell county Mo. Foster E. Ackley is, and has been since the organization of the association, its chief medical examiner, and either its actual or acting supreme secretary and its chief manager; in fact, the evidence shows that the executive duties of the supreme lodge have been intrusted wholly to him. Subordinate lodge No. 6 of the order is located at Springfield, Mo. On July 23, 1900, William Hiatt made application for membership in the order, and applied for \$2,000 insurance on his life for the benefit of his mother, Ellen O. Hiatt, of Lexington, Ky. He was examined by the local physician of the order at Springfield, and on July 31, 1900, was duly elected to become a member by local lodge No. 6. His application for insurance and his medical examination were forwarded to the home office, and were approved by Dr. Ackley, and the following certificate issued and forwarded to George Ragsdale, secretary of local lodge No. 6, at Springfield, to wit: "No. 2992. \$2,000. The Fraternal Home, Hamilton, Missouri. Keeps the Wolf from the door. Copyrighted 1899 by The Fraternal Home. Age 27. Rate 80c. This certifies that William M. Hiatt is a member of The Fraternal Home Lodge No. 6, at Springfield, State of Missouri, and within ninety days after receipt of satisfactory proofs of his death, there shall be paid to Ellen O. Hiatt (mother) if living, if not, to his legal representative, the sum of Two Thousand Dollars. The conditions, benefits and provisions, printed or written by the Society on the back hereof, are a part of this Certificate. The benefits herein shall be in-

contestable from this date. In witness whereof, The Fraternal Home has caused its corporate seal to be hereunto affixed and these presents to be signed by its Supreme President and Supreme Secretary, at Hamilton, Missouri, this 25th day of July, 1900. William W. Anderson, Supreme President. Foster E. Ackley, Supreme Secretary. [Supreme Seal.]

Ragsdale was confined to his home at the time by illness, and a secretary pro tem. (J. J. Hibler) was elected to act in his stead during his illness. Ragsdale, however, retained possession of the certificate. By-law No. 69 of the order, after prescribing the manner for making application for insurance and requiring a medical examination to be had, provides as follows: "Upon complying with the above the secretary shall send the application and medical examiner's report to the supreme medical director for review. At the first regular meeting of the lodge thereafter he shall be balloted upon. If three black balls are cast the applicant shall be rejected, and cannot again make application for a period of three months. He may be in waiting at the time the ballot is taken, and, if elected, shall be initiated. But if he fails to be present for initiation at such time, or the first regular or special meeting thereafter, the fees paid shall be forfeited, unless by special dispensation of the supreme lodge he is permitted to appear for initiation at a later date. Where the applicant fails to appear for initiation as above required and the fees are forfeited, if he again wishes to apply for membership he must be re-examined, but shall not be required to again pay the admission fees. If the application is accepted by the supreme medical director, a benefit certificate shall be issued, signed by the supreme president and supreme secretary for such amount as the supreme medical director shall authorize, but not to exceed \$2,000 from eighteen to and including forty-five years of age at nearest birthday; \$1,000 from forty-five to and including fifty years of age at nearest birthday, and \$500 from fifty to and including fifty-five years of age at nearest birthday: provided, that no person shall be admitted under eighteen or over fifty-five years of age. Said benefit certificate shall be sent to the secretary of the local lodge to be countersigned by the president and secretary thereof and delivered to the applicant when he is initiated and pays the following fees to the local secretary, viz.: One assessment, one month's reserve fund, one month's supreme lodge per capita tax, and one month's local lodge dues, and shall be liable for all subsequent benefit assessments in accordance with the laws of the fraternity. The benefits given under certificate applied for shall begin when the above requirements are complied with. At any time before the initiation of an applicant, the lodge may by a majority vote refuse to initiate, in which

case the benefit certificate, with a certified statement of the action of the subordinate lodge shall be immediately forwarded to the supreme secretary."

Local lodge No. 6 has weekly meetings. Hiatt did not present himself at the meeting on July 31st, when he was elected to become a member, or at any subsequent meeting, for the reason he was sick, which sickness resulted in his death, on August 9th, at eighteen minutes past 4 o'clock p. m.

On or about July 31st, Hiatt, through a friend, paid to one Scott, a deputy organizer of the order, \$1.20 in full for one assessment, one month's reserve fund, and local lodge dues to September 1, 1900. Scott, on the 9th day of August, but after the death of Hiatt, paid the money to J. J. Hibler, secretary pro tem. of local lodge No. 6, and took the following receipt therefor: "Aug. 9, 1900. Springfield Lodge No. 6, at Springfield, State of Mo., received of William M. Hiatt the sum of one and ²⁰/₁₀₀ dollars. Benefit fund assessment No. 3, 80 cents; month's Supreme Lodge per capita to first week day in Sept., 1900, 15 cents; month's reserve fund to first week day of Sept., 1900, 10 cents; month's local lodge dues to first week day of Sept., 1900, 15 cents. Total, \$1.20. J. J. Hibler, Secretary. No. 642."

At the time Scott paid the money to Hibler he had possession of the certificate and knew that Hiatt was dead. Neither Hibler nor T. W. Flitton, president of the local lodge, had at the time heard of the death of Hiatt. Scott, to induce them to countersign the certificate, falsely represented to them that Hiatt's mother wanted to start that night to Lexington, Ky., with her son to recuperate his health, and by this false statement induced Hibler and Flitton to countersign the certificate and deliver it to him. On the same evening Scott delivered, or caused to be delivered, the certificate to plaintiff. This certificate so procured is the foundation of this suit. Scott had been appointed deputy organizer by the supreme lodge for counties in the neighborhood of Greene, but had not been appointed as deputy organizer for Greene county. The local lodge, however, had appointed him organizer for it.

The by-laws made it the duty of the secretary of a local lodge to collect all assessments and other dues and to remit the assessments to the supreme lodge. It was his duty also to deliver all certificates of insurance to members of the lodge who had been initiated and paid the requisite fees, and all certificates of insurance issued to members of local lodge No. 6 were forwarded to him, with instructions to have them properly countersigned by the secretary and president of the local lodge, and to collect the assessments and other dues and forward them to the grand lodge. Ragsdale, the secretary, testified that when Scott was elected deputy organizer of the lodge he told him he would expect him to get the policies and deliver

them and collect the advance assessments and get the people into the lodge; that the deputy organizers always had done so, and that Scott promised he would; that while he was sick he delivered to Scott eight or ten certificates under this arrangement, but not the Hiatt certificate; that he went away from home before Hiatt died, and supposed Scott got the certificate from his wife. Ragsdale further testified that he had received instructions from the supreme secretary to deliver policies and collect the money and to have applicants initiated as soon as we could; that the instructions were contained in letters from the supreme secretary. He did not produce these letters; said he presumed he had destroyed them. He further testified that it had been the practice of local lodge No. 6 to collect the dues and deliver certificates of insurance to applicants before initiation, and that there were 49 members, or certificate holders, who had received certificates of insurance who had never been initiated into the order; that some of these persons had held their certificates and paid assessments and duties for two years. Other witnesses testified that they held certificates of insurance in the order, and had paid dues regularly, but had never been initiated. Dr. Ackley testified that Scott, as deputy organizer, had no authority to collect any money except the admission fee; that he had been the actual or acting secretary of the order from the date of its organization, had received all of its mail and superintended all of its correspondence; that he never wrote Ragsdale that certificates of insurance might be delivered and the assessment collected before the initiation of the applicant, and "that there was no knowledge or notice on his part, or on the part of any officer of the supreme lodge, that certificates were to be delivered, or were being delivered, prior to the initiation in the local lodge to the persons for whom they were intended; that the first time he ever heard of such a thing being contemplated was when a member of the local lodge No. 6 at Springfield wrote him a letter asking him if it was admissible to deliver a policy to a member without first initiating the candidate; this letter was written by Mr. J. B. Ketcham, and that was all he ever heard about it; the letter, however, did not contain any intimation that it was being done, but only that there was a question involved on which the lodge at Springfield desired to be thoroughly informed. He says: 'I never heard that a certificate had been delivered prior to initiation until this matter about Hiatt came up. In answer to Ketcham's letter, I wrote him that a certificate could in no event be delivered prior to the initiation; that deputy organizers such as Scott had no authority to receive advance assessments and dues,' and if they did so it was without his authority, and if Scott did it he did it without his authority or knowledge, or the knowledge or authority of any

one connected with the supreme lodge. He further says: 'After we got possession of all the information regarding the Hiatt certificate and its delivery, the matter was presented with the information to the board of directors of the defendant, and they rejected the claim on the ground that he was never a member of the order.'"

The contract of Scott, as deputy organizer, with the supreme lodge, was read in evidence, and it showed that his authority to collect money was restricted to the admission fee. The issues were trial by the court, who rendered judgment for defendant. Plaintiff took the usual steps to preserve her exceptions, and appealed.

Heffernan & Heffernan, for appellant.
Vaughn & Coltrane, for respondent.

BLAND, P. J. (after stating the facts). 1. Section 1408, Rev. St. 1899, from which defendant derives its power to issue certificates of insurance, declares fraternal beneficiary associations to be corporations formed and carried on for the sole benefit of its members and their beneficiaries, and not for profit; requires that they have a lodge system, a ritualistic form of work, and a representative form of government. By requiring a lodge system, the statute evidently intended that no person could become a member of one of these orders until he was initiated as a member of one of its lodges. The by-laws of the defendant expressly so provided.

William Hiatt, never having been initiated into the lodge, never became a member of the association, and was a person to whom the association could not rightfully issue a certificate of insurance. *Matkin v. Knights of Honor*, 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886. The only right that Hiatt had at any time was the right to become a member. Under a by-law of the order, which was a part of his contract, he lost this right by failing to present himself for initiation not later than the next meeting after his election. He let the time pass in which he might be initiated, notwithstanding his election, without first obtaining a dispensation from the supreme lodge permitting the local lodge to initiate him. This he did not procure. At the time of his death he was neither a member nor possessed of the right to become a member.

But it is contended by plaintiff that the association had waived the necessity of an initiation to entitle Hiatt to his certificate of insurance. That Ragsdale, secretary of the local lodge, acted upon the assumption that initiation into a lodge of the order was not requisite to the right to insurance, and that a large per cent. of the members of the lodge entertained the same notion, and had acted upon it, is apparent from the evidence; but that either Ragsdale or any member of the local lodge was led into this belief by any action of the supreme lodge or instructions

from any officer of the supreme lodge, either by correspondence or otherwise, the evidence, in our judgment, fails to establish. This loose and unauthorized course of conduct can only be accounted for upon the theory that some of the officers of the local lodge misinterpreted the instructions they had received from the supreme lodge, and were inattentive to the provisions of the by-laws, and misunderstood the provisions of the statute of the state from which the order derived its existence and powers.

But, aside from these considerations, the certificate is sued on as a complete and fully executed contract. Under the by-laws it could not be fully executed or become a complete contract until countersigned by the secretary and president of the local lodge. It was not signed by these officers until after Hiatt was dead. The living cannot contract with the dead, nor complete the execution of a contract that was partially executed with a living person, but now dead. The evidence is full, complete, and uncontradicted that the signatures of the secretary and president of the local lodge to the certificate were obtained by the false and fraudulent misrepresentations of Scott. It was no part of Scott's duty as deputy organizer, either under his appointment or under his contract with the supreme lodge, or under his appointment by the local lodge, to deliver certificates of insurance or to collect dues and assessments. The arrangement which he made with Ragsdale, secretary of the local lodge, to perform these duties was not binding either upon the grand lodge or the local lodge, and neither are responsible for his acts in this regard, much less for his fraudulent act in procuring the signatures of the officer of the local lodge to the certificate sued on.

2. It is contended that the lodge received Hiatt's money, and is therefore estopped to deny the contract of insurance. There is no question of estoppel raised in the case either by the pleadings or by the evidence. But, if the question were properly in the case, we would have to decide it against plaintiff's contention.

The evidence is that Hibler, as secretary pro tem., received the money from Scott; that as soon as he ascertained that Scott had deceived him, and perpetrated a fraud both upon him and the association, he went to him, and tendered the money back, but Scott would not receive it. Hibler then tried to pay the money to the local lodge, but it would not take it, nor would the supreme lodge have it. There was no administrator of Hiatt's estate to whom Hibler could pay or tender payment, and he now has the money, holding it for the rightful claimant whenever he presents himself.

From no view of the evidence does there appear the semblance of merit in the plaintiff's case, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

STATE v. BACK.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1908.)

SELLING LIQUOR WITHOUT LICENSE—JURISDICTION OF JUSTICE—INDICTMENT—REQUISITES—APPEAL—FAILURE TO PRESERVE EXCEPTIONS.

1. Under Rev. St. 1899, § 2640, declaring that on a criminal trial exceptions may be made as in civil cases, and that bills of exceptions shall be settled as in civil actions, etc., a record on a criminal appeal, which does not show any objection by defendant to the admission or exclusion of evidence, or exception to the giving or refusing of instructions, brings up nothing for review except the record proper.

2. An indictment for selling liquor without a license need not allege the name of the person to whom the sale was made.

3. Under Rev. St. § 2748, providing that justices of the peace shall have concurrent original jurisdiction with the circuit court coextensive with their counties in all cases of misdemeanor, etc., a justice has jurisdiction of a prosecution for selling liquor without a license.

4. In a prosecution for selling liquor without a license, where the evidence showed that defendant was a clerk in a drug store conducted by a registered pharmacist, the prosecution was properly for selling liquor without a license as a dramshop keeper, and not for selling liquor as a druggist or registered pharmacist.

Appeal from circuit court, Pemiscot county; Henry C. Riley, Judge.

Eli Back was convicted of selling liquor without a license, and appeals. Affirmed.

J. P. Tribble, for appellant. L. L. Collins, for respondent.

REYBURN, J. Appellant was prosecuted upon an information by the prosecuting attorney of Pemiscot county, filed before a justice of the peace of Hayti township, Pemiscot county, charging him with unlawfully selling intoxicating liquors in less quantities than three gallons, to wit, one gill of whisky, on the 13th day of April, 1900, in the county of Pemiscot, without taking out or having a license as a dramshop keeper, or any other legal authority to sell the same. At the setting of the case the justice of the peace certified the cause to the circuit court, holding that he had no jurisdiction, as such justice, to try it, and the circuit court ordered the case sent back to the justice, and ordered him to proceed with the trial, which resulted in the conviction of the defendant, who then appealed to the circuit court of Pemiscot county. In the circuit court defendant moved to quash the information, which the court overruled, and, a jury being waived, the trial was had before the court. In the circuit court the testimony tended to show that the defendant was a clerk for Back & Co., a firm composed of J. W. Back and C. A. Wells, and there was offered in evidence a merchant's license to the firm, a certificate of the state board of pharmacy issued to J. W. Back, a prescription issued by Dr. C. A. Wells, and a diploma to the latter as a physi-

¶ 2. See Intoxicating Liquors, vol. 29, Cent. Dig. § 238.

clan. The sale of whisky by the drink was admitted, but the testimony was conflicting whether the prescription was presented at the time of the sale. At the conclusion of the trial the judge before whom the case was tried found the defendant guilty, and imposed a fine of \$40. Motions for new trial and in arrest were duly filed and overruled, and exceptions to the ruling of the court upon these motions were duly saved by defendant, but the record fails to set forth the saving of any exception on behalf of the defendant to any ruling of the lower court, excepting the action of the court upon the motions for new trial and in arrest. The record also fails to disclose any objection by defendant to the admission or exclusion of any evidence; no instructions appear to have been asked or given in the case, though the motion for new trial refers to declarations of law. The rule in a criminal case in regard to matters of exception is identically the same as in civil proceedings. Section 2640, Rev. St. 1899; *State v. Dusenberry*, 112 Mo. 293, 20 S. W. 461; *State v. Meyers*, 99 Mo. 117, 12 S. W. 516. As defendant saved no exceptions during the progress of the trial, nor asked any instructions, the record proper alone is here subject to review. *State v. Griffin*, 98 Mo. 672, 12 S. W. 358. The sufficiency of the indictment is assailed on the ground that the name of the person to whom the sale was made should have been stated, but, as the charge was selling liquor without a license, this was not necessary. *State v. Martin*, 44 Mo. App. 50; *State v. Jaques*, 68 Mo. 260, and cases cited. Nor is the objection to the jurisdiction of the justice well taken, for jurisdiction is expressly conferred by section 2748 of the Revised Statutes of 1899. Nor should the defendant have been prosecuted for selling liquor as a druggist or registered pharmacist, for the reason that he was neither, and was properly proceeded against for selling liquor without a license as a dramshop keeper. *State v. Workman*, 75 Mo. App. 454; *State v. Goff*, 66 Mo. App. 491; *State v. Hammack*, 93 Mo. App. 521.

The judgment will therefore be affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE ex rel. SCHOOL DIST. NO. 1 v.
DENNY et al.

(Court of Appeals at St. Louis, Mo. May 13, 1902.)

SCHOOL DISTRICTS—CHANGE OF BOUNDARIES
—ARBITRATION—RECORD—DECISION.

1. Rev. St. 1899, § 9742, expressly provides that, in changing the boundary lines between two established school districts, one district shall not encroach on another simply for the acquisition of territory.

2. Under Rev. St. 1899, § 9742, providing for the appointment of arbitrators to consider the necessity for a change in the boundary lines between school districts, and render a decision thereon, requiring the decision to be transmit-

ted to the clerks of the districts interested, and making it the duty of the clerks to enter the decision on the records of the districts, it is not necessary for the board of arbitrators formed thereunder, or for the superintendent of schools, to keep a record of the proceedings of such board.

3. Where it does not appear from the proceedings of a board of arbitrators, appointed to consider the necessity for a change of boundary between two school districts, that they ever met and considered the matter submitted, or found that the proposed change was necessary, the proceedings are void on their face.

Appeal from circuit court, St. Louis county; John W. McElhinney, Judge.

Certiorari by the state, on the relation of School District No. 1, to R. B. Denny and others, to review proceedings changing the boundary lines between certain school districts. From a judgment setting aside the proceedings, defendants appeal. Affirmed.

This proceeding originated between School District No. 1 and School District No. 4, township 45, range 3 E., St. Louis county, for the purpose of changing the boundary lines between the two districts. Prior to the annual meeting in 1900, 10 resident taxpayers and voters of District No. 4 filed their petition with the clerks of District No. 1 and District No. 4, requesting each of them to post notices for the annual meeting, which notices contained a proposition to take from District No. 1, and add to District No. 4, lands described in the petition. The clerks of the respective districts posted the notices containing the proposition, and an accurate description of the lands proposed to be taken from District No. 1 and attached to District No. 4. These notices were posted 15 days before the annual school election in April, 1900. At the April election, District No. 4 voted unanimously for the change in the boundary line as set out in the notices, and District No. 1 voted against the change. Within the time required by law, the directors of District No. 4 filed their appeal with R. B. Denny, superintendent of schools in St. Louis county, and with their appeal filed a copy of the petition theretofore filed with the clerk of District No. 4, and a copy of the notices. Mr. Denny, as such superintendent, summoned four unprejudiced taxpaying citizens of St. Louis county to act as a board of arbitrators. The return to the writ is as follows: "Now comes R. B. Denny, for himself and the other respondents herein, and makes return to the writ of certiorari heretofore issued in the above-entitled cause by the circuit court of St. Louis county, and says that on the 5th day of April, 1900, within five days after the school election in April, 1900, the board of directors of School District No. 4, township 45, range 3 east, filed with him, as school superintendent, an appeal in the matter of changing the boundary line between School District No. 1, township 45, range 3 east, and School District No. 4, township 45, range 3 east, together with a notice put up fifteen days before the annual school

election, on April 3, 1900, as the law directs, which petition and notice are hereby attached as part of the record in said cause; that after the receipt of said petition he appointed four disinterested men, resident taxpayers of the county, to wit, C. H. Evans, T. J. Quinn, J. B. Greensfelder, and J. Will Andrae, as a board of arbitration; that within fifteen days thereafter the said board of arbitration, together with relator, met in the office of the school superintendent, your relator, at the courthouse in the town of Clayton, to consider said appeal; that both School District No. 1, township 45, range 3 east, and School District No. 4, township 45, range 3 east, were notified of said meeting, and then and there appeared both in person by their boards of directors and by attorneys, and then and there presented evidence as to the necessity of said change of boundary line, and, after fully considering the necessity of said change, said board of arbitration, together with your relator, determined that a change of boundary line between said districts was a necessity, and then and there entered the order hereto attached; and your relator on the twenty-fourth day of April, 1900, mailed to each district interested a copy of the order making said change." Respondent filed the following motion to quash the return: "Now comes the said relator, and moves the court to quash the return of the respondents to the writ of certiorari herein, and proceedings before the said respondents, R. B. Denny et al., as a board of arbitration in the proceedings herein for the reasons that from the said return it appears that the said proceedings before said board of arbitrators were not conducted according to law, and because it appears from said return, and the accompanying exhibits of the same, that the said respondents, board of arbitrators, never acquired jurisdiction of the matters in which they assumed to act, and that the report of the finding of said board of arbitrators in the matters pending before them is not in accordance with the question or questions submitted to the qualified voters of the different school districts interested herein, and respectively passed upon by them at their annual meetings, as in said return set forth." The court sustained the motion to quash the return, and entered judgment for respondent, setting aside the proceedings of the arbitrators and the superintendent. After an unsuccessful motion for new trial, an appeal was perfected.

R. H. Stevens and D. O. Taylor, for appellants. Jno. R. Warfield, for respondent.

BLAND, P. J. 1. The contention of respondent at the trial and here is that the proceedings are void: First, because it appears that one district is encroaching upon the other for the mere purpose of acquiring territory; and, second, that the board of arbitrators failed to show by their proceedings that they considered the necessity of the

change, and failed to make any record of their proceedings. The last clause of the statute (section 9742, Rev. St. 1899) provides that, in changing the boundary lines between two established districts, one district shall not encroach upon the other simply for the acquisition of territory. The learned circuit judge found that this proceeding was for the sole purpose of taking territory from District No. 1 and adding it to District No. 4, in order to increase the revenue of the latter district. The language of the petition addressed to the voters, praying for the change in boundaries, does not indicate any valid purpose for the change; nor does the document transmitted by the arbitrators to the clerks. The necessity for the change of boundaries is not set out or stated anywhere in any of the proceedings. In the absence of any showing in this respect, considering the quality of territory transferred from District No. 1 to District No. 4, it is indicated that the purpose on the part of District No. 4 was to acquire additional territory for the purpose of increasing its revenue, and warrants the conclusion arrived at by the learned trial judge.

2. It is made the duty of the board of arbitrators formed under the provisions of section 9742, *supra*, "to consider the necessity for such change and render a decision thereon, which decision shall be final." The statute requires the decision to be transmitted to the clerks of the districts interested, and it is made the duty of the clerks to enter the decision upon the records of their respective districts. This is the only provision made by the statute for keeping a record of decisions of these boards of arbitrators, and all that seems necessary. There is no requirement that the board of arbitrators or that the superintendent of schools should keep a record of the proceedings, nor do we see any necessity for such record. The board of arbitrators in this case was properly constituted, and had jurisdiction to hear and determine the matter submitted to them by the appeal. The duty of the board was to consider the necessity for the proposed change, and render a decision thereon; that is, to hear such evidence as might be submitted to it touching the necessity for the change, and, after comparing and considering the same in order to gain a knowledge of the necessity of the change, to render a decision thereon. In what manner the board proceeded is not disclosed by anything they made a record of.

3. The report made to the clerk of the board does not purport to be a decision of the question submitted to them by the appeal, but is an arbitrary order declaring the boundaries of the districts changed. The board of arbitration was a judicial tribunal. The vote of District No. 4, in favor of the proposed change in the boundaries, and that of District No. 1, opposed thereto, made an issue as to the necessity for the change. This issue was carried by the appeal before

the board of arbitration for decision. The statute (section 9742, supra) made it the duty of the board to meet, and to consider the necessity for the proposed change, and to render a decision thereon. It could not consider without inquiry into the conditions and boundaries of the two districts to be affected by the proposed change, and it could not judicially decide without inquiry and consideration. It does not appear from the proceedings of the board of arbitration brought into court by the writ of certiorari that the arbitrators ever met to consider the appeal, that any hearing was had, that they considered the necessity for the proposed change of boundaries, or that they decided that the change was necessary. It was as essential to a valid decision or judgment for the change of the boundaries that the arbitrators should have found that the proposed change was necessary, as is the verdict of a jury on the issues in a suit at common law in a court of record. A judgment is defined to be "the conclusion of the law upon facts found." 1 Freeman on Judgments, sec. 2; Orvis v. Elliott, 65 Mo. App. 96. From this definition, and from the nature of the subject, the facts to sustain the judgment must be found by the tribunal rendering the judgment. But there was no finding of any facts by the arbitrators, nor was any fact adjudicated by them; hence there is no valid judgment changing the boundaries of the districts. We do not hold that the finding of the board of arbitration should conform to any particular form, yet we think that it should somewhere and somehow appear from the proceedings that the arbitrators met and considered the matter submitted by the appeal, and that they arrived at a decision.

We conclude that the proceeding of the arbitrators is void upon its face, and we affirm the judgment.

BARCLAY and GOODE, JJ., concur in paragraph 8 of the opinion.

STATE ex rel. LIVESAY et al. v. HARRISON
et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

COUNTY COURT CLERK—SALE OF FORGED WARRANT—ASSIGNMENT—LIABILITY OF BONDSMEN TO ASSIGNEE.

1. The act of a county court clerk in selling at a discount a warrant forged by him is not an exercise of official duty, or a transaction in which he acts under color of his office, so as to render his bondsmen liable to the purchaser under a condition in the bond that the clerk shall faithfully perform the duties of his office.

2. Where a county court clerk, having forged a warrant, sells the same to a purchaser, executing an assignment in the purchaser's presence, consisting of an indorsement of the name of the payee by him, the purchaser acquires no rights enabling him to maintain suit on the clerk's bond, the assignment not being in statutory form, and ineffectual to convey title.

Appeal from circuit court, Phelps county; Leigh B. Woodside, Judge.

Action by the state of Missouri, on the relation and to the use of J. S. Livesay and others, against J. P. Harrison and others. Judgment for defendants, and relators appeal. Affirmed.

T. M. & C. H. Jones, for appellants. L. F. Parker, for respondents.

REYBURN, J. This is an action upon the official bond of John P. Harrison as clerk of the county court of Phelps county, of date November 24, 1894, executed to the state of Missouri, as obligee, by John P. Harrison, as principal, and his codefendants John P. Kaine, Joseph Campbell, and B. L. Knapp, as sureties, in the sum of \$6,000, and conditioned as follows: "The condition of the above bond is such, however, that whereas, the said John P. Harrison was on the 6th day of November, 1894, duly elected to the office of clerk of the county court of the county of Phelps, in the state of Missouri, and has been duly commissioned: Now, therefore, if the said John P. Harrison shall faithfully perform the duties of his office, and pay over all money which may come into his hands by virtue of his office, and shall himself or by his executors or administrators deliver to his successors safe and undefaced all the books, records, papers, seals, apparatus, and furniture belonging to such office, then this obligation shall be void; otherwise to remain in full force and effect." The breach assigned sets forth: That defendant Harrison, as such clerk of the county court of Phelps county, Mo., while acting as such clerk, under color and by virtue of his office, on November 2, 1897, unlawfully and wrongfully issued, forged, and falsely made a false and forged county warrant No. 138, purporting to be drawn on the pauper fund of Phelps county, Mo., by order of the county court of said Phelps county, for \$444.45, to which false and forged county warrant Harrison attached his official signature as clerk of such court, thereby pretending to attest as genuine the false and forged signature of John Wolfe, presiding judge of such court, to the warrant, which signature of such judge Harrison did forge to the warrant; and that he wrongfully attached the seal of such county court to the warrant, and afterwards, as such clerk, presented it to the county treasurer, and had it registered and attested; and thereafter, as such clerk of the county court of Phelps county, he uttered and published the warrant, and offered it to plaintiffs as a true, valid, and genuine county warrant, for sale, and plaintiffs, relying upon the fact that the official seal of the county court was attached thereto, and that it bore the official signature of Harrison as clerk of the county court, pretending to attest the validity and genuineness of the warrant, and that the defendant Harrison, as clerk of such court,

had presented and had the warrant duly registered with the county treasurer, and the warrant being in the hands of Harrison as clerk of the county court of Phelps county, and relying upon the official representations of Harrison as such clerk that the warrant was valid and genuine, the plaintiffs purchased it from Harrison, and paid him \$144.45 therefor. That by reason of such warrant having been falsely made, forged, sealed, and attested by Harrison, the clerk of the county court of Phelps county, it was worthless, and constituted no liability against Phelps county whatever; and that by such forgery of the warrant by the county clerk plaintiffs lost the sum paid therefor, and have been damaged by such unfaithful acts of Harrison, county clerk, in the amount named. The answer of the sureties (no service having been had on the principal Harrison) admitted the execution of the bond, and its approval by order of the county court, but denied all other allegations of the petition. The answer further pleaded in bar that another action had been brought in the name of the state of Missouri, at the relation and to the use of the county of Phelps, against the same defendants herein, for alleged breaches of the same bond, on which judgment was rendered in favor of plaintiff and against these defendants for the penalty of the bond, with damages assessed for \$2,500; that in such action, among other breaches assigned, it was charged that on the 2d of November, 1897, there was presented to the county court of Phelps county by the State Lunatic Asylum No. 1, of Fulton, Mo., for allowance, a bill for keeping of the insane poor of Phelps county in said asylum in the sum of \$144.40, which bill was by the court allowed in that sum by warrant No. 138, and defendant was by said court directed to forward said sum to said asylum, and it became and was his duty, as such officer and clerk of such county court, so to do; that, in violation of his duties as such clerk, he failed and neglected to obey the directions of such county court in that behalf, and, on the contrary, cashed such warrant, and embezzled and fraudulently converted the proceeds to his own use; that such warrant and the proceeds thereof came into such defendant's hands as clerk and officer of such county court, and by virtue of his office; and that he embezzled and converted the same to his own use, in violation of the orders and instructions of such county court and his duties as such clerk, to the damage of the county of Phelps in the sum of \$144.40—which warrant was the same warrant referred to in plaintiff's petition. The reply was a general denial, and the cause was tried before the court.

The testimony disclosed that at the general election in 1894 John P. Harrison was elected clerk of the county court of Phelps county, and gave bond, with respondents as his sureties, in the sum of \$6,000; entered on the duties of his office January 1, 1895, and

served until January 8, 1898; that at the November term, 1897, of the county court of Phelps county, among other bills presented to the county court for allowance, was a quarterly bill from W. D. Thomas, treasurer of the Fulton Lunatic Asylum, for the keeping of insane paupers, for \$144.40, which was allowed by the court, and a warrant ordered issued to W. D. Thomas therefor, and on November 2d, after this bill had been allowed by the court, Harrison issued a warrant, numbered 138, for the amount, payable to W. D. Thomas, treasurer of Fulton Insane Asylum, which was entered on the warrant register by Harrison, but which was subsequently probably destroyed by him; that after the issuance of warrant No. 138 for \$144.40, and without any authority of the county court, Harrison issued another warrant of the same number for \$444.45, also payable to W. D. Thomas, treasurer of the Fulton Asylum, and altered the warrant register in which he had registered warrant No. 138 for \$144.40, and changed the amount of that warrant on the register so as to make the warrant appear to have been registered as \$444.45, but such change on the register being clearly perceptible. He also took the warrant book, and changed the amount in like manner on the stub of the warrant which he had issued for \$144.40, making it correspond to the change on the warrant register; and to the warrant for \$444.45 he forged the name of John Wolfe, presiding judge of the county court, attested such forged signature by his own official signature, attached the seal of the county court to such forged warrant, presented it on November 17th to the county treasurer, and caused it to be protested for want of funds. On the same day he offered it for sale to the relators in this action, merchants of Rolla, and sold it to them at 95 cents on the dollar, receiving in payment his personal note for \$30, held by the purchasers, and a check, payable to himself individually, for the balance of the purchase price. Neither the warrant for \$144.40 nor the forged warrant had ever been delivered to or in any manner assigned by W. D. Thomas, but, when sold, the fraudulent warrant was indorsed in blank in Harrison's handwriting, "W. D. Thomas, by John P. Harrison," which indorsement was written in the presence of the purchaser of the warrant at the time it was purchased, and without any authority in Harrison to sign the name of Thomas to this assignment. The original warrant was never presented, and was either destroyed or falsified so as to become the warrant involved in this controversy; but the bill of Thomas was paid by the county, and the county sued these defendants, sureties on the same bond, for the money thus paid, and recovered judgment therefor, which judgment was paid and satisfied. Upon these facts the court held that plaintiff was not entitled to recover, declaring the law to be as follows: "The court declares

the law to be that under the laws of this state no person can draw money out of the county treasury on a county warrant except the payee thereof, an assignee to whom such warrant has been duly assigned in writing, signed by the payee thereof, or the executor or administrator of some such person; and that any person purchasing a county warrant, unless it is duly assigned as required by law, obtains no rights thereunder if the warrant were valid, and would obtain no cause of action against the securities of such clerk's bond if a forgery. That the sale of a county warrant, either valid or invalid, is no part of a clerk's duty of such office; and that this cause of action arises from the purchase of said warrant, and the plaintiffs, upon the facts, are not entitled to recovery." The appellants asked six declarations of law, all presenting in different forms the theory that the facts presented constituted an official act, and a breach of his official obligations as clerk, and the violation of his official bond, and especially that condition thereof providing that he should faithfully perform the duties of his office.

The theory presented by relators' claim is that the sale to them of the fraudulent warrant constituted a breach of the official bond of Harrison as clerk of the county court of Phelps county, but the foregoing statement shows that he was not acting in his official capacity in the action complained of. The doctrine contended for by relators, and sustained by the authorities cited by them, that when by reason of issuance or execution of a false or fraudulent warrant a clerk has violated his duty to the county, and the latter has a right of complaint which may mature into a cause of action if the county treasury suffers thereby, has no application to the facts here presented. These relators are in a different attitude from the county, and are without ground of complaint until they show their individual rights have been infringed by the wrongful act of the county clerk by virtue of his official position. The sale by the clerk of a warrant constituted no part of his official duty, and in such transaction he was not acting under color of his office, but beyond the duties of his office, and outside of the limits of his legal official authority; and while a county court may have the authority to discount or sell county warrants issued for the support and maintenance of insane poor, the clerk, as such, has no such power, and is obligated to perform no such duty; and the act of making or attempting to make such sale is one not within the scope of his official duties or authority, nor contemplated when his official bond was given, and therefore not a breach thereof. In making such sale, the clerk, being empowered by the county court, would have been acting merely as its agent to execute the act ordered by that body, and his sureties upon his bond as such would not have been liable for such extraordinary acts

as agent of the county court. But, in addition thereto, the assignment or attempted assignment of the warrant was not in form prescribed by the statute; and, even had it been a valid warrant, the purchaser would have acquired no title thereto, nor could he have maintained any action upon it. The cases cited from other states are confined to instances where, by reason of fraudulent warrants, or other official acts, funds have been abstracted from the public treasury; but in this case the county treasury has not suffered, the county is not complaining, nor is the act complained of part of the clerical duties for which the county clerk was elected to perform. The trial court properly held that no breach of the official bond of Harrison was committed, and its judgment will be affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE *ex rel.* JACKSON v. TOWN OF MANSFIELD et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

MUNICIPAL CORPORATIONS—INCORPORATION—COUNTY COURT—JURISDICTION—FRANCHISE—OUSTER—QUO WARRANTO—JUDGMENT—DISCRETION—APPEAL—REVIEW—LACHES.

1. Where, in quo warranto to set aside proceedings incorporating defendant as a city of the fourth class, on the ground that it had previously been incorporated as a village, and could not, therefore, be incorporated as a city by the county court, the court finds that the subsequent order incorporating the city was valid, and the evidence to show such previous incorporation as a village was both oral and meager, the judgment holding the subsequent proceedings valid would not be reversed on appeal.

2. An order of the county court for the incorporation of a town as a fourth-class city, though not conclusive in a proceeding by the state to test the legality of the corporation—the state being no party to the proceedings for incorporation—is nevertheless a judgment, and not a ministerial act.

3. Rev. St. 1889, art. 1, § 30, provides that, if a community is already incorporated as a city or town of some other class, it might become a city of the class to which its population entitled it by adoption of an ordinance therefor by a majority of the legal voters in the town, and, if the community has not previously been incorporated, it might petition the circuit court of the county where it was situate, on which an order of incorporation may be granted. *Held*, that the county court has no jurisdiction to incorporate a place as a city of any class if it has been previously organized as a town or city, but that such incorporation must be by vote of the inhabitants.

4. A proceeding by quo warranto to oust a municipality from its franchises, for illegality in proceedings for incorporation, brought by the state's attorney without leave of court, is within the discretion of the trial court, to be exercised after full hearing.

5. A municipality was organized as a city of the fourth class by decree of the county court, and acted as such for eight years; and, in quo warranto to oust it from its franchise for illegality in its incorporation, there was no evidence that a judgment in favor of relator could serve any useful purpose, but it might result in

great injury. *Held*, that the state was barred by laches from obtaining such relief.

Appeal from circuit court, Wright county; Argus Cox, Judge.

Quo warranto by the state, on relation of J. W. Jackson, prosecuting attorney, against the town of Mansfield and others. From a decree in favor of defendants, relator appeals. Affirmed.

Statement of the Case.

This is a quo warranto proceeding instituted at the relation of the state of Missouri, in the name of the prosecuting attorney of Wright county, to oust the defendants Crippen, McKain, and White from the offices, respectively, of mayor, marshal, and collector of the town of Mansfield, and to deprive said town of its rights, franchises, and privileges as a city of the fourth class, on the ground that it was illegally incorporated as such. The petition charges that said town, on the petition of two-thirds of its inhabitants, presented to the county court of Wright county, was, by an order of said court entered prior to February 13, 1893, incorporated as a village under the provisions of section 1666 of the Revised Statutes of 1889; that on the date mentioned a petition was presented to said county court which sought to have the corporate character of the town changed to that of a city of the fourth class, but that the proceedings to that end were void. The return alleges the town was incorporated as a city of the fourth class on the 7th day of February, 1893, by an order of the county court of Wright county on the petition of a majority of its then tax-paying citizens, and has ever since enjoyed the rights, privileges, and franchises of such a city; that the respondents are the officers. After denying the allegations of the petition, the return next pleads acquiescence and recognition by the state and public of the corporate individuality of the town of Mansfield as a city of the fourth class for 8½ years, and that because of laches the state should not be allowed to question the validity of its incorporation. The return also states the town has been sued as a city of the fourth class, and judgments rendered against it and paid; that justices of the peace have been appointed for it on the same theory; that its territory has been excluded from road districts; that it has levied taxes, enacted and enforced ordinances, improved streets, park, and a cemetery, regulated the speed of trains, created a board of health, and done other things within the powers of a city of the fourth class. Further, that, should the town be ousted of its franchises, all said acts would be rendered illegal, and future acts of the same kind prevented; that the public park, streets, and sidewalks could not be kept in repair, nor the speed of trains through the town be regulated, nor quarantine against disease established; it being averred

that, at the time this action was instituted, two cases of smallpox had been quarantined in the town, which could not be cared for; and other matters and things were pleaded, of a similar tenor. A motion to strike out that portion of the answer setting up the plea of laches or estoppel was filed by appellant and overruled. The records of the county court of Wright county were admitted at the trial to have been consumed by fire February 25, 1897, including the record of any order of said county court incorporating the town of Mansfield as a village, made prior to that date. A copy of an order of said county court of date July 7, 1893, incorporating Mansfield as a city of the fourth class pursuant to a petition of the majority of the resident taxpayers of the town, was introduced in evidence; said copy having been entered and preserved on the journal of the proceedings of the board of aldermen. There was also evidence to support the allegations of the return, and prove that since said date the town has had city officers, and has constructed and improved streets and sidewalks; that the city had a park, well set out in shade trees, and a public well; and, further, that cases of contagious diseases had been quarantined by the public authorities. It was also shown that the city owed debts; that judgments for damages growing out of defective sidewalks had been rendered against the city, and paid by it; further, that the city had collected taxes, and had a street commissioner, who looked after the condition of its streets. In fine, the evidence tended to prove that after the date of the above-mentioned order of incorporation the city had exercised all the usual functions and powers of one of the fourth class. Nor was there any proof of discontent with its status as a fourth-class city on the part of any of the inhabitants, or any reason for discontent—such as excessive expense and taxation, or bad social order, or lax enforcement of law, or inadequate protection of life, property, or the public peace. There was parol evidence to show that Mansfield had been incorporated as a village prior to the aforesaid order incorporating it as a city of the fourth class; that the village incorporation was formed by an order of the county court. A recital in one of the journals of the place tended to show it had village trustees to December 23, 1892. At the close of the evidence the circuit court found the town of Mansfield was duly and legally incorporated as a city of the fourth class by an order of the county court of Wright county entered of record February 13, 1893, and that the other defendants were the duly elected, qualified, and acting officers of said town, and not usurpers. The court further adjudged that the petition be dismissed, from which judgment an appeal was taken.

F. M. Mansfield, for appellant. Thos. H. Musick, for respondents.

Opinion.

GOODE, J. (after stating the facts). The contention of the appellant is that, inasmuch as Mansfield had been legally incorporated as a village by the county court prior to the date of the order incorporating it as a city of the fourth class, the latter order was a nullity. Just what steps were taken to incorporate Mansfield as a village, or whether they were sufficient and legal steps, such as warranted that action, the evidence does not apprise us. The circuit court found that the subsequent order of the county court incorporating it as a city of the fourth class was valid, and, as the evidence to prove its previous incorporation as a village was both oral and meager, we would not feel justified in setting aside the finding of the circuit court; granting that we have a right to review the evidence in this case, and make an independent finding on the facts, as to which we have a doubt. The order of the county court itself, ordering the incorporation of the town as a fourth-class city, was a judgment, not a ministerial act—a judgment, however, which is not conclusive in a proceeding instituted by the state to test the legality of the corporation, because the state was no party to the proceedings which led up to its creation. *State ex inf. Atty. General v. Fleming*, 147 Mo. 1, 44 S. W. 758. The statutes in force when the incorporation proceedings took place provided two ways in which a community might become a city of a certain class: First, if it was already incorporated by a special charter or under the general law as a city or town of some other class, it might become a city of the class to which its population entitled it to belong by the adoption of an ordinance to that effect by the vote of a majority of the legal voters of the town; second, that, if the community desiring incorporation as a city of a certain class had not theretofore been incorporated, it might petition the county court of the county where it was situate, and, if said court was satisfied the majority of the taxable inhabitants had signed the petition, it could order it incorporated. *Rev. St. 1889, art. 1, c. 30*. This law plainly means, and has been held to mean, that a county court cannot incorporate a place as a city of any class if it has been theretofore organized as a town or city, but that such a change must be made by a vote of the inhabitants. *State ex rel. Beasley v. Young* (St. L.) 61 Mo. App. 494. But whether this rule would prevent a community which previously had been organized as a village from being thereafter incorporated as a city of the fourth class by an order of the county court is not perfectly obvious. The language of the section (*Rev. St. 1889, § 977*) only precludes county courts from reincorporating a place which previously had been incorporated as a city or town. Be that as it may, the judgment of the circuit court was right. This case comes within the principle of *State ex rel. v. Town of Westport*, 116 Mo. 582,

22 S. W. 888, in which it was ruled, with eminent wisdom, we think, that the corporate life of a community which has been acting as a city for years with the acquiescence of the state, and to the contentment of the inhabitants, will not be destroyed for the mere asking.

The courts of this country have come to exercise, in the final disposition of quo warranto cases, that discretion which was originally only exercised in allowing the information to be filed; and they have come, also, to exercise some discretion when the proceeding is instituted by the state on the information of a state officer. These quo warranto proceedings are now commonly instituted of course, and without leave; and, if there is to be any discretion used about the relief at all, it must be used in delivering judgment. So, too, as the proceeding may be instituted at the relation of any prosecuting attorney, the sanctity which originally attached to it when the information was exhibited by a great officer like the Attorney General of England, or the Attorney General of the United States or of a state, who is supposed to represent in a peculiar degree the prerogative and sovereignty of the state, no longer exists; and the remedy has grown to resemble ordinary civil litigation, and at no stage, considering its present characteristics, and the modern practice tolerating the filing of informations as a matter of course, can discretion be so wisely or justly exercised as after the cause has been heard, and the court is fully advised as to the facts. And this discretion is used in cases to oust municipalities of their franchises on account of some illegality in their organization. *State ex rel. v. Tolan*, 33 N. J. Law, 195; *Jameison v. People*, 16 Ill. 258, 63 Am. Dec. 304; *People v. Maynard*, 15 Mich. 463; *State v. Leatherman*, 38 Ark. 81; *People v. Keeling*, 4 Colo. 129; *State ex rel. v. Tipton* (Ind. Sup.) 9 N. E. 704. It will be found by consulting the foregoing authorities that one main reason for refusing judgment of ouster against the officers of a municipality alleged to have been illegally organized, or against the municipality itself, where neither fraud nor an intentional violation of the law is charged, is that public or private interests may be seriously impaired by such a judgment. And this was the theory on which several of those cases were decided, as it is a general rule of law. 2 *Dillon, Munic. Corp.* (4th Ed.) 901.

No useful purpose, so far as the evidence discloses, would be subserved by ending the existence of the city of Mansfield, and much mischief might be done. If it was not legally organized as a city of the fourth class, it should not have been permitted to use its franchises for so long a period, if the use was detrimental to the welfare of the community, and doubtless would not have been. We think every interest of the state, such as the public peace, the security of person and

property, and the payment of the city's debts, would be impaired, rather than promoted, by setting aside the incorporation at this late day, and leaving the citizens without organization, administration, or corporate privileges. Unless some equity in favor of the state is shown both by averment and proof, its laches ought to preclude it from suddenly interposing to blot out the legal existence of a town, after tolerating it as a working municipality for eight years. If it is thrown back to a village—granting it was ever legally such—it would have no present officers or organization. So, without reference to any other question, we hold that such indifference and laches on the part of the state have been shown, and that such injurious results would likely ensue from changing the town's status, that the judgment of the court below was fully justified, and it is affirmed.

BLAND, P. J., and REBURN, J., concur.

MARKHAM v. COVER.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

PAROL EVIDENCE—EXPLAINING NOTE—PARTNERSHIP—SURETYSHIP.

1. It is competent to show by parol, when properly pleaded, that the makers of a note are partners, and that they executed the same as a firm obligation.

2. Parol evidence is competent to show that one who appears from the face of a note to be a co-maker executed the note as surety.

3. Evidence in an action by a surety against his principal that defendant guaranteed to save plaintiff harmless, introduced in the course of proving that defendant induced plaintiff to become surety on certain notes, and not as the basis of the judgment, was not prejudicial error.

Appeal from circuit court, Howell county; Wm. N. Evans, Judge.

Action by E. C. Markham against S. H. Cover. From a judgment for plaintiff, defendant appeals. Affirmed.

W. J. Orr, for appellant. Jas. Orchard, for respondent.

GOODE, J. In this action, Markham, the respondent, demanded and obtained judgment against Cover for contribution on three promissory notes, which respondent alleged he had executed as surety for Cover, Crow, and Martine in October, 1897, and afterwards was compelled to pay. There was much evidence that Crow, Martine, and Cover were partners doing business under the style of the Howell County Fair Association, although Cover denies that he was a partner, and says his only connection with the fair association was in trying to get money out of it which he had advanced. The evidence shows that the money obtained on

the three notes was used for the purposes of the association, and that Cover personally induced Markham to sign them as surety; telling him the association was in a tight place and had to raise money, and that he (Cover) would see that he never sustained a loss by signing them. Inasmuch as the main point relied on by appellant is that the petition declared on a different cause of action from the one on which the court rendered judgment for respondent, we will quote the first count of the petition, the others being not materially different: "Plaintiff states that Wayne Crow, Harry Martine, and S. H. Cover were at all times hereinafter named copartners doing business under the style and firm name of the Howell County Fair Association. Plaintiff, for his cause of action, states that on the 18th day of October, 1897, defendant, Wayne Crow, and Harry Martine, as principals, and this plaintiff, with E. C. Mitchell, as sureties, executed and delivered a certain promissory note obligatory, whereby they, and each of them, promised to pay the Howell County Bank, or order, value received, the sum of \$200, three months after date, payable at the Howell County Bank, in West Plains, Missouri, bearing interest from maturity at the rate of eight per cent. per annum, and, if interest was not paid annually or when due, to become as principal, and bear the same rate of interest; that said money was borrowed and used by the said copartnership in the business of said firm. Plaintiff further states that the defendant and his copartners have failed to pay said note, except the sum of \$69.34, which was paid by defendant, and that thereupon plaintiff and defendant and the other obligors on said note became liable to pay said sum of \$200, and thereupon the plaintiff, as one of the sureties of defendant and his copartners, was compelled to pay and did pay on said note the sum of \$69.34 on the 12th day of July, 1898, all of which defendant had on said day due notice, and that no part of said \$69.34 has been repaid to plaintiff. Plaintiff further states that Wayne Crow and Harry Martine are insolvent. Plaintiff states that, by reason of the premises, defendant has become justly indebted to him in the sum of \$69.34, together with interest thereon from July 12, 1898, at the rate of ten per cent. per annum. Wherefore plaintiff prays judgment," etc. At the conclusion of the testimony, appellant requested the following declarations of law, which the court refused: "The court declares that, although it may find and believe from the evidence that S. H. Cover and Wayne Crow and Harry Martine were partners under the firm name of the Howell County Fair Association, still, if the notes sued on were not executed by said firm, the plaintiff cannot recover in this action. The court declares that all evidence tending to show that the notes read in evidence were the notes of the Howell County

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. § 1732; Evidence, vol. 20, Cent. Dig. § 1964.

Fair Association is excluded and not considered, and parol testimony is not admissible to show that said notes were the notes of said firm."

It is now contended that, inasmuch as the notes do not show on their face they are the notes of the Howell County Fair Association, the court erred in receiving parol testimony to show they were. It is not very clear to us how that proposition affects the determination of the case, in any event; but the notes were executed by the three men alleged to compose the partnership, and it was not inadmissible to show they were partners, and that the notes were executed by them as firm obligations, of which there were averments.

The important question is whether Markham signed as surety for the other signers, or as a co-maker, which, on the face of the notes, he appeared to be; but certainly it was competent for him to prove by parol testimony he was a surety, as that proof did not vary the terms of the instruments, but was consistent with them. *Garrett v. Ferguson*, 9 Mo. 125; *Scott v. Bailey*, 23 Mo. 140; *O'Howell v. Kirk* (K. C.) 41 Mo. App. 523. The testimony to show Markham was a surety is wholly satisfactory and convincing. The evidence, instead of constituting a variance from the petition, showed exactly the cause of action pleaded, and that Markham had signed the notes as surety for Cover, Crow, and Martine, as the petition alleged.

Appellant complains of the admission of testimony that Cover guaranteed to hold Markham harmless. That testimony was received in the course of proving that Markham was induced to become surety on the notes by Cover, and was not the basis on which the judgment was rendered. Its admission was harmless.

No error was committed in refusing the declarations of law asked, nor in any other ruling, and the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

LADD et al. v. WILLIAMS et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

APPEAL—DISMISSAL—INSUFFICIENT ABSTRACT.

1. Rev. St. 1899, § 863, provides that on appeal each party shall furnish the court with a statement of the case, and the points to be insisted on in argument. Rule 15 of the Court of Appeals (67 S. W. ix) provides that the appellant shall file a brief containing a clear and concise statement of the pleadings, and facts shown by the record. *Held*, when the abstract of the record contains no pleadings, nor digest of any, nor any statement of the case, nor any showing that a bill of exceptions has been filed, the appeal will be dismissed.

Appeal from circuit court, Stoddard county; Jas. L. Fort, Judge.

Action by F. M. Ladd and another against E. J. Williams and another. From a judgment for defendants, plaintiffs appeal. Appeal dismissed.

Mozley & Wammack, for appellants. Wilson Cramer and C. L. Keaton, for respondents.

GOODE, J. Appellants' abstract of the record in this case contains no pleadings, nor digest of any, nor any statement of the case, nor any showing that a bill of exceptions was ever filed—in fact, nothing except the testimony. The case is therefore dismissed for failure to comply with the statutes (Rev. St. 1899, § 863) and the rules of this court. *McCullom v. Ulen* (St. L.) 87 Mo. App. 606.

BLAND, P. J., and REYBURN, J., concur.

DE FOE v. WILMAS.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

SALES—QUALITY OF GOODS—EVIDENCE—SUFFICIENCY.

1. Evidence that, out of 600 fruit trees sold plaintiff, all but 12 of them died, though they were well planted and cared for, and though similar trees purchased at the same time of other parties did reasonably well, was sufficient to support a finding that they were not of the quality contracted for.

Appeal from circuit court, St. Louis county; J. W. McElhinney, Judge.

Action by Cora L. De Foe against Anthony Wilmas. Judgment for plaintiff in the circuit court on appeal from a justice, and defendant appeals. Affirmed.

D. C. Taylor, for appellant. Stevens & Shotwell, for respondent.

BLAND, P. J. The suit was commenced before a justice of the peace on the following complaint, omitting caption: "Plaintiff states that in the month of November, A. D. 1900, defendant sold and delivered to the plaintiff six hundred (600) fruit trees for 15 cents each; that plaintiff exercised due care and diligence in planting and cultivating said trees, but that, unknown to plaintiff, said trees had been damaged previous to her receiving them, and all but thirty (30) failed to grow. Wherefore the plaintiff prays judgment for (\$150) one hundred and fifty dollars (the cost of the aforesaid trees, and her expense in planting and cultivating the same), and the costs of this action." After judgment in the justice's court the cause was appealed to the circuit court, where the issues were submitted to the judge, sitting as a jury, who, after hearing the evidence, found the issues for plaintiff, and rendered judgment in her favor, from which defendant, after taking the usual steps to preserve his exceptions to the rulings of the court, appealed.

For plaintiff, the evidence tends to prove that in the fall of 1890 she purchased 600 young apple trees of the defendant at 15 cents per tree, and afterwards paid the purchase price, less \$10; that all the trees, except 25, which were "heeled in," were set out within three days after they were delivered, at a cost of about 5 cents per tree; that the ground was well prepared and the trees properly planted; that, of the 575 set out, only 30 or 32 budded in the following spring, and of these only 12 lived through the summer; that all of the 25 that were "heeled in" in the fall were dead in the following spring, and for that reason were not set out; that she bought two other lots of apple trees from other nurseries the same fall, and set them out and cared for them in the same manner as those bought of the defendant; that the greatest loss of these other trees was 25 per cent. For the defendant the evidence tended to show that all the trees were grown in defendant's nursery; that they were healthy and thrifty and in good condition; that they were taken from the nursery only four or five days before delivered to plaintiff; that after being taken out of the nursery they were sprayed and wrapped in damp straw, and were kept in good condition until delivered to plaintiff, and were sound and in excellent condition when delivered; that the year 1901 was extremely dry and hot, and many young and old orchard trees, as well as forest trees, died from the effects of the heat and drought.

At the close of all the evidence the defendant asked the following declarations of law: "Now, at the close of all the evidence in this cause, the defendant, Anthony Wilmas, demurs to plaintiff Ora L. De Foe's cause of action, and the evidence thereof, as now presented, for the reasons that the petition does not state facts sufficient to constitute any cause of action in the premises, nor to support the theory for relief predicated by the evidence. (2) There is no evidence sufficient to or tending to prove a cause of action in the premises"—which the court refused to give. No further declarations of law were asked, and none were given.

The only question presented by the record for consideration is whether there is any substantial evidence in support of the finding and judgment of the circuit court. The fact that, out of the 600 trees, but 12 lived, in the light of the evidence that they were well planted and cared for, and that other lots of apple trees received and planted about the same time by plaintiff did reasonably well, and that not over 25 per cent. of them died, is very persuasive evidence that the trees furnished by defendant were not of the quality plaintiff bought and should have received.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

MAY v. MOORE.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

EXECUTORS AND ADMINISTRATORS—BONDS—CONTRACT WITH SURETY—DIVISION OF COMMISSIONS—VALIDITY—STATUTE OF FRAUDS—PERFORMANCE WITHIN YEAR.

1. Where an estate had been in process of administration for nearly two years, when the administrator was required to give a new bond, and contracted with a surety thereon that, in consideration of his becoming such, the administrator would pay him, as soon as received, one-half of all commissions due such administrator, such contract was not within the state of frauds, as not performable within a year.

2. The contract was not invalid as a trafficking in the appointment of the administrator.

Appeal from circuit court, St. Charles county; E. M. Hughes, Judge.

Action by R. F. May against J. D. Moore, Jr. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Peers & Morsey, for appellant. R. A. May, for respondent.

GOODE, J. In this case the defendant stood on a demurrer to plaintiff's petition, and judgment went accordingly. The petition states, in substance, that on May 28, 1896, defendant, James D. Moore, Jr., was appointed administrator of the estate of James D. Moore, deceased, and qualified and gave bond as such; that while acting as administrator, to wit, December 15, 1897, the probate court ordered defendant to give a new bond; that on February 11, 1898, an agreement was made between plaintiff and defendant by which the latter, in consideration of the former's signing as surety the new bond which the defendant had been required to give, agreed to pay plaintiff, as soon as received, one-half of all commissions due and to become due defendant as administrator of said estate; that, in pursuance of said agreement, plaintiff duly signed said bond on said last-named date, and performed all the conditions thereof; that thereafter defendant made several settlements, including his final settlement, in which he received credit for \$321 commissions due him as administrator, one-half of which the plaintiff is entitled to, and prays judgment for. The reasons invoked to establish that the petition stated no case are, first, that the contract is void, under the statute of frauds, because it was not to be performed within one year; second, that it amounts to trafficking in the appointment of an administrator.

Contracts which come within the statute of frauds are those which cannot or are not intended to be performed within one year, not contracts which may, within the contemplation of the parties, be performed within one year. *Biest v. Ver Steeg Shoe Co.* (St. L.) 70 S. W. 1081; *Harrington v. Railroad* (K. C.)

¶ 2. See *Contracts*, vol. 11, Cent. Dig. §§ 503, 535.

60 Mo. App. 223. It is manifest from the petition that the contract between these parties might have been performed within a year; for when it was made the estate had already been in process of administration for about two years, and, under the statutes, an administration need not last more than two years. It is readily perceived that there was no absolute necessity for this contract to run more than a year; hence it was not within the statute of frauds.

The contract was not one for the appointment of an administrator, and had nothing to do with defendant's appointment. He had, as stated, already been acting as administrator when the agreement was made. It is true enough that the law forbids trafficking in the appointment of administrators or other trustees, just as it forbids agreements, for a consideration, to procure the election or appointment of a person to a public office. *Porter v. Jones*, 52 Mo. 399. But instead of this contract being one to secure the appointment of an administrator, it was made to enable an acting administrator to give a good bond. Persons are allowed to compensate others for undertaking the obligation of suretyship, and paying compensation has grown into a customary mode of making bonds; surety companies being organized for the express purpose of earning money by signing bonds of officials and administrators, as well as various other bonds. What interest the public has that this contract would be hostile to, we know not. It falls within the principle and within the scope of the opinion in *Greer v. Nutt* (St. L.) 54 Mo. App. 4, which involved similar facts.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

SOUTHWICK v. SOUTHWICK.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

APPEAL—PRACTICE—BRIEF—INSUFFICIENCY—DISMISSAL.

1. Under Rev. St. 1899, § 863, requiring each party to a civil appeal to furnish a clear statement of the case and the points to be insisted on, and Court of Appeals Rule 15 (67 S. W. ix), requiring the appellant to file briefs containing a concise statement of the pleadings and facts shown by the record, etc., an appeal will be dismissed where the only reference to the pleadings or facts is contained in the parenthetical sentence, "See petition and evidence in the case."

Appeal from circuit court, Oregon county; William N. Evans, Judge.

Action between S. G. Southwick and Lizzie Southwick. From a judgment for the former, the latter appeals. Appeal dismissed.

Alf. Harris, for appellant. S. M. Meeks, for respondent.

BLAND, P. J. Rule 15 of this court (67 S. W. ix) requires the appellant in a civil

case to file with the clerk of the court, at least one day before the cause is called for trial, four copies of a brief containing: "First. A clear and concise statement of the pleadings and facts shown by the record. Second. An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition," etc. Section 863, Rev. St. 1899, requires that on appeal or writ of error each party, on or before the day next preceding the day on which the cause is docketed for hearing, shall make out and furnish the court with a clear and concise statement of the case and the points intended to be insisted on in argument. Rule 15 is the court's interpretation of this statute. Appellant has substantially complied with the second requirement of the statute by stating the propositions relied on for a reversal of the judgment, but has utterly failed to comply with the first requirement of the rule. The only reference to the pleadings or the facts made in her brief is the following parenthetical sentence, to wit: "See petition and evidence in the case." The penalty for failure of appellant to comply with rule 15 is that the court shall dismiss the appeal or reset the case. See rule 19 (67 S. W. ix). We have not been asked to reset the case; therefore we dismiss the appeal.

REYBURN and GOODE, JJ., concur.

CALLISON et al. v. TRENTON BUILDING & LOAN ASS'N.

(Court of Appeals at Kansas City, Mo. Jan. 5, 1903.)

BUILDING AND LOAN ASSOCIATIONS—PREMIUM-BY-LAW-USURY—SETTLEMENT.

1. Where a member of a mutual building association adjusted a loan, including the acceptance of credits for profits due her as a shareholder, and made a new loan, such settlement will not be disturbed in an action to determine the rights of the parties under the new loan.

On Rehearing.

2. Under Rev. St. 1899, c. 42, art. 9, a building association was permitted to charge a higher rate of interest on loans to its members than was permitted in ordinary contract, only when the loan was made on a premium determined by open competition of bidders. Under the act of 1895 (Rev. St. 1899, c. 12, art. 10), such associations as reorganized pursuant to that act were authorized to make loans at a premium named in a by-law, without competitive bids. Prior to 1895 defendant association adopted a by-law fixing a rate of premium which it thereafter charged, and in 1897 made a loan under such by-law, and without competitive bids. There was no evidence that such by-law was re-adopted after the act of 1896 was in effect, or that defendant reorganized under that act, but it appeared that in 1901 it was doing business under the act of 1895. *Held*, that defendant is entitled to only 6 per cent. interest on such loan, and the borrower is entitled to credit on the principal for all payments made in excess of such rate.

Appeal from circuit court, Grundy county; Paris C. Stepp, Judge.

Action by Elizabeth Callison and others against the Trenton Building & Loan Association. From a judgment for defendant, plaintiffs appeal. Reversed.

O. G. Williams and W. G. Callison, for appellants. Platt Hubbell, for respondent.

ELLISON, J. This is a proceeding in equity, seeking to cancel a note and deed of trust securing the same, and to restrain a sale under the deed of trust. The ground relied upon by plaintiff is that on the 22d day of May, 1900, she only owed \$286 on the loan, when proper credits, including usurious payments, were allowed, and she tendered that amount. Defendant claimed that there was due on that date \$341.60, and refused the tender. The result in the trial court was for defendant.

It appears that in 1894 Mrs. Endicott was a member of the defendant association, and borrowed of it \$400. At that time the association was governed by the general statute of 1889 relating to building and loan associations. That statute required competitive bidding in open meeting for premium for loans in order to protect them from usury. It was not had in making this loan, and under repeated rulings of the appellate courts of the state the loan was usurious, and the illegal payments could, ordinarily, have been forced as credits on the note. *Brown v. Archer*, 62 Mo. App. 277. But Mrs. Endicott, in November, 1897, settled and adjusted that loan, and made a new loan (the one in controversy) for \$400. In this settlement she accepted all proper credits in the association, which, being a mutual organization, included the profits to which, as a shareholder, she was entitled. The case, so far as concerns the first loan, is therefore governed by those of *State ex rel. v. Stockton*, 85 Mo. App. 477, and the recent case of *Cover v. B. & L. Ass'n*, 93 Mo. App. 302. Mrs. Endicott made various payments under the new loan until in 1899, when she sold to plaintiff the land in controversy, and plaintiff succeeded her in membership in the association. Plaintiff then continued payments until in 1900, when a difference of \$55.60 in what was considered due arose, and plaintiff made the tender as above stated. This proceeding seems to have originated as though the controversy was governed by the statute of 1889 (chapter 42, art. 9). Under that statute, as above stated, and as has been many times decided, organizations like defendant could receive interest and premium for privilege of the loans, which, together, would go beyond the rate of interest permitted by law in ordinary contracts. To secure such extraordinary privilege, it was necessary to make the loan on a premium determined by open competition of bidders. But in 1895, two years before the present loan was made, the legislature saw fit to make very material changes in the former statute, and that change has been carried forward into the revision of 1899 (chapter 12, art. 10).

(It was shown without objection that defendant was acting under this statute.) It is not for the courts to pass upon the policy of this change, much less to refuse to obey it. By this last statute loans can be made at a premium named in a by-law without competitive bids; in other words, on what is termed a "fixed premium." In the *Cover Case*, above referred to, we decided that, though a premium thus fixed, added to the regular interest charged, made a rate greater than the highest rate allowed by law in ordinary contracts, it was protected by the statute, provided only that it was not "unreasonable and extortionate." Section 1364. But we are asked to qualify, or rather to wholly change, our construction of the statute in the *Cover Case*. It is urged upon us with seeming earnestness that the statute did not intend to authorize these associations to receive sums which would in any case aggregate above the highest rate of interest in ordinary contracts. Such construction would be in the face of the express words of the statute (section 1364), wherein it is declared that no premium, fines, or interest, or interest on such premiums, charged as provided in "this article," shall be considered usurious; and the same may be collected as any other ordinary debt; provided, that the statute should not be construed as protecting an unreasonable, extortionate, and oppressive charge. The statute thus says, in terms, that usury may be charged, but that it must not be so great usury as to become extortionate, unreasonable, and unconscionable. In the *Cover Case* we held that a rate of 4 per cent. above the rate permitted by law was not extortionate, considering the statute and the mutual character of the association. What would be an extortionate and unconscionable rate of usury has been left open by the statute, with power of "investigation and correction by the courts." The effect of the statute as to building and loan associations is to except them out of the general statute as to usury. And it is not the only instance to be found. Thus, as to chattel mortgages, see section 1934, and as to pawnbrokers, see section 8858. *Hilgert v. Levin*, 72 Mo. App. 48.

No reason has been made to appear which would authorize us to interfere with the judgment, and it is consequently affirmed. All concur.

On Motion for Rehearing.

On further consideration we remain satisfied that plaintiff has no right to disturb the settlement and adjustment of the first loan. But as to the new loan—the one in controversy—we feel that we were not justified in stating that it was shown that defendant was doing business under the statute of 1895. Defendant's secretary, four years after the new loan was made, testified as follows: "Question: Your association does business under what law—what statute? Answer. Statute of 1895." This being unob-

jected to, and uncontroverted by plaintiff, might be considered sufficient to show that at the time the witness was testifying the association was carrying on its business under that law. But it was not evidence of how it was conducting its business when the loan was made. The new loan was not made by competitive bids, but for an arbitrary premium, fixed by a by-law of the association. This by-law was adopted long prior to the law of 1895, and was, therefore, void when adopted; and there is nothing in the record to show that the association ever reenacted a law of like nature after the statute of 1895 became effective. There does not seem to have been any attempt to reorganize the association as contemplated by the law of 1895 (section 1375, Rev. St. 1890), either by formal action, as specified in that section, or, as just stated, by enactment of a by-law under authority of that and other sections of that law. The result is that the new loan was not made under the privileges given by the law of 1895, and is not protected from the vice of usury. Plaintiff is therefore entitled to an accounting, in which she will be credited for all payments in excess of 6 per cent., the legal rate of interest.

The motion to set aside our judgment of affirmance is sustained, and the judgment of the trial court is reversed, and cause remanded, with directions to make the accounting between the parties as herein indicated, and render the proper judgment thereon, with the costs against the defendant. All concur.

KREPP et al. v. ST. LOUIS & S. F. R. CO.
(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

CONTRACTS—SALE OF LAND—FAILURE OF TITLE—ACTION FOR DAMAGES—MEASURE OF DAMAGES—DECREE—COURT OF APPEALS—JURISDICTION.

1. A complaint alleged that plaintiff purchased of defendant 400 acres of land, and took possession after payment, but that defendant, prior to the sale, had sold 40 acres of the land to another; and the prayer was that defendant be divested of title to the remaining 360 acres, and plaintiff have damages to the value of the 40 acres. The answer admitted both sales, and that defendant had offered to rescind the contract and return the purchase money, or make a deed of the 360 acres, and return the purchase price of the 40. *Held*, that a decree divesting title out of defendant to 360 acres, and investing plaintiff with title thereto, was proper, having been authorized by the pleadings and consented to by defendant.

2. A complaint alleged that plaintiff had purchased land of defendant, and paid for the same, and that defendant had previously sold a part of the land to another. The first count prayed that plaintiff be invested with title to that portion not previously sold, and the second count was for damages for breach of the contract as to that portion previously sold. The judgment was double, there being, first, a decree investing title; and, second, a judgment for damages and interest. The judgment recited that the decree was on the first count, and that the judgment was on the second; and showed that the decree on the first count was the result of a submission of is-

sues on that count to the court, and that the judgment on the second count was the result of the verdict of a jury. *Held*, that there was no erroneous confusion or mingling of the judgments.

3. In an action by the vendee of land for damages for a breach of contract to convey, the measure of damages is not the purchase price paid, with legal interest, but the actual value of the land at the time it should have been conveyed.

4. Where, in an action for damages for breach of a contract to convey land, the court gives an erroneous instruction as to the measure of damages, but the verdict shows that the right result was reached by the jury, the error was harmless.

5. Where, in an action for breach of contract to convey certain land, for which plaintiff had paid, the evidence shows that plaintiff had used water, from the time of the purchase, from a spring on the land, for domestic purposes, and for his stock, and that he had had possession, under fence, and had never been disturbed, plaintiff was not entitled to interest on the sum paid for the land.

6. A complaint alleged that plaintiff, having purchased certain land of defendant, paid therefor and took possession, and the prayer was that title be invested in plaintiff. The answer did not deny the allegations of the complaint. *Held*, that, there being no question of title involved, the Court of Appeals had jurisdiction of an appeal from a judgment for plaintiff.

Appeal from circuit court, Pulaski county; Leigh B. Woodside, Judge.

Action by Fred Krepp and others against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The first count of the petition alleges, in substance, that on the 12th day of March, 1901, the defendant, a corporation, sold to the plaintiffs 400 acres of land (describing it) situated in the county of Pulaski, Mo., at \$1.50 per acre, or for \$600; that plaintiffs immediately paid the purchase price and entered into possession of the land; that defendant, prior to making the sale to plaintiffs, had sold and conveyed the most valuable 40 acres of the tract (describing it) to one Nesbit, and for that reason was unable to make a deed to plaintiffs for said 40 acres. The prayer of this count is that defendant be divested and plaintiffs invested with the title to the remaining 360 acres, which it is alleged defendant had the title to, and was able to convey. The second count is for the recovery of \$300, alleged to be the value of the Nesbit 40 acres. The answer admitted the sale of 400 acres of land to plaintiffs at \$1.50 per acre, and the payment of the purchase money; admitted that, prior to making the contract of sale with plaintiffs, it had sold 40 acres included in the 400 to Nesbit; alleged that this was done through the neglect of the persons in charge of its land department to note on the landbooks of defendant the sale to Nesbit, as should have been done; that, as soon as the mistake was discovered, it immediately notified plaintiffs thereof, and offered to rescind the contract and return the purchase money, with interest, or to make plaintiffs a deed to the 360

acres to which it had title, and to return the purchase price (\$60) of the Nesbit 40 acres, with legal interest, but that plaintiffs refused both offers; alleged that the whole tract, including the Nesbit 40, was sold to plaintiffs at \$1.50 per acre; and consented that a decree might go, divesting it of title to the 360 acres, and investing the title thereto in plaintiffs; and tendered in court \$60, the alleged purchase price of the Nesbit 40 acres, and interest thereon. The reply was a general denial. The issues on the first count of the petition were, by agreement of parties, submitted to the court. A jury was called to try the issues on the second count, and all the evidence on both counts was taken and heard on the trial of the issues to the jury on the second count. The evidence for plaintiffs tended to prove that the 400 acres purchased by plaintiffs from defendant were worth from \$500 to \$550, and that the Nesbit 40 acres were worth from \$175 to \$200. The evidence for defendant tended to prove that, at the time the 400 acres were sold to plaintiffs, it was believed by the agent who made the sale that defendant had title to the whole of the 400 acres, and that the sale was made in good faith; that in fact, at the time the sale was made, 40 acres of the tract had prior thereto been sold to one Nesbit; and that, through an oversight of the persons in charge of defendant's land department, the sale to Nesbit had not been recorded. Defendant offered the following instructions: "The court declares the law to be, and so instructs you, that if you believe from the evidence the defendant on December 10, 1900, sold and agreed to convey the southeast quarter, southeast quarter, section 10, township 37, range 12, to A. M. Nesbit, and by mistake afterwards, in good faith, agreed to sell and convey the 400 acres described in the petition, and which includes the aforesaid forty acres, to these plaintiffs, and, upon discovering such mistake, notified the plaintiffs of such mistake, and offered to rescind the contract, then and in that event the plaintiffs, by insisting on a conveyance of the 360 acres, elected to accept the land at the contract price, with an abatement or reduction of the contract price of the said forty acres; and, if you believe from the evidence that sixty dollars was the contract price of said forty acres, then the plaintiffs are only entitled to recover said contract price, with interest from March 12, 1901, to this date, at six per cent. per annum." "The court instructs the jury that under the pleadings in this case, and the evidence, the purchase price of the southeast quarter of the southeast quarter, section 10, township 37, range 12, is sixty dollars, and the plaintiffs' measure of damages is sixty dollars, with interest at the rate of six per cent. from March 12, 1901, up to this time; and your verdict will be for plaintiffs, will be for that amount, and no more"—which the court refused. The court instructed the jury as fol-

lows: "(1) The court instructs the jury that it is admitted and shown that the defendant contracted to the plaintiffs 400 acres of land for the sum of \$600, and that the title to the southeast quarter of southeast quarter of section 10, township 37, range 12, which was included in said contract, was not at said time in defendant. You will find the issues for the plaintiffs, and assess their damages at what you find from the evidence to be the proportionate value of said southeast quarter of southeast quarter of said section 10, upon the basis of a value of \$600 for the whole tract, with interest on said sum at the rate of six per cent. per annum from March 12, 1901, to the present time. (2) The court, however, further instructs that if you find from the evidence that the value of the whole tract sold was at the time of such sale less than the contract price, to wit, \$600, then in such case you will find for the plaintiffs the proportionate value of said southeast quarter of southeast quarter of said section 10, upon the basis of the value you find from the evidence to be the value of the whole tract at the time of the sale, which shall in no case exceed the actual value of said southeast quarter of southeast quarter of said section 10 at the time of the contract, with interest thereon at six per cent. from March 12, 1901, to this date." The jury returned the following verdict: "We, the jury, find the issues for the plaintiff, and assess his damages at \$175, and interest at the rate of six per cent. from March 12, 1901." The court entered a decree divesting defendant of its title to 360 acres of the land sold by it to plaintiffs, and investing plaintiffs with the title thereto, and rendered a money judgment in plaintiffs' favor on the second count for \$175 as damages, and \$10.25 as interest thereon from the 12th day of March, 1901, to the 5th day of March, 1902—the day of the trial. The decree of divestiture and the money judgment were entered as one judgment. Defendant filed timely motions for new trial and in arrest, which were by the court overruled, and defendant duly appealed.

Parker & Woodruff, for appellant. Johnson & Reed, for respondents.

BLAND, P. J. (after stating the facts). 1. The decree divesting title out of defendant to 360 acres of the land, and investing plaintiffs with the title thereto, was not only authorized by the pleadings, but was consented to by the defendant, and furnishes no ground for complaint; nor do we see any valid ground for the complaint of defendant that the two judgments are rendered in one and the same decree and entry of record. It is true that the judgment is double. It is, first, a decree divesting and investing title to real estate; and, second, a judgment for damages and interest. But they are separately stated and clearly distinguished. The judgment recites that the decree is on the

first count, and recites that the money judgment is on the second count, of the petition; and it shows that the decree on the first count was the result of a submission of the issues on that count to the court, and that the judgment on the second count was the result of the verdict of the jury on a trial of the second count. There is no more confusion or intermingling of the two judgments than if each had been separately set forth in full on the record by separate and distinct entries.

2. The chief contention of the parties is in respect to the measure of damages on the second count of the petition. Defendant contends that the purchase price of the Nesbit 40 acres, to wit, \$1.40 per acre, with legal interest, is the correct measure of damages. On the other hand, plaintiffs claim that they are entitled to the benefit of their bargain, and to recover the actual value of the land at the time it should have been conveyed. In actions for breach of warranty of title, the measure of damages is the purchase price, with interest. *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Hutchins v. Roundtree*, 77 Mo. 500; *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048. The same rule does not apply where the action is for a breach of contract to convey land, but the rule adjusts itself to the varying conditions of each case, to afford compensation to the wronged vendee. In *Kirkpatrick v. Downing*, 58 Mo. 32, 17 Am. Rep. 678, *Wagner, J.*, reviewed the conflicting authorities as to the measure of damages in such cases, and approved the following rules, as sustained by the best considered cases: First, that when the vendor is able to comply with the contract, but for any reason refuses to do so, the vendee should recover not only the deposit, or the purchase price paid, and expense of investigating title, but damages for loss of his bargain, and that the measure of damages was the profits which it was shown he could have made on a resale; second, that where a party contracts to sell, and he has no title, the vendee is entitled to recover his expense, and, beyond this, damages for the loss of his bargain; third, when the vendee has not actually tendered performance or made an available tender, but, in consequence of the acts of the vendor, or otherwise, is still entitled to maintain a suit for breach of the contract on the part of the vendor in not conveying, the measure of damages would be the difference between the contract price and the value of the land at the time of the breach; fourth, where there is no evidence given showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land, but where there is evidence given, showing a change in the value of the land, the value at the time the breach occurred, and when the conveyance ought to have been made, shall furnish the standard of damages. In *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59, fol-

lowing the *Kirkpatrick Case*, and the case of *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218, it was held that it makes no difference, in principle, whether the contract be for real or personal property. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference. The court further held that the good or bad faith of the vendor should be excluded from consideration in estimating the damages; refusing to follow *Flureau v. Thornhill*, 2 W. Black. 1078, and other cases following the doctrine of that case. In *Matheny v. Stew*, art, 108 Mo. 73, 17 S. W. 1014, the Cases of *Hartzell* and *Kirkpatrick* were followed and approved. In *McGhee et al. v. Bell et al.*, 70 S. W. 493, the Missouri Supreme Court, in banc, held that where a grantor fraudulently represented to the vendee that the tract of land sold contained 80 acres, whereas it contained but 61 acres, the grantee might retain the land purchased and recover for the discrepancy, and that it was not error to estimate the measure of his recovery at the amount per acre for which the whole tract sold; that, in the absence of proof to the contrary, the measure of recovery was such a portion of the entire price as the amount lost is to the entire tract. Whatever may be the rule elsewhere, we think the cases above cited from this state establish the same rule here for the measure of damages for the breach of a contract to convey land, where the vendor had no title, as is applied for the measure of damages for a breach of contract to convey personal property, and that the plaintiffs were entitled to the benefit of their bargain; that is, that if the Nesbit 40 acres, which plaintiffs bought at \$1.50 per acre, and paid for, was actually worth \$175, then they were entitled to recover its actual value at the time it should have been conveyed, irrespective of the good or bad faith of the defendant in making the sale. Neither of the instructions given or refused announced the correct rule for the measure of plaintiffs' damages, but the verdict is supported by the uncontradicted evidence of a number of witnesses, who were not impeached. They testified that they resided either adjoining or near the 400-acre tract, and all testified that the Nesbit 40 was the most valuable of the ten 40's in the entire tract. The least estimate of its value by any of them was \$175, so that, notwithstanding error in the instructions as to the measure of damages, the verdict is manifestly for the right party, and for the correct amount.

3. In respect to the interest, the evidence shows that plaintiffs had built their dwelling near the Nesbit 40; that they had used water all the time from a spring on that 40 for domestic purposes, and also for their stock; that they had all or a portion of the 40 under fence, and had never been disturbed in their possession. Plaintiffs were not en-

titled to both the use of the land and to interest (*Hutchins v. Roundtree*, supra) and the \$10.25 allowed as interest should be remitted. In this view of the case, it is unnecessary to decide whether or not this clause in the verdict, to wit, "and interest at the rate of six per cent. from March 12, 1901," authorized the court to calculate interest on the damages awarded, \$175, and render judgment for both damages and interest.

4. It is insisted that, as the judgment divested title to real estate, this court has no jurisdiction of the cause of action. It is only where the title is in dispute and in issue that this court is denied jurisdiction in suits concerning real estate. There is no controversy here about the title to the land—no dispute as to any of the material facts of the transaction—and the defendant in its answer consented that the circuit court might render the very judgment it did render, divesting it of title to 360 acres of the land. An issue of fact is made by an affirmative allegation of its existence by one party, and the denial of that allegation by the opposite party. No such allegation or denial concerning title to any of the real estate involved in the litigation is found either in the petition or answer. We therefore conclude that this court has jurisdiction of the appeal.

The judgment on the first count is affirmed. As the plaintiffs were not entitled to the recovery of interest on the second count, the judgment will be reversed and remanded on that count unless within 10 days from the date of the filing of this opinion the plaintiffs remit \$10.25 from that judgment. If the remittitur is entered within 10 days, the judgment on the second count will also stand as affirmed.

REYBURN and GOODE, JJ., concur.

STATE v. JACOBS et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

ASSAULT AND BATTERY—INFORMATION—AFFIDAVIT—INDORSING NAME OF PROSECUTING WITNESS.

1. Under Rev. St. 1890, § 2477, providing that informations may be filed by the prosecuting attorney, as informant, verified by his oath, or that of one competent to testify in the case, or be supported by the affidavit of such person, and that the verification by the prosecuting attorney may be on information and belief, verification on information and belief by the prosecuting attorney makes the affidavit unnecessary.

2. Under Rev. St. 1890, § 2477, requiring the names of witnesses for the prosecution to be indorsed on the information as in case of indictment; section 2515, requiring the name of a prosecutor to be indorsed on an indictment for any trespass against the person, unless it is preferred on the information and testimony of a grand juror, or of some public officer in the necessary discharge of his duty; and section 2483, providing that, where an indictment is required to be indorsed by a prosecutor, the person making the affidavit on which the information is based, or who verifies the information, shall be

deemed the prosecutor—the name of the prosecuting witness must be indorsed on an information for assault and battery, where it is sworn to by the prosecuting attorney on information and belief only.

Appeal from circuit court, Dent county; Leigh B. Woodside, Judge.

An information against Fred Jacobs and others for assault and battery was quashed, and the state appeals. Affirmed.

The appeal is by the state from the judgment of the circuit court in sustaining a motion to quash the information, and discharging the defendant. No abstract or briefs have been filed in this court by either party.

The information is as follows:

"State of Missouri against Fred Jacobs, Wol Halbert, Robert Cook, Defendants. Now comes A. E. McGlashan, prosecuting attorney within and for Dent county, in the state of Missouri, and informs the court that Fred Jacobs, Wol Halbert, and Robert Cook on the 29th day of March, 1901, at and in Dent county, Missouri, then and there being, did then and there make an assault upon one George Raper, by then and there, in a rude, angry, and threatening manner, striking at said Raper, and drawing chairs and clubs upon him, the said Raper, and by throwing beer bottles at him, the said Raper, contrary to the statute in such case made and provided, and against the peace and dignity of the state: A. E. McGlashan, Prosecuting Attorney.

"Now comes A. E. McGlashan, prosecuting attorney, and makes oath and says that the facts set forth in the foregoing information are true, according to his best knowledge, information, and belief. A. E. McGlashan.

"Subscribed and sworn to before me this 3rd day of April, 1901. C. R. Weber, Clerk, by Will H. Welch, Deputy."

On the back of the information are the following indorsements:

"State of Missouri v. Wol Halbert et al. Assault.

'Filed April 3, 1901. C. R. Weber, Clerk, by Will H. Welch, Dept.

"Witnesses: J. L. Chambers, Chas. Cates, Lee McGee, Geo. Raper."

The motion to quash is as follows: "Defendants move the court to quash the information against them in this cause because no affidavit is filed therewith on which to base the same, and the name of the prosecuting witness is not indorsed thereon by himself, as required by law."

A. E. McGlashan, for the State. Wm. P. Elmer, for respondents.

BLAND, P. J. (after stating the facts). 1. Two questions are raised by the motion to quash. The first is whether or not the information is properly verified, and the second is whether or not it was requisite that the information should have been indorsed by the prosecuting witness in such a manner

as to make him responsible for the costs in the event the defendant should be acquitted.

Section 2477 of the Criminal Code (Rev. St. 1899) reads as follows: "Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Section 2479 provides that, when the affidavit is made by the prosecuting attorney, it may be in the following form:

"C. M., prosecuting attorney (or E. F., as the case may be), makes oath and says that the facts stated in the foregoing information are true, according to his best information and belief. C. M.

"Subscribed and sworn to before me, this — day of —, A. D. 19—.

"E. F. (style of office)."

Section 2477, supra, authorizes the prosecuting attorney to file an information in the circuit court, either upon his personal knowledge of the commission of an offense, or upon his information and belief that one has been committed. *State v. Feagan* (St. L.) 70 Mo. App. 406. We think the information was properly verified.

2. Section 2515, Rev. St. 1899, reads as follows: "No indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, and no indictment for the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is indorsed as such thereon, thus: 'A. B., Prosecutor,' except where the same is preferred upon the information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs." Section 2483, Rev. St. 1899, reads as follows: "When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 2478, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecut-

ing witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case." The offense charged (assault and battery) comes within the class mentioned in section 2515, supra. *State ex rel. Smith v. Hodges* (St. L.) 53 Mo. App. 532. It was therefore essential that the prosecuting witness should indorse his name on the back of the information as prosecutor, unless the affidavit of the prosecuting attorney to the information is equivalent to, and takes the place of, the evidence of one or more of the grand jurors. Even if it be conceded (which it is not) that, had the prosecuting attorney sworn of his own knowledge that the offense had been committed, he would then have had the right to present the information without having the name of the prosecutor indorsed on the information, he did not so swear. His affidavit was on information and belief only. This is not evidence of the commission of an offense. It seems to us that, in the class of cases to which this belongs, it is only where an indictment is found on the evidence of one or more of the grand jurors, or where the affidavit of the prosecuting witness is used and filed by the prosecuting attorney as the foundation for the information, that the indorsement of the name of the prosecuting witness on the indictment or information can, under the statutes above quoted, be dispensed with.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

KNOEPKER v. AHMAN et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

SALES—DRIVING HORSE—BREACH OF WARRANTY—INSTRUCTIONS—PROPRIETY.

1. In an action for breach of warranty in the sale of a driving horse, in that she was represented to be good for single and double driving, an instruction that if defendants so falsely and fraudulently represented, when the horse was not suitable for driving, as they knew, the verdict should be for plaintiff, provided he tendered the animal back on discovering the breach of warranty and demanded a return of his money, is proper.

2. An instruction that if it was shown that at the time plaintiff purchased the mare he was informed by defendants, or either of them, that the animal would break away from a hitching post, and plaintiff accepted the mare after such information, then the fact that the mare would not stand hitched constituted no breach of warranty, and, unless some other ground for recovery was disclosed, defendants were entitled to a verdict, is proper.

Appeal from circuit court, Warren county; Elliott M. Hughes, Judge.

Action by G. H. Knoepker against John Ahman and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Peers & Peers, for appellant. J. B. Garber, for respondents.

GOODE, J. Plaintiff purchased a mare from the defendants for \$80, making a cash payment of \$30, leaving the balance of the purchase price unpaid. The cause of action stated for the plaintiff is that the defendants falsely and fraudulently represented to him, when he bought the mare, that she was good for single and double driving, and the plaintiff, relying on that representation, purchased her; that in fact the representation was false, and was known to the defendants to be false at the time they made it. It is charged that the animal is a "tearer"—that is, will not stand hitched, but tears loose; and this seems to be the principal objection to her. There is evidence tending to prove that in harness she is contrary about going, and sometimes balks. The answer denied the allegations in the statement, and preferred a counterclaim for \$30 due on the price. There is considerable evidence on both sides of the issues of fact, that of the plaintiff tending to prove the facts alleged in the statement, and the defendants' to show they informed plaintiff the mare would not stand hitched but would break loose; also that she was not fit for family work, but would drive well single or double. The court instructed the jury that if they believed the defendant John Ahman, acting for himself, and also for his codefendant, falsely and fraudulently represented to the plaintiff that the horse mentioned was all right for single and double driving, and plaintiff was thereby induced to purchase her, when in truth she was not suitable for that purpose, as the defendants knew, the verdict should be for the plaintiff, provided the plaintiff had tendered the animal back as soon as he discovered she was not as represented, and demanded the return of his money. That was a fair charge. Complaint is made of this instruction: "The jurors are instructed that if it has been shown by the evidence in this cause that the plaintiff, at the time he purchased the mare from the defendants, was informed by the defendants, or either of them, that the said mare would break away from the hitching post, and plaintiff accepted said mare after being so informed, then the fact, if shown by the evidence, that the mare would not stand hitched to, or would break away from, the hitching post, constitutes no breach of any warranty, express or implied, and is no cause for plaintiff's action, and, unless the evidence shows some other ground for complaint on the part of the plaintiff, defendants are entitled to the verdict." That charge is unobjectionable. Certainly, if the defendants notified the plaintiff in advance the mare would not stand hitched, and plaintiff bought her with full knowledge of the fact, he cannot claim a breach of warranty, either express or implied, on account of her breaking loose, and must recover, if at all, on some other ground, as the court advised the jury.

No error occurred in the trial of this case, and the verdict of the jury in favor of the

defendants, both on the plaintiff's cause of action and on their counterclaim, is supported by testimony. The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

HUBER MFG. CO v. HUNTER.*

(Court of Appeals at St. Louis, Mo. Dec. 23, 1902.)

CONTRACT OF SALE—TERMS—QUESTION FOR JURY—LAW OF THE CASE—FRAUD—RECoupMENT OF DAMAGES—EXPERT EVIDENCE.

1. Evidence examined, and held to support a finding that a written contract for the purchase of an engine did not embody the entire agreement of the parties as to the kind of engine to be sold.

2. Where on a prior appeal the issue whether or not a written order embodied the entire agreement of the parties as to the kind of engine to be sold was referred back for trial, it would have been improper for the court to have given a peremptory instruction based on the theory that parol evidence was inadmissible to show conditions not included in the written order, and the issue was properly submitted to the jury.

3. If the entire agreement for the sale of an engine contemplated the delivery of a new engine, and, by fraud on the seller's part, an old one, instead, was imposed on the buyer, the latter could recover for the fraud, in diminution of the seller's demand for the price, though he had not given notice of the defects within a reasonable time, or returned the property.

4. On an issue as to whether a machine was of a certain kind, or not, when bought, where the facts testified to by experts concerned the condition of the machine in particulars which tended to show its permanent construction at that time, the fact that their examination was made a long time thereafter did not necessarily weaken or disqualify their testimony, and it was properly admitted.

Appeal from circuit court, Knox county; Edwin R. McKee, Judge.

Action by the Huber Manufacturing Company against L. M. Hunter. Judgment for defendant, and plaintiff appeals. Affirmed.

L. F. Cottey and J. W. Ennis, for appellant. O. D. Jones, for respondent.

BARCLAY, J. This is an action to recover the amount of a promissory note for \$825 executed to the plaintiff by defendant in part payment of the purchase price of a traction engine sold by the plaintiff to defendant in August, 1896, and to foreclose a mortgage given to secure the note. The defense is that there was fraud in the sale on the part of plaintiff, whereby an old, rebuilt engine was foisted on the defendant in lieu of a new one, of the pattern of 1896, which defendant verbally expressed the wish to buy, and plaintiff's agent agreed he should have in execution of the order given; that the fraud was not discovered by defendant until some months after the receipt of the engine; and that the latter was not worth the amount which defendant had paid on account of the debt, etc. To that defense plaintiff made several replies, the substance of which is that the engine was sold upon an express written

*Rehearing denied March 2, 1903.

warranty, which plaintiff fully kept; that defendant had not complied with the conditions of said warranty, by which he was bound, and that he accepted, used, and made payments upon the note in suit for the engine long after he had full notice of the alleged defects in its quality; and that defendant waived any right to complain thereof by his conduct after the sale. The cause was tried with the aid of a jury, and resulted in a verdict for defendant, from which plaintiff appealed in the usual manner. Those features of the trial which require notice will be mentioned along with our comment thereon.

1. The cause has been in this court by appeal on several occasions already. Huber Mfg. Co. v. Hunter, 78 Mo. App. 82, and Id., 87 Mo. App. 50. The general outlines of the controversy are shown in the opinions reported as aforesaid. After the latter reversal the cause came again to trial, with two new issues presented, namely, the one which had been tendered by the new matter in the reply, and which this court held to tender a proper issue after the trial court had stricken it out; and the other, the plea of waiver and estoppel founded on defendant's alleged acquiescence after knowledge of the inferior quality of the engine. After these issues were contributed to the legal materials of the litigation, the trial court endeavored to follow the directions which accompanied the judgment of remand. They were quite specific, and may well be quoted here. The majority of the court said: "The only issues which should be submitted to the jury on the next trial are: First. Whether or not the contract embodied the entire agreement of the parties as to the kind of engine to be sold. If it did, plaintiff is entitled to judgment. Second. If the contract was not completely expressed in writing, did plaintiff practice fraud on defendant by palming off on him a different engine from the one intended to be sold by the terms of the complete contract? If so, defendant is only liable for the reasonable value of the thing purchased; but, if he had paid more than that, he could not recover such overpayment, since it was voluntarily made. The judgment is reversed, and the cause remanded to be tried in conformity with this opinion." At the last trial the note and mortgage were admitted, and defendant took the affirmative. The gist of his testimony was that he was a dealer in general merchandise, engines, and threshers at the town of Novelty, Mo., and having a Case engine, which he wanted to trade for a new, 16 horse power one, he telegraphed his wish to plaintiff, a manufacturing company at Marion, Ohio. Plaintiff then sent an agent to see defendant. The agent exhibited to defendant a catalogue of plaintiff for 1896, showing plaintiff's engines offered for sale. Defendant selected one at the net price of \$975, and, owing to a minor agreement for exchange and option of repurchase of the

other engine, the note was agreed to be \$1,025. According to defendant's testimony, the engine pointed out by the agent as the one which would be furnished was a new one, of the kind indicated in the plaintiff's catalogue of the current year, 1896, which catalogue defendant produced at the trial. When the terms were settled verbally, and the engine definitely indicated, defendant executed the written order already referred to. Defendant's evidence tended to support his contention that the engine actually furnished by plaintiff was a secondhand one, so ingeniously put together and constructed as to be distinguishable as such only by experts, in consequence of which defendant did not discover its real character until long after he had received the machine and had had it in use. Defendant made payments on account of his note—\$40 on the day of its date, August 8, 1896; \$200 on December 29, 1896; \$140.25 on February 24, 1897; and \$75 on April 16, 1897. Defendant admitted having given the written memorandum, referred to as a contract in the opinion of the court reported in 87 Mo. App. 50. It was in the form of an order by defendant to plaintiff for "one 16 horse power Huber traction engine," in consideration of which defendant proposed to deliver an older (Case) engine, and to execute the note and mortgage on which this action is based. The written order further recited that "the machinery furnished under the above order shall be made of good material, well constructed, and, with proper use and management, capable of doing well the work for which the machines, respectively, are made and sold. If inside of six days from the day of its first use it shall fall in any respect to fill this warranty, written notice shall be given immediately by the purchaser to the Huber Mfg. Co., at its home office, Marion, O., by registered letter, and written notice also to the local agent through whom the same was received, stating particularly what parts and wherein it fails to fill the warranty, and a reasonable time allowed the company to get to the machine with skilled workmen and remedy the defects, if any there may be, if it be of such a nature that a remedy cannot be suggested by letter, the purchaser to render all necessary and friendly assistance and co-operation in making the machinery a practical success and providing opportunity for a fair test or trial of machine by company's experts." Further along in the order it is written that all the agreements appertaining to the order are included therein; that no verbal promises or agreements in addition are valid; that no agent has authority to make any different warranty, or to modify any of the written terms, or to waive any of the expressed conditions, etc. The plaintiff accepted the order by sending the engine which constitutes the bone of contention now. The plaintiff's testimony tended to show that the written order was the complete agreement of the parties, and that de-

fendant had given no notice of complaint for some months after full knowledge of the alleged imperfections of the engine. It is not necessary to give a full outline of the evidence. It will suffice to say that there was testimony to support the contentions of each of the parties. The learned trial judge refused to give a peremptory instruction for the plaintiff which was founded on the theory that the defendant was precluded by his written memorandum of August 1, 1896, from showing by oral testimony that some of the essential terms of sale were not included therein, namely, the representation, in the nature of a warranty, that the engine was to be new. But that ruling was obviously based on the directions for trial accompanying the order of remand in 87 Mo. App. 62. Under the most recent adjudications in the Supreme Court on the subject, those directions constitute the law of the particular case in the event of a new trial. It has been held to be manifestly improper for the trial court to depart from the directions of the appellate court where the facts disclosed at the last trial do not substantially change the case which was under review when the directions were given. *Bealey v. Smith*, 158 Mo. 515, 59 S. W. 984, 81 Am. St. Rep. 317; *Brummell v. Harris*, 162 Mo. 397, 63 S. W. 497. The written order of defendant was before this court on the appeal reported in 87 Mo. App. 50. The issue whether or not it "embodied the entire agreement of the parties as to the kind of engine to be sold" was referred back for trial, as stated in the report of that appeal. That issue, as to the real agreement of sale between these parties, was a proper one to be submitted for a finding. It was submitted, and the finding was for defendant. There was testimony to support that result, by a proper application of the principles announced by this court in the last previous appeal in the cause.

2. In submitting the aforesaid issue to the jury, the learned trial judge gave the following instruction at the instance of the plaintiff: "(3) The court instructs the jury that if they shall believe from the evidence that the written contract read in evidence, for the purchase of said engine, embodied the entire agreement between the plaintiff's agent and the defendant Hunter as to the kind of engine to be sold, then your verdict must be for plaintiff." On the issue of fraud raised upon the answer of defendant, the learned circuit judge gave the following instructions for plaintiff: "(4) The court instructs the jury that the defendant, Hunter, alleges in his answer that he was misled and deceived by false and fraudulent representations made by the agent of plaintiff in the sale and delivery of the engine in question. Unless the defendant shall show by a preponderance of the evidence, and to the reasonable satisfaction of the jury, that the agent of plaintiff in making said sale and delivery, and for the purpose of inducing

the defendant, Hunter, to purchase or receive said engine, did make the false and fraudulent representations set forth in defendant's answer, your verdict should be for the plaintiff. (5) The court instructs the jury that if they shall believe from all the evidence in the case that the transactions between the plaintiff's agent, Elliott, and the defendant, Hunter, in regard to the sale and delivery of the engine in question, were as consistent with honesty and fair dealing as with dishonesty or fraud, then they shall find the same to be honest, and return a verdict for plaintiff." The instruction given by the court at the instance of defendant was as follows: "(1) The court instructs you, on behalf of defendant, that if you find from the greater weight of the evidence that the written order for the engine, in evidence, does not embody the entire agreement of the parties as to the kind of engine sold and to be delivered to defendant, and that by the complete contract of the parties the defendant was to have a new and up to date engine, and that the plaintiff, by its agent, committed fraud upon defendant, by palming off on him a different engine from the one agreed to be delivered to him by the complete contract of the parties, and that defendant has paid plaintiff all that it is reasonably worth, then your verdict should be for the defendant." The learned trial judge refused the following instructions asked by plaintiff: "(8) If the jury believe from the evidence that the engine in question was the consideration of the note, and was worth anything, and that the defendant has failed to give notice of its alleged defects in a reasonable time to the plaintiff, or to return the same, then he is presumed to have acquiesced in the alleged defects, and is not entitled to any deduction from the amount of the note." The foregoing declaration is substantially a copy of the first instruction for plaintiff in *Barr v. Baker*, 9 Mo. (1st Ed.) 840 (2d Ed.) 850, copied in the later case of *Brown v. Welton*, 99 Mo. 567, 13 S. W. 342. A most interesting and ingenious argument has been submitted here to demonstrate that the decisions cited amount to an approval of that declaration as applied to a case like this. But in weighing that argument it should be remembered that in the *Barr* decision the instruction was given for the plaintiff, the defendant prevailed in the circuit court, and plaintiff brought a writ of error in the Supreme Court, where the judgment was affirmed. If the instruction, therefore, was more favorable to plaintiff in that case than strict law permitted, there was no occasion for the court to say so. We do not regard the ruling in the *Barr* Case as decisive of the exception taken to the refusal of the eighth instruction in the case at bar. But another decision cited is more nearly in point. In *Estes v. Reynolds*, 75 Mo. 563, plaintiff sued for damages for fraud in the sale of bonds, and was held disentitled to recover. He "did

not notify defendant of his discovery" (to quote the statement of facts opening the report of that decision). The court held that he could not keep the benefit of the contract and repudiate its disadvantages. Moreover, in *American Ins. Co. v. Kuhlman* (St. L.) 6 Mo. App. 522, it was held that, where a party claims to be injured by fraudulent representations, he must "make his objections known within a reasonable time after his discovery of the alleged falsehood, and that he shall not leave the other contracting party to suppose the contract in full force while the objector continues to enjoy its benefits." Yet, on the other hand, we find other decisions (some of them later) which announce and enforce the proposition that, where a sale of personalty has been induced by fraudulent misrepresentation, the injured party may stand by the bargain, and may even execute it thereafter fully on his part, without prejudice to his right of action for the fraud, and necessarily without prejudice to his right to recoup for those damages in an action for the price. *Jarrett v. Morton*, 44 Mo. 275; *Parker v. Marquis*, 64 Mo. 38; *Finlay v. Bryson*, 84 Mo. 600; *Nauman v. Oberle*, 90 Mo. 667, 3 S. W. 380; *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788; *Campbell v. Hoff*, 129 Mo. 317, 31 S. W. 603; *Moore v. Emerson* (St. L.) 63 Mo. App. 137; *Edwards v. Noel* (St. L.) 88 Mo. App. 434. In view of those positive rulings, we must hold that the eighth instruction was properly refused in the case at bar. If the entire agreement (as found by the jury) contemplated the delivery of a new engine, and by fraud on defendant's part an old one, instead, was imposed on plaintiff, he might recover damages for the fraud, in diminution of the seller's demand for the price. That right of recovery would not depend on his having given notice to defendant "in a reasonable time," or returning the property. A purchaser imposed on by fraud in the sale of an article may retain it, and recoup his damages resulting from the fraud when sued for the price. *Benjamin, Sales* (2d Am. Ed.) sec. 452, note "a"; *Brown v. Weldon*, 99 Mo. 564, 13 S. W. 342; and the last group of cases above cited.

3. The foregoing observations will suffice to dispose of another assignment of error on the refusal of an instruction (the eleventh) declaring, in substance, a waiver by defendant of his right to recoup on account of the quality of the engine if he failed to object thereto within a reasonable time after he received and used the engine.

4. Exception was taken to the testimony of experts who examined the engine a long time after the sale, and gave statements, as witnesses for defendant, concerning the physical facts they saw, from which it might be inferred that the machine was not a new one when delivered to defendant in August, 1896. The facts they attested concerned the condition of the machine in particulars which

tended to show its permanent construction when bought. The lateness of their examination did not necessarily weaken or disqualify the testimony. The facts they stated tended to show that the machine was not a new one at the time of the contract of sale, and we think their testimony was rightly admitted.

5. In fine, we regard the merits of this appeal as concluded by the rulings on the last previous hearing in this court, and by the Missouri cases of the type of *Nauman v. Oberle*, 90 Mo. 669. The findings by the trial court in regard to the true terms of the contract, to the delivery of an old for a new machine, and that defendant paid the full value of the delivered machine, leave little for review, considering the precedents, which are binding authority in this court.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

MUTUAL LIFE INS. CO. v. RICHARDS et al.
(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

LIFE INSURANCE—ASSIGNMENT—INTEREST
OF ASSIGNEES.

1. An assignment of a life policy to one paying premiums, but having no other insurable interest in the life, though absolute in form, gives him an interest in the policy only to the extent of the payments.

Appeal from circuit court, Butler county; J. L. Fort, Judge.

Bill of interpleader by the Mutual Life Insurance Company against Lillie Richards and Jesse Reynolds. Judgment for Richards. Reynolds appeals. Affirmed.

L. R. Thomasson, for appellant. W. N. Barron, for respondent.

GOODE, J. Both Lillie Richards, the respondent, and Jesse Reynolds, the appellant, demanded the proceeds of a certain insurance policy issued by the Mutual Life Insurance Company May 27, 1899, on the life of Stephen F. Richards, whereby said company promised to pay Lillie Richards the sum of \$2,000 at the death of said Stephen on receipt of satisfactory proof of his death. The insured died December 3, 1901, while the policy was in force; and, satisfactory proofs having been made, the insurance company filed a bill of interpleader in the circuit court of Butler county, paid the money into court, and prayed that appellant and respondent be required to interplead for the fund, and the company be discharged from further liability. An order to that effect was entered by the circuit court, pursuant to which the appellant and respondent filed pleadings stating their respective claims of right to the insur-

¶ 1. See *Insurance*, vol. 23, Cent. Dig. §§ 166, 1477, 1482, 1931, 1973.

ance money. Respondent's answer states that for many years she was the wife of Stephen F. Richards, and was still his wife when he died; that the policy of insurance was taken out for her benefit, and she was named as beneficiary therein; that Jesse Reynolds is not related by blood or marriage to the deceased, nor ever had any insurable interest in the latter's life. Her answer further states that on June 16, 1899, Reynolds advanced to the deceased the sum of \$164.50, to secure payment of which said policy of insurance was assigned to Reynolds; that afterwards, and during the life of the policy, to wit, November 17, 1900, Reynolds advanced the further sum of \$175.78, to secure the payment of which the policy was again assigned to Reynolds, whose aggregate advances, with interest, amounted to \$359.19, that being the total interest he had in the proceeds of the policy, which, the respondent averred, she was willing to have paid to him; praying that judgment be entered in Reynolds' favor for said sum, and in her favor for the balance of the fund. Reynolds' answer admits he was not related by blood or marriage to Richards, and had no insurable interest in the latter's life by virtue of any relationship; also that Lillie Richards was the wife, and is now the widow, of said Richards, deceased. The answer denies that Reynolds advanced any money for the purpose of paying premiums on said policy, but avers that he paid the premiums on said policy from time to time after the policy was assigned to him; that the payments were made for his benefit alone; that the assignment of the policy to him by the deceased and Lillie Richards was an unconditional and absolute assignment for a valuable consideration, and after it was made Lillie Richards had no interest whatever in the policy, but that he (Reynolds) became and was the sole and exclusive owner thereof, not holding the same in trust for the benefit of said Lillie. The evidence shows that when the policy was issued to Richards the insured had no money with which to pay the first premium, and that one Lederer asked Reynolds to advance the premium and take the policy up for Richards. Reynolds agreed to do so, provided the policy was assigned to him absolutely. Afterwards Reynolds paid the first premium, and an assignment was executed by Richards and his wife; Richards saying he was satisfied, if he died, that Reynolds would do right by his wife. The policy was delivered to Reynolds, who seems to have always kept it. Richards failed to pay the second premium, and Reynolds, having discovered that fact, wrote the company about it three or four months after the policy had lapsed for non-payment. The company notified him they had canceled the policy. Reynolds then went to St. Louis and got the insurance reinstated, he paying the second premium and all the expense of reinstatement. At that time he took the second assignment from Richards

and his wife. Reynolds says he told Mrs. Richards, when she said she ought to get something out of the policy, that he would relinquish his interest in it if any one would refund his money. He swears that, in addition to the second premium, he surrendered a note for \$13, with interest due for three or four years, to Richards, as part of the consideration for the reassignment of the policy. He also makes a claim for the interest on the premiums and an examiner's fee of \$3 paid at the date of the reinstatement of the policy, and \$3.20 for revenue stamps. Both assignments were in the same form, and we will set out the first one: "For one dollar (\$1.00), to me in hand paid, and for other valuable considerations, the receipt of which is hereby acknowledged, I hereby assign, transfer and set over to Jesse Reynolds, whose business address is Poplar Bluff, Butler county, Missouri, all my right, title and interest in this policy number 985,970, issued by the Mutual Life Insurance Company, of New York, and for the consideration above expressed I do also, for myself, and for my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, his executors, administrators and assigns, and their title to the said policy will forever warrant and defend. Dated in Poplar Bluff, Missouri, this sixteenth day of June, 1899, in the presence of Simon Lederer. [Signed] Stephen Richards. Lillie Richards." Mrs. Richards denied that she ever consented for Reynolds to have the full proceeds of the policy for paying the premiums, but admits that he demanded the full proceeds as the condition on which he would advance the premiums. She says she never agreed to it, but simply walked out of his office when he made that demand. She admits, however, that thereafter she executed both the assignments. Reynolds made out proofs of Richards' death, in which he claimed the full amount of the insurance, as assignee of the policy. Two questions in the proofs which he was required to answer were these: "What insurable interest, if any, did you have in the life of the deceased?" "For advances made for premium." "Give detailed statement of all money advanced by you, and for what purposes advanced, on said policy, and state what debts, if any, said policy was assigned to secure." "First premium, \$164.58, and second premium, \$164.58, and interest, \$5.00, and examiner's fee, \$3.00, transfer stamps, \$3.20." The circuit court found the respondent was entitled to \$1,608.02 of the insurance money, and the appellant to \$391.98, and further found respondent had offered in open court to pay Reynolds said sum, which Reynolds had refused to accept; whereupon it was adjudged that the clerk of the court distribute and pay the sum of \$2,000 in the following proportion: \$1,608.02 to Lillie Richards, and \$391.98 to Jesse Reynolds; taxing the costs

against Reynolds. An appeal was taken from that judgment by Reynolds.

We do not feel called on to review the various cases which appellant's counsel has cited to show the assignment to Reynolds vested the title to the entire proceeds of the insurance policy in him. That law prevails in certain states, among which are Rhode Island and New York; but according to the rule in this state the interest acquired by Reynolds on account of advancements to pay premiums constituted all his interest in the insurance. Further than that the assignments were obnoxious to public policy, as being a speculation or wager on the life of the insured. This is the doctrine of the Supreme Court of the United States, of the Supreme Court of Missouri, and of this court, as declared in many decisions. *Singleton v. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Whitmore v. Supreme Lodge*, 100 Mo. 36, 13 S. W. 495; *Masonic Benev. Assn. v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Heusner v. Ins. Co.* (St. L.) 47 Mo. App. 336; *Insurance Co. v. Rosenheim* (St. L.) 56 Mo. App. 27; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924. The three cases last cited are so nearly identical with the one at bar in all their important facts that we deem it only necessary to refer to them for an elucidation of the reasons for prohibiting individuals having no insurable interest in the life of another from taking the benefit of insurance policies either by original issue or assignment, except in so far as is necessary to secure a debt owing to the assignee. While the assignments in this case are proper in form, the proofs of loss made out by Reynolds show the nature and extent of his advancements, and that the policy was assigned to him to secure those advancements.

A stipulation has been filed in this court reciting that the circuit clerk of Butler county made a clerical error in entering the judgment, and that the error may be corrected here. The transcript of the judgment on file here contains no such error as is mentioned in the stipulation, but is according to the statement of its contents made above.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

METZ v. BLATTNER.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

APPEAL—EXCEPTIONS—CONFLICTING EVIDENCE.

1. No exception having been saved except to the refusal of a new trial, and no instructions having been asked, and the evidence being conflicting, there can be no review.

Error to Cape Girardeau court of common pleas; John A. Snider, Judge.

Proceeding by John Metz against Charles Blattner, administrator of J. G. Stuben-

rauch, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

R. G. Ranney, for plaintiff in error. F. E. Burroughs, for defendant in error.

REYBURN, J. After due notice, defendant in error presented for allowance against the estate of deceased, his father-in-law, an account made up of a series of debit items, with one item of credit, and a trial was had upon the claim before the court in the Cape Girardeau court of common pleas, a number of witnesses being examined on both sides, as well as documentary testimony being introduced, both for the claimant and the estate; and the court allowed the claim, classifying it as a fifth-class demand. A motion for new trial on behalf of the administrator was duly filed and overruled, exceptions being then saved on behalf of the administrator to this action of the court. The record falls to set forth the saving of any exception on behalf of plaintiff in error to any ruling of the lower court, excepting the overruling of the motion for new trial. There was no objection made to the admission of any evidence, nor were any instructions asked on behalf of plaintiff in error. The testimony was conflicting, and the plausibility of plaintiff's claim in many respects assailed, but the judgment of the court below is sustained by substantial evidence, and, as no declarations of law were prayed, there are no errors presented by the record for the review of this court, and the judgment below allowing and classifying the claim must be affirmed. *Riffe v. Wabash R. Co.*, 72 Mo. App. 222; *Rice v. McClure*, 74 Mo. App. 383.

BLAND, P. J., and GOODE, J., concur.

ATCHISON v. CHICAGO & A. RY. CO.

(Court of Appeals at St. Louis, Mo. May 13, 1902.)

APPEAL—BILL OF EXCEPTIONS—SETTLEMENT OF PARTIAL BILL—JURISDICTION TO SETTLE REMAINDER.

1. Under Rev. St. 1899, § 728, providing that all exceptions taken during a trial shall be embraced in the same bill of exceptions, where an uncompleted bill was presented to the judge for settlement, and he signed the same and entered an order extending the time for the preparation and submission of the remainder of the bill, he thereby exhausted his jurisdiction, and had no authority to sign the remainder or supplemental bill on its subsequent presentation.

Appeal from circuit court, Audrain county; Elliott M. Hughes, Judge.

Action by Harry Atchison against the Chicago & Alton Railway Company. Affirmed.

F. Houston, for appellant. P. H. Cullen, R. D. Rodgers, and E. S. Gantt, for respondent.

BLAND, P. J. A rehearing was granted in this cause, with leave to appellant to file amended abstracts of record. This has been

done, showing that the motion for new trial was filed in proper time, the date of the filing of the petition and the answer, and that certain extensions of time to file bill of exceptions were granted by the court. These additional abstracts show that on the 25th day of April, 1901, being the last day of the January term, 1901, of the Audrain circuit court, and within the time granted to file bill of exceptions, the following proceedings were had in open court: Defendant tendered to the court so much of his bill of exceptions as was prepared by the court stenographer, including all the evidence taken at the trial, which partial bill of exceptions was signed by the court. The court ordered said bill to be filed and made a part of the record in the case, and thereupon granted defendant 10 days to file the remainder of its bill of exceptions. Afterwards, to wit, on the 29th day of April, 1901, defendant filed the remainder of its bill of exceptions. Plaintiff in his additional abstracts denies that there is any record entry showing that the remainder of the bill of exceptions was filed in the cause on the 29th day of April or on any other day.

Supposing defendant's abstracts to be correct, then we have this state of facts in respect to the bill of exceptions, to wit: On April 23d an incomplete bill of exceptions was, in open court, examined, approved, and signed by the judge, and ordered to be made a part of the record (what this incomplete bill actually contains is left to conjecture). Six days after the filing of the incomplete bill, what the defendant terms the remainder of its bill of exceptions was examined, approved, and signed by the judge in vacation and filed by the clerk of the court. The appeal had been allowed before either of these transactions took place, and the only jurisdiction retained over the cause by the circuit court or the judge thereof was to sign the bill of exceptions, which jurisdiction was retained by virtue of the orders extending the time in which the bill might be signed and filed.

The last clause of section 728, Rev. St. 1899, in respect to filing exceptions, provides that "all exceptions taken during the trial of a cause or issue before the same jury, shall be embraced in the same bill of exceptions." This is a mandatory provision, and contemplates that the final bill of exceptions shall be embraced in one document. If it does not mean this, and a part of a bill may be signed and filed at one time and the remainder at another, then the court may sign, file, and make a part of the record a separate bill of exceptions for every exception that is taken in the progress of the trial, and thus reintroduce the pernicious and confusing practice that the statute was designed to abolish. The designation of the second filing of a partial bill of exceptions as the remainder of the bill is a mere subterfuge, designed to hide the fact that there were

filed in the court two incomplete bills of exceptions—a practice that is clearly not presumable under the statute, *supra*.

We think when the judge approved and signed the paper presented to him on April 23d as a bill, or a part of a bill, of exceptions, and ordered the same to be made a part of the record, he exhausted his jurisdiction in respect to signing a bill of exceptions, and could not thereafter sign a remainder, supplemental, or additional bill of exceptions. The original and additional abstracts filed by defendant show conclusively that there has not been a full and complete and properly authenticated bill of exceptions filed in the cause; hence the record of the trial is not before us for review. As to the record proper, no error is assigned.

It follows that the judgment should be affirmed. It is so ordered.

BARCLAY and GOODE, JJ., concur.

SHEPHERD v. PADGETT et al.

(Court of Appeals at Kansas City, Mo. Jan. 20, 1902.)

COUNTERCLAIM—WHAT CONSTITUTES—FAILURE TO PLEAD IN JUSTICE'S COURT—APPEAL.

1. Rev. St. § 8852, requires the defendant, in an action before a justice of the peace, to file his statement of set-off or counterclaim before the trial is commenced. Section 4078 provides that when the summons has been personally served no set-off or counterclaim shall be pleaded in the appellate court that was not pleaded before the justice. *Held*, in an action on a note, a defense, on appeal from a justice's court, setting up a partial failure of consideration by reason of fraud and deceit in the sale of the sheep for which the note was given, is a counterclaim, and should have been pleaded before the justice.

Appeal from circuit court, Macon county; Nat. M. Shelton, Judge.

Action by E. L. Shepherd against E. P. Padgett and another. From a judgment for plaintiff on appeal from a justice, defendants appeal. Affirmed.

J. T. Barker, Ellison & Campbell, and J. C. Bradley, for appellants. Joseph Park, for respondent.

SMITH, J. This is an action which was begun before a justice of the peace on a promissory note to recover \$240. The plaintiff recovered a judgment by default before the justice. The defendant in due time took an appeal to the circuit court, where there was a trial which resulted in judgment for plaintiff, and defendant appealed here.

At the trial in the circuit court the defendant offered to prove that at the time of the sale, and as an inducement to the defendant to make the purchase, the plaintiff represented and stated to him that the sheep for which the note was given were sound

¶ 1. See Justices of the Peace, vol. 21, Cent. Dig. § 673.

and free from disease; that if the sheep had been sound and free from disease they would have been of a value equal to the amount of the note—that is, that would have been their reasonable value; that at the time of the purchase and sale of said sheep they were diseased and unsound; that the disease with which they were afflicted was one commonly known as “scab,” and that from the said disease which the sheep had at the time of the said statement and sale by plaintiff about 30 of them died, and the others suffered much injury and were rendered almost worthless by reason of said disease, and that the actual value of the sheep in condition in which they were at the time of the sale was only \$25, which fact the defendant offers to prove as his defense in this case, as showing a partial failure of the consideration of the note sued upon in this case; that the defendant is not claiming that he has been damaged by the plaintiff in any way, but is only seeking to show a partial failure of the consideration of the sale, in that the statements made as to the condition of the sheep by the plaintiff to the defendant were not true, but that the defendant believed them to be true, and relied upon them in making the purchase. The plaintiff objected to the offer because the action arose in the justice’s court, where there was no pleading filed setting up a counterclaim, set-off, or recoupment, and the defense attempted to be set up is one for damages for misrepresentation for warranty, and can only be interposed by setting up such defense by a counterclaim in the court below. This objection was sustained, and, there being no other evidence offered, the court directed by an instruction that the jury return a verdict for plaintiff.

The sole question thus presented is as to the propriety of the action of the circuit court in rejecting the defendant’s offers of proof. The statute requires that, in an action before a justice of the peace, the defendant shall file his statement of set-off or counterclaim before the trial is commenced. Section 3852, Rev. St. And where defendant has been personally served with summons, as here, the defendant cannot avail himself of a set-off or counterclaim before the justice without filing the statement required by statute just referred to, nor can he on appeal for the first time avail himself of such right. Rev. St. § 4078; *Stephens v. Supply Co.*, 67 Mo. App. 587; *Gantt v. Duffy*, 71 Mo. App. 91; *West v. Freeman*, 76 Mo. App. 96.

The defendant did not offer to prove a total failure of the consideration for which the note sued on was given. It was conceded by the defendant that the sheep for the purchase price of which the note was given were of the value of \$25, and that it was only claimed by him that there was a partial failure of the consideration of the note; or, in other words, the defendant sought by his offers of proof to show that beyond the sum

of \$25 the note was without any supporting consideration. The defendant sought to prove the fraud and deceit of the plaintiff in respect to the sale of the sheep. In case of fraud in the sale of a chattel, where the purchaser on discovering the fraud retains the chattel, and thus affirms the sale, he is entitled to the damages he has sustained on account of such fraud. And in an action for the purchase price, where the damages claimed are less than the amount of the purchase price, the vendee may set up those damages by way of counterclaim, but where there is a total failure of the consideration this may be shown under the general issue. The defense which the defendant offered to prove went to the extinguishment of only part of the plaintiff’s claim, and was for damages occasioned by the plaintiff’s fraud in the sale of the sheep for which the note was given. These damages constituted a counterclaim (*Brown v. Welden*, 27 Mo. App. 251; *Stephens v. Barber*, 67 Mo. App. 588), which defendant was entitled to have set off against the note; but evidence of such a counterclaim could not be received unless a statement thereof had been filed before the justice, as required by statute. No statement of such counterclaim was filed with the justice, and therefore the court did not err in rejecting the defendant’s offers of proof. The court very properly directed a verdict for the plaintiff.

The judgment must be affirmed. All concur.

McCORMICK HARVESTING MACH. CO. v. CRAWFORD et al.

(Court of Appeals at Kansas City, Mo. Feb. 2, 1903.)

APPEAL—ABSTRACT—SUFFICIENCY.

1. An abstract on appeal, which does not show that the motion for new trial has been filed, is defective, and such filing cannot be evidenced by a bill of exceptions.

Appeal from circuit court, Adair county; Nat. M. Shelton, Judge.

Action by the McCormick Harvesting Machine Company against C. B. and J. E. Crawford. From a judgment for defendants, plaintiff appeals. Affirmed.

O. D. Jones and Rieger & Rieger, for appellant. Campbell & Ellison, for respondents.

SMITH, P. J. The transaction out of which this controversy arose may be stated in about this wise: The plaintiff sold defendants a “corn harvester,” for the part of the purchase price of which the note sued on was given, and at the same time warranted it to have no side draft and that it would do good work. The suit, which is on said note, was begun before a justice of the peace. From there it was later on removed by appeal to

the circuit court, where there was a trial resulting in judgment for defendants, and the plaintiff appealed.

At the inception of the trial the plaintiff objected to the introduction of any evidence by the defendants for the reason that they had admitted the execution of the note, but had not filed, either before the justice or in that court, any statement of the counterclaim relied on by them as a defense to the action. This objection was by the court overruled, and the propriety of that ruling is called in question here.

The evidence presented by the abstract shows that the defendants relied on a breach of the contract of warranty, claiming that the damages sustained by them in consequence of such breach were equal to the amount of the plaintiff's note and the interest that accrued thereon. The damages thus claimed by defendants constituted a counterclaim. *Brown v. Weldon*, 27 Mo. App. 251; *West v. Freeman*, 76 Mo. App. 96; *Stephens v. Barber Supply Co.*, 67 Mo. App. 588; *Gantt v. Duffy*, 71 Mo. App. 91; *Emery v. Railroad*, 77 Mo. 339. Under the statute (sections 3852, 4078, Rev. St. 1899), in actions begun before justices of the peace, the defendant is required to file his statement of set-off or counterclaim before the trial is commenced, and unless he does so he cannot avail himself of either of such defenses, either there or in the circuit court. *West v. Freeman*, supra; *Stephens v. Supply Co.*, 67 Mo. App., supra; *Gantt v. Duffy*, supra. Where a defendant files a statement of a counterclaim for damages growing out of a breach of warranty, as here, in an action on a promissory note for a sum equal to the amount due on the note, his defense is not that of failure of consideration, except in the sense that the counterclaim goes to the extinguishment of the note. And whether such a counterclaim goes to the partial or total extinguishment of the note, the requirement of the statute just referred to is exactly the same; that is to say, that in either case a statement of it—the counterclaim—must be filed before the justice in order to make it available as a defense anywhere, and anything declared in *Shepherd v. Padgett* (decided at the October term, 1901) 72 S. W. 490, to the contrary, is hereby overruled. It results from this that the ruling of the trial court must be disapproved.

Some complaint is made in respect to the instructions, but these need not be noticed further than to remark that, as the defendants had not filed a statement of their counterclaim before the justice as required by the statute, evidence tending to prove it was improperly admitted, the defense was not available to them; so that the plaintiff was entitled to the peremptory instruction requested, and the action of the court in failing to give it was erroneous.

It follows that the judgment must be reversed, and cause remanded. All concur.

On Motion for Rehearing.

(Feb. 28, 1903.)

The point was made in defendant's brief that the abstract of the record proper did not show that the motion for a new trial was filed. This was overlooked by us in the consideration of the case on the merits. He has again called our attention to the matter in his motion for a rehearing. An examination of the record has disclosed that the objection was well taken. No such recital anywhere appears in the abstract of the record proper, though it does appear from the bill of exceptions; but as said by us in *Turney v. Ewins*, 71 S. W. 543, the filing of it is a matter of record proper, and cannot be evidenced by the bill of exceptions. The evidence of the filing of it—the motion—must be found in the abstract of the record proper. Nothing else will do. *Kirk v. Kane* (Mo. App.) 71 S. W. 463; *Hill v. Coombs*, 93 Mo. App. 264; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Warehouse v. Glasner*, 150 Mo. 426, 52 S. W. 237.

Accordingly the judgment heretofore ordered by us to be entered in the cause will be set aside; and, as there appears to be no error patent upon the face of the record proper, the judgment of the circuit court must be affirmed. All concur.

WARNER v. DONAHUE et al.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

FORCIBLE ENTRY AND DETAINER—JUSTICE'S JUDGMENT—APPEAL—TIME LIMIT—TERMS OF COURT—COMPUTATION OF TIME—SUNDAY.

1. Under Rev. St. 1899, §§ 1699, 1731, providing that the Thirteenth judicial circuit shall be composed of the county of St. Louis and three other counties, and that a term of the circuit court shall be held in one of the other counties on the first Monday in December, in one on the second Monday in December, and in the third on the third Monday in December, the judge of the circuit court of St. Louis county adjourned its September term from November 30th to December 30th in order to hold court in the other counties of his circuit. *Held*, that such adjournment did not terminate the September term of the St. Louis county circuit court, so that under section 3370, providing that an appeal from a justice's judgment in forcible entry shall be returned within six days from the rendition of the judgment if the judgment is rendered in term time, the return day of an appeal from a justice's judgment in St. Louis county during the time when the judge of the circuit court was holding court in one of the other counties was within six days from the rendition of the judgment.

2. Under Rev. St. 1899, art. 2, § 4160, subd. 4, providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, etc., Sunday is to be included in computing the time within which an appeal from a justice's judgment in forcible entry and detainer shall be taken.

3. Rev. St. 1899, §§ 3381, 3382, require appellant from a justice's judgment in forcible entry and detainer to file a certified transcript of the record before the return day of the appeal, and

provide that, if he fails to do so, appellee may produce such transcript, and the court shall affirm the judgment, except for good cause shown. An appellant failed to file his transcript within the time limited, and the appellee moved to dismiss the appeal as not taken in time. *Held*, that appellant could not show good cause for his default, so as to justify the court in overruling the motion to dismiss, but, as the appeal had never been perfected by either party, the court was without jurisdiction thereof.

Appeal from circuit court, St. Louis county; J. W. McElhinney, Judge.

Action by George W. Warner against Mary Donahue and others. From a judgment for plaintiff, defendants appealed to the circuit court, and from an order granting a motion to dismiss the appeal they further appeal. Affirmed.

The action is unlawful detainer, commenced before a justice of the peace of St. Louis county. The cause was tried before the justice on December 3, 1901. The justice took it under advisement, and on the 6th day of December, which was Friday, gave judgment for plaintiff. At 6 or 6:30 o'clock p. m. on the 12th day of December, defendants filed with the justice their affidavit and recognizance for an appeal, and demanded a transcript of the proceedings before the justice. The justice approved the recognizance, and allowed the appeal, and on the succeeding day furnished defendants a certified transcript of the proceedings before him, which, with the affidavit, recognizance, and other papers, the defendants filed in the office of the clerk of the circuit court on the same day. Plaintiff filed the following motion to dismiss the appeal (omitting caption): "Comes now the plaintiff in the above-entitled cause, being now the respondent therein, and moves the court to dismiss the defendants' appeal, for the following reasons: Because said cause, being a cause of action originating and having been tried before the justice from whom the appeal was taken under the forcible entry and detainer act, and having been tried and judgment rendered therein during the term of this court, as shown by the transcript filed in said cause and by the records of this court, and the appeal taken by the defendants not having been taken and the transcript returned to this court within six days after the date of the judgment appealed from, this court acquired, and now has, no jurisdiction in said cause of action." To sustain the motion, plaintiff read in evidence the following stipulation: "It is admitted that on the 30th day of November, 1901, the September term of the circuit court of St. Louis county, Missouri, adjourned until the 30th day of December, 1901; that during the month of December, 1901, the judge of the circuit court of St. Louis county, Missouri, was engaged in holding the circuit courts of Osage, Gasconade, and Franklin counties, Missouri, and completed his work in these counties on the 21st of December, that year; that on the 30th

day of December, 1901, the circuit court of St. Louis county was convened, pursuant to adjournment, and from the 30th day of December, 1901, until the adjournment of the September term of said circuit court of St. Louis county to court in course, which was on Saturday, January 11, 1902, the said circuit court of St. Louis county was solely engaged in the trial of criminal cases, and that during said period of time no civil cases were tried or set for trial." Defendants offered the following evidence: First. That the 6th day of December, 1901, was on Friday. Second. The evidence of John Donahue, one of the defendants, who testified, in substance: That he went to the justice's office December 12th, about 6 p. m.—not later than 6:30 p. m.—and demanded a transcript to be filed in the office of the clerk of the circuit court, and the justice said to him that "he couldn't possibly get it for me that evening. It would take him two hours to do it; and he said to me that he would file the papers himself; and I insisted on having the papers, and explained to him that it was necessary for me to have them; and he finally went and got a book, and showed me that he was supposed to file the appeal; and he got his book out, and he said I was right; that we were supposed to file the appeal. So I told him we would like to have it right away; and he said I should not be in a hurry: that we had got six days from this time, which would be six days after the 12th of December." That he went back to the justice's office on the next day, and got the transcript and other papers, and filed them with the clerk of the circuit court. That he told the justice that his counsel advised him that the transcript should be filed with the clerk on the 12th. George L. Edwards, defendants' counsel, testified as follows: "I will state to the court that when this case was tried before the justice of the peace he held his court in a place called Georgetown, two or three miles south of Kirkwood; that at the conclusion of the trial I asked the justice, after he announced that he was going to take the case under advisement, if he would write me when he had decided the case, and he said no, that he would telephone me immediately on his having reached a decision in the case. He asked me for my telephone number, which I gave him; and he never at any time notified me of his decision in the case, either by telephone or by letter. The first I knew that the case had been decided was the information that I got from the counsel for the plaintiff, Mr. Taylor, which was on Monday evening following the date of the judgment, according to my best recollection." D. C. Taylor, counsel for plaintiff, testified that he informed Edwards on Monday following Friday, December 8th, that the justice had rendered judgment in favor of the plaintiff. The court took the matter under advisement, and on March 10, 1902, sustained the

motion to dismiss the appeal. Plaintiff took the necessary steps to preserve his exceptions to the rulings of the court, and appealed from the order dismissing his appeal.

Geo. L. Edwards, for appellants. D. C. Taylor, for respondent.

BLAND, P. J. (after stating the facts). 1. Section 3368, of the forcible entry and detainer act (Rev. St. 1899) allows an appeal to the aggrieved party. Section 3369 of the act provides that no appeal shall be allowed unless applied for and an affidavit and recognizance filed within 10 days after the rendition of the judgment and before the return day of the appeal. Section 3370 of the act provides that the return day of the appeal shall, if the judgment is rendered in vacation of the circuit court, be on the first day of the next term thereof, but, if the judgment is rendered in term time of the circuit court, the return day of the appeal shall be within six days from the rendition of the judgment. Section 3381 of the act requires the appellant to file in the office of the clerk of the circuit court a certified transcript of the record, etc., in the justice's court on or before the return day of the appeal. The next section (3382) provides that, if the appellant fails to file the transcript, etc., on or before the return day of the appeal, the appellee may produce such transcript and papers, and the court shall affirm the judgment, unless the appellant shall show good cause for his default. Because the circuit court of St. Louis county adjourned its September term from November 30 to December 30, 1901, and during the 30 days of adjournment the judge was engaged in holding terms of court in other counties of his circuit, defendants contend there was no term of the St. Louis county circuit court during the month of December, 1901, and that the appeal was not returnable until the next regular term, and hence they had 10 days in which to perfect their appeal.

The Thirteenth judicial circuit is composed of St. Louis, Franklin, Gasconade, and Osage counties. Section 1699, Rev. St. 1899. Section 1731, Rev. St. 1899, requires that a term of the circuit court shall be held in the county of Osage on the first Monday in December, in the county of Gasconade on the second Monday in December, and in the county of Franklin on the third Monday in December. Hence it is apparent that the September term of the St. Louis county circuit court was adjourned from November 30th to December 30th for the purpose of enabling the judge to hold the regular terms of court in the other counties of his circuit as required by law. It is contended that two terms of circuit court cannot coexist in one and the same circuit, and that, when the judge opened court in Osage county on the first Monday in December, the September term of the St. Louis county circuit court was thereby ended. A term of court has been defined to

signify the period from the first day of the term fixed by law until court is adjourned to the next court in course, and the word "vacation" has been held to mean the period between the day on which a term of court is adjourned to the next court in course, or until the day of the beginning of another term, and not the mere interval when, for any reason, the court is not in session, and is adjourned over for more than a day. *State v. Derkum* (K. C.) 27 Mo. App. 628; *Hadley v. Bernero* (No. 8,650, decided at the present term of this court, but not yet officially reported) 71 S. W. 451; *Bronson v. Schulten*, 104 U. S., loc. cit. 415, 26 L. Ed. 997; *Brayman v. Whitcomb*, 134 Mass. 525. Under these authorities we hold that the month of December was embraced in the September term, 1901, of the St. Louis county circuit court, and the appeal from the justice's court was taken during a term of the circuit court.

2. Appellants insist that the Sunday following the Friday on which the judgment was rendered by the justice should be excluded from the count of the days in determining the return day of the appeal. If Sunday be excluded, then the return day of the appeal was December 13th, and the transcript was filed in time. The fourth subdivision of section 4160, Rev. St. 1899, art. 2, entitled "Construction of Statutes," provides that "the time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be Sunday it shall be excluded." In *Patchin v. Bonsack*, 52 Mo. 431, and *Lieberman v. Findley* (K. C.) 84 Mo. App. 384, it was ruled that in computing the time limited for perfecting an appeal from a justice's court Sunday is to be included. In the *City of St. Joseph ex rel. Saxton Nat. Bank v. Landis* (K. C.) 54 Mo. App. 315, it was held that in computing statutory time Sunday is to be included. The statute and these decisions are against defendants' contention, and we hold that they did not perfect their appeal within six days from the rendition of the judgment by the justice.

3. It is further contended that under the provisions of section 3382, *supra*, defendants showed good cause for their default, and the court should have overruled the motion on the evidence. This section can be invoked only when the appellant fails to file a transcript together with the original affidavit, recognizance, and other original papers. In such case, after the return day of the appeal, the appellee may file such a transcript, etc., and move for judgment on the transcript he has produced and filed. *Bernicker v. Miller*, 37 Mo. 498. The plaintiff did not do this, nor could he have done so. He moved to dismiss the appeal on the ground that it was taken out of time, and for this reason the court had no jurisdiction over the subject-matter of the suit. To confer jurisdiction on the circuit court over the subject-matter of the suit, it was essential that the appeal

should have been perfected by filing a transcript, etc., in the office of the circuit clerk on or before the return day of the appeal. Robinson v. Walker, 45 Mo. 117; Holman v. Hogg (St. L.) 83 Mo. App. 370; Bauer v. Cabanne, 11 Mo. App. 114. The defendants having failed to perfect their appeal within the time allowed by law, the circuit court acquired no jurisdiction over the subject-matter of the suit, and rightfully dismissed the appeal.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

SHANNON v. CARTER.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

PARENT AND CHILD—SERVICES BY CHILD—COMPENSATION—PRESUMPTIONS—INSTRUCTIONS.

1. Evidence in an action by a decedent's daughter to recover from his estate for services examined, and *held* to warrant a finding that the services were rendered at the instance of the deceased, and upon his promise to pay.

2. An instruction, in an action by a decedent's daughter to recover from his estate for services, that if plaintiff continued to reside with her parents after attaining her majority, and did work as before, the presumption is that the services were gratuitous, and that the burden was on her to rebut this presumption, is not in conflict with another instruction that ordinarily a contract to pay for services would be presumed, but that a presumption might arise, under certain circumstances, that the services were gratuitous, and that in this case it was a question for the jury, taking into consideration the circumstances and the relationship of the parties, to determine if there was an implied contract between the parties.

3. In a suit by a decedent's daughter against his estate for services, an instruction that plaintiff could not recover unless she showed, by a preponderance of evidence, that the services were performed under an express or implied contract to pay for them, was proper.

4. When, in an action by a decedent's daughter for services, plaintiff's evidence showed that she came home at her father's request, and began work, with the understanding that she was to receive compensation, it was not error to instruct that she could recover for services from the time she began work up to the death of her father.

Appeal from circuit court, St. Francois county; Jas. D. Fox, Judge.

Action by Jennie Shannon against F. M. Carter, administrator of the estate of John C. Shannon, deceased. From a judgment for plaintiff in the probate court, defendant appealed to the circuit court, where a trial de novo was had. Judgment for plaintiff, and defendant appeals. Affirmed.

Huff & Tucker, for appellant. Pipkin, Swink & Young, for respondent.

GOODE, J. This suit was instituted in the probate court of St. Francois county on an account reading as follows:

The Estate of John C. Shannon, Deceased, to
Jennie M. Shannon, Dr.

To 832 weeks' work, at \$1.75 per week, at the instance and request of deceased	\$1,456 00
Credit for clothing at fifty cents per week for 832 weeks.....	416 00

To balance due claimant.....	\$1,040 00
Commencing April 27, 1884, and ending April 14, 1901.	

To this account there was attached an affidavit of the claimant, sworn to before her attorney, as notary public.

In the probate court, before a jury, the plaintiff recovered a judgment for \$600, which was afterwards allowed by said court and classified. An appeal was taken from the probate court to the circuit court, where, on a trial de novo before a jury, a verdict was rendered in plaintiff's favor for \$1,044. Judgment was entered accordingly, and an appeal taken to this court.

While there were many witnesses on either side, the evidence for the respective parties may be summarized as follows: The testimony of the plaintiff tended to prove that from April, 1884, until her father died, in April, 1901, she was the mainstay of her father's household; doing the domestic work, such as cooking, ironing, keeping the house in order, and occasionally doing outside work, such as feeding the stock. At an uncertain date—some time about 1882—she gave up her school, to go home to take charge of the housework, at the request of her father and mother; her mother being an old woman, and not able to do much, and her father an old man. She had a brother (Frank), who, it seems, from some mental weakness, was almost helpless, and was quite a burden on the family. There were a great many hands on the place at times, and the domestic work was onerous. If the witnesses for the plaintiff are to be believed—and several of them were her brothers and sisters—the brunt of that work fell on her, and she performed nearly all of it. There was testimony, too, that her father made statements on several occasions that she would be rewarded for it, and also testimony that he said in her presence that she should be remunerated, although no stipulated compensation was proven. The evidence was that such work as plaintiff performed was worth, in that community, about \$2 a week. The evidence for the estate tended to show that the plaintiff did only her part of the work around her father's house and farm; that the family was a large one, there being many children, and all of them being reared to work. The other girls married and left home, after which, of course, the household duties fell more to the lot of plaintiff. The evidence for the defense tends, also, to show that plaintiff was often away from home on long visits, which extended over months; that she did not stop teaching school to resume domestic work in her father's household, but taught until the

¶ 4. See Executors and Administrators, vol. 22, Cent. Dig. § 722.

school closed; and, generally, the evidence for the estate was that the duties performed by the plaintiff were those that a daughter still living at home after she had reached her majority would perform without expectation of other compensation than her living. No points are made in regard to the testimony.

For the plaintiff, the court instructed the jury that, where services are rendered, a contract or obligation to pay will be presumed, but that a presumption may arise from the relationship of the parties that the services were acts of gratuitous kindness; that in this case it was a question for the jury, taking into consideration all the circumstances, including the nature of the relationship of the plaintiff to her deceased father, and her condition in life, to determine whether there was an implied contract to compensate plaintiff for her services, or not, and if the jury found from the evidence that plaintiff rendered services for her father, in attending to his business and about his residence, and that it was understood between them that plaintiff should receive pay for such services, the jury should find the issues for the plaintiff, and allow her such sum as they might believe, from the evidence, she was entitled to, not exceeding \$1.75 a week, with interest thereon at 6 per cent. from the date of the filing of the claim. The court further instructed the jury that if they found the issues, under the foregoing instruction, for the plaintiff, then, in ascertaining what compensation to allow her, they should confine the compensation for services to such as they might find were rendered to her deceased father between April 27, 1884, and April 14, 1901. The defendant requested an instruction that plaintiff could not recover, under the evidence; also the following: "(2) The court further instructs the jury that where the daughter has continued to live with her parents after arriving at majority, and continues to labor as before, the law presumes such services to be gratuitous, and there rests a burden on the claimant in this case to overthrow such presumption by preponderance of testimony; and, further, the courts look upon claims of this character with disfavor, and, to prove such a contract, the evidence must be clear and convincing, and the jury must believe from the evidence that there was at the time the services were rendered an expectation on the part of the plaintiff to receive pay for such services, and on the part of the deceased to pay for the same." The court refused both of those, but gave the following, of its own motion, in lieu of the second one: "(3) The court further instructs the jury that if the plaintiff in this case continued to live with her parents after arriving at her majority, and continued to labor as before, the law then presumes such services to be gratuitous, and the burden of rebutting such presumption by a preponderance of testimony rests on the plaintiff; and,

before you will be authorized in finding a verdict for the plaintiff, you must believe and find from the evidence in this case that there was, at the time the services were rendered, an expectation on the part of the plaintiff to receive pay for such services, and on the part of John C. Shannon to pay for the same. (4) The court instructs the jury that the law in this case is that the ordinary presumption of contract for valuable services rendered does not obtain, and the plaintiff cannot recover in this case unless she shows by a greater weight of testimony that the services sued for were performed under and by virtue of a contract, either express or implied."

The only errors assigned are in respect to the instructions, and the defendant contends, first, that there was no evidence to support the verdict; and, second, if there was, there were inaccurate charges given to the jury.

The error assigned in regard to the insufficiency of the evidence merits no attention whatever, for witness after witness swore the services rendered by plaintiff, extending throughout many years, were rendered at the instance of her father, and that he promised to pay for them.

As to the first instruction given for the plaintiff, it is copied from one approved and commended by the Supreme Court in a similar litigation. *Sprague v. Sea*, 152 Mo. 327, 53 S. W. 1074.

The third instruction given by the court of its own motion is conceded by defendant to be correct, but said to be in conflict with the first one given for the plaintiff, in that the latter declares that the law presumes the services were to be paid for, which presumption may be rebutted by circumstances, such as relationship of the parties, while the other declares the services are presumed to be gratuitous. We see no conflict in those two instructions at all. The first one was general in its opening clauses, and, as has been seen, told the jury, in approved words, that ordinarily, where services were rendered, a contract or obligation to pay would be presumed, but that a presumption might arise, under certain circumstances, that the services were gratuitous. The instruction then proceeded to inform the jury that in this particular case it was a question for them, taking into consideration all the circumstances, including the relationship of the parties, to determine whether or not there was an implied contract for compensation.

The third instruction hypothecated the defendant's theory, to wit, that the plaintiff simply continued to reside with her father after arriving at her majority, and continued her labors as before, and told the jury that in that case the law presumed whatever services she rendered were given gratuitously, that the burden was on her to rebut said presumption by a preponderance of the evidence, and that, before the jury would be justified in awarding her a verdict, they

must find from the evidence that she rendered the services with an expectation of payment. That was a correct instruction, on the defendant's theory of the case. Plaintiff's testimony tended to show that, instead of remaining at home after she reached her majority, and continuing her labors as before, she left home, and was called back by her father and mother, induced to give up another employment, and, at their request, remained with them and assisted them.

The fourth instruction given by the court of its own motion must have freed the jury from any doubt as to the legal presumption in this case, for it distinctly told them that the usual presumption of a contract to pay for valuable services did not obtain, and that the plaintiff could not recover unless she showed, by the greater weight of the testimony, that the services sued for were performed under and by virtue of a contract, express or implied.

As to the measure of plaintiff's recovery, the effect of the instructions was that plaintiff could only recover for such services as she rendered under a contract, express or implied, which recovery must be limited to the time between April 27, 1884, when she began the services, and April 14, 1901, when her father died. The complaint of appellant in regard to the measure of damages is that the jury were not advised to confine the damages awarded to compensation for such work as was performed after a contract or understanding was made between plaintiff and her father. This objection is untenable, because, if the evidence for the plaintiff was true, as the jury must have believed it to be, she began to work with the understanding that she should receive compensation in April, 1884. The effect of defendant's evidence was, of course, that she was rendering free services, and that there was no understanding at all in regard to compensation.

This case seems to have been carefully instructed, and, as the evidence was sufficient to warrant the verdict, the judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

VAN BUREN COUNTY SAV. BANK v. MILLS.

(Court of Appeals at St. Louis, Mo. Jan. 17, 1903.)

BILLS AND NOTES—ACTIONS—PLEADING—JUSTICES OF THE PEACE—APPEAL—TRIAL DE NOVO—CIRCUIT COURT—CHANGE OF ISSUES—VERDICT—EVIDENCE.

1. Where, in an action by a bank on a note, defendant pleaded in the justice court that the note was given to check against, and that defendant checked against the note as a deposit, but paid to the bank the full amount of the checks so drawn, and plaintiff wrongfully refused to credit the note with the amount so remitted, wherefore defendant says that the note was

fully paid off, on the trial de novo in the circuit court evidence that defendant drew checks against the amount of the note, and afterwards paid the amount of such checks to the bank, was not such a change in the defense as is forbidden by Rev. St. 1890, § 4079, on appeal from a justice.

2. Where, in an action by a bank on a note, defendant claimed that the note was made to secure checks to be subsequently drawn, and that such note was not credited to his account, and that he had paid the amount of all checks drawn against the note, and the bank's ledger failed to show that the note was credited to defendant's account, though a witness for the bank testified that this was due to the fact that the face of the note was paid to defendant in cash, which defendant denied, a judgment in favor of defendant was not contrary to the weight of evidence.

Appeal from circuit court, Knox county; Edwin R. McKee, Judge.

Action by the Van Buren County Savings Bank against J. H. Mills. From a justice's judgment in favor of defendant, affirmed by the circuit court, plaintiff appeals. Affirmed.

Statement of the Case.

This action was instituted before a justice of the peace on a promissory note executed by the defendant to the plaintiff October 25, 1897, for \$100, due 60 days after date. Defendant filed an answer in the justice's court, which, in addition to a general denial, contained the following special defense: "Defendant further says that he admits the execution of the note sued on, but says that said note, with other notes, were given to the said bank by this defendant for the purpose of checking against them, and to secure checks drawn by this defendant on said bank. That this defendant did draw checks on said bank at divers times against said notes as such deposit, but defendant says that at the time and at divers other times he remitted and paid to said bank the full amount of the checks so drawn on said bank by this defendant. But defendant charges and avers that said plaintiff wrongfully and fraudulently refused to credit said note and said other notes with the amounts so remitted by this defendant as aforesaid. Wherefore defendant says that said notes are fully paid off and discharged, and asks to be discharged, with costs." The testimony of Mills, which was corroborated by certain circumstances, was that he was in the cattle business, and frequently had occasion, when purchasing stock, to draw checks on the plaintiff, the Van Buren Savings Bank, and that, in view of checks which he might draw, he gave the note in suit to the bank, so that the amount of it might be credited to his account in the bank, against which he could then check without overdrawing. He testified further that he received no credit for the note in suit on his account with said bank, but that he afterwards paid to the bank the full amount of all of the checks he drew on it. On the other hand, the testimony of the cashier of the bank and of other witnesses is that Mills was paid the pro-

ceeds of the note in cash at the time it was executed. This testimony was given on the trial de novo in the circuit court, which resulted in a judgment in favor of the defendant, an appeal being taken from that judgment to this court. It should be stated that at the first term of the circuit court after the case was appealed thereto the defendant made application for a continuance, stating that he had paid the note in suit in full, which payment his brother, T. S. Mills, witnessed, and a continuance was prayed on account of the absence of said T. S. Mills.

Rutherford Newbold, for appellant. Berkheimer & Dawson, for respondent.

Opinion.

GOODE, J. (after stating the facts). 1. Appellant insists that the case was tried on an issue in the circuit court different from that joined in the justice's court, the answer filed by the defendant in the latter court being asserted to state the defense of payment of the note. We have quoted the answer, which speaks for itself; and while it might, perhaps, be construed to plead payment of the note, the facts stated are consistent with those testified to by the defendant; namely, that he drew checks against the amount of this note, but afterwards paid those checks to the bank. It is true the answer states the bank failed to credit the note with the amount so paid; but a fair construction of the averments is that Mills drew checks on his account, supposing a credit had been given him for the proceeds of this note; and afterwards paid the checks without having received credit for the note's proceeds. There was no such change of the defense in the circuit court as is forbidden by the statutes, which seem, indeed, to be directed only against changing the cause of action, or perhaps a counterclaim. Rev. St. 1899, § 4079; *Hixon v. Selders* (K. O.) 46 Mo. App. 275.

2. It is also contended that the verdict of the jury was so opposed to the weight of the evidence as to be manifestly the result of prejudice or passion. We think otherwise. It is by no means clear from the account of defendant with the bank, which was introduced in evidence, that defendant got credit for the amount of the note in suit, and in fact it was admitted at the trial by the bank's attorney that its ledger did not show any credit to defendant by reason of the note in suit, although this fact was stated by the bank's officers to be due to the fact that Mills was paid the cash on the note when he gave it. Mills swore to the contrary, however, and, as there was plenty of evidence on both sides of the question, it was one for the jury to decide, subject to the revisory power of the trial court.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

STATE ex rel. HOPPER v. COTTENGIM et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

MANDAMUS—JUDGMENT AGAINST COUNTY—COMPELLING PAYMENT—SPECIAL FUND.

1. One having a general judgment against a county is not entitled to mandamus to compel payment from funds derived from taxes levied for the payment of certain bonds, irrespective of whether the bonds were valid or invalid.

Appeal from circuit court, Wright county; Argus Cox, Judge.

Mandamus by the state, on relation of William Hopper, against William Cottengim and others, as judges of the county court of Wright county, and the treasurer thereof, to compel an order for the payment of a judgment, and the drawing of a warrant therefor. From a judgment refusing a peremptory writ, relator appeals. Affirmed.

L. O. Neider and Thos. H. Musick, for appellant. W. S. Pope, for respondents.

BRACE, P. J. On the 16th day of September, 1898, the relator obtained a judgment against Wright county for the sum of \$1,776.45, and on the 30th of May, 1899, instituted this proceeding by mandamus in the circuit court of said county to compel the respondents, who are the judges of the county court and the treasurer of said county—the former, to order payment of said judgment, and draw a warrant on the county treasurer therefor; and the latter, to pay the same out of a fund in said treasury, derived as follows: At the May term, 1897, of said county court, and on the 7th day of May, 1897, the following order was made by said court: "Whereas, the courthouse situated at Hartville, the county seat of Wright county, in the state of Missouri, was destroyed by fire, and the said county of Wright has no courthouse, and it is necessary for the transaction of public business to erect a courthouse forthwith, and the said county of Wright has no means with which to erect the same, but by an issue of county bonds; and whereas, the said county of Wright has no bonded indebtedness, and the bonded indebtedness hereafter to be issued under the provision of our statutes authorizing the erection of a courthouse, will not equal five per cent. of the assessed valuation of the real and personal property in said county of Wright: Therefore it is ordered by county court of said county of Wright that county bonds of the said county of Wright in the sum of \$10,000 be issued under and in pursuit of the provisions of section 3107, Rev. St. Mo. 1889, for the purpose of rebuilding a courthouse at Hartville, the county seat of said county of Wright; said bonds to be of the denomination of \$500 each, and numbered from one to twenty, both inclusive, payable in fifteen years from July 1, 1897, bearing six per cent. interest per annum, paya-

ble annually; principal and interest payable in lawful money of the United States at the office of the county treasurer of said county of Wright. Interest to be evidenced by coupons thereto attached, numbered seriatim from one to fifteen, both inclusive. Said bonds shall be signed by the president of the county court, countersigned by the county clerk, with the seal of his office affixed, and shall have printed on the back thereof a copy of the order of the county court under which said bonds were issued, and the coupons thereto attached, to be countersigned by the county treasurer. It is therefore ordered by the court that, for the purpose of paying interest on said bonds, there shall be levied on the taxable property in the said county of Wright for each year, until all the interest on said bonds is paid, the sum of three cents on the \$100 valuation. And it is further ordered by the court that, for the purpose of creating a sinking fund to pay said bonds at maturity, there shall be levied upon the taxable property of said county of Wright in each year, until the principal of said bonds is paid, three cents per \$100 valuation, which shall be collected and paid into the treasury, and held as a sinking fund to pay the principal of said bonds, and to be used for no other purpose." In pursuance of this order a tax of 2 cents on the \$100 was levied for said sinking fund, and 3 cents on the \$100 for said interest fund, for the years 1897 and 1898; and the evidence tends to prove that on account thereof there was collected and paid into the treasury for the year 1897 the sum of \$1,253, and for the year 1898 the sum of \$1,100; that at the time this proceeding was instituted there was, of the moneys so collected, in the treasury, to the credit of the sinking fund, the sum of \$550.65, and to the credit of the interest fund the sum of \$615; and that there was loaned out the sum of \$770, making a total of \$1,935.65, which is the fund the relator contends is applicable, and which he seeks to have applied, to the payment of his judgment. The ground of this contention is that the bonds and coupons issued in pursuance of the order of May 7, 1897, are illegal and void, being, as it is claimed, a debt created in excess of the limitations of sections 11 and 12 of article 10 of the Constitution, and that the taxes levied and collected to provide a fund for the payment of the principal and interest thereof were so levied by the county court without any order of the circuit court, as required by sections 7653, 7654, Rev. St. 1889. Hence the fund aforesaid in the county treasury, so collected in this manner and for these purposes, is there without warrant of law, is not appropriated to any legal purpose, and is therefore applicable to the payment of relator's judgment. The conclusion drawn by the relator in this contention is such a palpable non sequitur from the premises laid down in his proposition that it becomes unnecessary to consider the serious questions

involved in his premises, in which other persons not parties to this proceeding are deeply interested, and who ought to be heard in any case affecting their rights. The writ of mandamus is, to a certain extent, a discretionary writ, and ought not to issue unless there is a clear legal right, and will be denied in doubtful cases, or when it would, in a collateral matter, decide questions of importance between persons not parties to the proceeding, upon whom its enforcement would entail great hardships and difficulties. 19 Am. & Eng. Encycl. of Law (2d Ed.) p. 753b.

The judgment of the relator was a general judgment against the county. His only right was to have funds belonging to the general revenue fund of the county, not otherwise appropriated, applied to the payment of his judgment. The fund in question was no part of the general revenue fund of the county. It was a special fund raised for a particular purpose, and neither the county court nor the county treasurer had any right to apply a dollar of it to any other purpose. If, on the one hand, the bonds are valid, and the taxes were legally levied, the bondholders are entitled to it. If, on the other hand, the bonds are invalid, or the taxes were illegally levied, the taxpayers from whom it was illegally and wrongfully wrested are entitled to it. In neither event is the county entitled to it, and in neither event is it applicable to its general indebtedness. The county court and the treasurer could not so rightfully apply it. The circuit court, on the facts of the case, correctly refused a peremptory writ commanding them so to do, and its judgment is affirmed. All concur.

UNION TRUST CO. v. SODERER et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

ADMINISTRATOR PENDENTE LITE—RIGHT TO
POSSESSION OF REALTY.

1. A petition in an action by an administrator to recover personality from the heirs of decedent, which does not describe the personality, is fatally defective.

2. Under Rev. St. 1899, § 13, declaring that, if the validity of a will be contested, letters of administration shall be granted during the time of such contest to some other person who shall take charge of the property, etc., an administrator pendente lite during such contest has no right to possession of the real estate owned by decedent at the time of his death, unless the probate court so orders, or the property is needed to pay debts.

Appeal from St. Louis circuit court; Wm. Zachritz, Judge.

Action by the Union Trust Company, as administrator pendente lite of Alois Soderer, against Caroline Soderer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

During a contest of the alleged will of Alois Soderer, the plaintiff was appointed by the probate court administrator pendente lite of the estate. This suit was begun in

the circuit court by the plaintiff in that capacity to recover of the defendants personal property and real estate which the petition alleges belonged to the estate and came into the hands of defendants as trustees under the will. The petition alleges that personal property of the value of \$5,800, belonging to the estate, was turned over to the defendants by the executrix before the plaintiff's appointment as administrator p. l., and is now held by them, and also several parcels of real estate, which are rented, and from which the defendants are collecting rents to the amount of \$1,000 a month; that defendants claim the right to hold this personal property and real estate, and collect their rents, by virtue of the will, under which they are appointed trustees; that plaintiff has demanded possession of the personal property and real estate, and an account of the rents collected, but defendants have refused to render the same. The prayer is for a decree for possession, an accounting, an injunction from interfering with plaintiff's management of the estate, etc. Defendants demurred to the petition. The court sustained the demurrer, and plaintiff declined to plead further. There was a final judgment for defendants, and the plaintiff appeals.

Joseph W. Lewis, for appellant. H. A. Loevy and Geo. W. Lubke, for respondents.

VALLIANT, J. (after stating the facts). The plaintiff is, of course, entitled to possession of all the personal property belonging to the estate. The petition alleges that before the plaintiff's appointment the executrix turned over to the defendants personal property belonging to the estate to the value of \$5,800, and that defendants still hold the same. But the petition does not state of what that personalty consisted, and therefore there is no issue tendered as to personal property. There could be no valid judgment against the defendants for personal property when the property is not described, and there could be no description in the judgment if there is none in the petition. It was not error, therefore, to sustain the demurrer to the petition regarding it as a demand for personal property.

The main point in dispute, however, as we judge from the briefs before us, is as to the right of the administrator pendente lite to the possession of the real estate owned by the deceased at the time of his death. All our law on the subject of the office of administrator pendente lite is contained in the following statute (Section 13, Rev. St. 1899): "If the validity of a will be contested, or the executor be a minor or absent from the state, letters of administration shall be granted during the time of such contest, minority or absence to some other person, who shall take charge of the property, and administer the same according to law, under

the discretion of the court, and account for and pay and deliver all the money and property of the estate to the executor or regular administrator, when qualified to act." The commission that that statute authorizes to be issued is "letters of administration." Those letters are to be issued by the probate court. The duties of the person to whom the letters are issued are to take charge of the property, and administer the same according to law under the direction of the probate court, and, when the contest is ended, to account to the executor or regular administrator, under the eye of the probate court, and pay and deliver to him the money and property of the estate. He is, to all intents and purposes, for the time being, the administrator of the estate; neither more nor less. It is not contemplated that he will wind up and distribute the estate, but that he will collect it, and hold it, and make disbursements, if the court so orders. But the character of his office is essentially that of an administrator of a decedent's estate. The tribunal in which he must render his accounts is the probate court, and the laws which prescribe his powers and duties are the laws of administration. He has no greater powers than a regular administrator has, and no more comprehensive title. He is to do, while his office lasts, whatever an administrator should do to protect the interests of the estate for those who are entitled to its benefits. He may sue for and collect its assets, guard the estate in the matter of demands against it, and, if it appears that there will not be sufficient personalty to pay debts, he may apply to the probate court, and obtain authority to take possession of the real estate and collect the rents therefrom. But an administrator pendente lite has no more authority to take possession of the real estate than has a regular administrator. He has nothing to do with the controversy over the will. The heir is as able to protect his inheritance from the claim of a pretended devisee, while the contest over the will is on, as he is to protect it against the unjust claim of a creditor or administrator. If, while the will contest is pending, a controversy between the heir and one claiming to be a devisee under the disputed will arises as to the care and preservation of the real estate, the circuit court is open to either of them, and is all-powerful to do what is right and best. But unless it appears to be necessary to draw the real estate into the administration for the payment of debts, the administrator pendente lite has no concern with it. There has been no suggestion of insufficiency of personalty, and there has been no order of the probate court for plaintiff to take possession of the realty.

The learned counsel for appellant cite some decisions of this court in which there are expressions to the effect that the office of an administrator pendente lite is more like that of a receiver than of a general administrator. Those expressions, however,

are to be understood in the light of the facts of the cases then under consideration. In *Lamb v. Helm*, 56 Mo. 420, the widow had been appointed administratrix with the will annexed, and afterwards a contest of the will was instituted, her office was suspended, and an administrator pendente lite was appointed. One of the questions in that case was whether the widow was entitled to be appointed administratrix pendente lite under the statute which gave preference to the widow to be appointed to administer her husband's estate. The court held that the statute related to the selection of one to be the general administrator of the estate, and did not govern the selection of an administrator pendente lite. It was in that connection that the court said that an administrator pendente lite was more in the nature of a receiver than of a general administrator, meaning thereby that his chief duty was to hold and preserve the estate while the litigation was pending; that he was more of a custodian than a final distributor. It was never intended to say that such an administrator had like powers of a receiver in chancery. As we have seen, all the law on the subject is contained in the brief section of the statute above quoted. We can find no authority in that for the clothing of the temporary administrator with the powers of a chancery receiver, or conferring on the probate court equity jurisdiction. In *Hawkins v. Cunningham*, 67 Mo. 415, to which we are referred, reference is made to allowing an administrator pendente lite commissions on rents collected by him. But there was no question in that case as to the right of such an administrator to take charge of the real estate. Of course, if he comes rightly into possession of the real estate, in the manner prescribed by law, he is entitled to commissions on the rents, as on any other money in his hands. There is no authority in that case for the contention now made by appellant. The strongest reliance of appellant is in certain language used in the opinion in the case of the *Estate of Soulard*, 141 Mo. 672, 43 S. W. 617. In that case the administrator pendente lite had (by what authority does not appear) taken possession of the realty, managed it, and collected the rents during the period of the temporary administration, and in his final settlement had accounted for and paid over the rents collected; and the question was, was he entitled to commissions on the rents. It was held that he was. In the opinion in that case language is used to the effect that such an administrator is in the nature of a receiver, and that he has the right to take possession of all the estate, real and personal. The language is to be understood, however, as referable to the facts of the case. If it is to be considered to mean that an administrator pendente lite has the right, by virtue of his office, to take possession of the real estate which was owned by the decedent at the

time of his death, without an order of the probate court, and when not needed to pay debts, it has not our approval.

There are no facts stated in this petition that entitle the plaintiff to take possession of the real estate mentioned therein, and therefore the court's judgment on the demurrer was correct.

The judgment is affirmed. All concur.

PHILLIPS et al. v. PRESSON et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DECEDENT'S ESTATE—WIDOW'S QUARANTINE — UNASSIGNED DOWER — ASSIGNABILITY — HOMESTEAD—RIGHTS OF MINOR HEIRS.

1. A widow's right to quarantine is a possessory right, which may be assigned, and on which an action of ejectment may be defended.

2. Under the express provisions of Rev. St. 1899, § 2934, a widow's right to unassigned dower is alienable.

3. Under Rev. St. 1899, § 3620, providing that, on the decease of the owner of a homestead, his widow and minor children are entitled to the possession of the premises until the youngest attains his majority, the right of infant heirs to the occupation of a homestead cannot be defeated by the alienation by the widow of her quarantine, dower, and homestead rights.

Appeal from circuit court, Mississippi county; H. C. Riley, Judge.

Action by Ora Phillips and others against D. C. Presson and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

R. B. Oliver and Russell & Deal, for appellants. W. H. Miller and W. C. Russell, for respondents.

BRACE, P. J. This is an action in ejectment to recover the possession of the E. ¼ of the N. W. ¼ of section 9, township 25, range 15, in Mississippi county. The petition is in common form; the answer, a general denial. The trial was before the court without a jury, on an agreed statement of facts. Judgment for the plaintiffs, and defendants appeal.

The plaintiffs are the minor children of J. J. Phillips, deceased, who died seised of the premises, which were his homestead. The defendants are in possession of the premises, holding the same under a deed from Mrs. Martha Phillips, the widow of said deceased, whose dower has never been assigned to her, conveying to them all her interest therein; and the only question in the case is, which party has the better right to the possession of the premises? On the death of her husband, Mrs. Phillips became invested with three cognate rights in and to the premises—the rights of quarantine, of dower, and of homestead. Rev. St. 1899, §§ 2933, 2954, 3620. Her quarantine gave her the right to

¶ 2. See *Homestead*, vol. 25, Cent. Dig. § 277.

the possession of the premises until her dower therein was assigned her. Section 2954, *supra*. At common law, and in many of the states, the right of quarantine is not assignable. 10 Am. & Eng. Encyl. of Law (2d Ed.) p. 148, and notes. And such is also the case with the right of unassigned dower. *Id.* p. 147, and notes. But by a long and uniform line of decisions in this state the doctrine is well established that a widow's right of quarantine is a possessory right, on which an action of ejectment may be maintained or defended, and that this right is assignable, and carries with it all the incidents that belonged to it prior to the transfer. *Stokes v. McAllister*, 2 Mo. 163; *Jones v. Manly*, 58 Mo. 559; *State v. Moore*, 61 Mo. 276; *Brown v. Moore*, 74 Mo. 633; *Gentry v. Gentry*, 122 Mo. 202, 26 S. W. 1090; *Fisher v. Slekum*, 125 Mo. 165, 28 S. W. 435; *Carey v. West*, 139 Mo. 146-176, 40 S. W. 661. And since 1889, by express statutory provision, the widow's right to unassigned dower is also alienable. Rev. St. 1899, § 2934; Rev. St. 1889, § 4514. So that the defendants, by their deed from Mrs. Phillips, acquired all her quarantine and dower rights in the premises, stand in her shoes, and sustain the same relations to this property that she did before the transfer was made. And if the plaintiffs had no other claim to this property than as heirs at law of their deceased father, there can be no question but that the defendant would have a better right to its possession than the plaintiffs. *Miller v. Talley*, 48 Mo. 503; *Holmes v. Kring*, 93 Mo. 452, 6 S. W. 347; *Westmeyer v. Gallenkamp*, 154 Mo. 29, 55 S. W. 231, 77 Am. St. Rep. 747; *Smith v. Stephens*, 164 Mo. 415, 64 S. W. 260, and cases *supra*. But the land in question was the homestead of their father, and when he died the plaintiffs, his minor children, also became entitled, jointly with their mother, to the possession of the premises until the youngest one of their number attained "its legal majority." Section 3620, *supra*. Of this right they could not be deprived by any act or deed of their mother. She might transfer her interest in and abandon the homestead, if she saw proper to do so; but neither she, nor any one claiming under her, could deprive the minor children of their right to its possession, or in any manner impair that right. And if ousted, as in this case, they may maintain ejectment to recover the possession thereof, and retain the same until the period during which the law has allotted it to them for a homestead has expired. *Canole v. Hurt*, 78 Mo. 649; *Roberts v. Ware*, 80 Mo. 363; *Rogers v. Mayes*, 84 Mo. 520; *Rhorer v. Brockhage*, 86 Mo. 544; *Hufschmidt v. Gross*, 112 Mo. 649, 20 S. W. 679. This has been so clearly and pointedly decided in these cases that a further discussion of the question is unnecessary.

The judgment of the circuit court is for the right party, and is affirmed. All concur.

172 Mo. 40

GOODIN et al. v. GOODIN.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DECEDENT'S ESTATE—PAROL AGREEMENT TO
CONVEY LAND—NATURE OF PROOF
REQUIRED.

1. To establish a claim by a son, as against other heirs of the deceased father, that the father made an oral contract to give the son a certain tract of land in consideration of services which the son had theretofore performed, and that improvements upon the land were made in reliance upon this agreement, the evidence must be so cogent and satisfactory as to leave no room for reasonable doubt.

2. In ejectment by the widow and children of a decedent against one of decedent's sons to recover a tract of land, evidence considered, and held insufficient to establish defendant's claim that decedent had entered into a parol agreement with defendant to give him the land in question in consideration of services performed by defendant, and that improvements erected upon the land were made in reliance on this agreement.

Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Action by W. R. Goodin and others against J. L. Goodin. From a judgment for plaintiffs, defendant appeals. Affirmed.

Gideon & Gideon, for appellant. Patterson & Patterson, for respondents.

BRACE, P. J. This is an action in ejectment to recover possession of the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 31, township 28, range 23, in Christian county, Mo. The petition is in common form. The answer of the defendant admits possession, denies the other allegations of the petition, and sets up an equitable defense, on which issue was joined by reply. A change of venue was taken from the Christian to the Greene county circuit court, where the case was tried before the court without a jury. The finding and judgment was for the plaintiffs for the undivided nine-tenths of the premises, and the defendant appeals.

In February, 1899, John Goodin, late of the county of Christian, died intestate, seised in fee of the premises. The parties to this action are his widow, who elected to take a child's share, and the heirs at law of said deceased; the defendant being his son, and the plaintiffs his widow, children, and grandchildren, entitled to the undivided nine-tenths of the premises, as found and adjudged by the circuit court, unless the defendant has made good his equitable defense and counterclaim. The substance of that defense and claim is that on the 1st day of January, 1892, the defendant entered into the possession of the premises under a verbal contract with his father, by which his father, in consideration of the work and labor which defendant theretofore had done for him after he had arrived at the age of maturity, agreed to give him the premises, and thereafter to make him a deed for the same; that, in pursuance of such agreement, he erected a dwelling house and made other valuable im-

provements thereon, and since has continued to occupy the same as his home. The evidence tended to prove: That the defendant became of age about the year 1884, and was married in 1890. That between those dates he worked for his father on his home place, doing general farm work, and assisting in the building of a house, "off and on" for about two or three years, during which time he made that place his home, and his stock, consisting of some horses and hogs, were kept on the farm; that after his marriage he went elsewhere to live; that his father owned about 350 acres of land in Christian and Greene counties. That one of his tracts, containing 80 acres, consisted of two adjoining 40's—one north of the boundary line between those counties in Greene county, and the other south of that line in Christian county. The south 40 in Christian county is the land in controversy. That some time about the 1st of January, 1892, the defendant went into the possession of this tract of land. That he went into the possession of the north 40 in Greene county as a tenant of his father from year to year, agreeing to pay as rent therefor one-third of the crop to be raised thereon, is conceded. The evidence tends to prove that the other 40, the premises in question, was timber land under fence, rough and rocky, of which about 18 acres was in cultivation, the remainder in its natural state. That after the defendant went into possession he cleared up and put in cultivation some 10 or 12 acres more, the timber off which he either used himself or sold to others. That he repaired the fencing, set out a small orchard, dug and walled a well, erected a one-story frame dwelling house of two rooms 14 by 14 feet each, with a box kitchen 12 by 14 feet attached, a stable or two, a smokehouse, and some other small necessary buildings; the value of which improvements to the premises was probably about \$600, and the cost, aside from the labor of the defendant, and the materials used from the place, was probably about \$300. Of this outlay \$149 was for lumber that went into the dwelling house, for which the defendant and his father executed their joint promissory note, which note, with the accumulated interest, amounting in the aggregate to \$197, his father afterward, on the 1st of June, 1898, paid. The evidence also tended to prove that the defendant received \$1 per load for the wood he sold off the place; that the premises were always assessed to his father, and the taxes thereon paid by him as long as he lived; that between the time when defendant became of age and was married he lived for a time on another tract of land, which he rented from his father, and for some 12 or 18 months was engaged in the livery business in a neighboring town; that at the time of his marriage his father held two notes of his, one dated March 15, 1890, for \$250, payable to his father, and one dated March 9, 1889, for \$150, payable to a

third party, which he continued to hold until his death; that the rental value of the premises was about \$100 per annum. In connection with the foregoing facts, the evidence upon which the defendant relied to support his claim is thus summarized in the brief of his counsel: Dora Steigel testified that "she worked at John Goodin's for about two years, and when she first went there the deceased said he would go after John, and have him come home and work there, and help build that house, and that he would deed John that 80 acres of land. That was about 14 or 15 years ago. That John worked all the time, and helped build the house." She is a great-niece of deceased. Samuel H. Stewart testified that "he was no kin to these parties, and that 9 or 10 years ago defendant hired him and paid him to build flues to the house he was building on the Christian county 40; and at that time deceased asked him what he thought of John's farm, and that he told him he thought it a rock and brush patch, but that good hard work would probably make a good farm out of it, and deceased said, 'Well, John is the man to make it;' and that in the last 3 or 4 years deceased in a conversation said, 'John was doing pretty well since he got on the farm.' I told him I thought John would do still better if he owned the place, to which deceased replied: 'Well, he does own it. I gave it to him. I deeded it to him.'" Henry Hays testified that he was no kin to these parties, and that deceased talked to him lots, and that in one conversation three or four years back deceased told him that he gave John that 40 acres of land over in Christian county; that John had been a good boy to work; that he was the best worker he had, and had done more for him than any child he had, and therefore he gave him the piece of land, and he owed it to him; he thought that he had earned it. Fred Balmour, whose children are cousins to defendant's wife, swore that "he had a good many conversations with deceased. Always told him that he gave that piece of land to John. The last conversation with him was two years ago this fall, on the square in Springfield. He told me that 'he gave it to him; he had earned it; that he was the best child he had to work; that he stayed with him so long to work for him.' This is the way he meant it, I think. He told me 7 or 8 years ago that he was going to give John that land; that John built a house there." John Claiborn testified that "while he was city marshal, constable, and deputy sheriff, 8 or 9 years ago, he officed with Squire Houts, and deceased came in, and told old man Houts 'he wanted him to write a deed,' and Houts asked 'where the land was,' and he said: 'In Christian county. It's a 40 down there. I want to make it to John.' Houts told him he was only a justice of the peace, and could not take his acknowledgment in Christian county. Deceased replied: 'That don't make any difference.

You write the deed. My wife won't sign it, anyway; and he wrote the deed, and the old man put it in his pocket, and went out." William Houts testified: That "he was justice of Republic township in 1894, and that deceased came into his office, and asked him to write a deed. That I ask him, 'Who to?' He told me, and gave me the numbers. I said, 'That land is in Christian county, and that I could not execute the deed—could not take the acknowledgment to it—being only a justice of the peace; it would not be good in the other county.' The numbers was the northeast quarter of the northeast quarter, section 31, township 28, range 23. He said he wanted me to write a deed for this piece of land to John L. Goodin, and I wrote it. This was along about 1892 or 1893. I would not be positive about the year. I wrote the deed, and John L. Goodin was named as grantee. John Goodin and wife were makers. It was made to the defendant, John L. Goodin. I don't know whether the consideration was love and affection or money consideration. After I had written the deed for him, he took it, and stuck it in his left-hand pocket, and said, 'Squire, say nothing about this.' That is what draws my attention to this business, and I never knew but what John had his deed till this suit came up. I am no kin to these parties." John D. Kemmel testified "that in the spring of 1897 he spoke to the old gentleman one day about buying an acre of ground over in Christian county. He said: 'That don't belong to me. It belongs to John. You will have to see John about it.' So I went to see the defendant, and he said: 'I don't want to sell it. I won't sell it at all. It will ruin the shape of my land.' I wanted to build a drug store on it." And to disprove his claim the plaintiffs introduced evidence tending to prove a positive oral agreement between the defendant and his father under which he entered into possession of the premises as a tenant of his father from year to year upon the same terms that he rented the other 40 from him. The defendant himself was permitted to testify in his own behalf, and, while he testified that his father, some seven or eight years before he took possession of the premises, promised to deed him 80 acres of land if he would come home and help him build a house, he in no way connected that promise with the land in question, and would not—at least did not—testify to any agreement between him and his father as to this 40 acres of land, although an opportunity to do so was afforded him. He admitted, however, that he rented the adjoining 40 from his father, and paid him the rent therefor, and that he cultivated the 40 in question, and used the stuff raised on it; but denied that he ever paid his father any rent for it.

In order to sustain the defendant's claim, it devolved upon him to show a contract in clear, definite, and unequivocal terms with his father to give or convey to him this par-

ticular piece of land, by evidence so cogent and satisfactory as to leave no room for reasonable doubt; and in like manner and by like evidence to satisfy the mind and conscience of the chancellor that the improvements made by him on the place were the result of such agreement, made in pursuance and on account thereof, and but for it they would not have been made, and that refusal to enforce the contract would operate as a fraud upon the defendant. "There must be no equivocation or doubt in the case." *Rogers et al. v. Wolfe*, 104 Mo. 1, 14 S. W. 805; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 32 Am. St. Rep. 769; *Brownlee v. Fenwick*, 103 Mo. 420, 15 S. W. 611; *Cherbonnier v. Cherbonnier*, 108 Mo. 252, 18 S. W. 1083; *Hubbard v. Hubbard*, 140 Mo. 300, 41 S. W. 749; *Alexander v. Alexander*, 150 Mo. 579, 52 S. W. 256; *Sitton v. Shipp*, 65 Mo. 297. The evidence, as it appears in the record before us, is full of equivocations and contradictions, and that there was some false swearing is beyond question. A careful perusal of the whole of it leaves the mind in doubt and uncertainty as to what was the real truth of the matter. If the witnesses for the plaintiffs are to be believed, no such contract as the defendant claims was ever made by his father with him; and, even discarding that evidence, and viewing the transaction from the standpoint of defendant's evidence only, in connection with the established facts, the proof falls short of the required standard as stated and laid down in the cases cited. All the evidence was given orally in court before the chancellor. He was in a much better position to determine the credibility of the witnesses, to properly weigh their evidence, and to reach a correct conclusion on the matters of fact in controversy than we are. He found the issues for the plaintiffs, and assessed the damages at one cent. The rental value of the premises from the time the defendant took possession January 1, 1892, until the date of the judgment, March 29, 1900, exceeded the value of the improvements, and under the evidence we do not see how the chancellor could have made a more equitable disposition of the case.

The judgment of the circuit court is affirmed. All concur.

RIGDON v. FERGUSON et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

ANSWER—LEAVE TO FILE AFTER TIME EXPIRES—MOTION FOR NEW TRIAL
—RULE OF COURT.

1. Defendants' request for leave to file an answer after the time limited had expired was refused, and no exception was taken, but defendants nevertheless filed the answer. *Held* not error to strike it out on motion; the error, if any, being in the refusal of leave to file the same.

2. Any error in refusing leave to file an answer after the time limited has expired cannot

be made a ground of a motion for new trial, such a motion relating only to that which occurs on the trial.

3. Rule 4 of the circuit court, which provides that "all pleadings must be filed within the time prescribed by law, unless leave of court shall be obtained to file the same out of time, which leave must be obtained before the time for pleading expires and must be made a matter of record," etc., is within the power of the court, and is reasonable.

Appeal from circuit court, Callaway county; Jno. A. Hockaday, Judge.

Action by James F. Rigdon against Edward Ferguson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

N. D. Thurmond, for appellants. D. H. Harris, for respondent.

VALLIANT, J. This is an action in ejectment. The suit was filed August 16, the writ served August 29, and the return day was December 10, 1900, on which day court convened. No answer to the petition was filed by defendants during the first three days of the term. On the fourth day, defendants, by their attorney, asked leave of court to file an answer. The court refused to grant the leave. It does not appear from appellants' abstract that any exception was taken to that action of the court. The defendants then filed their answer, and with it an affidavit setting out the reason why they had not filed it within the time prescribed by the statute. A motion was filed by the plaintiff to strike the answer from the files, and with the motion was filed an affidavit in support of it. There was at the time, and had been for several years, a rule of court in force, in these words: "Rule 4. All pleadings must be filed within the time prescribed by law, unless leave of court shall be obtained to file the same out of time, which leave must be obtained before the time for pleading expires and must be made a matter of record. Disregard of this rule will subject the pleadings to be stricken out upon the motion of the adverse party." This rule was invoked by the plaintiff at the hearing of the motion. The court sustained the motion to strike out, to which action the defendants excepted, and when the cause was reached on the docket there was a judgment rendered for the plaintiff for possession. On the same day a motion for new trial was filed by defendants, founded alone on the action of the court in refusing to grant leave to file the answer, and in striking it out, which motion the court overruled; and defendants excepted, and bring the cause here by appeal. They assign for error the refusal of the court to allow defendants to file their answer.

So far as the abstract of the record shows, there was no exception taken to the refusal

of the court to allow the answer to be filed. If the court committed any error, it was then. After the refusal by the court of leave to file the answer, the actions of the defendants and of the clerk in filing it were in disobedience to the court's ruling, and the least the court could have done was to strike it from the files. If exception was not otherwise preserved to the action of the court in refusing leave to file the answer, it was not saved in the exception taken to the action of the court in overruling the motion for a new trial. A motion for a new trial relates only to that which occurs during the trial. The ruling on the application for leave to file the answer was no part of the trial, and could not be embraced in a motion for a new trial. There were affidavits pro and con on the motion to strike out. They related to matters of fact that passed in the presence of the court, and of which the judge knew as much as the affiants. He certainly knew better than we can know from the affidavits in the record the facts in dispute, and was therefore better prepared to exercise a sound judicial discretion in the matter than is this court.

Whilst the disposition of the courts is to reach the merits of every controversy, yet they also recognize that there is an obligation on every party to a suit to take care of his own interests. The orderly conduct of the court's business requires that a party be held to exercise a reasonable degree of diligence in bringing his side of the case to the court's attention. This the party owes not only to himself, but to the court and to the public in general who also have business before the courts. It has always been the practice to require the parties to plead within a limited number of days named. Our statute so requires, and justice also so demands. There is a discretion in the court to extend the time for pleading, but it is a judicial discretion, to be used with good judgment. There is nothing in this case to indicate that the court abused its discretion in refusing to allow the defendants to file their answer out of time.

That courts of record have authority to make rules governing the practice before them, when in harmony with the law, is beyond question. *Brooks v. Boswell*, 34 Mo. 474. The rule invoked in this case was within the power of the court to make, and was a reasonable regulation. When a rule of practice that is reasonable and proper is thus made, and is known to the bar, it is the duty of the court to enforce it. If the court should disregard its own rule, it would thereby suffer the rule to become misleading to those who follow it, and work injustice.

We perceive no error in the court's rulings. The judgment is affirmed. All concur.

RICHARDSON v. MESKER et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—MACHINERY—OPERATORS AND HELPERS.

1. Plaintiff, 15 years of age, had been employed in defendant's factory, and was directed to assist in operating an iron die. On the second day the operator stopped the machine to repair it. Plaintiff, while holding a piece of iron while the operator clinched the nails at one end, rested his hand on a cogwheel, by which power was communicated to the machine. While in this position, the operator started the machine, and plaintiff's hand was crushed. *Held*, that plaintiff was guilty of contributory negligence.

2. Plaintiff and the operator of the machine, by whom it was started, were fellow servants, and plaintiff could not recover for such operator's negligence in starting the machine without giving plaintiff notice of his intention to do so.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Application by William C. Richardson, curator of Walter Heckel, a minor, against Benjamin T. Mesker and another. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

L. M. Conkling, for appellant. Percy Werner, for respondents.

BRACE, P. J. This is an action for personal injuries to the said Walter Heckel while in the employ of the defendants Benjamin T. Mesker and Frank Mesker, in which, at the close of the plaintiff's evidence, the court sustained a demurrer thereto, and the plaintiff took a nonsuit, with leave, and, the court refusing to set the same aside, the plaintiff appeals.

The only evidence in the case, except as to the minor's expectancy of life, was that of the said Walter Heckel, who testified, in substance: That on the 6th of July, 1898, he was 15 years and 2 months old; was in the employ of the Meskers at their factory, and had been for 4 or 5 months. That prior to the 5th of July he was engaged in running a pair of shears, by which patterns for skylights were cut out of galvanized iron, and which was operated by a treadle. That about 7 o'clock on the morning of that day, Mr. Niehaus, who was the foreman of the said defendant, having the control and direction of their employes, directed him to go down and help Louis Reynolds on the die. By this machine sheet or galvanized iron was molded into shape for cornice. It consisted of a steel die, working perpendicularly in the grooves of an iron frame about 8 feet long and 1½ feet wide. The power was communicated to the machine by two cogwheels, one above the other, at the west end of the machine; the upper a large, and the lower a small, one, on the end of the shaft. The machine was operated by a treadle at the east end; a step on the treadle causing the

die to come down and go up once, and it then stopped, until started again by the use of the treadle. That in obedience to the directions of Niehaus he helped Reynolds all that day. Their work consisted in feeding the machine with strips of sheet or galvanized iron; Reynolds, at the east end of the machine, holding one end of the strips against the gauge, and operating the treadle, and Heckel, at the west end, holding the other end of the strip against the gauge. That on coming to his work on the morning of the 6th of July he was again told by Niehaus to help Reynolds at the machine that day. That he did so, and they continued their work as on the day before, until about 4 o'clock in the evening, when the machine became out of repair, and Reynolds said to him, "I have got to fix it." That Reynolds then got a piece of sheet or galvanized iron about eight feet long and four or five inches wide, with two holes punched in it, and such holes about five inches from either end of the strip, in which two nails were placed, by which the strip was to be attached to the rear of the frame, so as to hold the die within the grooves. That, after Reynolds put the strip in position, he directed the witness to hold the west end up and in position until he clinched the nail in the east end, and then he would clinch the one in the west end. That Reynolds passed to the front of the east end of the machine, clinched the nail in that end; and while he was doing so witness was holding the west end of the strip in position with his left hand, and, in order to brace himself for that purpose, placed his right hand on the small cogwheel in front of him, and while in this position, and after Reynolds had clinched the nail in the east end of the strip, the machine started, witness' fingers slipped between the cogs of the wheels, and were crushed. To recover damages for his injury this suit is brought, the cause of action charged in the petition being: "That while said Walter Heckel was thus engaged in so helping, and while holding the material with which said Reynolds was fixing or repairing said machine or die, said defendants Mesker, by and through said defendant Reynolds, carelessly, negligently, and wrongfully started and set said machine or die in motion and operation without first giving notice or warning to said Walter Heckel of the intention to start said die or machine in motion. That said Walter Heckel, while thus engaged in helping in the fixing or repair of said machine, had no notice of any kind whatever, or had any prior knowledge or indication, of the starting and setting in motion of said machine. Plaintiff further states that by reason of the carelessness, negligence, and wrongful act of said defendants Mesker and said defendant Reynolds in starting said machine and setting the same in motion without first giving warning or notice to said Walter Heckel of the starting thereof, or of the intention to start the same at that time, the right hand of

said Walter Heckel, who was at the time engaged in his work of so helping therein as aforesaid, was caught in said machine, and the entire four fingers thereof were crushed and cut off next to the knuckle joint of his right hand." Niehaus and Reynolds were both made parties defendant in the petition, but no judgment was asked against either of them. No cause of action was started against Niehaus, and the cause was dismissed as to Reynolds before nonsuit; so that the action was practically against the Meskers only. Their answer admitted the injury to Heckel on one of their machines, denied all the other allegations of the petition, and set up a plea of contributory negligence. It further appeared from the evidence of the witness, illustrated by a photograph of the machine, to the correctness of which he testified, that he was perfectly familiar with the operation of the machine, which was simple and uncomplicated; that the lower cogwheels of the machine on which he placed his hand were about on a level with his eyes; that the cogwheels were in plain and unobstructed view, almost in front of his eyes, during the whole time he was at work on the machine; that he placed his hand on the smaller cogwheel so close to its intersection with the cogs of the larger wheel that his fingers were caught as soon as the wheels began to revolve; that he did so while Reynolds was engaged on the other side of the machine in clinching the nail at that end, and that, owing to the intervention of the body of the machine between them, neither could see the respective positions of the hands and body of the other; that Reynolds was at the end of the machine, where it was operated by the treadle, and, as no one else was there, it may be inferred that he started the machine; that he did so without giving any warning to Walter that he intended to do so; while evidence also tended to prove that when the machine started Reynolds did not know, nor had he any reason to believe, that the boy's hand was on or near the cogwheels, as there was no real necessity for his hand being in that position, or in any position of danger, in order to hold up the end of the strip in position while the nails were being clinched. The danger to the plaintiff from the movement of these cogwheels was manifest, and could be and was just as well appreciated by him as it could have been by the most skilled mechanic. He either thoughtlessly placed his hand between these wheels, or did so on the assumption that the machine would not be put in motion until after Reynolds had clinched the nail at his (plaintiff's) end of the machine, of which fact, however, he had no assurance. Conceding, then, that Reynolds started the machine, yet if, under the circumstances, it can be said that Reynolds, without any notice of the dangerous position in which the plaintiff's hand was, was guilty of negligence in starting the machine without giving plaintiff any notice of his inten-

tion to do so, so, also, it must be said that the plaintiff was guilty of negligence in placing his hand in that dangerous position without any notice of that fact to Reynolds; and, his injury being the immediate and direct result of these two concurring acts of negligence, no recovery in his behalf can be had therefor against his employers, the Meskers. But eliminating his own negligence from the case, and attributing the injury solely to the negligence of Reynolds, still the same result must follow, as the relation between Reynolds and him was simply that of fellow servants of the same master, under the control and supervision of Niehaus, the same foreman or superintendent of that master, and engaged in the same work, on one and the same machine of that master. The only difference in grade between them being such as arose from their own personalities and the nature of the particular part of the work which each performed. Reynolds was an adult, and operated the machine—work for which he was competent and suitable. The plaintiff was a boy, and assisted or helped him—work for which he was competent and suitable. And, whatever difference of opinion may exist on this vexed question, there can be no doubt that under any rule that has hitherto received the sanction of this court these two must be held to be fellow servants. *Hawk v. McLeod Lumber Co.*, 166 Mo. 121, 65 S. W. 1022; *Grattis v. K. C., P. & G. Ry. Co.*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Schaub v. Han. & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924, and cases cited. And, being fellow servants, their employer cannot be held to answer for an injury to one of them, caused by the negligence of the other. So, in any view of the case, the circuit court committed no error in sustaining the demurrer to the evidence and in refusing to set aside the nonsuit, and its judgment is affirmed. All concur.

GRAHAM et al. v. STAFFORD et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1908.)

DESCENT AND DISTRIBUTION—WIDOW'S QUARANTINE—ASSIGNMENT—RIGHTS OF PURCHASER—TERMINATION—ASSIGNMENT OF DOWER—LIMITATIONS—LACHES.

1. Where a widow resided on land, owned by her husband, after his death, a conveyance of the land by her operated as a valid grant of the widow's quarantine, which entitled the purchaser to possession until dower was assigned, or during the widow's life at the pleasure of the remaindermen.

2. Where a widow conveyed her right to quarantine in the house and plantation of her deceased husband, and dower was not assigned to the widow, limitations did not begin to run against an action by a remainderman to recover the property from the grantee until the widow's death.

3. Where, after her husband's death, his widow conveyed her quarantine in the house and plantation on which they had lived, the fact

that remaindermen did not terminate the purchaser's rights by having dower assigned, and did not assert ownership of the land for 50 years after the husband's death, during which the widow still lived, did not constitute such laches as precluded them from recovering the land after the widow's death.

Appeal from circuit court, Daviess county; Gallatin Craig, Judge.

Ejectment by James L. Graham and others against Newton Stafford and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Suit in ejectment for 11 $\frac{1}{2}$ acres of land, described by metes and bounds, in the north part of the N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, Sec. 24, town 67, range 29, in Daviess county, against defendant in possession. The petition is in the usual form, alleging ouster as of August 29, 1898. The answer is a general denial. There was judgment for plaintiffs, and the case is brought here on defendant's appeal. The plaintiffs, a son and the grandchildren of William M. Graham, deceased, claim the whole of said southeast quarter aforesaid, and began their suits in ejectment against other persons found in possession of the remainder of said quarter section at the same time this action was begun, and those suits are to await and abide the result of the judgment herein. The evidence at the trial disclosed this state of facts: That William M. Graham, deceased, the father of one of these plaintiffs, and the grandfather of the others, entered said S. E. $\frac{1}{4}$, Sec. 24, town 61, range 29, in the year 1843, and took immediate possession thereof, enclosed a few acres, built a small house thereon, and occupied the house and premises as a home for himself and family until the time of his death, which occurred in September, 1845; that the widow, with the children, continued to live upon the land, and in the latter part of the year 1847 she was married to one John M. Miller, and he with his wife and her children by her first husband further continued to live upon the land in controversy, as their only home, until February, 1848, when Mrs. Miller sold her interest therein to her brother-in-law James J. Graham, who, by himself and those claiming under him, have even since been in the exclusive possession and enjoyment of the land up to the trial of this action. When James J. Graham bought Mrs. Miller's interest in the land in 1848, she and her then husband, John M. Miller, joined in a deed, with covenants of general warranty, intending to convey the wife's interest in the land in controversy to said grantee, but by an oversight the particular quarter of the section named was omitted from the description. This defect not being discovered until years afterwards, in October, 1867, Mrs. Miller and her husband made another deed to said James J. Graham, to correct said defect, in which deed the land was properly described. After selling her interest in the land in controversy in 1848,

Mrs. Miller, with her then husband, moved to Virginia, and there the family continued to live until the death of Mrs. Miller in 1898. It was also shown that no assignment of dower in the land to the widow was ever made. These are the substantial facts of the case. There was, however, some testimony by way of the declarations of one Meadows appearing in an application for a continuance by defendant, to the effect that the widow, Rebecca Graham, with her children, moved from the household in which the husband, William M. Graham, had died, shortly after that occurrence, to the home of her brother-in-law, the grantee in the deed of February 4, 1848, and lived with him until her marriage to John M. Miller and their subsequent departure for Virginia. This fact, however, if it could be said to have any significance, was found by the trial court against defendant—very properly, we think—and so we have stated the fact to be that the widow remained upon the homestead until she sold her interest therein to James J. Graham, through whom defendant's only claim of title to the land is made.

Hicklin, Leopard & Hicklin and H. K. Allen, for appellants. W. D. Hamilton and Boyd Dudley, for respondents.

ROBINSON, J. (after stating the facts). As we understand appellants' position on this appeal, it is, to use the language of their brief, "that Rebecca Graham, widow of Wm. M. Graham, respondents' ancestor, by joining in the deed of date Feb. 4, 1848, and returning to Virginia, abandoned and destroyed her right of quarantine, and that plaintiffs are barred from recovery herein by lapse of time," and, second, "that quarantine is a mere personal privilege to be exercised in favor of the widow, but is not the subject of grant." If appellants are correct in either of their contentions, it is manifest that the judgment in favor of these plaintiffs is clearly wrong, as this action was not begun for more than 50 years after defendant's grantor went into possession of this land, and from that time to the present he and his grantees have held the uninterrupted possession and enjoyment thereof. However much we might be disposed to recognize the logic of appellants' analysis of our quarantine act, and the force of their argument made in support thereof, to the effect that quarantine is a mere personal privilege to be enjoyed by the widow pending the assignment of her dower in the lands of her deceased husband, and not a right therein which she may assign, to be enjoyed by another, if the question was before us now for its first determination, the matter has been so long settled to the contrary in this state, and the decisions have been so repeated and unvarying, and so many property rights have been acquired on the strength thereof, that nothing but confusion and evil would result

from its adoption at this time. This court, in an opinion as far back as the second Missouri, under a statute practically the same as the law of 1845, in force at the time the widow's right of quarantine attached in this case, held that quarantine (or "the right to tarry in the mansion house of her husband and the plantation thereto belonging") was alienable, and in numerous cases since, as the question has come up in one way and another, this court has repeatedly declared and announced the same rule, except in the one case referred to by appellants that will presently be noticed. *Stokes v. McAllister*, 2 Mo. 163; *Jones v. Manly*, 58 Mo. 559; *Brown v. Moore*, 74 Mo. 633; *Gentry v. Gentry*, 122 Mo. 216, 26 S. W. 1090; *Carey v. West*, 139 Mo. 177, 40 S. W. 661; *Fischer v. Slekmann*, 125 Mo. 165, 28 S. W. 435; *Osborn v. Weldon*, 146 Mo. 192, 47 S. W. 936; *Kane v. McCown*, 55 Mo. 181; *Westmeyer v. Gallenkamp*, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747. While we do not undertake to say that this court has gone to the extent of holding that quarantine is classed and defined as a definite estate in lands, in the technical sense of that term, beginning with the case of *Jones v. Manly*, 58 Mo. 564, and followed in an unbroken line of authorities to *Carey v. West*, 139 Mo. 146, 40 S. W. 661, it has been uniformly held that the right of quarantine is not only alienable (or "assignable," as the term is generally employed), but that, when assigned, there go with it all the incidents of the right belonging to the widow prior to the transfer, which is the right to the use and possession of the land until the widow's dower has been assigned, or during her life, at the pleasure of the remainderman. Whatever inconsistency there may be said to have existed in the rules of construction placed by the court upon the statute defining dower and quarantine, and the right of the widow under each, that there did exist a rule of construction restricting the disposition of the former right (except to release it), while at the same time it permitted the alienation of the latter, is most clear and certain. But as we are concerned now only with the ascertainment of what was the rule as to the right of the widow to dispose of her quarantine, and not its reconciliation with other rules affecting the right of disposition or want of disposition of her dower, we need only say at this time that the inequality in rights, if inequality it should be characterized, has been corrected by the legislative act of 1889, now section 2934, Rev. St. 1899, giving to the widow the right "to transfer and assign her unassigned dower interest in the real estate of which her deceased husband died seised in law or equity," as she has ever held, by rule of court, the right to dispose of her quarantine.

In answer to the contention of appellants, that the case of *Quick v. Rufe*, 164 Mo. 408, 64 S. W. 102, declares the rule to be, "that quarantine is a right personal to the widow,

and is inalienable," we have only this to say, that, while the above language in quotation is found in the opinion, the question of quarantine, or the widow's rights thereunder, was not for consideration in that case, as the further following language of the opinion clearly shows: "Properly considered, however, there is nothing in this record to support the contention that there were any quarantine rights complicating the case." The declaration that quarantine "is a right personal to the widow, and is inalienable," in that case, is rather in the nature of a dictum, than an authoritative announcement of a definite rule asserted by the writer thereof. As said, however, a rule to the contrary in this state has been too long announced and acted upon to be set aside at this late day without driven thereto by the most obvious reason of necessity, which does not appear to us at this time. •

As the land in suit was a part of the plantation belonging to the mansion house of William M. Graham, deceased, and was included in the deed of February 4, 1848, and the one made in correction thereof in 1867 by Rebecca A. Miller and her then husband to James J. Graham, and as those deeds operated to convey all and whatever right the widow had in or to the land (in this case her quarantine) to said James J. Graham, and as said land has been in the possession of said James J. Graham, and those claiming through him, at all times since 1848 up to the death of Rebecca Miller in 1898, and as during all that time there had been no assignment of dower to the widow (Rebecca Miller), nothing has occurred to put in operation the statute of limitations invoked in favor of the defendant, and against the plaintiffs, until the occurrence of the death of the widow, Rebecca Miller, in 1898, and that is short of the statutory period that will bar a recovery. The fact that for more than 50 years after the death of plaintiffs' ancestor they have done nothing to indicate an assertion upon their part of ownership in, or right to, the land in controversy, is no evidence upon which to base the charge of laches, or to predicate an assumption that they had abandoned all claim of right to the land. Though plaintiffs might at any period during that entire time have terminated the right of James J. Graham, or those claiming through him, to the exclusive possession of the land in controversy, as assignee of the widow's quarantine, by having her dower assigned, they were not compelled to so act, and their inaction, resulting, as it has, to the exclusive benefit of said James J. Graham and those claiming through him, cannot be construed as an act of abandonment by plaintiffs of their claim of right to the land, or that defendant's holding of the same was in any sense hostile to plaintiffs' claim of right, and that, too, without regard to whether plaintiffs' inaction in the matter was the result of a generous consideration for the right of

their mother's grantee, who, they might have thought, paid substantially all the land was worth, or whether it was the result of carelessness, or of absolute ignorance on their part that they had or were entitled to any interest in the property, contingent or otherwise. The law will presume that defendant knew the limit of his right under the deed through which he claimed, and since plaintiffs have done nothing, by word or action (or, for that matter, by their inaction), that has induced defendant or those from whom he got the land to change his or their attitude thereto on the strength of plaintiffs' conduct, or that would operate to bar plaintiffs' assertion of their claim of right to the land at this time, the defendant must stand where the title of record of the land places him, in the position of a life tenant in possession after the death of the person upon whom his life's estate or life right of possession to the land was depending.

The judgment of the trial court was for the right party, and is affirmed. All concur.

BANK OF TIPTON v. ADAIR et ux.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

FRAUDULENT CONVEYANCES—CONVEYANCE TO WIFE—FRAUD AS TO HUSBAND'S CREDITORS—CONSIDERATION.

1. A wife's scheme, whereby she acquires certain lands, and resells a portion at an advance, so as to leave her a remaining tract paid for (she being aided in the transaction by the desire of her grantors to provide a home for her), is not a fraud on the creditors of the husband, though he represents the wife in the transaction, and, together with her, signs the purchase-money notes and trust deed, and also alone signs one of the contracts of purchase, on account of doubts as to the legal effect of the wife's coverture.

Appeal from circuit court, Morgan county; Jas. E. Hazell, Judge.

Suit by the Bank of Tipton against P. D. Adair and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

W. M. Williams and J. W. Jamison, for appellant. Jno. D. Bohling and A. L. Ross, for respondents.

BRACE, P. J. By general warranty deed dated October 15, 1897, and on the same day duly acknowledged and recorded in the recorder's office of Morgan county, Sarah H. Payne, Jacob A. Payne, B. W. Payne, Sarah M. Cresap, S. P. Cresap, and M. M. Payne, by their attorney in fact, George E. Draper, conveyed a tract of land containing 322.78 acres, situated in said county, to the defendant Mary J. Adair. On the 17th of December, 1898, the plaintiff obtained judgment against her husband, the defendant P. D. Adair, for the sum of \$2,743.90, execution on which was duly issued and levied on all the right, title, and interest of said P. D. Adair in and to 240 acres of said land so conveyed

to the said Mary J. Adair, and at the sale duly made under said execution the plaintiff became the purchaser thereof, and received a sheriff's deed therefor, dated April 21, 1899, and thereafter, on the 7th of November, 1899, instituted this suit, alleging in the petition that the said P. D. Adair was on the 15th of October, 1897, insolvent and largely indebted to the plaintiff; that on that day he became the purchaser, for a good and sufficient consideration, of the following described portions of said land so conveyed to the said Mary J. Adair, and included in said sheriff's deed, to wit, "the southeast quarter of the southwest quarter of section thirty-one in township forty-four of range seventeen, and the southeast quarter of the northwest quarter and the south thirty acres of the southwest quarter of the northwest quarter of section five, and the east half of the northeast quarter of section six in township forty-three, range seventeen"; that with the intent and for the purpose of defrauding the plaintiff, and preventing it from collecting the amount due and owing it by the said P. D. Adair, he caused the deed aforesaid to said real estate, of date October 15, 1897, to be made to his wife and codefendant, the said Mary J. Adair, without any consideration moving from the said Mary J. Adair therefor, she well knowing his fraudulent design and purpose, and consenting that the deed be so made for the purpose of aiding and assisting him in said fraudulent scheme; that defendants are in possession of the premises—and praying that the said Mary J. Adair be divested of the title to said described real estate, that the same be vested in plaintiff, that plaintiff have possession of the lands, and for general relief. The answer of defendant P. D. Adair is a general denial. The answer of Mary J. Adair denies all the allegations of fraud in the petition. Denies that her codefendant, P. D. Adair, either purchased or paid for the land, and avers that on or about the 3d of March, 1897, she purchased from George E. Draper, attorney in fact for Sarah H. Payne and others, the land described in the petition, and received the deed therefor on or about the 15th of October, 1897; that she bought and paid for said lands, and executed her obligations therefor, and that the same was done in good faith and for her own use; says that the said sheriff's deed is a cloud upon her title, and prays that the same may be declared null and void, and for general relief. The court found the issues for the defendants, granted the affirmative relief prayed for in the answer of defendant Mary J. Adair, and rendered judgment against the plaintiff for costs, and the plaintiff appeals.

The grantors in the aforesaid deed to Mary J. Adair of October 15, 1897, were the widow, heirs at law, and devisees of Moses U. Payne, late of the state of Iowa, deceased, of whose estate the said George E. Draper was administrator with the will annexed.

as well as attorney in fact for said widow, heirs, and devisees, all of whom were residents of the state of Iowa. The consideration expressed therein is \$2,123, and other valuable considerations; and on the same day the said Mary J. Adair and her husband, the said P. D. Adair, executed and delivered to the said George E. Draper their five promissory notes, of even date therewith, for said sum of \$2,123, payable to him—one for \$323 on March 1, 1898, one for \$450 on March 1, 1899, one for \$450 on March 1, 1900, one for \$450 on March 1, 1901, and one for \$450 on March 1, 1902—and also the following written obligation: "Versailles, Missouri, October 15, 1897. For good and valuable consideration it is agreed by and between Mary J. Adair and P. D. Adair, of Morgan county, Missouri, of first part, and George E. Draper, of Fremont county, Iowa, of second part, that in event that S. F. Bowman, Bruce or A. J. Vogt, or either of them, should fail to pay balance due said George E. Draper on lands purchased and secured by deed of trust on the lands purchased of Payne heirs and said trust deeds, or either of them, should be foreclosed and the property sold should fail to pay the amount then due and unpaid of principal, interest and costs, then and in that event we are to pay said George E. Draper such deficiency as so remains unpaid. Mary J. Adair. P. D. Adair." And to secure the payment of said notes, and the performance of said written obligation, the said Mary J. Adair and her said husband executed and delivered to said Draper a mortgage or deed of trust on said lands so conveyed to her, of even date therewith, which on the same day was duly acknowledged and recorded.

The evidence tends to prove that the said Moses U. Payne for many years prior to his death was the owner of a tract of land, containing about 1,075 acres, in Morgan county; that the said P. D. Adair for a long time had been a tenant of his, living on a portion of said land, and exercising, to some extent, supervision over the remainder for him; that at one time the said Payne was the owner of another, smaller tract, of 60 or 100 acres, which he had conveyed to the said P. D. Adair in trust for the benefit of Mr. and Mrs. Tipton, the parents of his wife, the said Mary J. Adair, for whom and her family he and his family seem to have entertained a kindly and benevolent feeling; that the said Moses U. Payne died some time in the year 1895; that afterwards Mrs. Adair, in view of the friendly feeling entertained for her and her family by the Paynes, conceived the idea that they might be willing to sell her their lands in Morgan county at such a price as would enable her, by selling the greater portion thereof at an increased price to other parties, to retain some part thereof for a home. This idea she communicated to her family at a reunion of its members at her home in the summer of 1896, and requested their co-operation, to which they all readily

assented. Thereupon negotiations were commenced with Mrs. Draper and parties to whom it was thought some of the land could be sold. These negotiations were conducted by her husband and her two sons, Walter and Henry, both of whom were of age (the elder, Walter, being engaged in business in St. Louis), in the course of which it was ascertained that the Paynes were favorably disposed to the scheme, and that S. F. Bowman was willing to purchase 120 acres of the land at \$2,200, and M. B. Bruce 400 acres at \$4,900; and the negotiations culminated in the meeting of these parties with Mr. Draper at Versailles, in Morgan county, on the 4th of March, 1897, where and when it was finally agreed that Mrs. Adair should have the whole tract for \$13,000, and should be credited with the amount of such sales thereof as should be made to other parties and approved by Mr. Draper; the deeds to such parties to be made directly to them. In making the agreement, Walter Adair acted as spokesman for his mother, who was not present, and it was distinctly stated by him, and understood by all the parties, that the contract or deal was with her, and for her benefit. He directed Mr. Draper to draw the papers accordingly—he being compelled to leave in order to make his train for St. Louis—and Mr. Draper agreed to do so. Thereupon Mr. Draper executed general warranty deeds to Bowman and Bruce severally for the tract which each had agreed to purchase as aforesaid. They each made the cash payment thereon required, and executed their several promissory notes for the remainder of the money, secured by several deeds of trust on the land purchased by each; thus disposing of 520 acres of the land, and \$7,100 of the purchase money therefor. Mr. Draper then drew and signed a written agreement for the remainder as follows:

"This agreement made this the 4th day of March, 1897, by and between Geo. E. Draper, attorney in fact for heirs and residuary legatees of M. U. Payne, of first part, and P. D. Adair of second part is to witness, that for good and sufficient consideration first party has given second party the option of purchase of the following real estate in Morgan county, Mo., to wit: S. W. $\frac{1}{4}$ Sec. 5, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Sec. 5, N. W. N. W. $\frac{1}{4}$ Sec. 5, N. E. $\frac{1}{4}$ Sec. 6 & E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ Sec. 6, all in Twp. 43, R. 17, and S. E. S. W. $\frac{1}{4}$ Sec. 31 Twp. 44, R. 17, until the 1st day of March, 1899, upon the following terms, to wit: Second party is to pay 1st party, in event of purchase, as purchase price of said real estate, the sum of \$5,900.00. One-fourth of said purchase price to be paid at time of purchase or on or before March 1st, 1899, and balance in three equal annual payments payable respectively March 1st, 1900, 1901 & 1902 with annual interest on deferred payments at rate of six per cent. per annum payable annually from and after March 1st, 1899. In the event said second party shall

on or before March 1st, 1899, elect to purchase said real estate and pay said Geo. E. Draper the said twenty-five per cent. of said purchase price and shall execute and deliver his three promissory notes in amt. each one-fourth of said purchase price payable at Sidney, Ia., and bearing interest each at rate of six per cent. per annum from March 1st, 1889, payable annually and shall execute and deliver his trust deed to said Geo. E. Draper on said real estate to secure the payment of said notes, same to be duly and legally executed in usual form thereof, then and in that event said first party shall execute and deliver a deed of said premises in form of warranty deed signed by said first party as attorney in fact for said heirs, to wit: M. M. Payne, J. A. Payne & wife, S. M. Brunk and husband and Sarah H. Payne.

"It is further agreed that time is of the very essence of this contract and that the right of the 2nd party to purchase said property as aforesaid shall terminate on March 1st, 1899, and in that event 1st party is entitled to possession and all rights in said premises same as though this contract had not been made. This contract and no other part thereof can be assigned by 2nd only upon consent 1st party except that he may assign to his wife in which event his individual responsibility shall continue same as before assignment.

"It is further agreed as part of this contract that 1st party is to and does hereby lease to 2nd party the aforesaid premises for the period of two years commencing March 1st, 1897, and as rental of said premises 2nd party agrees to pay the tax of 1897 & 1898 on said premises and in addition to pay 1st party the sum of \$354.00 on the 1st day of March, 1898, and the sum of \$354.00 on the first day of March, 1899, and if 2nd party elects to purchase said premises he is to pay tax of 1899 and in event any of said rental aforesaid has not been paid same shall be added to said purchase price.

"Dated March 4th, 1897.

"Geo. E. Draper,

"Attorney in Fact for Widow and Heirs
at Law of M. U. Payne.

"P. D. Adair."

This paper seems to have been drawn after the parties had left except Mr. Draper and P. D. Adair. Mr. Draper was a citizen of Iowa, and testified in behalf of the plaintiff. After testifying that the agreement between the parties was as hereinbefore stated, he was asked why the writing was drawn to P. D. Adair, instead of to Mary J. Adair, and his answer was: "My reason for making it that way was that I was not entirely advised as to how far a married woman might go in contracts. For that reason, I wrote the contract in the name of P. D. Adair." Mr. Adair also testified, in substance: That, after the paper was drawn, Mr. Draper gave it to him, and requested him to sign it. That he looked over it, and told Mr. Draper that it

was not drawn according to the agreement, and he replied that, not being acquainted with the laws of Missouri in regard to married ladies, he had drawn it that way; that it was all right; that he understood the deal was made in the interest of Mrs. Adair, and that the deed would be made to her. Afterwards 234 acres of the land was sold to A. J. Vogt for \$4,000, and on the 15th day of October, 1897, Mr. Draper executed to him a general warranty deed therefor; he making the cash payment required to Mr. Draper, and giving him his notes for the deferred payments, secured by a deed of trust on the lands purchased. And on the same day Draper executed the deed of that date in question to Mrs. Adair for the remainder of the lands; the recited consideration therein of \$2,128 being the balance of the \$13,000 purchase price of the whole tract, with accrued interest, after deducting the amount of the sale to Bowman, Bruce, and Vogt. Afterwards Mrs. Adair sold 80 acres of the land deeded to her to Thomas L. Sparks for \$1,746.60, and 50 acres to her daughter Mrs. Brewer for \$500. So that when the obligations of all the other purchasers have been discharged, and the proceeds of these sales applied to the indebtedness secured by her deed of trust to Draper, that obligation will be discharged, and she will have left 190 acres of the land as her profit on the whole transaction; and this is the land the plaintiff is seeking to recover in this action.

It further appears from the evidence that the indebtedness on which plaintiff's judgment was rendered consisted of three promissory notes signed by W. J. Adair and P. D. Adair (the former a cousin of the latter)—one dated September 14, 1896, for \$1,500, one dated October 15, 1896, for \$600, and one dated November 2, 1896, for \$331.20; that this was an indebtedness of W. J. Adair, and that P. D. Adair was his surety (the plaintiff's cashier so testifies), and that at that time P. D. Adair had no property, real or personal; and that previous to the Draper deal he never had any property (and the evidence tends to prove that, of this indebtedness, Mrs. Adair had no knowledge before or at the time she acquired title to the lands in question); that in the fall of 1896 the plaintiff also held another note, for \$600, signed by P. D. Adair and W. J. Adair, the date of which is not disclosed, which was for an indebtedness of P. D. Adair, and W. J. Adair was his surety; that some time during that fall the said W. J. Adair became insolvent, broke up, and left the country; that after Mrs. Adair had acquired title to said real estate, to wit, on the 28th of October, 1897, she and her husband executed their promissory note and a deed of trust on these lands to secure the payment of \$1,600 to plaintiff; the same being for the amount of said \$600 note, and \$1,000 that day borrowed by them from the bank, which incumbrance still remains upon the land. It

further appears from the evidence that the Bank of Versailles held two notes of P. D. Adair—one dated August 10, 1896, for \$600, signed by him and W. J. Adair, and one dated November 30, 1896, for \$210, signed by P. D. Adair alone; that on the 24th of May, 1897, P. D. Adair, at the request of that bank, executed a mortgage to secure the payment of those notes on all the interest by him held or thereafter to be by him acquired in the tract of land theretofore conveyed to him by Moses U. Payne in trust for the Tiptons as aforesaid, and also all the interest which he then had or might thereafter acquire in the lands described in the written contract of March 4, 1897. The evidence tends to prove that Mrs. Adair had no knowledge of this indebtedness or of the execution of this mortgage by her husband until after she acquired title to her lands, but on the 28th day of February, 1898, being requested so to do, she on that day signed and acknowledged that mortgage. She testified that the paper was not read to her, however, and that she did not know that it contained her lands bought from Mr. Draper, but thought it contained the Tipton tract. The evidence also tended to prove that the preliminary negotiations with Mr. Draper were conducted by P. D. Adair, who was personally acquainted, and for that reason was chosen to conduct the correspondence, with him. That Mr. Draper and the Payne heirs understood, however, that he was acting for his wife, appears from his own evidence and that of Jacob A. Payne, one of the heirs, who testified to the intimate relations formerly existing between his family and the family of Mrs. Adair, and his affection for her mother, who had nursed him when he was a child; that he wanted to aid her in getting a home; and that he asked Mr. Draper to make the price and condition as favorable to Mrs. Adair as possible. P. D. Adair also negotiated the sale to Vogt. The sales to Bowman and Bruce were negotiated by the younger son, Henry. The sale to Brewer by her daughter Mrs. Brewer, and the deal with Draper, were finally consummated by the elder son, Walter, as hereinbefore stated. The preponderance of the evidence is that these negotiations were conducted and these several transactions consummated by these parties as the agents of Mrs. Adair, and for her benefit; that at the time they were being conducted, and when Mrs. Adair received her deed, her husband, P. D. Adair, was insolvent, and had neither money nor estate; and that he was indebted as hereinbefore stated is established beyond question; that he was so insolvent and destitute when all of this indebtedness was incurred. That not one cent of his money or of his estate ever went into this property, and not one dollar of this indebtedness was ever incurred upon the faith of his ownership of this property, or of any interest therein, is equally as well established. The title to this property is the product of an idea

72 S.W.—33

growing out of, and based upon, a sentiment. The idea was Mrs. Adair's. The sentiment was an affection for her upon the part of her grantors. She was the "other valuable consideration" of the grant. She was enabled to realize her idea, in the shape of this property, by the assistance of her husband and her adult children. Can the fact that her husband rendered the service in this behalf, hereinbefore stated, for her without compensation, have the effect of rendering her deed fraudulent as to his creditors? The chancellor held that it could not, and he was clearly right in so holding. There is no room for presumption as to where or from whom the consideration came in this case. The facts in regard to that are fully disclosed by the evidence. Mrs. Adair produced the title to this property. She was the causa causans of its existence. Her husband was one of the agencies employed for that purpose. She had the right to so employ him, and to obtain the services which he rendered in the matter, either with or without compensation, and he had the right to so render them. "Equity has no jurisdiction to compel men to work for their creditors, who may perversely prefer to work for their wives and children and leave honest debts unpaid." Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632; Seay v. Hesse, 123 Mo. 451, 24 S. W. 1017, 27 S. W. 633; Gruner v. Scholz, 154 Mo. 415, 55 S. W. 441, and cases cited.

The judgment of the circuit court ought to be affirmed, and it is so ordered. All concur.

STATE v. TERRY.

(Supreme Court of Missouri, Division No. 2.
Feb. 8, 1903.)

CRIMINAL LAW—APPEAL—MOTION FOR NEW TRIAL—EVIDENCE—HEARSAY—CONCLUSION OF WITNESS—INSTRUCTIONS.

1. Under Rev. St. 1899, § 2689, providing that motions for a new trial shall state the grounds therefor in writing, etc., a judgment of conviction will not be reversed for errors in the exclusion of evidence where no complaint in this regard was made on motion for a new trial.
2. In a prosecution for murder, evidence that deceased stated to defendant after he was shot that defendant was not to blame for the difficulty was inadmissible, as hearsay.
3. The statements were further inadmissible as being merely conclusions.
4. Failure of the court in a criminal prosecution to instruct that defendant was a competent witness in his own behalf was harmless, where defendant actually testified without objection, and the instructions made no discrimination between him and other witnesses.

Appeal from circuit court, Pemiscot county; Henry C. Riley, Judge.

W. H. Terry was convicted of murder, and appeals. Affirmed.

At the February term, 1902, of the circuit court of Pemiscot county, defendant was convicted of murder in the second degree,

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 947.

and his punishment fixed at 10 years' imprisonment in the penitentiary, under an information theretofore filed in the office of the clerk of the circuit court of said county by the prosecuting attorney thereof, charging him with having at said county on the 23d day of June, 1901, unlawfully, willfully, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, with a pistol, shot and killed one Charles Stewart. After unsuccessful motions for new trial and in arrest, defendant appeals.

The salient facts are about as follows: On June 23, 1901, and for some time prior thereto, the defendant was employed in the management of a poolroom which was adjacent to a saloon in Pascola, Pemiscot county, Mo. On that day there were numerous persons at the rooms in charge of defendant, among whom was Charles Stewart, the deceased. It seems that Stewart was crippled and deformed until he was unable to walk or move about in an upright position. Deceased, with others, had been drinking considerably during the day. None of them, however, as the evidence shows, had become thoroughly intoxicated. At about 11 o'clock p. m. on the day of the homicide, defendant and one Dr. Wells were engaged in playing a game of pool. Deceased and Dr. Wells were on intimate terms, and deceased had been playing pranks on the doctor by interfering with the pool balls. Just previous to the homicide he asked Dr. Wells who was running the house, when defendant stated that he (Terry) was; and, as deceased asked the question, he, with his left hand upon the pool table, raised himself up as though he was going to again move the pool balls, and, as defendant made reply to the question asked by deceased of Dr. Wells, he drew from his pocket a 38-caliber revolver, and, taking deliberate aim, shot Stewart; the ball passing entirely through his body, and giving him a mortal wound, from which he died, after lingering in much pain, on the 31st day of July, 1901. Immediately after shooting Stewart, defendant covered Dr. Wells with his weapon, and caused him to throw up his hands. Then defendant left the room, and was located some time afterwards in Little Rock, Ark. He returned to Missouri without requisition papers. A trial was had, and the jury failed to agree. Upon second trial he was found guilty of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the penitentiary. He appeals. Evidence was introduced by defendant to show that deceased had made threats against him, and that he was a rough, violent man. Defendant set up self-defense, and asserted that deceased was making an assault upon him at the time of the homicide, and he shot him in self-defense. The court instructed on murder in the first and second degrees, manslaughter in the second and fourth degrees, and self-defense.

D. R. Cox, J. L. Downing, and J. P. Tribble, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. (after stating the facts). The principal ground urged upon the attention of this court for a reversal of the judgment is with respect to the action of the court below in excluding evidence offered by defendant, but in the motion for a new trial, except as to matter hereafter considered, no complaint is made to the action of the court in this regard, nor its attention in any way called thereto; and it has uniformly been held that errors of this character, in order to be reviewed on appeal or writ of error, must be raised by such a motion. Rev. St. 1899, § 2689; Ray v. Thompson, 26 Mo. App. 431; State v. Johnson, 115 Mo. 480, 22 S. W. 463. In State v. Gilmore, 110 Mo. 1, 19 S. W. 218, it is said: "Nothing is better settled than that errors of this character must be called to the attention of the trial court in a motion for new trial, or they will not be noticed here." State v. Noeninger, 108 Mo. 166, 18 S. W. 990; State v. Reed, 89 Mo. 168, 1 S. W. 225; State v. Mitchell, 98 Mo. 657, 12 S. W. 379; State v. Harvey, 105 Mo. 316, 18 S. W. 886; State v. Alred, 115 Mo. 473, 22 S. W. 363.

Defendant offered to prove by witness Finley that deceased stated to him after he was shot, in effect, that defendant was not to blame for the difficulty, and that, if he (deceased) had stayed sober and in his own place, there would have been no trouble, and that he did not wish defendant arrested or bothered for what he had done. This testimony, on objection by the state, was excluded, and that ruling is assigned for error. Deceased was no party to the prosecution, and the state was not bound by anything he may have said with respect to the difficulty, either before or after it occurred. What he did say was mere hearsay. It is only when statements of this character are part of the res gestæ, or are made in articulo mortis, that they are admissible in evidence (McMillen v. State, 13 Mo. 31; State v. Punshon, 124 Mo. 448, 27 S. W. 1111); and there is no pretense that the statements proposed to be proven were either part of the one, or made in anticipation of immediate dissolution. Moreover, the statements were mere conclusions of the witness, and inadmissible for that reason also.

The court did not instruct the jury that defendant was a competent witness in his own behalf, and this is assigned for error in the motion for new trial. Defendant did, however, testify as a witness without objection, and no discrimination is made in the instructions between him and other witnesses, nor the fact that he was the defendant on trial in any manner adverted to; and, it does seem to us, in the absence of a request of the court by defendant to so instruct that he was competent to testify as a

witness in his own behalf, that the failure of the court to do so should not be sufficient ground for a reversal of the judgment.

The indictment is well enough. The verdict is amply sustained by the evidence, which clearly established defendant's guilt.

The judgment is affirmed. All concur.

HAVILAND v. KANSAS CITY, P. & G. R. CO.

(Supreme Court of Missouri, Division No. 1.
Dec. 24, 1902.)

SERVANT—INJURY—LIFTING RAILS—STRAINING BACK—LIABILITY OF MASTER —EXPERT EVIDENCE.

1. Where plaintiff, a railroad employé, strained his back while loading steel rails onto a flat car, and it nowhere appeared from his testimony that the force employed was inadequate, or that he was expected or required to lift more than any ordinary man could lift or shove, or more than he had previously lifted or shoved with safety, or that anything unusual occurred to cause the injury, he could not recover.

2. Testimony of an alleged expert that, while an ordinary man could lift 200 pounds, 16 section hands were necessary to lift a rail weighing 600 pounds, was properly stricken out, as manifestly absurd.

Appeal from circuit court, Barton county; H. C. Timmonds, Judge.

Action by William Haviland against the Kansas City, Pittsburg & Gulf Railroad Company. From an order granting a new trial after plaintiff had taken a nonsuit, defendant appeals. Reversed.

This is an action for \$5,000 damages alleged to have been sustained by the plaintiff, employé of the defendant, while engaged, as a member of a section gang, in loading steel rails onto a flat car, caused, it is averred, by the employment, by defendant, of an insufficient number of men to do the work. The injury is said to have resulted from the plaintiff overexerting himself, in consequence of which he strained his back. The negligence charged in the petition is the employment of only four men, where eight are alleged to have been necessary. The answer is a general denial, and a plea of assumption of risk. At the close of the plaintiff's case, the court sustained a demurrer to the evidence, and also sustained a motion to strike out the testimony of a witness called as an expert, and in consequence the plaintiff took a nonsuit, with leave. Thereafter the court set aside the nonsuit, and granted the plaintiff a new trial, assigning as ground therefor the sustaining of the demurrer to the evidence and of the motion to strike out the expert testimony. From this order the defendant appealed.

The case made by the plaintiff is this: Prior to the alleged accident, the plaintiff was an able-bodied man, 35 years of age, and for the preceding three months had been in the employ of the defendant as a section hand, taking up old rails and putting in the new ones, and had previously assisted in taking

up and piling the rails hereinafter spoken of. The petition avers, and the evidence shows, that on a prior occasion, three or four weeks before the accident, he had assisted in loading 17 steel rails, like those he was loading on this occasion, onto a flat car; that there were six men then engaged in such work, and that they loaded them by lifting one end of the rail from the ground and resting it on the top of the flat car, putting a pick handle in the standard slots on the side of the car to prevent the end, so lifted, from sliding off of the car, and then lifting the other end of the rail from the ground and placing it on the top of the flat car. On the day of the accident a section gang, composed of seven men, were engaged in loading rails onto a flat car. The rails were 30 feet long and weighed 600 pounds each. The top of the flat car was $4\frac{1}{2}$ feet above the top of the railroad track, and the top of the track was 18 to 20 inches higher than the ground on which the rails were piled. The gang constructed an incline from the ground to the top of the flat car by taking two steel rails about 15 feet long, tapering at one end, and rested one end on the top of the car and the other end on the ground, or on a cross-tie, and then greased the skids to make the rails slide easily. Then five of the seven men would take a rail and slide or push it up the incline, two standing at either end and one at the middle of the rail, and the two remaining members of the gang, who were stationed on the top of the flat car, would receive the rail that was thus pushed up the incline by the five men, and would put it in a proper place on the car. There were some 50 or 60 rails to be loaded. When about one-half had been loaded, one of the men who was on the top of the car "pinched his finger" and quit, and one of the five men who had been helping to push the rails up the incline took the place on the car of the hurt man. The remaining six men continued the work, four shoving up the rails and two putting them in place. The plaintiff all the while was engaged in the work of shoving. While so engaged with the other three shovers, the plaintiff claims he strained himself. He told one of the fellow servants of it at the time, but neither then nor afterwards did he say anything to the foreman, who was present, about hurting himself, nor about the gang being insufficient; on the contrary, even after he says he was hurt, he continued in the work until all the rails were loaded, and also helped to load a lot of cross-ties, and never said anything to the foreman about being hurt, nor did he suffer any further strain.

The plaintiff called James McCalliment as an expert. He qualified by showing that four years before he had assisted in loading 25 cars with rails by means of skids, as was done in this case, and then said it would require 10 men to so load such rails; that usually 16 to 18 are employed to load rails on a car, and that, instead of skids, the men

pick up the rails and place them on the car. He also said that an average man can lift 200 pounds, and hold it up for a minute.

This is the expert testimony that was stricken out by the court, and which ruling is assigned as a ground for granting a new trial.

Lathrop, Morrow, Fox & Moore, for appellant. Cole & Burnett, for respondent.

MARSHALL, J. (after stating the facts).

1. The first question in this case is whether the trial court erred in sustaining a demurrer to the evidence.

A master owes his servant a duty to furnish him a reasonably safe place and reasonably safe and suitable appliances for doing his work. When the work requires men to do it, the men engaged therein are classed as appliances. Wood on Railroads, p. 1758; Thorpe v. Railroad, 89 Mo. loc. cit. 663, 2 S. W. 3, 58 Am. Rep. 120. This duty, however, does not make the master an insurer of the servant. Gratts v. Railroad, 153 Mo. loc. cit. 403, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; Minnier v. Railroad (Mo.) 66 S. W. loc. cit. 1076. On the other hand, the servant assumes the risks that are ordinarily incident to the business. The servant is not obliged to quit because the master has failed in his duty, if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances furnished; but if the danger of using such appliances is obvious, patent, or such as to threaten immediate injury, then the servant assumes the risk in using them, or in remaining in the master's service. Minnier v. Railroad (Mo.) 66 S. W. loc. cit. 1076, and cases cited. Apply these principles of law to the case made by the plaintiff, and we have this result. According to the plaintiff's testimony, three or four weeks before the accident he and five others had loaded seventeen similar steel rails onto a flat car. They did it by first lifting one end of the rail and resting it on the car, and then lifting the other end of the rail up onto the car. Hence the plaintiff knew that 6 men could thus load a 600-pound rail onto a flat car. If they had picked the rail up bodily, instead of only one end at a time, it would have required each of the 6 men to lift only 100 pounds each, but by lifting only one end at a time it would be easier, and would not necessitate each man to lift as much as if the rail was lifted all at once. In addition to this, the plaintiff knew that he had assisted in taking up and piling these identical rails. With this experience before him, the plaintiff was required on this occasion, with four others, and later with three others, not to lift the rail, but to shove or slide it up an incline that was greased. It needs no testimony to show that it does not require as much force or power to shove a rail up such a greased incline as it does to lift such a rail bodily. This is a question of physics with which ev-

ery fairly educated person is more or less familiar, and, in addition, it is a matter of common sense that would be at once recognized as true by any one, without respect to any education. When the plaintiff was called upon, with three others, to shove these rails up this incline, he therefore knew that six men had picked up such rails, one end at a time, and loaded them onto a flat car, and the question he had to decide at the time he was then called upon to act was, are five men or four men enough to shove this rail up this inclined plane? If the two men who were on the top of the car were enough to handle the rails and place them in position on the car after the four men shoved them up onto the car, it is at once apparent that the four men ought to be sufficient to shove the rail up the incline. If six men could load the rails by lifting one end at a time, it would seem that four men ought to be enough to shove the rails up the greased incline. Given a rail weighing 600 pounds, and 4 men to handle it, it follows that each man would only have to shove 150 pounds of the weight. If 6 men can lift 600 pounds, it seems only reasonable to believe that 4 men can shove 600 pounds up a greased incline. These considerations and facts were known to the plaintiff, and he entered upon the work without objection, and continued in the work after one of the men got hurt and retired. He knew the weight to be handled and the force supplied to handle it. There were 50 or 60 rails to be loaded. About a half had been loaded before the accident is alleged to have occurred. Actual experience in so loading such rails with such force had therefore taught the plaintiff whether or not the force was adequate. He continued in the work without objection. Then he says he strained his back. He gives no reason for so doing. He does not pretend that any of his fellows shirked his duty, or that anything unusual happened to throw any more weight upon him than his due proportion, or than he had been successfully and safely handling. He gives no explanation whatever of how or why he was injured. But he says he strained his back. Even then he did not complain to the master, nor object that the force was inadequate. He said nothing to the master about being injured. He continued to work in the same way, with only the same force, until all the rails were loaded, and even thereafter, for he assisted thereafter in loading some cross-ties onto a car. So far as the plaintiff's own testimony is concerned, it nowhere appears that the force employed was inadequate, nor that any one required or expected the plaintiff to strain himself, or to lift more than any ordinary man could lift or shove, or more than the plaintiff had previously lifted or shoved with safety, nor yet that anything unusual occurred to cause the injury, nor, in fact, is there any attempt to give a reason or explanation for the happening of such an injury.

The only other evidence bearing upon the insufficiency of the force is the testimony of the alleged expert, McCalliment. He testified that, four years before, he had assisted in loading 25 cars with rails by shoving the rails up greased skids, as was done in this case, and that it required 10 men to so load such rails. He further said that usually rails were loaded by simply lifting them up bodily and putting them on the car, and that it required from 16 to 18 men to load them in that way. He further said that an ordinary man can lift 200 pounds. Or, in other words, according to such expert testimony, a man can lift 200 pounds, but can only shove 75 pounds up an inclined plane. And while an ordinary man can lift 200 pounds, it takes 16 section hands to lift 600 pounds; that is, an ordinary man can lift 200 pounds, but a section hand can only lift one-sixteenth of 600 pounds, equal to 37½ pounds. This is the expert testimony that the court struck out. And is it surprising that the court did so? Is any court obliged to believe any such absurd testimony, or to allow such manifest nonsense to go to a jury? Is it not an insult to common intelligence to be asked to believe that a section hand can only lift 37½ pounds, or that such a section hand can only push a 75-pound weight up a greased inclined plane of about 40°? It is too obvious for debate that such testimony shows conclusively that the witness was not an expert, or else that he was playing upon the credulity or gullibility of the jury. The court properly struck out such testimony. But even if the court did err in so doing, and even if such testimony be still treated as in the case, the plaintiff made out no case that entitled him to go to a jury, and therefore the court properly sustained the demurrer to the evidence. For the physical facts and plaintiff's own testimony and conduct completely nullify all such expert testimony, and show that it is unreliable, and, in addition, they show that if the plaintiff strained his back he did so without being compelled, ordered, or expected to do so by any one, and without any apparent reason for doing so, and therefore he did not make out a *prima facie* case.

The plaintiff cites and relies on the case of *Thorpe v. Railroad*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120. In that case the negligence consisted in not having a sufficient number of men in a switching crew, to convey the proper signals to the engineer, in consequence of which the engine was moved while the plaintiff was between the cars, attempting to couple them. It is apparent, therefore, that that case has no application to this case. There the plaintiff was injured by the act of the engineer in moving the train prematurely. Here the plaintiff was injured by his own act in employing more effort than was necessary, and without the order or act of any one else.

The plaintiff further cites *Fogus v. Rail-*

road, 50 Mo. App. 250. That case, however, is different from the case at bar, in the following respects: First, the plaintiff objected to doing the work, before it was done, because he considered it dangerous, and because the force of men was insufficient, but the foreman ordered him to proceed, and said it was safe, and engaged in the same work himself. Second, the injury to the plaintiff in that case was caused by the workmen on each side of the heavy iron wheel being removed, shoving against each other to prevent it from careening on them. Neither of these conditions are present in this case. In addition to this, in that case, the weight to be moved was 1,400 pounds, and the moving force was 4 men, while here there were 4 men to move 600 pounds. Moreover, in that case it was an iron wheel, which was likely to fall over on its side at any time, as it did, while here it was a rail that was pushed up an incline, and could not fall over at all.

The plaintiff also relies on *McMullen v. Railroad*, 60 Mo. App. 231. That was a case wherein the plaintiff was engaged in lifting rails and throwing them from the track, and was injured by the rail "falling back upon his foot." The sole negligence alleged in that case was that the railroad did not furnish an adequate number of men to do the work, in that it furnished only three men, while the petition alleged that four were necessary. So, if that case furnishes any light for the proper adjudication of this, it shows that the force furnished in this case was sufficient, for it was charged therein that four men were sufficient. It also shows that three men were lifting the rails, whereas here there were four men shoving—not lifting—the rails. There can be no doubt as to the general legal principles enunciated in that case, but the facts in judgment there prevent that case from being of any assistance to the plaintiff in this case.

The case of *Worlds v. Railroad* (Ga.) 25 S. E. 646, is more applicable to this case. There a car became derailed, and the plaintiff, with others, was required to carry cross-ties for about 100 yards. He objected because they were too heavy to carry that far. The yardmaster ordered him to continue in the work, saying he was as much able to do so as the rest of them. The plaintiff there had had no previous experience in carrying such cross-ties, and claimed that he strained his back while doing so. The trial court sustained a demurrer to the petition which set out these facts, and the Supreme Court affirmed the judgment. The syllabus in that case is as follows: "(1) When one enters the service of another, he impliedly assumes the usual and ordinary risks incident to the employment about which he is engaged, and, in discharging the duties which he has undertaken to perform, he is bound to take notice of the ordinary and familiar laws of nature applicable to the

subject to which his employment relates; and if he fails to do this, and in consequence is injured, the injury is attributable to the risks of the employment, and the master is not liable. (2) Where an employé of a railroad company, in the discharge of his duties, is directed to lift and carry an ordinary object like a cross-tie, he is bound to take notice that it is heavy, and that a certain amount of physical strength will be required to accomplish the task; and if he misconceives the amount of physical strength to be exerted, and overstrains himself in lifting the ties, and is thereby injured, the master is not liable. The fact that he was acting under the orders of a superior at the time does not alter the question, even though he might have had reason to believe that disobedience of the order would result in his dismissal."

The case of *Ferguson v. Cotton Mills* (Tenn. Sup.) 61 S. W. 53, was a case where the plaintiff was engaged in moving cotton from one vat to another on a large four-wheel truck. One of the wheels fell into a hole in the floor, made by a defect in the flooring. The plaintiff, with another servant, attempted to lift the wheel out of the hole, and strained his back. He had only been so employed for five days, and had no previous experience in lifting the truck, and no knowledge as to its weight. It was held that he could not recover, and that he could not "hold the master liable for overexerting and straining himself. He is the best judge of his own lifting capacity, and the risk is upon him not to overtax it."

The cases of *Walsh v. Railroad* (Minn.) 8 N. W. 145; *Freemont Brew. Co. v. Hansen* (Neb.) 91 N. W. 279; *Railway v. Drake*, 53 Kan. 1, 35 Pac. 825; and *Railway v. Moore*, 49 Kan. 617, 31 Pac. 138, rest on substantially the same principles.

Without further elaboration, it is apparent that, either with or without the testimony of the alleged expert, the plaintiff failed to make out a case for the jury, and therefore the court properly sustained the demurrer to the evidence. For the same reasons, the court erred in granting a new trial, and therefore its judgment in so doing is reversed, and the cause remanded with directions to set aside the order granting a new trial, and to permit the judgment of nonsuit to stand. All concur.

STATE v. SCHAEFFER.

(Supreme Court of Missouri, Division No. 2.
Dec. 16, 1902.)

MURDER—CUSTODY OF JURY—SEPARATION DURING TRIAL—INSTRUCTIONS—HARMLESS ERROR—CONVICTION OF LESSER OFFENSE—EVIDENCE—HEARSAY.

1. Under Rev. St. 1880, § 4209 (Rev. St. 1879, § 1009), providing that, "with the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of court during the trial,

in all cases of felony, except in capital cases," and Rev. St. 1879, §§ 1910, 1966, declaring the separation of the jury in cases of felony, after retiring to deliberate, ground for a new trial, the separation of the jury in a capital case before retiring to deliberate does not vitiate their verdict where the state affirmatively shows by affidavits of the jurors that they were subjected to no improper influence while separated.

2. In a prosecution for murder, where there was no question as to the killing, and the evidence tended to show it was done with premeditation, it was not error to instruct the jury that they could return a verdict for murder in the second degree.

3. Error in not defining the term "violent passion," as used in an instruction on manslaughter in the fourth degree, is not ground for reversal of a conviction of murder in the second degree.

4. Statements, by one of the crowd in which the person killed was, that one of the crowd had a gun, are inadmissible in evidence in a prosecution for murder as admissions of a co-conspirator; the evidence showing that the conspiracy, if any, had been abandoned.

Appeal from circuit court, St. Charles county; E. M. Hughes, Judge.

Al Schaeffer was convicted of murder in the second degree, and appeals. Affirmed.

Norton, Avery & Young and T. F. McDearmon, for appellant. The Attorney General and Jerry M. Jeffries, for the State.

BURGESS, J. Having been convicted of murder in the second degree, under an indictment charging him with murder in the first degree, and his punishment fixed at 10 years' imprisonment in the penitentiary, for shooting to death, with a shotgun, one Bud Henderson, defendant, after unavailing motions for a new trial and in arrest, appeals.

The homicide was committed at O'Fallon, in St. Charles county, Mo., at about 8 o'clock on the evening of the 2d day of September, 1900. Defendant, two of his sons, and a man by the name of Hollander, when not at work in the country, lived in an old blacksmith shop on the back part of a lot in O'Fallon, the front of which was occupied by one Vetch as a saloon. About 6 o'clock or 6:30 on the evening of the homicide, defendant's boys and Hollander were at the railroad depot in said town, and while there a controversy occurred between them and some other negroes who were there. Defendant, being informed that negroes at the depot were whipping his boys, went there and got the boys, and started back with them to the old shop where they lived; but when they got near the shop they found they were cut off, and were then assaulted by the same gang of negroes, and were forced to take refuge in Vetch's saloon. In the meantime the anti-Schaeffer crowd of negroes seems to have been joined by a white man by the name of John Moriarity. Schaeffer, after getting into the saloon, got his shotgun. A few minutes thereafter some one of the crowd of negroes who had assaulted defendant threw a rock at Schaeffer while in the saloon, and struck him on the shoulder. Schaeffer shortly thereafter with his two

sons and Hollander, started to the country, to stay overnight with a friend, but had gone but a few steps when they again encountered the same gang of negroes, among whom was the deceased, Bud Henderson—some of them armed for the evident purpose of again assaulting defendant. When Schaeffer approached the crowd, Sanford Taggart, who was one of them, remarked: "Here comes Schaeffer with his gun. We better move." Bud Henderson and his nephew stepped behind a post, and Taggart stood still behind a tree; and, when defendant and his boy came up, defendant said, "Where is the black son of a bitch who had it in for me?" and pulled up his gun and shot; the charge taking effect in Henderson's left side, producing death immediately. Henderson was not doing anything when shot.

After the 12 men were selected and sworn to try the case, they were put in charge of Sheriff Dierker, with injunction by the court that they should be kept together and not permitted to separate; but during the whole of the trial, or at every intermission thereof, the jury was permitted to, and in fact did, separate, and when separated none of them were in the presence or sight of the sheriff. The record shows that all 12 of the men were guests of the Galt House, a hotel in the city of St. Charles, and that they occupied four separate rooms; that these rooms were in the third story of the hotel; that there was no connection between these rooms, but that in said third story there were 12 rooms, all opening into a common court, and, to reach any one of these rooms, it had to be done from this court; that while the jury occupied 4 of the rooms, and the sheriff and his deputy 2 of the others, the other 6 rooms during the whole of the trial were occupied by guests of the hotel other than the jury and the sheriffs, and that this court was used in common by all of the guests, including the jury, and that often parts of this jury were seen in this court when neither the remainder of the jury, nor the sheriff or his deputy, were in sight; that the jurors divided into squads of 2 and 4, and had full control of their respective rooms, could go and come as they pleased, had the keys to the rooms, and could lock themselves in, or unlock the doors and come out, at their own free will; and that the sheriff and his deputy had separate rooms, not connected with the rooms of the jurors at all, and, as the sheriff says, "It was possible at any time for the jurors to leave their rooms or to admit others to their rooms." To overcome any presumption that the jury were tampered with at any time during the trial, and that they were not subjected to improper influences, the state introduced the affidavits of the sheriff and his deputy who were in charge of the jury all the time, and each one of the jurors, showing that the jurors were not subject to improper influence during the trial, nor is it claimed that they were in fact;

but the contention is that the statute (section 2623, Rev. St. 1899) is mandatory, and the separation of the jury in violation thereof. It provides that, "with the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial in all cases of felony, except in capital cases." And it has been held, under this section, that a new trial is only mandatory because of the separation of the jury where such separation occurs after the retirement of the jury to consider their verdict. *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329. There is no pretense that the jury were permitted to, or that they did, separate after the case was finally submitted to them for their determination, so that the only question is with respect to the effect of the separation of the jury while the case was being heard, and before finally submitted to them. Section 1909, Rev. St. 1879 (section 4209, Rev. St. 1889), is simply declaratory of the common law, which forbade the separation of the jury in the trial of all felony cases. 1 Bishop, Criminal Prac. sec. 995. And unless changed by some other statute, or adjudication of the Supreme Court, the law remains the same as at common law, and the verdict in the case at bar would have to be set aside on account of the separation of the jury. But in the Revised Statutes of 1879 three new sections on this subject were adopted, viz., section 1909, supra, sections 1910 and 1966. And notwithstanding the fact that section 1909 provides that the court may permit the jury to separate, by and with the consent of the defendant and the prosecuting attorney, at any adjournment or recess of the court during the trial, in all cases of felony, except in capital cases, it was held in the case of *State v. Orrick*, supra, wherein the jury separated before the case was finally submitted to them, that said sections 1910 and 1966 were intended to effect a radical change in the previous law and practice, yet it will be observed that these sections, by their express terms, only apply to the conduct of juries after they retire, under the charge of a sworn officer, to deliberate upon their verdict; that from that time on until their final discharge the law is imperative that they shall be kept together. The court said: "As has been said, section 1909, as applicable to capital cases, is merely declaratory of the common law, and the effect of a separation upon the verdict before final submission of the case to the jury must be determined by some reasonable rule. There have been two rules applied in such cases, differing only in the measure or degree of proof required to overthrow the verdict. These rules are stated by Thompson & Merriam, in their work on Juries (section 328), as follows: 'To the rule already stated, that the mere fact of a separation is not, of itself, ground for a new trial, there is an op-

posing rule, generally applied in capital cases. According to the former rule, a separation of the jury is no ground for a new trial unless it be made affirmatively to appear probable that the jury were thereby subjected to improper influence. But according to the present rule, a separation will be ground for a new trial unless it affirmatively appear that they were not thereby subjected to any improper influence. In other words, under the former rule a juror may separate from his fellows, and from the officer in charge of him, and still the presumption of right acting attends him, just as it attends a judge when he quits his courtroom and mingles with his fellow citizens. But under this rule his departure from the custody and control of the officer is *prima facie* sufficient to vitiate the verdict. Under the former rule a separation shown will not, in the absence of other circumstances of suspicion, entitle the prisoner to a new trial. But under the present rule the verdict will be set aside unless the prosecution remove the presumption which has arisen against its purity by showing that, as matter of fact, the absent juror was not tampered with, or at least by producing evidence which dispels all probabilities or suspicion of tampering.' * * * But inasmuch as the rule forbidding the separation of jurors in capital cases has been declared by statute, and, in view, too, of the other changes effected by the other sections referred to, we feel satisfied that the more stringent rule should be applied in case the requirements of section 1909 are disregarded, and that a separation before the jury retires to deliberate upon their verdict will be ground for a new trial unless it be shown affirmatively by the state that the jurors were not subjected to improper influence." *State v. Sansone*, 116 Mo. 1, 22 S. W. 617, was a prosecution for a capital offense; and, after conviction, defendant asked for a new trial upon the ground that one of the jurors was permitted to separate from the others during the trial; and, upon its being affirmatively shown on the part of the state that the juror was not subjected at any time to any improper influences, it was held that the presumption arising from the separation was fully rebutted. Citing *State v. Orrick*, supra; *State v. Avery*, 113 Mo. 475, 21 S. W. 193; and other cases. *State v. Howell*, 117 Mo. 307, 23 S. W. 263, was a prosecution for murder in the first degree, and, after conviction, defendant moved for a new trial upon the ground that the jury separated during the trial. *Sherwood, J.*, in speaking for the court, said: "We have hitherto ruled that section 4209, Rev. St. 1889, respecting the nonseparation of jurors in capital cases, must be strictly observed. *State v. Murray*, 91 Mo. 95, 3 S. W. 397; *State v. Gray*, 100 Mo. 523, 13 S. W. 806. In this case, however, the state has assumed the burden, under the ruling in *State v. Orrick*, 106 Mo. 111, 17 S.

W. 176, 329, and affirmatively shown the facts aforesaid, which facts directly establish that no such separation has occurred as would fall within the purview of our statute or former rulings." See, also, *State v. Sansone*, 116 Mo. 1, 22 S. W. 617. Similar views were expressed, and the rule announced in *State v. Orrick*, supra, was adhered to, in *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938, and must now be considered as the settled law of this state. But the acts of the officers in charge of the jury in this case in permitting them to occupy separate rooms, with no doors between them, and to mingle with other persons during the trial, is certainly not to be commended, and should not be permitted, if possible to prevent it, which could have been done in this case.

It is said that the court erred in instructing the jury for murder in the second degree. The contention is that there was no evidence to warrant such an instruction, and that, under the evidence, if defendant was guilty of any offense, it was either murder in the first degree or manslaughter in the fourth degree. But we are unable to concur in this view. There was no question as to the killing, and, as the evidence tended to show that it was done with premeditation, it fully justified the instruction upon that theory of the case.

It is insisted that, as the court instructed the jury for manslaughter in the fourth degree, it committed error in not defining the term "violent passion," as therein used. A sufficient answer to this contention is that, as defendant was not convicted of manslaughter, it is impossible that he could have been injured by the failure of the court to define the term "violent passion." It has been held by this court that a defendant cannot complain of an instruction with respect to a grade of homicide of which he was not convicted, even though the instruction was erroneous. *State v. Dunn*, 80 Mo. 681. And the same rule should be applied to the failure to define a term or words used in an instruction given in behalf of defendant, when not convicted of a grade of homicide covered by such instruction.

No error was committed in excluding evidence offered by defendant as to what *Julius Washington* said the next morning after the homicide with respect to the conduct of the negroes the evening before—that one of them, at least, in the crowd where *Henderson* was killed, was armed. This evidence was offered upon the theory that *Washington* was one of the conspirators, and that any statement made by him in regard to the statements and acts of any of the conspirators was admissible in behalf of defendant. But it is clear that the purpose of the conspiracy, if there was one, had been abandoned, and the proffered evidence mere hearsay. *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133.

Nor do we think the remarks of the prose-

cuting attorney in his closing address to the jury of such a character as would justify a reversal upon that ground.

Counsel for defendant has presented an able brief and argument in behalf of his client, but, after a careful consideration of them, we are of the opinion that there is no reversible error in the record, and therefore the judgment should be affirmed. It is so ordered. All concur.

BARTLEY v. BARTLEY.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

PARTITION—DECREE—EJECTMENT—RES JUDICATA—ATTACKING FORMER JUDGMENT—PLEADING.

1. Rev. St. 1890, § 4386, provides that on partition the court shall declare the titles and interests of the parties. *Held*, that where, in partition, the decree finds that defendant has no interest in the premises, such judgment is conclusive in a subsequent action of ejectment by the plaintiff in partition against the defendant therein.

2. Where, in ejectment, defendant's plea was a general denial, he could not attack a former decree in partition between the same parties on the ground that such partition decree was rendered in his absence, and entirely contrary to what the court had intimated it would render.

Appeal from circuit court, Callaway county; John A. Hockaday, Judge.

Suit by R. L. Bartley against J. F. Bartley. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an ejectment suit brought in the Callaway circuit court to its August term, 1899. The petition was in the usual form of petitions in ejectment, and the answer was a general denial. The cause was tried by the court without the intervention of a jury, and the court, under the pleadings and proof, found the issues for the respondent. Respondent, during the trial of this cause, together with other proof, introduced in evidence the petition, answer, and judgment in a partition suit brought to the December term, 1898, of the Callaway county circuit court, wherein this respondent was plaintiff and this appellant was defendant, to partition the same lands now in controversy in this suit. The petition in the partition suit alleged that R. L. Bartley, this respondent, was the owner of three-fourths of these lands, and that J. F. Bartley, the appellant, was the owner of one-fourth of these lands. The answer of J. F. Bartley, this appellant, in that case, denied that he owned any interest in these lands. The judgment of the court in that cause was as follows, to wit: "Now, at this day, this cause coming on to be heard, the parties appear with their attorneys, and announce 'Ready for trial.' A jury being waived, the cause is submitted to the court, and after the introduction of the evidence, and the court being fully advised in the premises, doth find from the plead-

ings and evidence in the cause that defendant has no interest in the lands described in the petition, but that plaintiff is the sole owner of the same, and that the present proceedings for partition of the premises cannot be maintained; and it is ordered that plaintiff take nothing by his writ herein, and that defendant go hence without day, and that he have and recover of plaintiff all costs herein expended, and that execution issue therefor." There was evidence introduced tending to show title in the appellant; but, as the result of this suit presented to this court for determination depends solely upon the force and effect of the judgment rendered in the partition proceeding, it is unnecessary to burden this opinion with a statement in detail of the testimony going to support the title of appellant. Both parties waiving a jury, the cause was submitted to the court, and its finding was for the respondent, and judgment was entered in pursuance of such finding. From this judgment this appeal is prosecuted.

D. P. Bailey and I. W. Boulware, for appellant. A. Finley, for respondent.

FOX, J. (after stating the facts). The errors complained of, as indicated in the brief of appellant, are: First. That "the judgment in the partition suit set out in the abstract is not conclusive against appellant, if, indeed, it was competent evidence." Second. "Said judgment should not have been admitted in evidence against defendant's objections." Third. "The court in the trial of the partition suit had no jurisdiction that would authorize the rendition of the judgment vesting the title absolutely in R. L. Bartley, and that to that extent said judgment is absolutely void." Our attention is not specifically called to any particular fact which deprived the court of jurisdiction in the partition proceeding introduced in evidence in this cause, or in what respect the judgment in the partition suit was void, or even irregular. There is this suggestion made by appellant in his abstract of the record filed, in which he says: "The partition referred to was tried by the court at its May term, 1899, without a jury, and on the conclusion of the evidence the court announced from the bench that it found that the parties had divided the land in question between themselves, and the court, if called upon, would force them to make deeds accordingly. Without the knowledge of appellant, until after the adjournment of court for the term, the judgment was entered as hereinbefore set forth." If the contention of appellant is sustained in respect to the force and effect of the judgment in the partition proceedings, then the judgment of the trial court should be reversed, for it is evident that in the trial of this cause the court treated the judgment in the partition suit as binding and conclusive upon the appellant. Measured by the law as

we view it, the action of the trial court was entirely proper, in treating the judgment introduced in evidence as a complete estoppel to the claim of title on the part of the appellant. It is true, the partition suit has its peculiar features. The plaintiff in this case was the plaintiff in the partition suit. In that suit he alleged that defendant had a one-fourth interest in the land in dispute. The defendant in this cause was also the defendant in the partition suit. His answer was a general denial—in effect, disclaiming all interest or title to the land in dispute. After the hearing of the testimony in the cause, the court rendered its judgment as herein set forth. It will be noted that the judgment is not one simply dismissing the action of plaintiff, but is one in which the court made its findings and declared the interests of the parties to the suit. It recites that the "court doth find from the pleadings and evidence in the cause that defendant has no interest in the lands described in the petition, but that plaintiff is the sole owner of the same." From this judgment, there was no appeal, and it was in full force at the date of the trial of this suit in ejectment. The abstract of the record, as furnished by appellant in this cause, does not disclose any want of jurisdiction in the court to render the judgment in the partition suit. The court had jurisdiction of the subject-matter, and the record shows, by the filing of the answer, that defendant submitted his person to its jurisdiction. The statute governing the proceedings in partition contemplates the adjusting of titles. It provides that the court shall "declare the rights, titles and interests of the parties to such proceedings, petitioners as well as defendants." Section 4386, Rev. St. 1899. "The law requires the court to ascertain and determine the rights of the parties and makes it the duty of the parties to disclose their adverse claims." Freeman on Judgments (3d Ed.) sec. 304; *Bobb v. Graham*, 89 Mo. 200, 1 S. W. 90. In the case of *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 308, Robinson, J., speaking for the court, says: "One who is made a party defendant in a partition suit is required to set up any adverse interest which he may have, and, failing to do so, is estopped from setting it up in a subsequent suit between the same parties." It may be said, as to the judgment referred to as the judgment in partition, that in fact there was no judgment in partition rendered; that there was no allotment or division of property. This is true, but does that fact render it any the less a judgment? Plaintiff filed his petition. Defendant filed his answer. The parties were before the court. Proof was introduced, and the court made its findings as indicated by the judgment. The court has the authority to ascertain the interests under a proceeding of this character, and the fact that it finds that a party has no interest in the property sought to be partitioned, and as to such par-

ty makes no allotment of the property, would not lessen the binding and conclusive force of such finding.

As to the complaint of the appellant, in his abstract of the record in this cause, "that the judgment complained of was rendered in his absence, and was entered contrary to what the court intimated it would render" under the pleadings in this cause, it has no merit in it. It must be remembered that the answer in this cause is a general denial. If appellant desires to avoid the force and power of the judgment rendered, he must do so in a proper proceeding, by appropriate allegations as to the irregularities which would render it inoperative and void.

Finding no error in the trial of this cause, the judgment will be affirmed. All this division concur.

BANE v. IRWIN et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

MASTER AND SERVANT—INJURY TO MINER—
EXPLOSION OF BLAST—ORDER OF MINE BOSS
—ASSUMPTION OF RISK—FELLOW SERVANT
—WILLFUL INJURY—EXCESSIVE VERDICT.

1. A miner and the mine boss prepared three blasts. The miner lit one and the boss a second, whereupon the miner retired up the shaft, while the boss attempted to light the third. The boss joined the miner, whereupon two explosions occurred. The boss then ordered the miner to return and light the third blast. As the miner reached the blast, it exploded, injuring him. *Held*, that the miner did not assume the risk.

2. The relation of vice principal borne by a mine boss towards a miner is not altered by the fact that there is a general superintendent, who has supervision of both.

3. The character of the act of a mine boss, in ordering a miner to return and fire a third blast after two have exploded, as an act of superintendence, is not altered by the fact that in preparing the blasts, lighting one, and attempting to light another the boss acted as a fellow servant of the miner.

4. To entitle a miner to recover for the negligence of his boss in ordering him to return, after two blasts had exploded, and fire a third blast, which the boss had attempted to ignite, it is not necessary that the boss willfully concealed the ignition of the third blast, but it is sufficient if it appeared that he had attempted to light it, and sent the miner back without waiting until it could be ascertained whether he had done so.

5. A \$6,000 verdict for the loss of both the eyes of a miner 23 years old is not excessive.

Appeal from circuit court, Jasper county; Jos. D. Perkins, Judge.

Action by James Bane against Thomas K. Irwin and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action for damages for personal injuries. The defendants were partners engaged in operating lead and zinc mines at Duenweg, Jasper county, Missouri, under the name and style of Ground & Irwin. The plaintiff was in their employ, working in one

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 650.

of their mines, cutting dirt and blasting. On the 24th of March, 1899, one Thomas Gibbs was mine boss or ground foreman in the mine at which plaintiff was working for defendants. Defendants had other mines in that immediate vicinity, and Sennett Rankin was the general ground foreman over the ground foreman in each of said mines. Plaintiff, for his cause of action, alleges: That on said 24th of March, 1899, the said Gibbs, as such ground foreman, had full charge, and represented the defendants in the said mine, with full power and authority to act for and represent defendants in the conduct of their business therein. That on said day the said ground foreman ordered plaintiff to drill holes and prepare three shots, and plaintiff made the three necessary holes for the said shots, and the said foreman loaded said shots and tamped them, and then and there ordered plaintiff to burn one shot, and then and there stating that the said ground foreman would at the same time burn one shot. That plaintiff set fire to one shot, and the said ground foreman, as plaintiff then supposed and believed, set fire to one of the other three shots, when said ground foreman said to the plaintiff: "Let's get out of here. It is time for us to get out." Plaintiff and said ground foreman then went down to the switch, 100 to 125 feet from where the shots were. That after they had reached the switch two shots went off, being all the shots that plaintiff supposed had been lighted. When the said two shots went off, the said foreman, while acting in the scope of his authority, and while representing the defendants with full power to bind defendants, negligently and carelessly ordered and directed plaintiff to go back and light the other shot, saying, "Go right up there and light that other shot." And the plaintiff, then and there believing that the other shot had not been lighted by said ground foreman, and not knowing that the same had been lighted, in obedience to said order went into the drift and to the shot to light the shot; and as soon as plaintiff got to the shot, and before he could turn and get away or do anything, it went off, and exploded, and knocked plaintiff around on his hands and knees. That by the said explosion crushed rocks and flint and gravel were thrown with great force and violence against plaintiff's head and body and into both of plaintiff's eyes, whereby plaintiff was greatly bruised, and both of his eyes put out and utterly destroyed. That he thereby suffered great pain and anguish of body for a long period of time, to wit, six months, and suffered great anguish of mind, and his eyesight entirely lost. Plaintiff further alleges and charges the fact that at the time the plaintiff fired one of said shots, and the said foreman announced that the said foreman would discharge one other of said shots, the said foreman lighted both of said shots, but wrongfully and negligently concealed from plaintiff the fact to be that he

had lighted two of said shots, and the said ground boss and the said defendants were guilty of gross negligence in ordering plaintiff to return to fire the remaining shot without first notifying plaintiff that the said third shot, or the fuse thereof, had been theretofore lighted by the said ground foreman, and that by reason of said negligence and carelessness of the said defendants through their said agent, the said ground foreman, plaintiff suffered the injuries complained of. Plaintiff further states that by reason of the premises and the negligence of the defendants as aforesaid, and the explosion aforesaid, he was damaged and injured in the sum of \$20,000. Wherefore plaintiff prays judgment against defendants for the said sum of \$20,000. The answer was a general denial, a plea of assumption of the risk, and that the negligence, if any, was that of a fellow servant. There was a trial and verdict for plaintiff for \$6,000. Defendants appeal.

The evidence was confined to the immediate circumstances, and was substantially the following: Plaintiff was 23 years old at the time of the injury. His physicians testified he was totally blind as a result of his injuries. Immediately prior to the injury the plaintiff had been put to work by his foreman, Gibbs, boring holes in some logs constituting the timbering of an old shaft, which shaft was in the way of a drift being extended underground. After boring the holes in the logs, blasting powder was to be placed in the holes and exploded for the purpose of tearing out the logs and clearing the way for the drift. Plaintiff bored three holes,—one in the lower log, near the ground, on the left-hand side; another in the center log, about two or three feet higher; and another, a third, in another log some two feet still higher, and on the right side of the drift. After boring these holes, he started to bore a fourth hole, when his auger broke. Gibbs, the foreman, came along about that time, and told plaintiff to prepare three shots for the purpose of loading the holes already bored. After preparing these shots, plaintiff handed them to Gibbs, who placed the shots in the holes. Gibbs then directed the plaintiff to fire the left-hand shot, stating that he (Gibbs) would fire the right-hand shot at the same time. The shots were lighted by placing a miner's lamp against the fuse. Gibbs lighted the right-hand shot as plaintiff undertook to light the left-hand shot. The fuse in the right-hand shot caught fire more readily than the one which plaintiff was undertaking to light, whereupon plaintiff took his miner's lamp, and split the end of the fuse on this shot, in order to make it light more readily, and then set fire to it. This was done just after plaintiff observed the right-hand shot spitting. Plaintiff's shot then spit also, which indicated that the fuse was burning pretty rapidly, and that the fire was nearing the powder. Gibbs then stepped over to the center shot, and placed his miner's lamp

against the fuse of this shot, while plaintiff walked back into the drift some 12 or 15 feet. Plaintiff saw Gibbs standing in front of the center shot, in the act of lighting it, but could not see from his position whether Gibbs lighted it or not. After working with the center for a few seconds, Gibbs turned to the plaintiff, and said, "Let's get out of here." They thereupon hurried away from the scene of the shots about 100 feet into another drift, where plaintiff asked Gibbs if he had lighted the center shot. Gibbs replied, "No, I was afraid to." Very soon after this reply one of the shots exploded, and Gibbs remarked, "We are killing Spaniards." Within a few seconds thereafter, another shot exploded. Immediately on the explosion of the second shot Gibbs ordered plaintiff to go back and light the other shot. In obedience to this order, plaintiff went back to light the center shot, and just as he got in front of the shot it exploded, putting out both of plaintiff's eyes and otherwise seriously injuring him. On the trial Gibbs admitted lighting the right-hand shot, but denied lighting the second shot, his contention being that the plaintiff lighted the left-hand shot and also the center shot. He further contended that after they retired to the drift only one shot exploded, and that after the explosion of this shot plaintiff went back to light the other two shots. On cross-examination, when pressed on this point of ordering the plaintiff back, this witness said, "I wouldn't make affidavit that I didn't, but I made it in the first statement that I don't believe I did" (meaning a statement given to the insurance company shortly after the accident). This witness was contradicted not only by the plaintiff, but by other witnesses, to whom he made the statement on the day following the accident that, if he had it to do over, he would not order the plaintiff back on to the shot. On the question of the authority of Gibbs and his duties as ground foreman, the plaintiff testified that Gibbs is what they called "ground boss" or "ground foreman," who gave directions to plaintiff and other men working in the ground as to the time, manner, character, and place of their work. Gibbs was introduced as a witness by the defendants, and on the defendants' behalf testified: "Q. What were your duties in the shaft? A. Showing the men where to work, principally. Q. What else? A. Be as careful as I could by my instructions. Q. Did you work yourself? A. I did not do but very little work myself. Whenever a man was short, I filled his vacancy as near as I could. * * * Q. Who was your superior? A. Mr. Rankin. Q. What are his duties? A. His duties were to look after the whole thing, and direct me what to do, etc. * * * Q. Those orders related to what? A. The ground work." On cross-examination Gibbs testified as follows: "Q. You ordered the men, or you directed the men, down there in the mine? A. That was my

business. Q. What to do? A. Yes, sir. Q. And where to work, and what to do? A. Yes, sir. Q. And how to do it? A. When they didn't know, I showed them how. Q. How long had you been foreman in the ground? A. Why, for the company I suppose I had worked 18 months altogether. * * * Q. You had other work to do after you say you heard one shot—you had other work to do, and you went off to do it? A. I didn't have any particular work to do. I was there about the ground. Q. You went into some other drift? A. Yes, sir. Q. And gave the men direction what to do in some other drift? A. Yes, sir." In describing the character of the order given plaintiff by Gibbs to go back and fire the third shot, plaintiff testifies: "A. He just says, 'Go back and light that third shot, and clean out a place there to put in a false post before dinner.' He says, 'I want to catch that up before dinner,' and talked like he meant it." On being inquired of as to whether he knew that the third shot was on fire or had been fired when he went back on to it, plaintiff testified: "A. No, sir; I didn't know it was fired. I wish I had of known it." On the trial defendants undertook to advance the theory that the center shot caught fire from the explosion of one of the other shots, and examined Sennett Rankin on this subject. This witness stated that it might be possible for such a thing to occur. On cross-examination he admitted that in 20 years' experience he had never known of such a thing happening, and, further, that in case the center shot had been affected by the explosion of the other two shots, it would have gone off at the same time. It was also shown that where a shot was set on fire by burning the fuse, as Gibbs had fired the center shot, it took longer for the fuse to burn and for the shot to explode than where the fuse had been split as in the case of the other two shots.

Percy Werner, Howard Gray, and Galen & A. E. Spencer, for appellants. Thomas & Hackney, for respondent.

GANTT, P. J. (after stating the facts). 1. The first instruction is assailed on four distinct grounds. The first is that it is entirely too long, and summarizes the evidence favorable to plaintiff alone. The instruction is open to the objection of being entirely too long. The purpose of instructions is to give the jury a concise statement of the legal propositions involved in the case, and leave them to apply the law thus given them to the facts. But inasmuch as we find no misstatement of the evidence, and no assumption of any controverted fact, we do not feel justified in reversing the case. However much we disapprove the style and length of the instruction, we refrain from reproducing it, lest it become a precedent. The gravamen of the petition was that defendants' ground foreman negligently sent plaintiff upon the

undischarged shot, and that plaintiff was ignorant of the fact that it had been lighted, and his injury had occurred because the foreman had lighted it, and plaintiff, relying upon his assurance that it was not, had been hurt. The jury were required to find and did find that the foreman had lighted the fuses for two shots; that he was bound to know that; and yet when only two exploded, without waiting a reasonable time, he negligently sent plaintiff back to fire the third shot, and thereby the injury was caused. The instruction stated a liability, and was within the issue presented by the petition to the jury. *Herdler v. Range Co.*, 136 Mo. 8, 37 S. W. 115.

2. The plaintiff did not assume the risk to which he was exposed by the negligent order of his foreman. The plaintiff's evidence tended to prove that the foreman had lighted the third shot, but had told the plaintiff he had not done so; that plaintiff left the foreman in the immediate vicinity of the third shot; and that plaintiff had every reason to rely upon what Gibbs, the foreman, told him; and that the foreman, without waiting for the shot to explode, ordered plaintiff back into the dangerous place. As said by Judge Sherwood in *Sullivan v. Railroad*, 107 Mo., loc. cit. 78, 17 S. W. 751, 28 Am. St. Rep. 388, the fact of the presence of the ground foreman and his order to plaintiff "was tantamount to an assurance that it was safe for plaintiff to go back into the mine, and plaintiff had a right to rely on the judgment of the foreman that he would perform his duty to him"; and especially is it applicable in this case, where plaintiff knew there were only three shots prepared and two had exploded. When he received the assurance of Gibbs, who was last at the shots, that he had not fired the third, it was entirely reasonable for him to act upon the assumption that it was safe to return and fire the shot, as directed by the foreman. Plaintiff did not assume the risk of this danger, which his foreman was bound to know, and which he did not know. The two men were not on equality either in service or opportunity to know the hazard of the undertaking.

3. Gibbs was not a fellow servant with plaintiff. The evidence shows he had control of the plaintiff's work; to direct how, when, and where he should work. The fact that they both had a general superintendent over them in the person of Mr. Rankin did not make them fellow servants. The foreman, in directing plaintiff's work, what he was to do, where he was to do it, and how he was to do it, was performing the master's duty *pro hac vice*, and was a vice principal. *Dona-hoe v. Kansas City*, 136 Mo. 670, 38 S. W. 571; *Miller v. Railroad*, 109 Mo. 350, 19 S. W. 58, 32 Am. St. Rep. 673; *Russ v. Railroad*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *Moore v. Railroad*, 85 Mo. 588. We agree with counsel for defendants, "It is the act, and not the

rank, of the vice principal, which determines whether two employes are fellow servants." In this case the acts of Gibbs were the acts of the master. It is true that according to the evidence Gibbs at times did the work of a servant in loading and firing the shots, and, had the injury occurred while he was performing a servant's duty, he and plaintiff would have been fellow servants; but it is clear that the negligence in this case was the negligent order to plaintiff to return to the dangerous place and fire the remaining shot, and the injury was the consequent result of that order, and not the negligent loading and tamping of the shot. While Gibbs acted in a dual capacity, the injury here resulted from the order, in making which he represented the master. It was not at all necessary that the plaintiff should prove, or the jury find, that Gibbs willfully concealed from plaintiff that he had lighted the third shot. It was sufficient if it appeared that he had negligently lighted it, and, knowing he had done so, he did not wait until it could be ascertained it had not ignited before sending plaintiff back into the drift to fire it a second time.

The instruction as to the measure of damages was sufficient, and was not misleading. *Minter v. Bradstreet Co.* (this court; not yet officially reported) 73 S. W. 668. The amount of damages for the loss of both eyes to a young man in no manner smacks of prejudice or passion.

It results that the judgment must be and is affirmed. All concur.

STATE v. JOHN.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1908.)

HOMICIDE—BLOW WITH FIST—MURDER IN SECOND DEGREE.

1. Defendant was a dog catcher, and while engaged in pursuing dogs his passion was aroused by several boys "barking" at him, when he approached deceased, a workman, who was standing apart from the crowd, watching defendant and his companions attempt to catch the dogs they were pursuing. Defendant, without justification, struck deceased a blow on the jaw, which caused him to fall, his head striking the pavement, causing contusion and laceration of the brain, from which he died. *Held*, that an instruction on murder in the second degree and a conviction of that offense were proper.

Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Edward John was convicted of murder in the second degree, and he appeals. Affirmed.

The defendant was indicted at the October term, 1901, of the circuit court of the city of St. Louis, and was regularly assigned to the criminal division of said court No. 9, presided over by Judge Franklin Ferris. The charge was murder in the second degree. Henry Richter was the victim. The substantial averment is that defendant, on the

3d day of July, 1901, at the city of St. Louis, "with force and arms in and upon one Henry Richter, in peace of the state then and there being, feloniously, willfully, premeditatedly, and of his malice aforethought did make an assault, and that the said Edward John then and there feloniously, willfully, premeditatedly, and of his malice aforethought, with his fist, in and upon the jaw and head of him the said Henry Richter, did strike, knock, hit, and beat, and did then and there feloniously, willfully, premeditatedly, and of his malice aforethought knock, push, cast, and throw him the said Henry Richter, with great force and violence, down, in, and upon the pavement, brick sidewalk, and stone curbing then and there being, and the said Edward John thus and thereby then and there feloniously, etc., by the means aforesaid, then and there did give the said Henry Richter one mortal wound and fracture of the skull, of which mortal wound so as aforesaid inflicted by defendant, the said Richter languishing did live from the 3d day of July, 1901, till the 11th day of July, 1901, on which last-named day the said Richter died at the city of St. Louis." The indictment is in all respects according to the most approved precedents. We have merely set forth the substance. Defendant was duly arraigned, and pleaded not guilty. He was tried December 5, 1901, and convicted of murder in the second degree, and sentenced to the penitentiary for 15 years. The circumstances attending the homicide were as follows: The defendant, at the time of the occurrences related in this record, was a dog catcher. The deceased was a laborer, 43 years of age. On the morning of the tragedy, the defendant, in company with another who was engaged in the same business, was going to his work, and about the hour of 6:30 o'clock, as the deceased and other laborers were going to their daily toil, one of these dog wagons and its occupants were observed. The wagon contained the defendant and his associate and a driver, and as they were passing the intersection of Howard street and Broadway, in that city, they spied some dogs that were wandering thereabout. The defendant and his associate left their wagon, and made an effort to seize and impound the dogs. The pursuit of the dogs by the defendant and his partner attracted the attention of the deceased, who stopped, as did others, to gratify their inherent curiosity, or to enjoy the pursuit of the dogs. Some boys near by began barking after the manner of a dog, and jeering defendant and his comrade. This conduct on the part of the boys seemed to arouse the ire of the defendant. The state shows by an overwhelming amount of evidence that the defendant walked up to the deceased, who was standing somewhat apart from the crowd, with his coat on his arm and with his dinner pail in the other hand; that the defendant, without justification or excuse, immediately struck the defendant

upon the jaw, and that the deceased fell upon the sidewalk, and, either from the blow or the fall, or both combined, received a mortal wound, producing a contusion and laceration of the brain, which rendered him unconscious, in which condition he remained until his death, eight days later. There was a perfect unanimity of expression by all the witnesses, save the defendant, that the deceased was inoffensive and unoffending. He was immediately taken to his home, and on the following day was removed to the Good Samaritan Hospital, where his skull was trephined, but the operation did not subserve the end sought, and the deceased died on the 11th day of July, 1901. The state proved that the skull of the deceased was fractured, the brain lacerated and contused, and that the injuries were such as to inevitably cause death. The defendant, immediately on striking the blow, hurriedly sought his wagon, got in it, and drove rapidly away, and was arrested the same morning, and admitted he struck the deceased. The evidence on behalf of the defendant tended to show that he was pursuing a dog. When he passed the deceased he was tripped by him, and fell. He testified that, when he went to rise, he was kicked in the breast and hit in the ear by some one, and that, therefore, he struck the deceased. But he does not say that the deceased kicked him or struck him, or that he did anything save trip him. Indeed, his own testimony does not show that the deceased intentionally tripped him; he simply stated "that he stuck out his foot, and I fell." The defendant was not supported on this point by any of the witnesses, who did not seem to be prejudiced against the defendant, and most of whom were strangers to the deceased. They testified no such thing occurred. The court instructed the jury on murder in the second degree and manslaughter in the fourth degree, and gave the usual instructions on reasonable doubt, credibility of witnesses, etc.

Truman P. Young, E. E. Schnepp, and Wm. Scullin, for appellant. The Attorney General and C. D. Corum, for the State.

GANTT, J. (after stating the facts). The indictment, as already said, was in all respects sufficient, if murder can be committed by one person killing another by a blow with his fist. In *State v. Hyland*, 144 Mo. 302, 46 S. W. 195, we held that it was as much murder to kill a man with his fist in the circumstances of that case as if the defendant had shot him with a loaded revolver. *People v. Munn*, 65 Cal. 211, 3 Pac. 650. The facts of this case are in all respects the counterpart of that. Counsel have, however, respectfully urged a reconsideration of the *Hyland* Case. In that case, as in this, the indictment charged not only that the defendant struck his victim with his fist, but knocked him down with great force and vio-

lence on the stone pavement, and by the combined force of the blow and the fall on the hard pavement the mortal wounding was accomplished. In *Rex v. Kelly*, 1 Moody, 113, it was conceded that, if the indictment had charged the blow with the fist and the fall, it would have been sufficient, but, as it was charged to have been with a brick in the right hand of the prisoner, it was a variance. Counsel cite us to *Wellar v. The People*, 30 Mich. 16, in which the Supreme Court of Michigan points out that, whether a person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended must be of controlling importance. This has always been the doctrine of the common law, but in that case the trial court did not submit to the jury whether the defendant in that case might not be guilty of manslaughter only. The case is well reasoned, but the facts are unlike those in *Hyland's Case* or the case at bar. In this case the defendant, alone, of all the witnesses, states that as he passed the deceased "he stuck out his foot, and defendant fell." He does not even say that defendant intentionally tripped him, but upon this state of facts the court gave an instruction on manslaughter in the fourth degree. The contention of defendant's counsel is that there was no evidence to support the charge of murder in the second degree; in a word, that the character of the assault was such that the jury were not justified in finding that defendant intended to kill or do the deceased any great bodily harm. Counsel concede that the manner of killing is immaterial; that one may be guilty of murder with his fist as well as with a deadly weapon; but say, "though the manner is immaterial, the intent with which the act is done, and circumstances surrounding the act as throwing light on that intent, are material." This is all true, but it ignores the want of any mitigating facts save that which defendant testified to—the tripping of defendant—as to which the court gave him a most favorable instruction on manslaughter. All the other, and, we may add, disinterested evidence, disclosed that the deceased was a perfect stranger to defendant; that he merely halted a moment on the sidewalk, attracted by the excitement produced by the defendant and his companion's effort to catch the stray dogs; that he was apart from the crowd who were watching the defendant and his companion pursue the dogs, and that defendant, apparently incensed at the boys who were barking, threatened to kill some of the crowd, and then, without the slightest provocation by word, gesture, or act on the part of the inoffensive and unoffending workman, who was merely looking on, singled him out and came up to him, and, without warning, struck him the murderous blow, which instantly felled him to the sidewalk. How can counsel argue that such a blow, under such circumstances, was not in-

tended to produce great bodily harm? The court properly instructed the jury that a man is presumed to intend the natural and probable consequences of his acts. It was not a case in which there was a mutual combat with fists, or a lick with a stick not calculated to produce death, but a malicious, unprovoked attack upon a defenseless and unsuspecting citizen, who had given no provocation and was utterly ignorant of the intended assault. Such an act was malicious in and of itself, and clearly felonious. A strong brawny man will not be allowed to approach an unoffending citizen in a public highway and deal him a deadly blow with his fist in a vital part, and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him, and not to kill him. The facts of this case disclose unmitigated brutality—conduct much in keeping with the business in which defendant was engaged.

We have no hesitancy whatever in holding that the trial court properly instructed on murder in the second degree, and that the jury properly found defendant guilty of that offense. The record is without error and the judgment is affirmed.

BURGESS and FOX, JJ., concur.

BALZ et al. v. NELSON et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

FRAUDULENT CONVEYANCES — TRANSFERS AFTER SUIT BROUGHT—DEED TO HOMESTEAD—APPEAL—SUPREME COURT—JURISDICTION—TITLE TO REAL ESTATE.

1. Where, pending an action against defendant, he conveyed certain land to a third person, who thereafter conveyed the same to the defendant's wife, a suit to set aside such conveyances as fraudulent against defendant's creditors is an action involving the title to real estate, of which the Supreme Court alone has appellate jurisdiction.

2. Where, pending an action against defendant, he conveyed his homestead, in which he had an equity of redemption amounting to only \$1,200, through a third person, to his wife, such conveyance was not fraudulent as to his creditors.

3. Defendant received from his wife \$1,000 in 1885 and \$2,350 in 1887. No note was given, nor time specified when the money was to be repaid, and no interest was ever paid, but defendant promised to protect her if he got into any trouble. In 1896 defendant's property was damaged by a cyclone, when his wife asked for her money or security, but she obtained neither until January 19, 1897, three days after suit was brought against defendant for injuries resulting in the death of plaintiff's intestate, when he conveyed certain property to a third person, who thereafter conveyed the property to the wife. *Held*, that such conveyances were fraudulent.

Appeal from St. Louis circuit court; Jas. E. Withrow, Judge.

Action by Jacob Balz and others against Nels Nelson and others to set aside certain

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 118.

fraudulent conveyances. From a judgment in favor of plaintiffs, defendants appeal. Modified.

This is a bill in equity to declare fraudulent and void and to cancel two deeds to certain real estate in the city of St. Louis—one from Nels Nelson and Sophie, wife, to her sister Emma Decker, and the other from Emma Decker to Sophie Nelson—and thereby to divest the title to said real estate out of Sophie Nelson and leave it in Nels Nelson, as it was before said deeds were made, and to have the land sold to satisfy a judgment in favor of the plaintiffs and against Nels Nelson. The circuit court entered a decree as prayed, and the defendants appealed to the St. Louis Court of Appeals. That court transferred the case to this court on the ground that title to real estate was involved, and hence this court alone had appellate jurisdiction. *Balz v. Nelson*, 86 Mo. App. 374. The case made is this: In 1884 Sophie Nelson was the wife of William Kloddick. He died, and she received \$2,000 life insurance. She then married Nelson, and in 1885 she loaned him \$1,000. About two years thereafter she sold some real estate she owned before her marriage to Nelson, and received therefor \$1,350; and this, with the remaining \$1,000 insurance money, she also loaned Nelson. They both say he verbally agreed to pay her 8 per cent. interest, but he never did so. They both further say there was no note or other evidence given for the money borrowed, and no time specified when he should repay her. But they say he "promised if he got into any trouble he would protect her." She made no demand on him for the interest, nor for the loan, nor for security or protection, until after the cyclone which struck St. Louis on May 27, 1896, and which damaged his property to the extent of about \$3,500; and he paid no attention to that demand, and she did not then further insist. About four months after that time he was building a house, and through his negligence the plaintiff's child was killed. On the 16th of January, 1897, the plaintiffs began suit against him for \$5,000 damages for the death of their child. Three days after this suit was begun, and after the summons had been served, and after she knew of the suit, he and his wife conveyed three parcels of land that stood in his name on the records to her sister Emma Decker, and she conveyed the same to Mrs. Nelson. The consideration expressed in these deeds was nominal. Their deed to Emma Decker was immediately recorded, but her deed to Mrs. Nelson was not recorded until November 19, 1897. In the meantime, on September 1, 1897, and before the judgment in favor of the plaintiffs was rendered, and before the deed from Emma Decker to Mrs. Nelson was put upon record, Emma Decker made a quitclaim deed to Nels Nelson for a portion of one of the tracts or parcels of land, and he sold it to an innocent third person for \$4,100. Both Nels Nelson

and Sophie Nelson testified that he had no other property than that covered by the deed to Emma Decker, and he admitted that for six years prior to the date of the trial of this cause, which was on May 15, 1899, he had done no work. Emma Decker acted in the matter simply to oblige her sister and brother-in-law. She paid nothing and received nothing for the land. The Nelsons say the conveyances were made in pursuance of his promise that "if he got into trouble he would protect her," made at the time she loaned him the money. Thereafter, on January 4, 1899, the plaintiff recovered judgment against him for \$800, and it remained unsatisfied. The plaintiffs claim that the conveyances were fraudulent and void, and intended to hinder, delay, and defraud them as creditors of Nels Nelson, and that, while an insolvent has a right to prefer any of his creditors, still a conveyance that was intended to hinder, delay, and defraud creditors is void, even if made to one who is a bona fide creditor, if the creditor knew the conveyance was intended to defraud the grantor's creditors, and if the creditor participated in the fraud, and that even conceding that the \$3,350 in money was a loan, and not a gift, from Sophie to Nels Nelson, still the deeds in question here were intended to defraud his creditors, and not as a preference to Mrs. Nelson. The trial court found the deeds to be fraudulent, and entered a decree for the plaintiffs, and the defendants appealed.

S. T. G. Smith, for appellants. O. S. Broadhead and Percy Werner, for respondents.

MARSHALL, J. (after stating the facts).

1. The primary question in this case is whether this court has jurisdiction. It is a bill in equity to declare fraudulent and void the deeds of Nels and Sophie Nelson to Emma Decker, and from Emma Decker to Sophie Nelson, and for an order of sale of the real estate to satisfy the plaintiffs' judgment. Those deeds are muniments of title. They constitute the public record which declares to the world that the title is in Sophie Nelson. Without them, the title would in fact, and according to the record, be in Nels Nelson. The judgment to be rendered, if the plaintiffs succeed, will therefore strike down and cut out, root and branch, these muniments of title, and the effect of a judgment in plaintiffs' favor will be to divest the title out of Sophie Nelson and revest it in Nels Nelson. The fact that after this is done the land can be sold, as the land of Nels Nelson, to satisfy the plaintiffs' judgment, does not change the character of the action, nor take out of the case the main issue in controversy, to wit, the question whether the land belongs, of right, as to these creditors, to the wife or the husband; nor does the fact that if the husband should pay the plaintiffs' judgment, and thereby take away the plaintiffs' right to

question or controvert the title that is now in Mrs. Nelson, affect the matter. No such issue is raised, and no such condition presented, in this case. The only controverted issue is over the title. The subsequent sale of the land will follow, of course, if the deeds that vested the title in Mrs. Nelson are set aside, and the title is thereby revested in Nels Nelson. The title to real estate is thereby directly and necessarily involved in this case, and therefore the appellate jurisdiction is in this court, and not in the Court of Appeals. *Price v. Blankenship*, 144 Mo., loc. cit. 209, 45 S. W. 1123; *May v. Trust Co.*, 138 Mo. 275, 39 S. W. 782; *Hanna v. Land Co.*, 126 Mo. 9, 28 S. W. 652; *Bank v. Ins. Co.*, 145 Mo. 127, 46 S. W. 615; *Edwards v. Railway*, 148 Mo., loc. cit. 516, 50 S. W. 89. See, also, *Beland v. Brewing Ass'n*, 157 Mo. 593, 58 S. W. 1, where the suit was to cancel a deed of trust after the debt was alleged to be paid; *Crothers v. Busch*, 153 Mo. 606, 55 S. W. 149, where the suit was to set aside a deed of trust on the ground of fraud; *Truesdale v. Brennan*, 153 Mo. 600, 55 S. W. 147, where the suit was to have a deed of trust declared to be entitled to priority over a deed of trust that was recorded before the former; *State ex rel. v. Rombauer*, 124 Mo. 598, 28 S. W. 75, where the suit was to set aside a judgment of condemnation of the land. If the suit was simply to establish or enforce a special tax bill, or a mechanic's or vendor's lien, or any other kind of a lien, the title to real estate would not be involved. *State v. Court of Appeals*, 67 Mo. 199; *Corrigan v. Morris*, 97 Mo. 174, 10 S. W. 880; *Bobb v. Wolff*, 105 Mo. 52, 16 S. W. 835; *Syenite Granite Co. v. Bobb*, 97 Mo. 46, 11 S. W. 225; *Baier v. Berberich*, 77 Mo. 414; *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045. And the reason is that in all such cases the title is necessarily conceded to be in the defendant, for otherwise the plaintiff would not be entitled to a lien against the land in that suit, and therefore no judgment that could be rendered in the case could divest the title out of the defendant. The result of the establishment of the lien on the land, and the sale of the land to satisfy the judgment, might be that the defendant would lose the land, but the same is true in every case of a judgment against one who owns land. In such case the title to the land passes as the legal result of a sale on execution to satisfy the judgment, but the judgment itself rendered in the case does not strike down a muniment of title, or, ipso facto, and without any execution, divest title from the defendant.

2. The remaining question is whether the deeds in question were honestly intended to create a preference in favor of the wife, or whether they were intended to hinder, delay, or defraud the plaintiffs, as creditors of the husband, and, if so, whether the wife participated in the fraud. Since the passage of the married woman's acts, a married woman

can contract with reference to her separate property as fully as any one could do, and she may become a preferred creditor of her husband. *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Riley v. Vaughan*, 116 Mo. 176, 22 S. W. 707, 38 Am. St. Rep. 586; concurring opinion of Macfarlane, J., in *Seay v. Hesse*, 123 Mo., loc. cit. 462, 24 S. W. 1017, 27 S. W. 633. In *Bank v. Winn*, 132 Mo., loc. cit. 87, 33 S. W. 457, Macfarlane, J., speaking of the effect of the wife's rights under the married woman's acts, said: "But while this is so, the marital relation gave the wife no rights superior to those of other creditors, and, inasmuch as preference given to the wife indirectly inures to the benefit of the husband, transactions between them should be closely scrutinized in case fraud is charged. The law which places her upon an equality with other creditors also imposes upon her the same obligation to act honestly and in good faith in taking preferences as is required of other creditors. A participation by her in a fraudulent attempt on the part of her husband to conceal or cover up his property for the purpose of putting it beyond the reach of other creditors, though an honest and valid debt is thereby secured or paid, will render the whole transaction fraudulent as to both. *Riley v. Vaughan*, 116 Mo. 176 [22 S. W. 707, 38 Am. St. Rep. 586]; *Sexton v. Anderson*, 95 Mo. 379 [8 S. W. 564]." The debt Nelson owed his wife, treating it as a debt, and not as a gift, was \$3,350. The property conveyed by the deeds in question from him to her consisted: First. Of three parcels of a lot on Gratiot street, worth not over \$4,000, and subject to a mortgage for \$2,800. This was his homestead, and the equity of redemption amounted to only \$1,200, which was not in excess of the value allowed by law; and therefore he had a right to do what he pleased with it, and his creditors have no right to question it. *Bank v. Guthrey*, 127 Mo. 195, 29 S. W. 1004, 48 Am. St. Rep. 621; *Rose v. Smith*, 167 Mo., loc. cit. 86, 66 S. W. 940. The trial court therefore erred in declaring the conveyance of this lot void, and the judgment must be modified so far as it affects that lot. Second. A lot on Dolman street, valued at not more than \$4,000, and subject to a mortgage for \$3,500, leaving the equity of redemption worth about \$500. Third. A lot on Castleman avenue, having a front of 50 feet, on which there are two houses. One-half of this lot was sold to an innocent third person pending this action for \$4,100, and is not, therefore, now involved in this case. The other half has a house on it, and the house and lot are variously valued at from \$3,000 to \$4,300. There was a mortgage covering both of these lots, for \$3,000, and when one lot was sold this mortgage was paid; and, after deducting the expenses of the sale, it left a surplus of \$1,000. The total value of the property conveyed by the husband to the wife, exclusive of the homestead, was, there-

fore, of the value of from \$4,500 to \$5,800, according to the various estimates. The husband received from the wife \$1,000 in 1885, and \$2,350 in 1887. They say he was to pay her 8 per cent. interest, but as the promise was not in writing, as the statute requires (section 3706, Rev. St. 1899), such a rate of interest cannot be computed. Assuming that she would be entitled to 6 per cent. interest—as to which there is doubt (Rev. St. 1899, § 3705)—the principal and interest on January 19, 1897, when the deeds were made, would have amounted to \$5,480. So that it cannot be said that the property conveyed was excessive security for the debt and interest, if the conveyance was an honest preference. The trial court found the conveyance to be fraudulent, and the facts and circumstances afford ample support for that finding, and are inconsistent with the theory of an honest preference. The following group of facts and circumstances are enough to afford support for the judgment of the circuit court: (1) There was no note or other evidence of debt taken when the money was turned over to the husband, as would probably have been done in case it was to be a mere loan, and not a gift. (2) No time was specified when the money should be repaid. (3) No interest was ever paid or demanded. (4) They both say he promised to protect her if he got into any trouble. From this the inference may be fairly drawn (especially when considered in connection with the other three facts above stated) that if he never got into trouble he would never be called on to protect her, or to return or repay the money. This is not the usual way of making loans of so large an amount of money. (5) She says she wanted her money or security after his property had been damaged by the cyclone in 1896, but he would not pay any attention to her. Debtors are not usually so deaf to the demands of their creditors. (6) The conveyances were made three days after the plaintiffs' suit for damages was filed. For ten years before that he had her money, had paid no interest, given no evidence of debt or security, and she had permitted this condition to exist. But as soon as the possibility of his having to respond to the plaintiffs for the wrong he had done their child arose, his regard for his obligation to his wife quickened; his conscience that had slumbered so long and so peacefully became suddenly aroused, and spurred him to honest action, and prompted the preference. This may be true, but the trial court did not believe it. On the contrary, that court held that the conveyance was fraudulent, and intended by both the husband and wife to prevent these plaintiffs from collecting any judgment they might obtain against him. There is nothing in this record that discredits or casts doubt upon the finding of the chancellor in this regard, and therefore this court will defer to the finding of the trial court.

The judgment of the circuit court is modified so as to exclude from its operation the homestead on Gratton street, but in all other respects the said judgment is affirmed. All concur.

BOLTON v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1.
Oct. 14, 1902.)

CARRIERS—TRANSPORTATION OF LIVE STOCK—INJURY TO PERSON IN CHARGE—LIABILITY—DEFENSES—PROVISIONS OF CONTRACT—GENERAL DENIAL—SPECIAL PLEA—EVIDENCE—MATERIALITY—MISLEADING INSTRUCTIONS—EXCESSIVE DAMAGES.

1. Exceptions to the rulings of the court on matters in pais can only be preserved in the bill of exceptions.

2. In an action for injuries to one accompanying live stock on a freight train while in the car with the stock, on account of the alleged negligence of the company's servants in permitting another car to bump into it with great force, a provision in the contract of shipment requiring plaintiff to ride in the caboose, if a defense to the action, is admissible under the general denial.

3. Matters specially pleaded, if admissible under the general denial, should be stricken out as redundant.

4. Clause in a contract of shipment of live stock permitting plaintiff to accompany the stock, but requiring him to ride in the caboose while the train was in motion, and providing that whenever he should leave the same, or pass over or along the cars or track, he should assume the risk, was no defense to an action for injuries to plaintiff received while in the car, caring for the stock, while it was standing still on the track, owing to other cars being bumped into it with great force; there being a further provision in the contract devolving the duty of "feeding, watering, bedding, and otherwise caring for the live stock" on plaintiff.

5. The clause in the contract would not be any defense even if plaintiff had no right to be in the car with the stock; it appearing that the conductor knew that he was there, and that just prior to the accident other cars had been bumped into the car with such force as to knock down some of the stock, and that plaintiff was caring for them; it being the conductor's duty, under such circumstances, to either prevent further recklessness on the part of defendant's employés, or to warn plaintiff to get out of the car.

6. Whether one accompanying live stock had a right to ride in the car with the stock while the train was in motion was immaterial, where the injury to him occurred while he was in the car when it was standing still on the track.

7. An instruction relative to the liability of a railroad company for injuries to one accompanying live stock on a train held not so vague and self-contradictory in its terms as to be obscure.

8. One injured while accompanying live stock on a train, by reason of other cars being bumped into the car with great force, had both bones of his lower leg broken, and the flesh lacerated by one of the bones protruding. At the trial 15 months afterwards, one of the bones—the longer one—had not united, and he could walk very little without a crutch. The surgeon was of the opinion that the bone would finally unite, but could not speak with confidence. The party injured was a farmer, 35 years old, and no longer able to pursue his occupation. Held, that a verdict for \$9,000 would not be disturbed.

Appeal from circuit court, Morgan county;
Jno. M. Williams, Special Judge.

Action by John M. Bolton against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Action for personal injuries received by the plaintiff, while in a car on defendant's railroad, through what is alleged to have been the negligence of defendant's servants in charge. The petition states, in effect, that on June 29, 1898, in pursuance of a contract which plaintiff, for himself and his mother, made with the defendant, the latter furnished him a freight car in which to transport certain furniture and live stock, and also himself, as a passenger, from Versailles, Mo., to Trinidad, Colo.; that while he was in the car with the furniture and live stock for that purpose, after having been carried thereon from Versailles to Tipton, Mo., and while on a side track at Tipton, the servants of defendant, in switching cars, negligently and recklessly ran a train into and against the car in which plaintiff was, with such force and shock as to throw plaintiff down on the floor, and to throw one of the live stock, to wit, a cow, on the plaintiff, and thereby break and lacerate his leg. The answer of the defendant is a general denial, and a general averment, without specification, that the plaintiff's injuries were the result of his own negligence, and then a specific denial of the contract pleaded in the petition. Then the answer goes on to aver, in effect, that the only contract the defendant ever made in relation to the shipment in question was with the plaintiff's mother, and that was that the plaintiff was entitled to ride free of charge on the freight train on which the furniture and live stock were to be carried, and that he should remain in the caboose attached to the train while the same was in motion, and that whenever plaintiff should leave such caboose car, or pass over or along the cars or track, he should do so at his own risk of personal injury from any cause whatsoever, and that plaintiff had no right to be in the freight car with the stock. The latter paragraph of the answer was, on motion of the plaintiff, stricken out. The evidence on the part of the plaintiff tended to show the following: Plaintiff, for his mother, made a contract with defendant for the transportation of a horse, two cows, a calf, and some household furniture from Versailles, Mo., to Trinidad, Colo. In the contract it was stipulated that the shipper was to assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock, and that the plaintiff was to accompany it on the train and perform that duty. It was also stipulated that plaintiff was to remain in the caboose while the train was in motion, and that whenever he should leave the same, or pass over or along the cars or track, he should do so at his own risk of personal injury from any cause whatever. A car was furnished the plaintiff for the purposes of this contract at Versailles, and he made cer-

tain partitions in it, to separate the live stock from the household goods—putting the one in one end of the car, and the other, together with food, water barrels, etc., in the other end—and located himself in that part of the car marked off for the furniture. The car so loaded and occupied was put into a mixed train, consisting of a passenger car and freight cars, and so transported from Versailles to Tipton. Between Versailles and Tipton the conductor came to the car in which plaintiff was travelling, and inspected and punched his ticket or stock pass. At Tipton the car was taken out of the train in which it had come there, and was side-tracked to await the arrival of a freight train on the main line, into which it was to be placed. On the arrival of a west-bound freight train, plaintiff asked the station agent if his car was to go in that train, and, being informed that it was, he got into the car again. The car was moved onto the main track, and while there another car, loaded with ties, was bumped against it with such violence as to knock one of the cows through a partition and against the horse, and knocking both down. Plaintiff went to the door of the car to see if the engine had hold of the tie car, and, finding that it had not, but seemed to be going away, plaintiff went to the assistance of the horse and cow, and succeeded in getting them on their feet again. Then came another bump, harder than before, and the horse and cow and the man all went down together; the cow falling on plaintiff's leg, and breaking both bones between the ankle and the knee. Between the first bump, in which the cow was thrown through the partition, and the second, in which the plaintiff was injured, the conductor of the train came to the car, and asked the plaintiff, "How is everything?" to which plaintiff made reply that "it knocked thunder out of one partition." At that time the car had not been coupled to the train. The testimony was to the effect that the switching of the cars which produced the injury was with unusual force and recklessness. Plaintiff was a farmer, 35 years old. At the time of the trial, which was about 15 months after the accident, one of the bones in his leg—the large one—had not knit. He could walk very little without a crutch. The surgeon who attended him could not say whether the bone would ever unite, though it might, but it was uncertain. Defendant introduced no evidence, but relied on a demurrer to the plaintiff's evidence, which was overruled. At the request of the plaintiff the court gave the jury the following instruction: "The court instructs the jury that if they find from the evidence in this case that on or about the 20th day of June, 1898, the defendant agreed, for a consideration, to transport the plaintiff and certain live stock and household and kitchen furniture over its railroad from Versailles, Missouri, to Trinidad, Colorado, and that it became part of the duty of the plain-

tiff, while said live stock and household and kitchen furniture was so transported, to look after and care for the same while so being transported, and if the jury further believe from the evidence that plaintiff took passage with said live stock on one of the defendant's trains, and that on or about the said 20th day of June, 1898, while said train was in transit at Tipton, Missouri, that some of the stock being transported by the defendant was knocked down in the car by reason of the negligent and careless acts of the defendant's agents and servants in charge of one of the defendant's trains, in carelessly and negligently running other cars against the car in which said live stock and goods were so being transported, and by reason thereof knocked some of the live stock down in said car, and that at the time plaintiff was in said car for the purpose of caring for said live stock, and afterwards while raising same again to its feet and putting them in proper position, and that while plaintiff was so engaged in caring for said stock the defendant's servants and agents in charge of the defendant's train again negligently and carelessly permitted a car or cars to again strike the car in which said stock was so being transported, with great force, and while said car was standing still on the track, and by reason thereof, and without any fault or negligence on the part of the plaintiff, the plaintiff and some of the stock in said car were knocked down, and that the stock so being knocked down fell upon plaintiff and broke his leg, and thereby injured plaintiff, then the jury will find for the plaintiff. And this is true although the jury may believe from the evidence that at the time the plaintiff was so injured it was his intention to take passage in said car for Trinidad, Colorado, provided the jury further believe from the evidence that at the time of said injury said train in which said car in which said stock was loaded had not proceeded on its journey from Tipton to Trinidad, but was standing still on the track." Defendant asked a number of instructions, some of which were given, and some refused. Among those refused were two, the refusal of which is assigned for error, and were to the effect, first, that, if the jury found that the contract read in evidence was the only contract plaintiff had with defendant, then by the terms of that contract he agreed to ride in the caboose, and that, if he left it to pass over or along the cars or track, he did so at his own risk, and, under the allegations of the petition, could not recover; second, that defendant had the right to designate the place where a person to be carried on a freight train should ride, and if the jury should find that by the terms of the contract the plaintiff was required to ride in the caboose, but he failed to do so, and went into the car with the live stock, etc., instead, then he was not entitled to recover. The verdict was for the plaintiff, and his

damages were assessed at \$9,000. Defendant appeals.

M. L. Clardy and Wm. S. Shirk, for appellant. D. E. Wray and John D. Bohling, for respondent.

VALLIANT, J. (after stating the facts). 1. The whole defense is embodied in the proposition that the contract required the plaintiff to travel in the caboose, and stipulated that whenever he should leave it he took all risks on himself. That proposition is presented in that part of the answer stricken out, in the demurrer to the evidence, and in the instructions refused. If it had been necessary for the defendant to have pleaded that provision of the contract in order to have availed itself of it, then the point is not properly before us for review, because the bill of exceptions, or so much of it as is shown in the abstract of appellant, does not show that any exception was taken to the action of the court in striking out that part of the answer. Exceptions to the ruling of the court in matters in pais can only be preserved in a bill of exceptions, but, if that were any defense to this action, proof of it was admissible under the general denial. Any fact, the effect of which is to show that an essential statement in the plaintiff's cause of action is untrue, may be proven under the general denial, and therefore should not be specially pleaded, and, if so pleaded, should be stricken out as redundant. The Missouri doctrine on this point is laid down in Pattison's Mo. Code Pl. §§ 561, 566, where the Missouri decisions are collected and discussed. The same doctrine is also announced, and other authorities cited and discussed, in Pomeroy's Code Rem. §§ 657-660. And in fact upon the trial of this case the defendant was permitted, in the course of cross-examination of plaintiff's witnesses, to prove that the contract contained the clause on which the defense rested. But that clause in the contract was no defense to the case made by the plaintiff's pleadings and proof. The whole contract was read in evidence, and among its provisions was one devolving the duty of "feeding, watering, bedding, and otherwise caring for the live stock" on the plaintiff. If, in the course of this rough handling of the car, the live stock had been thrown down, as was the case, and if no one had been there to help them up, and they had become injured in their struggles to arise, the defendant could have well said to the owner of the stock: "If your man in charge had been there, and had done his duty, the injury would probably have not occurred. Therefore the negligence of your agent contributed to the result." But the plaintiff was in his place of duty, and rendered the assistance necessary. It was both his right and duty, under the contract, to be where he was. I. C. Ry. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43

L. R. A. 210, 66 Am. St. Rep. 253. Even, however, if the plaintiff had been out of place, the defendant cannot be excused, under the circumstances shown in the evidence. The conductor saw the plaintiff in the car, and saw that the first jolt had been of sufficient violence to throw one of the cows through the partition against the horse, breaking the partition and knocking down both cow and horse. He saw the reckless management of the switch engine, and it was his duty to have either caused the engine to be moved with more moderation, or else to have warned the plaintiff to get out of the car. But he suffered the plaintiff to remain, and suffered the man in charge of the engine to repeat the act with even greater violence. This conduct evinced a reckless disregard of the plaintiff's safety, even if it did not quite show that the result was willful injury. The defendant at the trial introduced no evidence to contradict that of the plaintiff as to the manner in which the switching was done, or to parry the force of the plaintiff's evidence on that point. The only theory of the defense was that the plaintiff was in a place of danger, where he had no right to be, and defendant owed him no duty. But as we have seen, the plaintiff was where he had a right, under the contract, to be; and, even if he had not such right, the conductor in charge knew he was there, and owed him the duty to not inflict wanton injury on him.

2. The court, over defendant's objection, admitted evidence tending to show that the defendant had a custom of allowing men under such a contract to ride in the stock car, and this is assigned as error. When the witness Witten was on the stand, he testified that after the accident he took the plaintiff's place in the contract, and completed the journey. He was asked by the plaintiff: "From the time you started to the end of the trip, where did you ride?" Defendant objected to the question. Plaintiff's attorney stated that he purposed to show that the witness had traveled in the same car in which plaintiff had been injured, and to show that such was the custom of the road under such circumstances. The court sustained defendant's objection on the ground that the point was immaterial. But on cross-examination the fact was brought out that the witness rode in this car with the stock all the way to Trinidad, Colo., and that the various conductors along the route saw him in the car. Thus the defendant brought out the first evidence on this point. But it was wholly immaterial. Of course, custom cannot alter a contract; but, as we have seen, at the time of this accident the plaintiff was where his duty, under the contract, called him to be. Whether he had a right to ride in the car while the train was under way is immaterial. The train at this critical moment was not under way. He had ridden in the car from Versailles to Tipton, and the indications were that he intended to ride in it from Tipton to

Trinidad, and, if the injury had occurred while the train was so in progress, the question that defendant seeks to raise might have come up. The testimony, therefore, as to custom, even if it were inadmissible, which we do not decide, could not have affected the question of the right of the plaintiff to be where he was at that time, because the contract gave him that right.

3. The instruction for plaintiff is criticised on several grounds: First, that it is vague, self-contradictory, and 'confusing'; second, that it submits a question not authorized by the evidence, viz., that the plaintiff was in the car to look after the stock; third, that it ignores the contract, which required the plaintiff to ride in the caboose; and, fourth, it ignores the fact that plaintiff was not injured by the jolt, but by the falling of the cow on him. We do not think either of these positions can be sustained. We perceive nothing so vague or self-contradictory in the terms of the instruction as to obscure its meaning. The circumstances of the case were in themselves evidence of the purpose for which the man was in the car. We have already discussed the caboose element in the contract. And as to the fourth ground, that the plaintiff was injured by the cow falling on him, and not by the jolt of the car, and that if he had been where he ought to have been—in the caboose—instead of trying to prevent injury to the stock, he would not have been hurt, we deem it necessary only to say, in view of what has already been said, that we do not think the absence of that hypothesis in the instruction is reversible error.

4. The last insistence is that the award of damages is excessive. The evidence shows that both bones of the plaintiff's lower leg were broken, and the flesh lacerated by one of the bones protruding; that at the trial, 15 months after the accident, one of the bones—the larger one—had not united, and he could walk very little without a crutch. He was 35 years old, and no longer able to pursue his vocation—that of a farmer. The surgeon was of the opinion that the bone would finally unite, but could not speak with confidence. The jury assessed the damages at \$9,000. Compensation for the injury is the object of the assessment. In arriving at the amount, we have no fixed measurement by which we can be assured of an accurate estimate. The jury in the first instance, the trial judge next, and the judges of the appellate court in the end, must draw largely from common experience; and in so doing, of course, much diversity of opinion will be shown. The duty is first on the jury, and, whilst their act is subject to review, yet the law gives preference to their judgment, and allows it to be set aside only when it is clear that a mistake has been made. An examination of the authorities cited shows that it is a subject that has received much study and profound consideration in this court, and, after all, the

result is, to a great extent, a matter of individual opinion. *Nichols v. Glass Co.*, 126 Mo. 55, 28 S. W. 991; *Burdick v. Ry.*, 123 Mo. 236, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Chitty v. Ry.*, 148 Mo. 64, 49 S. W. 868; s. c., second appeal, 65 S. W. 959. If the plaintiff is to remain the rest of his life in the condition he was at the trial, \$9,000 would not compensate him for his injury; but, on the other hand, if the broken bone within a reasonable time should unite, and the leg regain its former strength and usefulness, \$9,000 would seem excessive. We think, on the whole, the jury and the trial judge were in a better position than we are to pass judgment on the point, and we do not feel justified in setting the verdict aside on the ground that the award is excessive.

We see no error in the record, and the judgment is affirmed. All concur; MARSHALL, J., in result.

BARRON v. MISSOURI LEAD & ZINC CO.
(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

MINES AND MINING—SHAFTS—PRECAUTIONS AGAINST INJURIES—STATUTES—APPLICATION—DEATH—ACTIONS—PETITION.

1. Rev. St. 1899, § 8811, provides that every owner, agent, or operator of every mine operated by shaft shall provide suitable means for signaling, and cages covered with boiler iron for the safety of persons descending and ascending the shaft, and requires that guides shall be placed in the sides of the shaft, with brakes, and that such cage shall be fitted with spring catches, to prevent accidents in consequence of the cable breaking, etc. *Held*, that a petition thereunder for decedent's death, alleging negligence in the selection of the material for the construction of the derrick and hoist, and in failing to put a roof over the derrick, and in the construction of the brake on such derrick, did not allege negligence in any act required by the statute; it being enacted for the protection of persons conveyed up and down the shaft, and having no application to a hoister, whose business it was to run the hoisting appliance.

Appeal from circuit court, Jasper county; Jos. D. Perkins, Judge.

Action by Rachel Barron against the Missouri Lead & Zinc Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

On October 22, 1898, this suit was commenced in the circuit court of Jasper county, Mo., by filing with the clerk of said court the following petition: "Plaintiff, for a cause of action against the defendant, states: That on and before June 26, 1898, the defendant was a corporation, duly incorporated under the laws of the state of Missouri as a business corporation, and was then and there engaged in mining for lead and zinc ores and other valuable substances on its mining land near the city of Joplin, and in said county, and was engaged in digging and raising lead ore and zinc ore and waste from its mines and drifts, and lowering and hoist-

ing persons employed by it and into and out of its said mine by means of a rope, pulley, and derrick by horse power, known as a 'horse hoister'; and that on the said 26th day of June, 1898, Ira D. Barron, son of plaintiff, was in the employ of the defendant, as its servant, as hoisterman, at said shaft, running its said hoister, receiving the said ore and waste at the mouth of the shaft, hoisting it to the surface of the earth by said hoister, and lowering the empty tubs to be refilled and hoisted, and lowering and hoisting persons in its employ into and out of its said mine. That it became and was the duty of defendant, in order to make the said derrick safe in hoisting from said mine, to construct said derrick of sound and strong timber. That the defendant negligently failed to construct said derrick of sound timber, but the said timber was unsound, by reason of age, and was not heavy enough to make the same safe; and that the same was full of nail holes, which weakened the said timber, and was full of knots, which made the said timber unsafe, and insufficient to support the weight of the tubs, when loaded, in case of a sudden jerk or fall of the tub any distance. That it was the duty of the defendant, in order to render the said hoister safe in rain, to have the said derrick covered or roofed, so as to keep the rain from coming on the brake, but the said defendant negligently failed to put any roof or covering over said derrick, so as to keep the rain from coming onto the brake of said hoister; and that it was the duty of the defendant to construct the brake so as to make the same reasonably safe, but that the said brake was improperly constructed, and the defendant was negligent in the construction of said brake, and the brake was improperly placed, and the said defendant was negligent in the placing of said brake in such a way that it could not be handled, and could not be readily set, so as to stop the sudden descent of the loaded tub; and that on the 26th day of June, 1898, while the said Ira D. Barron was so in the employ of the defendant, as its servant, as hoisterman, at said hoister and mine, and engaged in hoisting a loaded tub from said mine, on account of the negligent construction of said derrick and hoister, and the negligence of the defendant in failing to put a roof over said derrick, it then and there being a rainy day, said brake being wet therefrom, and on account of the rotten and defective and insufficient timber of said derrick, and the nail holes and knots therein, and on account of the defective construction of the said brake, the said brake being defectively and negligently placed on said derrick, gave way, and by force of the weight of the tub the timbers of said derrick were thrown down with great force, and struck the said Ira D. Barron, and knocked him into said shaft; and that he fell to the bottom of said shaft, a distance of one hundred and ten feet, and

was instantly killed. That the said Ira D. Barron was a son of plaintiff, and that he was, at the time of his death, a single man, never having been married; and that he left no widow, lineal heirs, or adopted children; and that the plaintiff, before and at the time of the loss of her said son, Ira D. Barron, was dependent for support upon the said Ira D. Barron. Wherefore plaintiff states that by reason of the carelessness and negligence of the defendant, as aforesaid, and the death of her said son, occasioned by said carelessness and negligence of the defendant, as aforesaid, she is damaged in the sum of ten thousand dollars, and that a cause of action has accrued to her for that sum. Wherefore plaintiff prays judgment against the defendant for the said sum of ten thousand dollars (\$10,000), together with costs. Thomas & Hackney and W. E. Grayston, Attorneys for Plaintiff." Summons having been served, returnable to the December term, 1898, of said court, the defendant, on December 5, 1898, appeared, and filed its demurrer in said cause, in words and figures as follows, omitting caption: "Demurrer. Now comes defendant, and demurs to plaintiff's petition herein, for the reason that said petition does not state facts sufficient to constitute a cause of action against this defendant. Galen & A. E. Spencer, Attorneys for Defendant." And afterwards, on December 24, 1898, during said term, the said demurrer of defendant to the petition of plaintiff coming on to be heard, the same was, by the court, sustained, and, the plaintiff declining to further plead, but electing to stand on her petition, the court rendered judgment for defendant upon the demurrer, and from this judgment plaintiff appeals.

Thomas & Hackney and Grayston & Yoss, for appellant. Percy Werner and Galen & A. E. Spencer, for respondent.

FOX, J. (after stating the facts). It will be observed that there is but one question presented in this cause, and that is as to the correctness of the action of the trial court in sustaining the demurrer to the petition of plaintiff. This petition is evidently based, or intended to be predicated, upon the failure of the defendant to comply with the requirements of section 8811, Rev. St. 1899. Plaintiff brings this suit, in pursuance of the provisions of section 8820, Rev. St. 1899, which provides in part that, "in case of loss of life by reason of such violation or failure as aforesaid a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children or to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed for a like recovery of damages sustained by reason of such loss of life or lives." Section 8811, supra, provides that: "The owner, agent or operator of every mine operated by shaft shall provide suitable means of signaling between the bottom and

the top thereof, and shall also provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft; and such cage shall be furnished with guides to conduct it on slides through such shaft, with a sufficient brake on every drum to prevent accident in case of the giving out or breaking of machinery; and such cage shall be furnished with spring catches, intended and provided as far as possible, to prevent the consequences of cable breaking or the loosening or disconnecting of the machinery; and no props or rails shall be lowered in a cage while men are descending into or ascending out of said mine." Plaintiff's petition can only be supported by allegations which bring it within the purview of that section. Her right to maintain the action is purely statutory, and she "must bring herself within the statutory requirements necessary to confer the right of action, and this must appear in the petition, otherwise it will show no cause of action." *Baker v. Hannibal & St. J. Ry. Co.*, 91 Mo. 86, 14 S. W. 280. Unless it is substantially charged that the defendant has been guilty of negligence by reason of its failure to comply with the provision of section 8811, supra, then the plaintiff cannot maintain this action. Measured by this statute, from which the authority, if any, must flow, to maintain this suit, and the well-settled principles of law applicable to it, did the petition of plaintiff state a cause of action? A careful examination of the provisions of the statute unerringly points to the conclusion that it does not, and that the action of the trial court in sustaining the demurrer was proper and appropriate. The acts of negligence complained of in the petition are "negligent construction of derrick and hoister," "negligence in failing to put a roof over said derrick," "negligent construction of brake, the said brake being defectively and negligently placed on said derrick," "the rotten and defective and insufficient timber of said derrick, and the nail holes and knots therein." Now, it will not be contended by this court that the acts herein set forth, and alleged in the petition, do not constitute negligence, for it is just as imperative and as highly important for a mining company to furnish its employes with reasonably safe machinery as any other branch of business; but that does not meet the difficulty in this case. It must be remembered the acts of negligence for which this particular plaintiff can maintain an action must be in respect to some of the duties required by the statute upon which this action is predicated. The statute that is charged or is intended to be charged as being violated makes no mention whatever of the subjects of negligence alleged in the petition. It substantially requires "means for signaling," "cages to be covered with boiler iron," "there must be placed guides in slides in shaft with brakes

on drum," "there must be spring catches on such cage to prevent the consequences of cable breaking." There is no question, if the defendant company was guilty of the negligence complained of in the petition, that any person to whom the cause of action would survive could maintain an action under the general damage act for common-law negligence. Sections 2864-2866, Rev. St. 1890.

Appellant earnestly invites our attention to the case of *Durant v. Lexington Coal Mining Co.*, 97 Mo. 62, 10 S. W. 484. An examination of that case will demonstrate the distinction between it and the one before us. In that case the party charged to have been injured was at work in the cage, at the bottom of the shaft. The act of negligence charged was the failure to comply with one of the requirements of the statute—"the failure to cover the cage with iron." Hence, it is readily noticed that the two cases are not parallel. Considering this case from another standpoint, even though it was alleged that there was a failure to comply with the provisions of section 8811, we are of the impression that the deceased was not occupying a position in respect to such hoister, at the time of his injuries, as would make it available to the plaintiff in this action. No one can read the section referred to without reaching the conclusion that the legislative mind was directed towards the protection of persons being lowered or hoisted in the cage used in the shaft. Respondent, in its brief, appropriately says, "The section of the statute in question provides for 'safe means for hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft.'" The petition in this case alleges that deceased was engaged as "hoist-erman." He was at work on top of the ground. He was not in the cage or in the shaft at the time of the accident; nor was any one else using the cage in being lowered or hoisted from the shaft; nor did his ordinary duties require him to be in the cage or shaft. The position of the deceased was entirely different to that of *Durant* in the case of *Durant v. Lexington Coal Co.*, supra. The party injured was in the cage at the bottom of the shaft, and, by reason of the failure of the coal company to cover the cage with iron, as provided by the statute, the party was injured. The court, in announcing the doctrine in that case, does it upon the particular facts disclosed by the record, and in reaching a conclusion by construction broadened the statute sufficiently to include the case decided. In the *Durant* Case Judge Black says, "Our statute seems to be the same as that of Illinois"; therefore, a construction of the statute by the Appellate Court of Illinois should be a very persuasive

argument as to the correctness of the conclusions reached by this court upon this question. Since the decision of the *Durant* Case, the Appellate Court of Illinois in the case of *Lumaght v. Voytilla*, 101 Ill. App. 112, has construed the statute from which, doubtless, the provisions of our statute, so far as they could be made applicable, were borrowed. In that case, in discussing section 28 of the statute (*Hurd's Rev. St. 1901*), the court says: "When all the provisions of section 28, to which we have referred, are considered, it seems to us that the plain intent of the Legislature by the provisions therein contained was to prescribe rules and regulations for the safety of the men while entering and leaving the mine; and this is so clearly pointed out by the first paragraph (a) that it seems that argument to prove it becomes almost pedantry." From the opening paragraph to the closing one, every line and word wherein effective action is required relates to the "hoisting and lowering of men or cages." It must be noted, as we refer to this Illinois case, that the plaintiff based his cause of action upon the failure of defendant to comply with the statute, which provided for a light at the bottom of the shaft as long as there were men underground. The plaintiff's duties were underground, but were not at the bottom of the shaft; but 60 or 90 feet away in an entry. The court adds, in further discussing this case upon the facts as there indicated: "So that it is not perceived how or wherein any of these statutory provisions are applicable or were intended to be applied to the appellee in the situation he was placed at the time of his injury. He was not approaching the bottom to be hoisted, but was then engaged in his ordinary duties. He was not going to the bottom at all, but his ordinary duties required him in the entry, from sixty to ninety feet away from the bottom. If, then, the purposes of the statute did not apply to the conditions in which appellee found himself, he had no right to rely upon the absence of a sufficient light at the bottom of the shaft." Then the court announces the doctrine "that persons for whose benefit a statute was intended can have no rights in consequence of the omission by others to comply with its provisions"; citing a number of cases supporting the doctrine. So we say in this case that it is apparent that section 8811, Rev. St. 1899, was never intended to protect persons in the situation of the deceased. As before stated, the statute had in view the protection of those being lowered and hoisted in the shaft.

Entertaining the views as herein expressed, we are of the opinion that there is no error in the action of the trial court in sustaining the demurrer, and its judgment will be affirmed. All concur.

CHRIST et al. v. KUEHNE et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DEEDS — TESTAMENTARY CHARACTER — CONSTRUCTION — DEED BY HUSBAND TO WIFE — EQUITABLE ESTATE — REMAINDER.

1. A deed conveyed property to the grantor's wife, "to have and to hold from and after the death" of the grantor "for and during her natural life," and after her death to the grantor's heirs forever; "it being understood that this conveyance is made upon the express condition" that the grantor should "during his lifetime retain the possession and control of the premises hereinbefore described." Held to pass a present interest in the property, and not to be testamentary in character.

2. Where in the granting clause of a deed one is named as party of the second part, but she is only given a life estate, and the heirs of the grantor are designated in the habendum clause as invested with the fee, the interest of the second party is only a life estate, and the fee goes to the grantor's heirs, though they are not designated by their names.

3. Where a husband gives a deed to his wife for life, though the estate taken by her is equitable only, the husband holds the legal title as trustee for her; and, in the event of his death before her, she becomes seised of the whole estate, both legal and equitable, so that there is at all times a particular legal estate existing, sufficient to support a remainder in fee to the grantor's heirs.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Suit by Catherine Christ and others against Ernst Kuehne and others. From a decree for defendants, complainants appeal. Affirmed.

Suit in ejectment for a city lot in the city of St. Louis, brought by plaintiffs, the heirs at law of one Mary Annie Greenlaw, deceased, against the tenants of the heirs of Edwin M. Greenlaw, deceased. Edwin M. and Mary Annie Greenlaw were husband and wife at the time of the execution of the deed to the property in suit, on April 6, 1891, the construction of which deed has given rise to the present controversy. This deed of April 6th was from said Edwin M. Greenlaw to his wife, Mary Annie Greenlaw, conveying to her the property in controversy, with the following provisions contained in the habendum clause thereof. "To have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging or in any wise appertaining unto her, the said party of the second part, from and after the death of said party of the first part, for and during her natural life, and after her death to have and to hold to heirs at law of the said party of the first part and their heirs and assigns forever, it being understood that this conveyance is made upon the express condition that the said Edwin M. Greenlaw shall, during his lifetime, retain the possession and control of the premises hereinbefore described." About two years after the execution, delivery, and placing of record of the above deed, Edwin M. and Mary Annie Greenlaw executed deed to the same proper-

ty to one Courtney, who on the same day executed his deed by which he purported to convey this property to Edwin M. Greenlaw and his wife, Mary Annie Greenlaw, as joint tenants. In May, 1896, Edwin M. Greenlaw died, leaving, as his heirs, children by a former marriage, who have joined their tenants in this suit as defendants; and in June of the same year his widow, Mary Annie Greenlaw, died, leaving as her heirs a mother and two brothers, the plaintiffs herein. As said, this is a controversy between Mrs. Greenlaw and the heirs of her husband, Edwin M. Greenlaw. The trial of the cause in the lower court resulted in a judgment for the defendants, and the case is brought here on plaintiffs' appeal.

J. W. Collins, for appellants. Hornsby & Harris, for respondents.

ROBINSON, J. (after stating the facts). There were no controverted facts in the case; the rights of both parties depending entirely upon the construction to be given to the deed of April 6, 1891. If this deed was operative to convey to the heirs of Edwin M. Greenlaw the land in suit after the death of Mary Annie Greenlaw, then plaintiffs have no right thereto, and the judgment of the lower court was for the right party.

Appellants' first contention is that this deed of April 6, 1891, was testamentary in character, and hence revocable, and that the after conveyance by Edwin M. Greenlaw and wife of same land therein named to Courtney in February, 1893, operated as a revocation of any grant or gift intended by said first instrument; and, further, they contend that as this deed, direct from husband to wife, vested only an equitable estate in the wife, therefore, when Edwin M. Greenlaw, by this deed, conveyed the property in suit to his wife "from and after his death, for and during her natural life, and after her death to his heirs," he granted to his heirs such an estate as could be supported only by a particular estate at law, and that, as the particular estate created was an equitable life estate in the wife, it was not sufficient to support the estate in future in the heirs of said Edwin M. Greenlaw. Respondents, upon the other hand, insist that the instrument of April 6, 1891, in question, is in every sense of the term a deed, and that since section 4596, Rev. St. 1899, expressly permits the creation by deed of estate of freehold to commence in future, the common-law rule requiring a particular estate to support remainder has been abolished, and, further, that irrespective of the statute, and if it be conceded that a particular estate was necessary to support the future estate conveyed to the heirs of Edwin M. Greenlaw by the deed of April 6, 1891, that particular estate was clearly provided. However proper it may be to resort to the rule of interpretation invoked by appellants under proper circumstances of considering the subsequent acts of the par-

ties to an instrument, to ascertain how they understood its meaning, where the terms employed are ambiguous or of doubtful meaning, the rule has no application here. After all that may be said, the intention of the grantor should, if possible, be gathered from the language of the instrument itself, and not by a total disregard of it; and, in this case, the subsequent act of Edwin M. Greenlaw and wife in making the second deed, of February 13, 1893, should be construed, if possible, in harmony therewith, and not as an effort on the part of the grantor to defeat the force of the previous deed of April 6, 1891, or to render its obligations void. But whatever might have been the purpose and intention of Edwin M. Greenlaw and his wife in making the deed of February 13, 1893, the defendants herein, as beneficiaries under the deed of April 6, 1891, were in no wise parties thereto, and that deed could not possibly affect rights created in them by said first-named deed, unless the court should believe said first-named instrument was intended to be testamentary in character and effect, and subject, as such, to revocation by the subsequent disposition of the property named therein. Was, then, the instrument of April 6th, in question, testamentary in character, or was it a deed, in the strict sense of the term? By the direct words of the instrument itself, it is declared a deed made and entered into by and between the party of the first part and the party of the second part. In consideration of love and affection, and for one dollar expressed to have been paid to the grantor by the grantee, it grants, sells, assigns, transfers, and conveys the property therein named; and by it the grantees are to have and to hold the property conveyed forever. Up to this point the form and language of the instrument are that employed in the ordinary deed for the conveyance of real estate in use in this state. It was signed, sealed, delivered, and placed of record as deeds usually are. Up to this point, then, the instrument in question is, in every form, phase, and feature, a deed; and it ought not be denied its qualities as such without the above-quoted conditions in the habendum clause thereof clearly show that the intention on the part of the grantor was to make it a testamentary paper only, subject to revocation by subsequent action on his part, having in view a different disposition of the property named therein. No effort, however, is made here to question the correctness of the general assertion of appellants that, whatever the form of the instrument employed by the grantor or maker, if by it no present interest in the property named is vested in the grantee, but only a designation is made therein of what the maker wishes done with his property after his death, the instrument is testamentary in character and effect.

Appellants' first contention seems to have arisen from the failure on their part to ob-

serve the distinction between the creation of an interest in land and the possession and enjoyment of that interest. By the instrument in question an absolute right in the grantees to enjoy the property is created, while their right only to its possession is postponed until the expiration of the life use thereof, which the grantor reserved to himself. The wife's title in the life estate conveyed by the instrument was wholly unaffected by the reservation of the life use of the land to the grantor, conveying that estate, and all the authorities agree that such reservation in no wise prevents the conveyance from operating to pass an immediate right to the future possession of the present estate conveyed. In no clause or phrase of this instrument is to be found a suggestion that may be said to imply that the title to the land named shall remain in or is reserved to the grantor for one instant after its execution, but, on the contrary, it passed eo instanti to the grantees therein named. The instrument is in no sense testamentary in character. By no language employed therein, as by no construction that may reasonably be placed thereon, is it made to appear that it was not to take effect until after the death of the grantor, or that no interest in the property conveyed was to pass until after that event; but, as said above, the instrument is a deed, in every phase, feature, and purpose. We therefore hold against appellants on their first contention, that the instrument is testamentary in character, and for that reason revocable by its maker, or that it was inadmissible as evidence of defendants' title, on account of the fact that it had not been probated as a will, and because it was not signed and attested as the law directs such instruments to be. In every case cited by appellants where the court had construed the instrument as testamentary in character, though in form a deed, there has appeared in the instrument construed, in clear and direct terms, such qualifying and dominating expressions as "to be of full effect at my death," or "the grantor shall have no interest in the premises conveyed as long as the grantor shall live," and such like expression, evincing a manifest purpose that no immediate estate was intended to be created, while in the conveyance in question the condition is only "that the said Edwin M. Greenlaw [grantor] shall during his lifetime retain the possession and control of the premises hereinbefore described." The condition in this instrument was not to affect an estate created, but was to operate only upon its enjoyment, which in this instance was postponed until the event of the death of the grantor. By the use of the above language in the conveyance in question, the grantor meant only to retain to himself the possession and control of, for such time as he should live, the land conveyed; but nowhere in the instrument is there to be found a suggestion that he wished or intended to retain the title to the land

for an instant. As said above, an estate was immediately created in Mrs. Greenlaw and the heirs of Edwin M. Greenlaw upon the execution of the deed of April 6, 1891, with the right vested in the grantor to occupy and possess the land until his death.

As to appellants' second contention, based as it is upon the effect of a deed made from a husband directly to his wife, and the character of the estate conveyed by such an instrument, and its effect upon the remainder interest in fee to the heirs of the grantor, it may be said, in the first place, that the instrument in question is not strictly one of that character, and that the rules governing such instrument do not fully apply. Though in the granting clause of this deed the wife alone is named as the party of the second part, in the habendum clause thereof, above set out, which clause was manifestly intended to govern the disposition the grantor was making of his property, his heirs are designated as the parties who are invested with the fee to the land disposed of. The wife, though named as the sole grantee in the granting clause of this instrument, in fact is giving only a life estate in the land named. When the whole instrument is read together—when the granting clause is read and construed in the light of the controlling language of the habendum—the wife's interest is only a life estate in the land, while the fee therein goes in remainder to the grantor's heirs, undesignated though they are by their particular individual names. But to adopt appellants' views, and agree that the effect of this deed was to invest in the wife, Mrs. Mary Annie Greenlaw, only an equitable estate in the property in question, and that the legal title thereto still remained in the husband, Edwin M. Greenlaw, on account of the manner of the making of the deed, what, then, is the result of appellants' further contention made—that, to support the estate in remainder in fee to the heirs of Edwin M. Greenlaw under the deed in question, a legal particular estate must have been created at the same time in the grantee, Mary Annie Greenlaw? Under such deeds direct from husband to wife, as the deed in question, all the authorities unite in asserting that the legal title remaining in the grantor (husband) will be treated as held by him as trustee for his wife, and that in the event of the husband's death, and the trust ceasing, the wife becomes seised of the whole estate—legal as well as equitable—conveyed. Although the estate of a wife under a conveyance directly from husband to wife is properly characterized as equitable only, the effect of such a conveyance as this is to pass the legal estate from the control and influence of the husband in his individual capacity, making the conveyance, to the husband in the capacity of trustee holding for his wife; and thus it is seen that under this deed, however considered, there was at all times from its execution to the death of the wife, Mary

Annie Greenlaw, a particular legal estate in existence to support the estate in remainder given to the heirs of Edwin M. Greenlaw; and appellants' argument predicated upon the proposition that no valid legal estate in remainder could pass to the heirs of Edwin M. Greenlaw by the deed in question, because by the same deed and at the same time no particular legal estate passed from the grantor to support it, must fail for want of supporting facts. The legal title to the particular life estate intended for the wife under this deed did, in contemplation of law, pass from the control of the grantor in his individual capacity as owner of the land conveyed to himself in his capacity as trustee holding for the use of his wife, and it was as effectual for that purpose as if an independent trustee had been specifically named therein to take and hold said title for the wife. After the making and delivery of the deed of April 6, 1891, by the grantor, Edwin M. Greenlaw, the interest of his wife, as that of his heirs, to the land in suit, became fixed and absolute; and the grantor could do nothing while enjoying the possession of said premises under the reservation therein to himself to revoke or to impair the estate thus created, even though the wife should join him in the subsequent conveyance of said property, as was done in the deed of February 13, 1893, under which the plaintiffs are now claiming the property.

The effect of the deed of February 3, 1893, under which the plaintiffs alone claim the property in suit, is of no concern in this inquiry, other than to say of it that it did not operate to revoke the deed of April 6, 1891, in so far as defendants' rights thereunder are involved. That being so, it results that the judgment of the trial court in favor of the defendants was for the right party, and should be affirmed. It is so ordered. All concur.

STATE v. EYERMANN.

(Supreme Court of Missouri, Division No. 2.
Feb. 3, 1903.)

BAIL—ADDITIONAL BOND—VALIDITY—FORFEITURE—VALIDITY OF ORDER.

1. The circuit court is a court of general jurisdiction, and the presumption is in favor of the regularity of its proceedings leading to the taking of a recognizance, and in favor of the validity of the instrument itself.

2. Under Rev. St. 1899, § 2543, providing that, when a defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment is pending may let him to bail, where defendant, after having been admitted to bail, comes into court voluntarily and complies with an order of the court by giving an additional recognizance with surety, he thereby waives arrest, and his surety cannot raise the objection that he was not in custody or under arrest, within the meaning of the statute, when the new recognizance was given.

3. Where the court is of the opinion that a bond for the appearance of a defendant in a criminal prosecution is insufficient, it may order

a new bond to be given, and order the defendant into custody if, on notice, he fails to comply.

4. Where the defendant in a criminal prosecution, and his surety, execute an additional bail bond under order of the court, the original recognizance is abrogated.

5. A bail bond taken by a judge of the court in which a criminal prosecution is pending, after adjournment for the day, has the same binding effect as if taken in open court.

6. Where defendant entered into a bail bond for accused, and later, on order of the court, entered into an additional bond, the original bond being abrogated, it was not necessary for the court, in declaring a forfeiture, to specify which bond was forfeited.

7. It is not necessary that an order declaring a forfeiture of a recognizance state the amount of the forfeiture, especially in view of Rev. St. 1899, § 2800, providing that a proceeding on a recognizance shall not be defeated on account of any defect of form or other irregularity.

8. A judgment of forfeiture of a recognizance, entered against a surety, is not void because the record does not show that the court had jurisdiction over the principal, nor that the proceeding was dismissed as to him.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Proceeding by the state against Gottlieb Eyermann, Jr., to enforce the forfeiture of a recognizance. From a judgment against defendant, he appeals. Affirmed.

This is a proceeding by *scire facias* to enforce a forfeiture of a recognizance entered into by Charles Kratz as principal and Gottlieb Eyermann, Jr., as surety, on the 20th day of March, 1902, in the sum of \$20,000, conditioned that said Kratz should be and appear before division No. 9 of the circuit court of the city of St. Louis from day to day during the present term, and on the first day of any future term thereof to which this cause may be continued, then and there to answer to an indictment pending against him for bribery, and not depart the court without leave. On the 1st day of February, 1902, the grand jury of the city of St. Louis returned an indictment against Kratz upon the charge of bribery. At the opening of the court on the 3d day of February, the cause was assigned to division No. 9, and on that day the defendant appeared in open court and filed his recognizance in the sum of \$5,000, with the defendant, Gottlieb Eyermann, Jr., as surety, to answer such indictment, the bond being conditioned as follows: "That if the said Charles Kratz shall appear before the circuit court of the city of St. Louis, division No. 9, from day to day during the present term, and on the first day of any future term thereof to which this cause may be continued, then and there to answer to an indictment preferred by the grand jurors of said city against said Charles Kratz for the offense of receiving a bribe, and shall not depart the said court without leave thereof, then this recognizance to be void, else to remain in full force and effect." On the 1st day of

March, during the same term of said court, to wit, the February term, 1902, the cause against Kratz was continued to the April term, 1902, of said court, and by consent the case was docketed for the 7th day of April. However, on the 20th day of March, still during the February term, the court entered this order: "This day the said Charles Kratz comes into court, in his own proper person, and thereupon, on recommendation of the circuit attorney, representing the state, it is ordered by the court that the bond heretofore entered into and filed in this court for the sum of five thousand dollars by the said Charles Kratz be raised to the sum of twenty thousand dollars. Thereupon the said Charles Kratz enters into and files his recognizances herein in the sum of twenty thousand dollars, with Gottlieb Eyermann, Jr., as surety, to answer said indictment." The recognizance for the \$20,000 thus entered into was conditioned as follows: "That if the said Charles Kratz shall personally appear before the circuit court of the city of St. Louis, division No. 9, from day to day during the present term, and on the first day of any future term thereof to which this cause may be continued, then and there to answer to an indictment preferred by the grand jurors of the said city against the said Charles Kratz for the offense of bribery, and shall not depart the said court without leave thereof, then this recognizance to be void, else to remain in full force and effect." On the said 7th day of April, at the April term, to which said cause was continued, the defendant failed to appear, and, although solemnly called, made default. The court thereupon made the following order: "That the bond of said defendant, Charles Kratz, as well as of his surety, Gottlieb Eyermann, Jr., be and is hereby declared forfeited, and it is ordered by the court that a writ of *scire facias* issue against them, and that a *capias* issue for said Charles Kratz." The *capias* above referred to was issued, and returned by the sheriff "not found." The *scire facias* recited the giving of the \$20,000 bond, as heretofore mentioned, as well as the forfeiture thereof, and was made returnable on the first day of the next term, which would be the June term, 1902, of said court. This *scire facias* was properly served upon defendant, Eyermann, but on the 17th day of April was returned "not found" as to Kratz. On the return day defendant Eyermann filed his return to the *scire facias*, which said return is in words and figures as follows: "The State of Missouri vs. Charles Kratz, Defendant. No. 163, December Term, 1901. Return of Gottlieb Eyermann, surety for the above-named defendant, and for return to the order heretofore entered herein requiring him to show cause why the state of Missouri should not have execution against him of the debt in said order referred to, states: (1) The recognizance in said order referred to was made upon the condition that if said Charles Kratz shall personally appear before

this court from day to day during the then term, to wit, the February term, 1902, and on the first day of any future term thereof to which this cause may be continued, then and there to answer to the indictment preferred against him by the grand jurors of said city for the offense of bribery, and shall not depart the said court without leave thereof, then said recognizance to be void; and the said Eyermann states that said Kratz complied in all respects with the conditions of said recognizance; but the said cause was on the 1st day of March, 1902, during the said February term, 1902, continued by the court to the 7th day of April, 1902, being for a day later than the first day of the succeeding term, the April term, 1902, and therefore and thereby the said Eyermann, as such surety, was released from his obligation, if any, under said recognizance, and the judgment of the court, rendered on the 7th day of April, 1902, declaring a forfeiture of said recognizance and directing scire facias to issue, is null and void. (2) The said recognizance is null and void for the reason that it was taken and certified by O'Neill Ryan, a judge of said court, after the adjournment of said court, and was never taken or approved by the court, as required by law. (3) The said recognizance is also void for the reason that before said recognizance was taken a prior recognizance had been taken and approved by the court, for the penal sum of five thousand dollars, on the 3d day of February, 1902, and on the 20th day of March, 1902, said former recognizance was in full force and effect, and that the recognizance of March 20, 1902, was taken without any lawful order of the court, and without consideration. (4) The said recognizance is also void for the reason that the penalty thereof, to wit, \$20,000, is excessive, and contrary to the provisions of article 2, § 25, of the Constitution of Missouri, providing that excessive bail shall not be required. (5) The recognizance is also void for the reason that the indictment preferred by the grand jurors, in said recognizance referred to, is insufficient and void, and does not state facts to constitute any criminal offense under the laws of the state of Missouri. (6) The said Eyermann also states that final judgment should not be entered at this, the June term, 1902, of this court, for the reason that service has not been obtained upon the principal in said bond as required by law. In view of the premises, said Eyermann states that final judgment should not be entered against him for the penalty of said recognizance, and that execution should not be issued against him, and that the judgment of forfeiture heretofore entered should be set aside, and said Eyermann prays that he may be discharged with his costs." Defendant asked the court to declare the law to be as follows: "The court declares the law to be that under the record, forfeiture, scire facias, and return of the surety in this cause, the plaintiff is not

entitled to recover against the surety, Gottlieb Eyermann, Jr." The court refused to so declare the law, to which refusal of the court, defendant, Eyermann, excepted at the time, and on the 17th day of July, during the same term, the court entered judgment against defendant, Eyermann, in the sum of \$20,000 and costs. In due time defendant filed motions for new trial and in arrest, which being overruled, he appeals.

Rassieur & Rassieur, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, for the State.

BURGESS, J. (after stating the facts). It is claimed that the recognizance is void because of the want of authority in the court for exacting a second bond, except at a time named in the bond, when the defendant is surrendered by his surety. The argument is that sections 2543, 2556, Rev. St. 1899, determine the duty and the power of the court in taking bail; that in bailable offenses the court must fix the amount of bail required of the defendant, and the judge shall take the recognizance, and when it shall have been done the defendant is entitled to his liberty, upon the terms and for the period fixed in the condition of the recognizance, unless surrendered by his surety, and then, and then only, other bail may be given or required. Section 2543 provides that, when the defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail and take his bond or recognizance. And the question for solution is whether the facts disclosed by the record bring the case within the provisions of the statute. The circuit court is of general jurisdiction, and the presumption is and ought to be in favor of the regularity of the proceedings which led up to taking the recognizance, and the validity of the instrument, unless the want of authority in the judge of the court to take it appears from the record. Does it so appear? We think not, and for these reasons:

It is indisputable that the court had the power at any time during the term at which Kratz was let to bail to alter, amend, cancel, or set aside any order made with respect thereto, notwithstanding he may have complied with its order fixing his bond at \$5,000 (Rottmann v. Schmucker, 94 Mo. loc. cit. 144, 7 S. W. 117; Aull v. St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; and authorities cited; Crawford v. Ry. Co. [Mo.] 66 S. W. Rep. 350); and when Kratz thereafter, on the 20th day of March, 1902, came into court in his own proper person, which, in the absence of anything that appears from the record to the contrary, the presumption must be indulged that he did voluntarily, and the court, at the suggestion of the circuit attorney representing the state, ordered that his bond theretofore entered into and filed

in the court for the sum of \$5,000 be raised to the sum of \$20,000, and he thereafter complied with the order last named, by executing his recognizance in the sum of \$20,000, with defendant Eyermann as his surety, it can but be held that he waived the matter of arrest, as he unquestionably had the right to do, and defendant should not now be permitted to say that he did not so do. It will certainly not be contended that if the court, after the original bond was taken and Kratz was released thereon, had become satisfied that it was invalid or the surety thereon irresponsible, it did not have the power to have him brought in and required to give a good and sufficient bond, and if it possessed such power—in regard to which there can be no difference of opinion—it must logically follow that it possessed the power to require the bond in question. So we hold that, if the court for any good and sufficient reason was of the opinion that the \$5,000 bond was insufficient, it had the power to order that Kratz give a new bond, and if, upon notice thereof, he failed to comply with the order of the court, to order him into custody for failure to so do (*State v. Posey*, 79 Ala. 45); and that, in any event, when the last bond was executed, it abrogated the original, and he nor his surety was longer liable thereon.

Defendant, however, says that the bond was taken by the judge of the court after its adjournment for the day, and therefore void, and relies upon the case of the *State v. Caldwell*, 124 Mo. 509, 28 S. W. 4, as sustaining that contention; but that case is clearly distinguishable from the case at bar in this: In that case the bond was taken by the clerk, who had no authority to do so, and was therefore void; while in this case the bond was taken by the judge of the court before whom the case was pending, and therefore had the same binding effect in law as if it had been taken in open court and spread upon the minutes of the clerk. *State v. Abel et al.* (not yet officially reported) 70 S. W. 487.

Another insistence is that the declaration of forfeiture on April 7th was void because the order did not specify which bond was forfeited, and because the order did not determine the amount for which judgment was entered. With respect to the first proposition it may be sufficient to say that, as we have already ruled that when the \$20,000 bond was executed the original bond was abrogated, there was but the one bond of any binding force or effect, and that is the bond upon which the *scire facias* was issued.

As to the contention that the order of forfeiture is void because it does not specify the amount of the bond forfeited, it was not necessary to do so. While it is otherwise held in *Galindo v. State*, 15 Tex. App. 319, *State v. Cox*, 25 Tex. 404, and perhaps by other courts, it is not the practice in this state. All that is necessary for the record to show in this state is that the bond was adjudged to be forfeited, and that a writ of

scire facias be ordered to be issued against the parties thereto, which was done in this case. *Kelley's Criminal Law and Practice*, sec. 102; *State v. Austin*, 141 Mo. 481, 43 S. W. 165. In *Kelley's Criminal Law and Practice*, sec. 102, it is said: "No proceeding upon a recognizance will be defeated or judgment prevented on account of any defect in form, omission of recital, condition of undertaking therein, neglect of the justice or clerk to note or record the default at the time or term, or any other irregularity, so that it be made to appear, from the whole record or proceeding, that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of giving the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that defendant should appear before a court or magistrate at a term or time specified for trial." But, if there were any doubt in regard to what we have said, it must be dispelled when section 2800, Rev. St. 1899, is taken into consideration, which provides that: "No proceeding upon a recognizance shall be defeated, nor shall judgment thereon be prevented or arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the justice or clerk to note or record the default of any principal or surety at the time or term when such default shall happen, or of any other irregularity, so that it be made to appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate at a term or time specified for trial."

Nor was the judgment prematurely entered. While the record does not show that the court had jurisdiction over the principal in the bond, Kratz, nor that the proceeding was dismissed as to him, it does show that it had jurisdiction over Eyermann, Jr., and that judgment was rendered against him only, and, the bond being joint and several, the judgment was in effect a dismissal as to Kratz. *State v. Abel et al.*, supra. And, as was said in effect in the case last cited, at most, the omission to order a formal dismissal as to Kratz was an irregularity which in no way affected the substantial rights of this appellant, and the judgment of the circuit court should be affirmed. It is so ordered. All of this division concur.

STEVENS et al. v. STEVENS et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DECEDENTS' ESTATES—PARTITION—CONTINGENT CLAIMS.

1. Nine notes given by an intestate to his father and mother were payable on the 1st day

of January of each year for nine years, and each note provided that it was executed on the sole condition that the death of the payees should be equivalent to payment. Seven of the notes were unpaid at the time of intestate's death, and the father was then about 80 years of age, and the mother but little younger. *Held*, in an action for partition of certain realty covered by a deed of trust securing the notes, it was error to charge the land with the present value of the notes, without regard to the contingency expressed therein; the proper practice being to reserve a sufficient amount of the proceeds of the sale of the mortgaged land to meet the notes as they fell due, distribute the balance, and provide that if the payees die the remainder of the fund should be also distributed.

Appeal from circuit court, Audrain county; E. M. Hughes, Judge.

Action by Eli Stevens and others against Sarah A. Stevens and others. From a judgment for plaintiffs, defendant Sarah A. Stevens appeals. Reversed.

This is an action for the partition of the N. W. $\frac{1}{4}$ of section 2, township 52, range 7, in Audrain county. Alexander E. Stevens died in February, 1899, without issue, intestate, owning this land, and leaving his wife, the defendant Sarah A. Stevens, and his father and mother and three brothers, the plaintiffs herein, surviving him as his heirs. His widow elected to take a child's share. On the 24th of December, 1896, said Alexander E. Stevens and Sarah A., his wife, executed a deed of trust upon the S. $\frac{1}{2}$ of the said property to secure the payment of nine promissory notes, for \$200 each, payable on the 1st day of January of each year from 1898 to 1906, inclusive, payable to his father and mother, Eli and Lucinda. The notes each contained this provision: "This note is made and executed to the payees herein on the sole condition that the death of the payees shall act as the equivalent of a payment of this note and satisfy the same in full." The deed of trust contained an equivalent provision. The two notes maturing January 1, 1898 and 1899, were paid before Alexander Stevens' death. The personal estate was sufficient to pay all the debts, except the seven notes aforesaid. The trial court decreed partition, ascertained the present value of the seven notes to be \$1,184.65, adjudged the land incapable of partition in kind, ordered the land sold, and directed the proceeds of the portion subject to the deed of trust to be applied to the payment of the ascertained value of the seven notes, and directed the balance, with the proceeds of the sale of the portion not subject to the deed of trust, to be divided as follows: One half to the widow, the defendant, and the other half to be divided between the mother, father, and three brothers of the deceased in equal shares. The court, however, concluded its judgment as follows: "The court not being satisfied from the evidence that the personal property belonging to the estate of A. E. Stevens is more than sufficient to pay all claims and demands against the same, it is

ordered that distribution be suspended until said estate shall have been finally settled, and all claims against the same are fully discharged." The father was about 80 years old at the time of the trial, and the mother a year or two younger. The father and mother, the beneficiaries in the deed of trust, are parties plaintiff herein, and the trustee in the deed of trust is made a party defendant with the widow of the deceased. The widow appealed from the judgment of the circuit court.

W. W. Fry, for appellant. P. H. Cullen, for respondents.

MARSHALL, J. (after stating the facts).

1. The sole question arising on this record for adjudication is as to the ruling of the trial court in ascertaining the then present value of the seven notes not then due, and ordering that value to be presently paid out of the proceeds of the sale of the portion of the property covered by the mortgage which secured those notes. The plaintiffs, in supporting this ruling, rely chiefly upon the case of *Schmieding v. Doellner*, 13 Mo. App. 228. That was a case where a husband bound himself, by a bond secured by a deed of trust, to pay his wife a certain annuity during her life. The husband died, and the wife asked to have her contingent claim allowed against the estate of her deceased husband. The court ascertained the present value of the annuity, and allowed it against his estate. The case was controlled by sections 205 and 206 of the Statutes of 1879, which provided as follows:

"Sec. 205. When the demand or set-off is not due at the time of the trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court, or, at the option of the parties, by rebating therefrom, at the rate of six per cent. per annum, from the time of trial until due.

"Sec. 206. In case the parties do not agree to rebate the demand or set-off, as provided for in the preceding section, no execution shall issue upon any such judgment until the demand or set-off upon which the judgment was rendered shall become due and payable."

It will be noted, however, that that case is unlike the case at bar, in that it was presented as a demand against the personal estate of the obligor, while this is a suit for partition among the heirs of the obligor. Of course, the claim against the estate of a deceased person must be presented within the time limited by statute, or it will be barred. Hence, if the claim is not due, the probate court must adjust it, as the statute now is (Rev. St. 1899, § 204), or, as the statute of 1879 was, the court was required to adjust it, or, at the option of the parties, rebate it at the rate of 6 per cent. per annum, or, if the parties refused to accept the rebate, the

court allowed the claim, but stayed the execution until the debt became due. Woerner's American Law of Administration (2d Ed.) vol. 2, sec. 393, speaking of allowing claims that have not matured against an estate, says: "In accordance with the policy of speedy settlements of the estates of deceased persons, aimed at in most of the statutory provisions of the American states, most of them enable debts payable, according to the contract entered into by the deceased, at a future time, to be presented to the administrator and adjusted before their maturity." The author points out that in 33 states statutory provisions to this end have been adopted, and refers to section 203, Rev. St. 1889 (being section 204, Rev. St. 1899), as the statute in this state on the subject. The author further says: "To be proved and allowed as subsisting claims, they must constitute absolute debts running to certain maturity, such as promissory notes and the like. In Missouri unaccrued rent under a covenant to pay rent is held to be a demand entitled to be proved against the lessee's estate as an unmatured claim; but elsewhere this is denied, unaccrued rent being held to be neither debitum nor solvendum—never payable if the lessee should be evicted before the day on which it is payable. Reason and the trend of authorities seem clearly to support this view." Section 393. The case of *Traylor v. Cabanne*, 8 Mo. App. 131, is cited as the Missouri case holding that unaccrued rent could be proved against an estate. That case does so hold, but there was no extended discussion or examination of the question indulged in. The statute was simply referred to as covering the case. The question arose again in *Kavanaugh v. Shaughnessy*, 41 Mo. App. 657, and the St. Louis Court of Appeals (which court had also decided the case of *Traylor v. Cabanne*), after referring to sections 205, 206, Rev. St. 1879, said: "The defendant claims that the word 'demand,' in those sections, does not and cannot include rent not due and unearned, as rent is in no sense a debt before the day on which it is covenanted to be paid. As Gray, C. J., aptly says in *Deane v. Caldwell*, 127 Mass. 242, 'It is neither debitum nor solvendum; for, if the lessee is evicted before that day, it never becomes payable. * * * It is not an existing demand, the cause of action on which depends upon a contingency, but the very existence of the demand depends upon a contingency.' If the case were one of first impression, we would not hesitate to say that this objection is well taken. It seems to us that the statute, when speaking of demands, has reference to cases of absolute liability, which, although not due when presented, are running to a certain maturity, and not to cases where the existence of the future liability is contingent and uncertain. But this court at an early day, in *Traylor v. Cabanne*, 8 Mo. App. 131, 135, took a different view of the law; and it is fairly presumable that

courts exercising probate jurisdiction in this state have since that time followed that ruling, and it should not be disturbed unless such ruling not only is logically incorrect, but also leads to unjust results. Now, while we incline to the opinion that the interpretation of the word 'demand' contended for by the defendant is the correct one, yet it is of no practical importance which one of the two interpretations is adopted. The judgment in this case is that the recovery should not be enforceable until the rent becomes actually due, and the rent cannot become actually due until it is earned. Should the tenant, or those claiming under him, be evicted by holders of a paramount title prior to the expiration of the lease, or should the beneficial enjoyment of the estate by them cease by reason of causes absolving them from the further payment of rent under the covenants of the lease, the tenant or his representative could show that fact in resisting the enforcement of the judgment with the same effect as if the judgment, pro tanto, had been paid. The reasoning of the court in *Barclay v. Pickler*, 38 Mo. 146, leads to the conclusion that the tenant would be at liberty to do this, and we see no technical difficulties in the way. Under these circumstances, we do not feel at liberty to disturb a ruling acquiesced in by the court for many years simply because we have serious doubts of its abstract logical accuracy. It is of importance to all citizens that the law should be stable and certain." In *Garesche v. Lewis*, 15 Mo. App. 565, a demand for unpaid stock subscription in an insolvent corporation was presented for allowance. It was objected that the claim was barred because it was not presented within two years. The trial court entered judgment for the defendant, and this judgment was affirmed by the St. Louis Court of Appeals. That court, speaking of allowing claims not due, said: "The mere fact that a demand is not due is not necessarily a sufficient excuse for its nonpresentation against the estate, because the statute provides (Rev. St. 1879, §§ 205, 206) that, when the demand is not due, the court may adjust the same, and render judgment for the amount, or, at the option of the parties, by rebating therefrom at the rate of six per cent. until due; if the parties do not agree to a rebate, then no execution shall issue upon the judgment until the demand becomes due. It has been repeatedly decided that the special statute of limitation begins to run from the time that the substantial right of recovery accrues (*Burton v. Rutherford*, 49 Mo. 258; *Greenbaum v. Elliott*, 60 Mo. 32; *Chambers' Adm'r v. Smith's Adm'r*, 23 Mo. 174; *Miller v. Woodward*, 8 Mo. 169; *Finney v. State*, 9 Mo. 227), and that it does not begin to run in the case of a dormant warranty until a right to a substantial recovery accrues (*Chambers v. Smith*, 23 Mo. 174; *Miller v. Woodward*, 8 Mo. 169). But whilst such inchoate and

merely contingent demands need not be exhibited until there is a substantial right of recovery, the statute seems to contemplate that all claims capable of being exhibited, whether due or not, if running to certain maturity, shall be barred if not exhibited within the period limited by the administration law for their exhibition to the administrator." This court adopted the opinion of the Court of Appeals, and affirmed its judgment. *Garesche v. Lewis*, 93 Mo. 197, 6 S. W. 54. Woerner's Law of Administration (2d Ed.) vol. 2, sec. 394, speaking of contingent claims, says: "Claims not absolute or certain, but depending upon some event after the debtor's death, which may or may not happen, are not enforceable against executors or administrators, after they have fully administered, without notice that such claim has become absolute." And in the note to this section the learned author quotes from Poland, C. J., in *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320, as follows: "A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability." Thus the distinction fully appears between contingent demands and demands "running to certain maturity." Stock subscriptions were held to belong to the latter class in *Garesche v. Lewis*, and unpaid rents under a covenant in a lease were held to belong to the same class in *Traylor v. Cabanne*, but afterwards this decision was utterly discredited in *Kavanaugh v. Shaugnessy*, and the judgment allowed to stand in that case, partly on the principle of *stare decisis*, but partly, and it must have been principally, on the ground that "the judgment in this case is that the recovery shall not be enforceable until the rent becomes actually due, and the rent cannot become actually due until it is earned"; the Court of Appeals pointedly saying: "It seems to us that the statute, when speaking of demands, has reference to cases of absolute liability, which, although not due when presented, are running to a certain maturity, and not to cases where the future liability is contingent and uncertain."

It is manifest that because the statute bars claims not exhibited against an estate within the period limited, and because of the policy of speedily administering upon estates, there was a reason and necessity for the statutory provision allowing the probate court to adjust demands that are not yet due, but which will surely become due in regular course of time, but the statute was not intended to cover contingent claims which might never become debts. In respect to real estate that descends to the heirs, however, there is no statute which permits any court to adjust demands not yet due, or to ascertain the present value of contingent demands, and order the land to be sold and the ascertained present value to be paid at once.

Such a course would make certain, to the extent of the ascertained value, a contingent liability that might never become a fixed debt, and would pay presently that sum, when otherwise it might never become payable. The Legislature has given no such power to the courts, either for the speedy settlement of partition suits or otherwise. If any such power rests in the courts, it must be inherent. This court has held that in suits for partition the beneficial holder of a deed of trust, or the mortgagee in a mortgage, on the land, may be made a party. *Becker v. Stroeher*, 167 Mo., loc. cit. 320, 66 S. W. 1083; *Harbison v. Sanford*, 90 Mo., loc. cit. 481, 3 S. W. 20. The fact, however, that there is an outstanding mortgage on the land, and that the mortgagee is not made a party, will not bar a suit for partition. The judgment, however, will not affect or bind the mortgagee in such a case, but the land can be partitioned subject to the mortgage. *Walte v. Bingley*, 21 L. R. Ch. Div., loc. cit. 681; *Cheney v. Ricks*, 168 Ill., loc. cit. 546, 48 N. E. 75; *Walter v. Walter*, 3 Abb N. C. 12; *Fennell v. Tucker*, 49 Ala. 453. Speaking to this question, *Knapp on Partition*, pp. 96-97, aptly states the reason for making incumbrancers parties to the suit as follows: "Some courts have held, and especially in the last case cited, that it is not necessary to make judgment creditors and others having incumbrances upon premises parties to a bill for partition, even where a sale of the premises is decreed; and, where they were made parties in such a case by a supplementary bill, it was held that the bill should be dismissed, as in the case of *Swan v. Swan*, 8 Price, 518. The action was a bill for partition of premises mortgaged by a common owner to a third person. At a hearing it was argued for the defendant that the mortgagee should have been before the court, as he was a party in interest. But it was decided that the court could not make the mortgagee agree to a partition, because he is entitled to the whole. This decision undoubtedly was correct. But it is hard for one to see, under the present practice, why the mortgagee, or in fact any person having incumbrances upon premises, should not be made party defendant to the action. It is true that the mortgage liens, and perhaps the judgment liens, rest upon the whole property sought to be partitioned. But the purchaser, upon the sale, should know the standing of those holding such liens, and should know the exact position and circumstances governing and controlling the premises bid in by him. Then, if those incumbrancers are not made parties to the action, they might proceed to enforce their liens. In that case it would multiply expense and costs, and create many difficulties not necessary in such proceedings. And it is assumed to be the late practice that all persons having an interest or lien upon the property of any kind shall be brought into court, so that the court may adjudicate their

claims. It is not to be assumed that the court can compel the mortgagee to receive the money secured to him by his mortgage before the same becomes due; neither is it to be assumed that the court can compel such an owner of a lien to allow his lien to rest upon any part or portion of the property, or to take any satisfaction of his lien in part of the property. But he has rights in the premises, which the court has power to examine, which all parties to the case have a right to understand—especially the purchaser. And for these reasons, we believe that the latter practice of bringing all persons who have an interest before the court is the proper and better way in such cases." But however proper or desirable it may be to adjust the claims of a mortgagee in a partition suit, or to afford a clear title to the purchaser at a partition sale, no such considerations give countenance or support to the judgment in this case. If it be that the land could not be advantageously sold subject to the deed of trust, and if it be that it was proper to sell the land free of the incumbrance, this could not make the notes fall due sooner than their terms prescribed; nor could it give the court the right to make certain the contingent liability expressed on the face of the notes and deed of trust—that the death of the payees should extinguish the notes. There is no reason or rule of law for computing the present value of the notes, and paying that at once out of the proceeds of the sale of the mortgaged land. The notes were for \$1,400. The court computed their present value to be \$1,184. The father was 80 years old, and the mother a little younger. The judgment was rendered June 4, 1900. The notes were payable the 1st day of January of each year until 1906. Therefore, to entitle the payees to recover the whole \$1,400, they, or one of them, had to live until 1906. The court deducted \$216 from the face of the notes, and ordered the balance of \$1,184 to be paid at once. The right of the payees to recover any part of the \$1,400 was contingent upon their living until such installment fell due. The court wiped out the contingency, and made \$1,184 payable immediately. This was error. If it was proper to sell the mortgaged land free of the incumbrance, the court should have ordered that \$1,400 of the proceeds of the sale of the mortgaged land be reserved in the registry of the court (or loaned out at interest under the direction of the court) to meet the installments or notes as and when they fell due, and then distribute the balance of the proceeds of the sale of the mortgaged lands among the parties. The order should have further provided that, if the payees of the notes died, the remainder of the funds so reserved should be distributed among the parties in the proportion of their interests, as ascertained and adjudged, in the property. No practical difficulty could obstruct the efficiency of such a judgment, but in that way each party would

ultimately get all he was at any time entitled to, and no more, and the other heirs would not be compelled to pay to the father and mother a contingent liability that might never become a debt.

For these reasons, the judgment of the circuit court is reversed, and the cause remanded, to be proceeded with in accordance herewith. All concur.

HARRINGTON & GOODMAN v. HERMAN.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

BANKRUPTCY—DISCHARGE—SALE—FRAUD OF BUYER—JUDGMENT FOR PURCHASE PRICE OF GOODS—BUYER AND SELLER—FIDUCIARY RELATION.

1. Bankr. Act 1898, § 17 [U. S. Comp. St. 1901, p. 3428], provides that a discharge shall release all provable debts, except "judgments in actions for fraud or obtaining property by false pretenses or false representations." A judgment recited that plaintiff's cause of action was founded "upon a written instrument, to wit, an account." In the suit, which was for the price of goods, a writ of attachment had been issued; one of the grounds therefor being that the debt sued for was fraudulently contracted. *Held*, that the judgment creditor could not go behind the judgment, and prove that the sale of the goods was induced by the fraud of the judgment debtor, to avoid the effect of the debtor's discharge in bankruptcy.

2. Bankr. Act 1898, § 17 [U. S. Comp. St. 1901, p. 3428], provides that a discharge shall release a bankrupt from all provable debts, except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. *Held*, that no fiduciary capacity existed between a buyer and seller of merchandise, which would prevent a discharge in bankruptcy releasing the purchaser from a judgment for the price of the goods, though the sale had been induced by his fraudulent representations.

Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Action by Harrington & Goodman against D. H. Herman. Judgment for defendant, and plaintiffs appeal. Affirmed.

This cause was tried by the circuit court of Greene county, Mo., the result of which was a judgment for defendant, from which judgment plaintiffs, in due time and form, have prosecuted their appeal.

This is an ordinary proceeding to revive a judgment heretofore rendered in favor of the plaintiffs and against the defendant. The respondent, as a defense thereto, pleads a discharge in bankruptcy. The appellants, by way of replication, plead that defendant's discharge in bankruptcy is no bar to the revival of their judgment against the defendant; alleging that the judgment was for goods sold to the defendant, and obtained by defendant from the plaintiffs by false pretense and false representations. The court treated respondent's discharge as a complete release of all his indebtedness, of every character whatsoever, and rendered judgment against the plaintiffs for costs, and

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 818.

discharging the respondent from the obligations of the judgment. From this judgment, and after an unsuccessful motion for new trial, the plaintiffs appealed to this court.

In order to fully understand the disputed questions in this case, it would be well to examine the pleadings, and see precisely what is in issue. The petition to revive the judgment is as follows: "Harrington & Goodman, a firm composed of Samuel Goodman, Wm. E. Goodman, and Jos. Goodman, Plaintiffs, v. Daniel H. Herman, Defendant. In the Circuit Court of Greene County, Missouri, May Term, 1899. Come the above-named plaintiffs, Harrington & Goodman, a firm composed of Samuel Goodman, William E. Goodman, and Joseph Goodman, and represent to this honorable court that on the 2d day of February, 1891, plaintiffs recovered in this court a judgment against Daniel H. Herman, the above-named defendant, said judgment being founded upon the sale by plaintiffs of merchandise to the firm of Herman Bros., of which the above-named defendant, D. H. Herman, was a member, amounting at said time to seven thousand one hundred and twenty-nine dollars, and therefore the said plaintiffs recovered against said Daniel H. Herman a judgment for said amount, with interest thereon at the rate of six per cent. per annum from said February 2, 1891, to this date, and for costs of said suit, which said judgment was duly entered upon the records of this court, in Judgment Record 38, at page 259; that no part of said judgment has been paid, and the whole amount thereof is due and unpaid; that no part of the costs of said suit has ever been paid by said defendant; and that the lien of said judgment on the lands and tenements of said Daniel H. Herman has expired. Wherefore plaintiffs pray that said judgment thereof be revived against the said Daniel H. Herman, and that the lien be revived against the lands and tenements of said Daniel H. Herman, and that a writ of scire facias issue to the said Daniel H. Herman, his tenants, and the occupants of his lands, commanding him and them to appear before this court at the next term thereof to show cause, if any he has, why this judgment, in form as rendered aforesaid, and the lien thereof on the real estate of the said Daniel H. Herman, be not revived, and for such other and further relief as may be proper. Heffernan & Heffernan, Attorneys for Plaintiffs." Defendant files answer to this petition as follows: "Harrington & Goodman, Plaintiffs, v. Daniel H. Herman, Defendant. In the Circuit Court of Greene County, Missouri, May Term, 1899. Comes now the defendant in the cause above entitled, and, for answer to plaintiffs' amended petition, denies each and every allegation in said petition contained, and so, having answered, prays to be discharged, with costs. And for another and further answer to petition of plaintiffs, defendant said that here-

tofore, to wit, on the 22d day of November, 1898, he filed a petition in the District Court of the United States for the Southern Division of the Western District of Missouri, to be adjudged a bankrupt; that thereafter, in the course of said bankruptcy proceedings, the plaintiffs in this case, as well as the other creditors of this defendant, proved up their judgments before the said court and the referee in bankruptcy, George S. Ratlibun, against the defendant and against his estate; that afterwards, in due course in said proceedings, the petition of this defendant to be adjudged a bankrupt, and discharged as such, came on to be heard before the judge of said court, and on such hearing the plaintiffs in this case, as well as certain other creditors of the defendant, filed objections to the defendant being adjudged a bankrupt, and discharged as such; that said objections were heard in due course in said United States District Court, and were on the 10th day of April, 1899, by said court, overruled, and thereupon, on the said day, this defendant was adjudged a bankrupt, and judgment was entered finally discharging him as such bankrupt. That by the force and effect of said judgment the defendant was discharged and relieved from further liability on the account of the alleged indebtedness of the plaintiffs against him, and is no longer responsible therefor. Wherefore, having so fully answered, defendant prays to be discharged, with costs. R. L. Goode, Attorney for Defendant." The replication of plaintiffs was in the nature of a confession and avoidance of the new matter alleged as a defense to the action. It is admitted that the defendant was discharged, as alleged, in the bankrupt proceedings, from all debts against his estate, under said bankrupt act, but it is averred that the debt evidenced by the judgment sought to be revived is excepted by law from such discharge, for the reason it is alleged that the merchandise purchased by the defendant, for which plaintiffs recovered judgment against the defendant, was by the defendant, D. H. Herman, obtained and procured from the plaintiffs by false pretenses and false representations. The replication of plaintiffs fully sets forth the manner of obtaining the merchandise, and avers in detail in what the fraud in securing the goods consisted. As to the original suit, in which the judgment was recovered for merchandise sold defendant by plaintiffs, a writ of attachment was issued in aid of the suit. One of the grounds in the affidavit which was filed in procuring the attachment was "that the debt sued for was fraudulently contracted for on the part of the defendant." A plea in abatement was filed by defendant, which put in issue the grounds alleged in the affidavit for attachment. This plea was withdrawn, and the attachment was sustained.

Heffernan & Heffernan, for appellants.
W. D. Tatlow, for respondent.

FOX, J. (after stating the facts). It will be observed that in this controversy there is but one issue, and that is sharply presented by the pleadings in this cause. Plaintiffs offered in evidence the judgment obtained against the defendant, which is sought to be revived; also the affidavit in attachment, and the judgment in case of McNally v. Herman, Record No. 38, page 265; also the affidavit in attachment and judgment in case of Lippincott, Johnson & Co. v. Herman—to all of which testimony defendant objected as irrelevant, incompetent, and immaterial. This evidence was admitted subject to objection. This was the prima facie showing as made by plaintiffs. "Defendant offered in evidence certified copy of discharge of D. H. Herman from bankruptcy, together with the objections and exceptions thereto, to which plaintiffs objected because said discharge is not a discharge in a case of the character that is sought to be revived, because the United States court failed and refused to consider the objections made by Harrington & Goodman; stating at the time that it wasn't a proper defense to his discharge, and that, if the facts were true as stated, it would have to be brought up in a different way. (Objections overruled, to which plaintiffs then and there duly excepted at the time)"—which discharge in bankruptcy is as follows: "Discharge of Bankrupt. District Court of the United States, Southern Division of the Western District of Missouri. Whereas, Daniel H. Herman, of Springfield, in Greene county, and state of Missouri, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Daniel H. Herman be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 22d day of November, A. D. 1898, on which date the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy. Witness the Honorable John H. Rogers, Presiding Judge of said District Court at said April term, A. D. 1899, and the seal thereof, this 10th day of April, A. D. 1899. [Signed] John H. Rogers, Presiding Judge." This was all the evidence offered by the defendant. Plaintiffs, in rebuttal, offered a volume of testimony tending to show that the defendant procured the credit for the merchandise for which they obtained judgment by false and fraudulent representations. It is unnecessary to burden this opinion with the details of the testimony, for it is apparent from the record in this cause that, under the view of the law adopted by the trial court, this testimony was excluded, or at least was not considered. The only issue in this cause was very aptly and appropriately presented by the declaration of law prayed for by the plaintiffs, as

follows: "The plaintiffs' judgment against the defendant should be revived, notwithstanding defendant's discharge in bankruptcy, because the merchandise sold and delivered by plaintiffs to the defendant, for which said judgment was rendered, was secured from plaintiffs by false and fraudulent representations, for the purpose of 'obtaining property by false pretenses and false representations,' which declaration of law the court refused to give, to the refusal of which the plaintiffs excepted to at the time. The defendant, upon his behalf, asked no declaration of law."

Plaintiffs' contention is that the trial court, upon this state of the record, should have entered judgment for plaintiffs, reviving the judgment upon which this action is predicated. It will be observed that the discharge in bankruptcy pleaded as a defense to this action was procured under the provisions of the bankrupt law of 1898. In order to reach a proper conclusion in this cause, it is necessary to carefully examine the provisions of that act. Section 17, St. U. S. 1897-99 [U. S. Comp. St. 1901, p. 3428], provides: "Sec. 17. Debts not Affected by a Discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." Plaintiffs' contention is that the evidence offered by them in this cause placed the judgment sought to be revived within the exceptions as mentioned in subdivisions 2 and 4 of section 17, supra. Under subdivision 2, "Judgments in actions for fraud, or obtaining property by false pretenses or false representations," are not released by a discharge in bankruptcy; and subdivision 4, it will be observed, provides that debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," are not released. The judgment sought to be revived in this cause was based upon an account for merchandise sold the defendant by plaintiffs. The recitation in the judgment shows, beyond question, that fact. It recites, "and their cause of action being founded upon a written instrument, to wit, an account;" hence it cannot be contended that this was an action for fraud, or obtaining property by false pretenses or false representations. It is, however, insisted by plaintiffs that they

have the right to go beyond the record in this cause, and show that the creation of the debt upon which the judgment is based was by fraud and false representations. This we do not think plaintiffs have the right to do, under the provisions of the bankrupt law in force at the time of the entry of the discharge of the defendant in the bankruptcy proceedings. The provisions of the bankrupt act of 1898 are materially different from the act of 1867. The last-mentioned act provides "that no debt created by the fraud of the creditor shall be affected by the discharge." The term used under the former act (being the act of 1898) is that "no judgment in an action for fraud" shall be affected. In the one there is no importance placed upon the form of the action. In the other, it expressly provides that the action upon which the judgment is predicated shall be one for the fraud perpetrated in the transaction. This distinction is very aptly drawn in the case of *Argall v. Jacobs et al.*, 87 N. Y. 110, 41 Am. Rep. 357, where the court, in discussing the act of 1867, says, "It is not provided that no cause of action for fraud shall be discharged, but that 'no debt created by fraud' shall be discharged." In this case we will say that the provisions of the statute do not apply to debts "created by fraud," but substantially contain the provision which the court says in the case of *Argall v. Jacobs et al.*, *supra*, the statute of 1867 did not contain. In that case the suit was upon two promissory notes, not upon a judgment, as in this case. The defense was a discharge in a bankrupt proceeding. Plaintiffs in that case, in their reply, alleged that the debt, as evidenced by the notes, was "created by fraud," and the court very properly held that the fraud in the creation of the debt might be shown, to the end that the discharge in bankruptcy might be inoperative, so far as this particular debt was concerned. The case of *Bank of North America v. Crandall*, 87 Mo. 208, is nearly identical with the New York case above mentioned. This case was upon promissory notes, and the defense was a discharge in bankruptcy, both of which were tried under the provisions of the act of 1867. These cases were entirely different from the case at bar. The discharge was under a statute materially different, and the actions were upon the original debt. Even under the strong provisions of the act of 1867, we are of the opinion that the plaintiffs are not entitled to go behind the judgment and the pleadings to show that the debt upon which the judgment was based was fraudulently incurred. In the case of *Shuman v. Strauss*, 52 N. Y. 404, while the court fails to positively assert in its opinion that this cannot be done, for the reason that the question was not legitimately before it, yet it does say that the contention of plaintiff that he could go behind the judgment and record, and show that the debt was "created by fraud," is not supported by the authorities

cited, and that the cases cited by plaintiff fall far short of the claim of the plaintiff. The court proceeded in that case to examine the decisions cited, and demonstrated that the judgments and record supplied the proof that the debts upon which the judgments were based was created by fraud. Our attention is earnestly directed to the case of *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723. An examination of that case will demonstrate that the judgment and record proved beyond question that the debt upon which the judgment was based was created by fraud. It will further be observed that the discharge in bankruptcy in that case was in pursuance of the bankrupt act of 1867. It will not be contended that, if the action is based upon fraud, the fraud is merged in the judgment, but it must appear from the record and judgment that the action was based upon a fraudulent transaction. See case of *Forsyth v. Vehmeyer* (Ill.) 52 N. E. 55, where this question is fully discussed. In the case of *Stern v. Meyer*, 9 Misc. Rep. 102, 29 N. Y. Supp. 34, the conclusions reached in case of *Shuman v. Strauss*, *supra*, are fully approved. And in *Palmer v. Preston*, 45 Vt. 154, 12 Am. Rep. 191, the doctrine is clearly announced that "the recovery of a judgment upon a contract induced by fraud is a waiver of the fraud, and the judgment is not a debt created by fraud, within the meaning of the bankrupt law act, and the plea of a discharge in bankruptcy is a good defense to an action of debt founded upon said judgment." So far as this contention is concerned, the action of the trial court in the case at bar does not need the support of the doctrine heretofore announced. Its action is fully supported by the very terms of the statute—"no judgment in an action for fraud or obtaining property by false pretenses or false representations shall be affected." The judgment sought to be revived was based upon an ordinary suit on account for goods sold and delivered. The action for fraud or obtaining property by false pretenses or representations, as mentioned in the bankrupt act of 1898, must be construed as contemplating the common-law form of action for fraud and deceit. The form of the action must be determined by the petition; hence the affidavit for an attachment in aid of the suit forms no part of the petition, and cannot be looked to in determining the form of action. The provision of the bankrupt act of 1898 must be construed to mean what it says—that it is judgments in actions for fraud, and not debts created by fraud, as in the act of 1867, which are not to be affected by the discharge in bankruptcy. The conclusions as herein expressed upon this contention having been reached by this court, the error urged by the appellants in this respect must be ruled against them.

This leaves us to the last contention, based upon subdivision 4, § 17, of the bankrupt act of 1898 [U. S. Comp. St. 1901, p. 3428], which

provides "that no fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity shall be discharged." Was there any fiduciary relation existing between plaintiffs and defendant at the time of the sale of the goods upon which their judgment sought to be revived is based? We think not. Our attention is called to the case of *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326, and *Brooks v. Yocum*, 42 Mo. App. 516. We will say as to those cases, if they are cited in support of the theory first treated of in this opinion, "that the plaintiffs had the right to go behind the judgment, and show that the debt upon which the judgment was founded was created by fraud"; that they are not applicable, because that question was not involved. These cases were suits upon the original debts, and not upon judgments, as the case at bar. We have no doubt as to the correctness of the doctrine, under the act of 1867, that in a suit upon an account or note, or any other evidence of debt, where the defendant would plead a discharge in bankruptcy, plaintiffs in such suit upon the debt would be entitled to show it was created by fraud; but that is not this case. If the cases are cited in support of the contention that a fiduciary relation existed between the plaintiffs and defendant at the time the merchandise was sold to defendant, we will say that the facts as to the relationship in those cases and the facts in the one before us are not at all similar. In the *Booth* and *Yocum* Cases, the defendants were commission merchants, and consignments of goods were made to them, to sell. In this case it was a plain sale and delivery of goods and wares in the ordinary course of business. As has been very appropriately said, "In almost all of the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of the trust." But it is apparent that this is not the "fiduciary capacity" spoken of in the bankrupt act. This contention is settled adversely to the plaintiffs in the very able and exhaustive review of all the authorities in the case of *Bracken v. Milner*, 5 Am. Bankr. Rep. 23, 104 Fed. 522. In that case, *Phillips, J.*, very clearly demonstrated how the conflict in the different cases originated in respect to the application of the terms "fiduciary capacity." Under the bankrupt act of 1841, the provision in respect to the subject now under discussion was that "debts created in consequence of defalcation" as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, would not be affected by the discharge in bankruptcy. And this provision was the subject of controversy in the case of *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236. It was held in that case "that a factor who had defaulted in accounting for a balance due his principal was not acting in

a fiduciary capacity." Subsequently this statute was amended by the act of 1867, in which the enumerations of classes were omitted; that is to say, executors, administrators, etc. Judge *Pardee*, in the case of *Fulton v. Hammond* (C. C.) 11 Fed. 291, drew the distinction between the statutes of 1841 and 1867, and by reason of this change in the statutes, held that there was an intention to enlarge the comprehension of the terms "fiduciary capacity," and that the *Chapman* Case was no longer to be followed in that respect. But in the cases of *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586, and *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, the cases making the distinction between the acts of 1841 and 1867 are discussed, and the conclusion finally reached that the *Chapman* Case was the law, even under the statute of 1867. Without passing on the soundness of the doctrine, it might not be amiss here to say that the rule announced in the Missouri cases heretofore mentioned was laid down by reason of the distinction drawn by the cases holding that the *Chapman* Case was not applicable to the bankrupt act of 1867. This doctrine was departed from in the cases of *Neal v. Clark* and *Hennequin v. Clews*, supra. The reason of the rule in the cases of *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326, and *Brooks v. Yocum*, 42 Mo. App. 516, under the act of 1867, having been abandoned, the rule itself would fall. After a full discussion by the learned judge in the case of *Bracken v. Milner*, supra, this very appropriate and intelligent application of the terms "fiduciary capacity" was reached: "That the phrase implies a fiduciary relation existing previously to or independently of the particular transaction from which the debt arises." In the case before us for determination it might be claimed that the plaintiffs, as has heretofore been said, in a commercial sense, reposed a trust in the punctuality and integrity of the defendant at the time they sold him the goods, yet we are unable to reach the conclusion that such a trust in a simple, plain sale and delivery of merchandise created a "fiduciary relation," such as is contemplated by the bankrupt act of 1868.

Finding no error in the action of the trial court, the judgment will be affirmed. All concur.

HOLMES v. BRADENBAUGH.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

INJURY TO SERVANT—PERSONAL INJURIES— FAILURE TO FURNISH SAFE APPLI- ANCES—EVIDENCE.

1. Evidence in an action by a servant for personal injuries held to show that plaintiff's injury was not the result of the master's failure to furnish safe appliances, but of plaintiff's negligent management thereof.

Appeal from circuit court, Jackson county; James Gibson, Judge.

Action by Joseph R. Holmes against J. O. Bradenbaugh. From an order setting aside a nonsuit, defendant appeals. Reversed.

This is an action for \$5,000 damages for personal injuries received by the plaintiff while in the employ of the defendant, in his elevator, in Kansas City. The plaintiff suffered a nonsuit, which the court afterwards set aside, and from which order the defendant appealed.

The allegations of the petition as to the cause of the injury and the negligence charged are as follows: That on November 1, 1899, and at all times hereinafter mentioned, the plaintiff was in the employ of and working for said defendant in and about said Crescent Elevator. That on November 1, 1899, he was working on the bin floor of said elevator, and the spiral conveyor became disarranged and did not work properly, so that it was necessary to disconnect it with the power from the engine. In order to do this, the plaintiff attempted to throw the belt off of the pulleys connecting the said conveyor with the shafts and belting running to the engine, and to tie up the belt with a rope provided for that purpose, to keep the belt out of reach of the machinery. This work had to be done in a very narrow space just over the shaft, while the shaft was revolving with great speed. While attempting to tie up this belt, the belt or rope being used by the plaintiff was caught by the revolving shaft or set screw thereon, and the plaintiff was drawn into the machinery, and his hands caught by the revolving shaft and held until the machinery was stopped. That the plaintiff's left hand was torn across the back each time the set screw revolved, and the ends of the fingers on his right hand were mashed off, and the plaintiff was in great danger of losing his life. The plaintiff further alleges that his injury was due to the negligence, carelessness, and failure on the part of the defendant to provide proper and safe machinery for the doing of the work assigned to plaintiff, and the failure on the part of defendant to keep said machinery in repair. That the defendant used a spiral conveyor to distribute the wheat in the several bins, and allowed the spiral and the machinery running the same to become rusty and out of repair, so that it worked with difficulty and frequently caught, necessitating the throwing of the belt off of the pulleys connecting said spiral conveyor with the power running the same; that only a stick was provided with which to throw off the said belt, and so confined was the space provided that when the belt was thrown it was necessary to tie up the belt out of the way of the machinery, and for this purpose a rope was provided, all of which made said machinery dangerous and difficult to operate. That defendant was negligent in not providing a belt conveyor, which could have been stopped, without danger to the operator, by means of a lever, and the said defendant was

further negligent in not stopping the engine and machinery when said spiral conveyor had to be disconnected, and the defendant was further negligent in not providing a larger space and safer place within which the operator might work while tying up said belt. The plaintiff further alleges that the defendant received notice prior to the accident, and knew, that said machinery was defective and unsafe, and the same was unknown to the plaintiff. That the plaintiff was not negligent or careless while doing said work at the time he was injured, but was careful and prudent in the use of said machinery and in the doing of said work. The plaintiff further alleges that at all times herein mentioned he was performing the duties required of him, and for which he had been employed by the defendant.

The answer is a general denial, with special pleas of contributory negligence and assumption of risk.

The case made by the plaintiff was this: For over two years before the accident the plaintiff had been in the employ of the defendant. The plaintiff is a nephew of the defendant's wife, and at the time of the accident he was 29 years old. It was the plaintiff's duty to weigh the grain in and out of the elevator, to see that it was put in the proper bin, to look after the machinery on the upper floors, and, if anything went wrong, to shut it off, if he could, and fix it, and, if he could not do so, then to notify Ed. Hunt, the superintendent.

Without entering into a detailed description of the machinery, it is enough now to say that the grain is carried to the top of the elevator, and then there are spiral conveyors which carry it to the several bins. A conveyor is a kind of a trough, made usually of iron, on the inside of which there is a spiral screw or auger, which, by revolving, carries the grain along the inside of the conveyor. The outside of the conveyor is stationary, and has drop flaps over each bin that may be opened so as to permit the grain to fall into the proper bins below. The spiral screw or auger on the inside of the conveyor is operated by means of a belt and pulley, that is, a belt working around a revolving shaft. There were two such conveyors in this elevator, on the east and west sides thereof respectively. Where the two ends of the shaft are coupled together, there is a knuckle that goes around the shaft, and a set screw that fastens the knuckle, which is three-fourths of an inch in diameter and stands up about an inch from the shaft. At first, and up to about 18 months before this accident, there were two friction band pulleys on the shaft, one to control each conveyor, and when it was desired to stop the conveyor, or, rather, the spiral screw inside of the conveyor, without stopping the shaft, it was only necessary to pull the lever, which pulled the pulley out of gear, and permitted the shaft to revolve without revolving the pulley that

operated the conveyor; and to start the conveyor again, it was only necessary to throw the lever back again. This part of the machinery had gotten out of repair and had been taken out. For about 18 months before the accident, the only method provided for stopping a conveyor without stopping the whole machinery was a stick or pole and a piece of rope. By means of the stick the belt was shoved off of the drum or wheel on the shaft, and thus left hanging slack around the shaft. To prevent it from coming in contact with the other belt that operated the other conveyor, and thereby being injured or burnt by the friction of the other rapidly moving belt, the rope was used to tie the first-named belt up to a railing that ran above the belt and alongside of the walk on which the person who was attending to the putting of the grain into the proper bins could go to reach and operate the drop flaps aforesaid. The plaintiff saw these appliances every day while he worked at the elevator. It does not appear from the evidence, however, that he ever tried to throw the belt off of the shaft and stop the conveyor until two days before the accident, when the east conveyor got out of fix, and he called down to the superintendent Hunt and told him about it, and asked him to stop the machinery and come up and fix it. Hunt told him to throw the belt off from the shaft (this is not technically correct, but expresses the idea well enough) and fix it himself. The plaintiff replied that he could not do it. Hunt answered that he would have to do it; that it was a part of his duty. Thereupon the plaintiff did so, and tied up the belt and fixed the conveyor, and threw the belt back again. To do this he used the stick and the rope aforesaid. On the day of the accident Hunt told the plaintiff that as soon as the grain was put in the bins he wanted him to throw the belt that operated the west conveyor, as it was not working right, and he (Hunt) wanted to work on it. Before the grain was loaded, however, the plaintiff heard a great noise about the west conveyor, and supposed the spiral screw on the inside of the conveyor had fallen down and was working against the bottom of the conveyor, which would ruin both the screw and the conveyor. Without notifying Hunt or asking him to stop the machinery, because he says he knew Hunt would tell him to do as he had done two days before on the east conveyor, the plaintiff took the stick and threw the belt off of the shaft, and tied the belt up to the railing with the rope. He started away and then looked back, and saw that he had not tied the belt up high enough, and that as it was it would come in contact with the other belt and be ruined. So he went back and attempted to tie it up. While so engaged he was caught by the rope, dragged over the railing, the railing broken, his hands tied with the rope and caught between the belt and the shaft, and both hands injured. He

is unable to tell how it happened or what caused it, but said that he thought the rope became entangled around the set screw on the revolving shaft, and thus tightened until it drew him into the position in which he was. Upon the alarm being given, the machinery was stopped, and, when Hunt got to him, he found his hands in the condition above described, and the rope wound around the set screw. The ends of the rope were spliced so as to make a loop, and not to have any knot that might catch in the machinery. The plaintiff offered testimony to show that such a set screw in other elevators had a shield around it to prevent anything becoming entangled in it, and that this set screw had no such precautionary device, but the court excluded the testimony because no negligence in this regard was charged in the petition. The plaintiff testified that there was no danger incident to using the stick to throw the belt off of the shaft, because it was a long pole or stick, and the person using it stood at a distance from the machinery; that it was difficult to do this, because the belt was tight around the shaft, and it would sometimes break the end of the stick. The superintendent, however, testified that he considered this method of throwing the belt with the stick and tying it up to be an unsafe method. This opinion was admitted without objection. The superintendent, however, gave no reason whatever for this opinion. He admitted telling the plaintiff two days before that he must throw the belt off of shaft that operated the east conveyor and fix it himself, but he added that he told him, if he could not do so, to let him know. There was no evidence tending to support the allegations of the petition that the defendant was negligent in not stopping the engine and machinery when the conveyor was to be disconnected, nor that the space was not large enough for the operator to work while tying up the belt. As to not stopping the machinery, the plaintiff said he did not notify the superintendent or any one else that there was any trouble, nor that he intended to throw the belt, nor did he ask that the machinery be stopped while he was so doing.

Upon this showing the court nonsuited the plaintiff, and afterwards set it aside and granted a new trial, and the defendant appealed.

Harwood & Meredith, for appellant. Frank P. Sebree and Jno. D. Wendorff, for appellee.

MARSHALL, J. (after stating the facts). 1. The negligence charged in the petition is that the defendant furnished a stick to throw the belt off the shaft and a rope to tie it up, while he should have had a lever attachment for doing this. That such was the method that had been used for about 18 months before the accident there is no doubt or con-

sist in the evidence. The only evidence, however, that such a method was unsafe that was offered was the opinion of Hunt, the superintendent, and, while he gave the opinion, he gave no reason whatever for the opinion, or why it was unsafe. It appears that the method had been in use for a year and a half. Hunt knew it; the plaintiff knew it; every one around the elevator knew it. It also appears that the means and methods so furnished had been used every time the conveyors became choked up with grain or got out of fix; that two days before the accident the plaintiff had successfully used the same means and method for stopping the east conveyor; that no one had ever been hurt by the use of such means and methods before. In fact, the method is so simple that it is difficult to see how it could be dangerous or unsafe. The plaintiff himself says that there can be no danger in using the stick or pole to throw the belt, because the pole is long, and the person using it stands a distance away from the machinery. It is uncontradicted that, when the belt is thrown off from the drum or wheel on the shaft that holds it taut and moves the belt as the shaft revolves, the belt still remains around the shaft, but is so loose that the revolving of the shaft does not move the belt. The belt is therefore stationary. The belt, however, is slack, and may rub against the other belt that operates the other conveyor, and the friction may burn or injure it; so, to prevent this, the rope was used to tie the stationary belt to the railing along the side of the walk, and thereby keep the two belts from coming in contact. This does not seem at all an intricate or dangerous thing to do. The manipulation of no machinery is involved in tying a stationary belt to a railing with a rope. It appears so simple that any one, especially an educated man 29 years old, who had worked in this elevator over two years and had seen this done many times, should be able to do it without any especial trouble or risk. Why the plaintiff met with any injury on this occasion from attempting to do it he says he cannot explain and don't know, unless it was that the rope got tangled with the set screw on the revolving shaft. That the rope was so entangled when the machinery was stopped, and Hunt got to the plaintiff, is shown by the testimony of Hunt. But how or why or from what cause the rope got so entangled nowhere appears from the evidence. The set screw was on the shaft, and projected about an inch above the shaft. The belt that the plaintiff had thrown off from the shaft was some 18 feet in length; that is, the evidence shows the conveyor was 18 feet from the shaft, and that the belt communicated the power from the shaft that operated the conveyor, so the belt must have been 18 feet long. This being true, there appears no reason whatever that required the plaintiff, while tying the belt to the railing, to get near

enough for the rope to become entangled with the set screw on the shaft. If he did so, and if this was the cause of the accident, the plaintiff was properly nonsuited in this case, both because no right to recover was predicated in the petition upon any negligence in not covering the set screw with a shield to keep the rope from becoming entangled with it, and also because it was the plaintiff's own negligence that caused the accident; or, at any rate, no actionable negligence on the defendant's part has been shown.

The correlative rights and duties of the master and servant are thus defined in *Minnier v. Railroad*, 167 Mo. loc. cit. 112, 66 S. W. 1072: "It is the duty of the master to furnish to the servant a reasonably safe place and reasonably safe machinery and appliances in which and with which to do the master's work." *Tabler v. Railroad*, 93 Mo. 79, 5 S. W. 810; *Grattis v. Railroad*, 153 Mo. 403, 55 S. W. 108. "It is not the duty of the master to furnish any particular kind of tools, implements, or appliances. His duty in this respect is to use ordinary care and diligence in selecting and furnishing safe and suitable tools and implements. No inference of negligence can arise from evidence which shows that the implement was such as is ordinarily used for like purposes by persons engaged in the same kind of business." This terse statement of the rule was announced by Black, J., in *Bohn v. Railroad*, 106 Mo. loc. cit. 433, 17 S. W. 580. This court, in banc, speaking through Sherwood, J., in *Steinhauser v. Spraul*, 127 Mo. loc. cit. 562, 28 S. W. 625, 30 S. W. 102, 27 L. R. A. 441, said: "It is well-settled law that an employer is not bound to furnish his employes the safest known appliances, tools, or machinery, the latest approved patterns of tools and improvements therein, etc., nor does he render himself liable by failing to discard tools or appliances which are not such, and to supply their places with those which are more safe (2 *Thompson on Neg.* p. 983; *Blanton v. Dold*, 109 Mo. 64 [18 S. W. 1149])." The servant, in entering the service of the master, assumes the risks that ordinarily and usually are incident to the business being conducted by the master, and his wages include compensation for injuries received from such risks. In *Bradley v. Railroad*, 138 Mo. loc. cit. 302, 39 S. W. 763, this court, per Macfarlane, J., said: "It is equally well settled that a master can conduct his business in his own way, and the servant, knowing the hazards of his employment as the business is conducted, impliedly waives the right to compensation for injuries resulting from causes incident thereto, though a different method of conducting the business would have been less dangerous." To the same effect is *Jackson v. Railroad*, 104 Mo. 448, 16 S. W. 413. It is also the law, not only in this state, but almost universally, that if the master fails in his duty to his serv-

ant to furnish safe appliances, and if the servant knows, or by the exercise of ordinary care could know, that the appliances furnished are not altogether or reasonably safe, the servant is not obliged to refuse to use the appliances or quit the service of the master if he reasonably believes that by the exercise of proper care and caution he can safely use the appliances, notwithstanding they are not so reasonably safe, and if he does use them and exercise such care and caution, and is injured, the servant does not waive his right to compensation for injuries received in consequence, nor is he guilty of contributory negligence. But if the appliance is obviously so dangerous that it cannot be safely used even with care or caution, or, as it is sometimes said, if the danger of using it is patent, or such as to threaten immediate injury, then the servant is guilty of contributory negligence, if he uses it, and the master is not liable, notwithstanding his prior failure of duty. *Huhn v. Railroad*, 92 Mo. 447, 4 S. W. 937; *Soeder v. Railroad*, 100 Mo., loc. cit. 681, 13 S. W. 714, 18 Am. St. Rep. 724; *Holloran v. Iron Co.*, 133 Mo. loc. cit. 476, 35 S. W. 260.

Whilst it is true that mere knowledge on the part of a servant of the defective machinery or improper appliance will not bar a right of action, or require the servant to quit the service if the danger does not threaten immediate injury, and if the servant reasonably supposed the machinery or appliance could be used by the exercise of ordinary care (*Francis v. Railroad*, 127 Mo. 609, 28 S. W. 842, 30 S. W. 129; *Pauck v. Beef Co.*, 166 Mo. 639, 66 S. W. 1070); and whilst it is true that, if the facts of any case are such that reasonable men may fairly differ as to whether there was or was not negligence, the case is one for the jury (*O'Mellia v. Railroad*, 115 Mo. 221, 21 S. W. 503; *Hamman v. Coal Co.*, 156 Mo. 232, 56 S. W. 1091)—still these rules of law do not control the decisions of this case, because the case made for the plaintiff does not bring him within these rules. The plaintiff himself says there could be no danger from using the stick to throw the belt off of the shaft. It is too clear to admit of a difference of opinion among reasonable men that it is not negligence on the master's part to furnish the servant with a rope to tie the stationary belt to the railing so as to prevent its rubbing against the moving belt, and to require him to do so. The rope was a safe appliance for such a purpose. That the appliance could be safely so used, without risk or danger or injury, is not only demonstrated by the fact that it had been so used many times for a year and a half, and by the fact that the plaintiff had so used it two days before on the west belt, but it is also a plain, obvious, physical fact that no man of ordinary intelligence could be found to deny. So that, if the rope on this occasion caused the accident, it was not because the rope was not a suitable ap-

pliance for the purpose it was intended for, but because the rope was improperly handled or applied by the plaintiff himself. *King v. Morgan*, 48 C. C. A. 507, 109 Fed. loc. cit. 448. And, this being true, the court properly nonsuited the plaintiff, and erred in afterwards setting it aside, and its judgment is reversed, and the cause remanded with directions to set aside the order setting aside the nonsuit. All concur.

GLADNEY et al. v. SYDNOR et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

CONSTITUTIONAL LAW — HOMESTEAD — HUSBAND'S RIGHT OF ALIENATION—INVASION OF VESTED RIGHT—CONSTITUTIONALITY OF STATUTE—ALTERATION OF WIFE'S REMEDY.

1. Subject to Rev. St. 1889, § 5435, permitting a wife to file a claim of homestead to lands occupied by herself and husband, after which he could not alienate without her consent, a husband had, prior to 1895, the right to alienate his homestead, subject only to the wife's dower. In 1895 the legislature enacted that the husband should be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner, and any such sale, etc., should be void. *Held*, that this act, in so far as it affected a husband's power over an existing homestead, was an invasion of his vested right, in violation of Const. art. 2, § 15, prohibiting laws retrospective in their operation.

2. The husband's right, prior to 1895, to convey the homestead without the wife's consent, was a vested right, though the wife might defeat it by taking the steps prescribed by Rev. St. 1889, § 5435.

3. The fact that the husband had not exercised such right would not warrant its invasion by the legislature.

4. The act of 1895 was not defensible as merely affecting the wife's remedy, as under it she was not required to proceed in any manner to bar the husband's power of alienation.

Appeal from circuit court, Lincoln county; E. M. Hughes, Judge.

Suit by Clemanda Gladney and another against Thomas G. Sydnor and another. From an order dissolving a temporary injunction and a judgment dismissing the bill, plaintiffs appeal. Affirmed.

This was an action commenced by the appellants in the Lincoln county circuit court on the 3d day of October, 1899, to enjoin a sale under a certain deed of trust, and to cancel and hold for naught said deed. The petition contains substantially the following allegations: "First, Clemanda Gladney, the real plaintiff, stated that she was, and since 1859 had been, the wife of her coplaintiff, George W. Gladney; that Thomas G. Sydnor was the sheriff of Lincoln county, Missouri; that the land described in the petition, consisting of 173.74 acres, had been owned and occupied by George W. Gladney as a homestead for a great many years, all of it since 1884, and that during all that time plaintiff and George W. Gladney, as husband and wife, had owned and occupied the same as a homestead; that on the 25th day of

May, 1897, George W. Gladney, without the knowledge and consent of plaintiff Clemanda Gladney, his wife, executed and delivered to George O. Hamilton, trustee, for the use and benefit of Ellen E. Wilson, a deed of trust, securing a note made payable to Ellen E. Wilson; that Clemanda Gladney, as the wife of George W. Gladney, did not join with George W. Gladney in the execution of said deed of trust, and that said deed of trust was on the land in plaintiff's petition described, being the 173.74 acres composing and comprising the homestead of George W. Gladney and Clemanda Gladney at that time; that the note described in said deed of trust was due; that George O. Hamilton, as trustee, had refused to act, and that defendant Thomas G. Sydnor, the then sheriff of Lincoln county, Missouri, under the provisions of said deed of trust, had the land advertised, and was threatening the sale of same. Plaintiff Clemanda Gladney further stated that since the 25th day of May, 1897, to wit, the 21st day of March, 1899, that the title to said land had been conveyed to her through mesne conveyance from George W. Gladney; that she, Clemanda Gladney, was now the sole owner of said land; that the deed of trust given by George W. Gladney to George O. Hamilton, trustee, was, under the laws as they now exist in the state of Missouri, absolutely void; but that, if Thomas G. Sydnor was permitted to sell and make a deed thereto, that it would cast a cloud over her title to the land, and that the deed of trust itself made by George W. Gladney, then on record, cast a cloud over her title. She therefore prayed for a judgment and decree of the court enjoining Thomas G. Sydnor, the acting trustee, from selling said land, and enjoining Ellen E. Wilson from attempting to carry into execution the said deed of trust made by George W. Gladney, and praying the court to cancel and hold for naught the said deed of trust. This petition was filed in the circuit court of Lincoln county, Missouri, and, the court not being in session, and no judge of the circuit court being in the county, a temporary injunction was issued on the 3d day of October, 1899, by the probate court of Lincoln county, Missouri. In the circuit court Ellen E. Wilson filed a separate answer, in substance as follows: Admitting that plaintiffs were husband and wife; admitting that George W. Gladney alone executed the deed of trust complained of on the 24th day of May, 1897, and admitting the record of the deed of trust as charged in the petition; denied the use of the land as a homestead; denied that Clemanda Gladney had become the bona fide owner of any portion of the land since the execution of the deed of trust; charging that, if Clemanda Gladney had obtained the title to any portion of the land from George W. Gladney, the same was without consideration, and the same was to defraud his creditors, and especially this defendant; admit-

ting that defendant Sydnor was the sheriff of Lincoln county, Missouri, and had the land advertised for sale under the terms of said deed of trust; and denying each and every allegation in the petition; and, further answering, alleging that the deed of trust complained of was made to secure an indebtedness created by George W. Gladney prior to the 21st day of June, 1895, and alleging that up to the time of making said deed of trust George W. Gladney owned the land described therein, consisting of 173.74 acres, in his own right, and was then of the value of \$4,000; alleging that Gladney owned the land prior to June 21, 1895, and as such owner and head of a family had and possessed a vested right and power, unrestricted by any act or deed or declaration of the said Clemanda Gladney, made or executed by her prior to the making of said deed of trust, to convey, alienate, or incumber the same, whether said land, or any part thereof, was a homestead or not; and that in the exercise of said right George W. Gladney made said deed of trust. Defendant Sydnor answered, stating that he was sheriff of Lincoln county, and at the request of defendant Ellen E. Wilson advertised the land for sale under the power of said deed of trust made by George W. Gladney to George O. Hamilton, trustee, said Hamilton having refused to execute said trust; and, further answering, said he had no knowledge or information as to the other allegations in plaintiffs' petition. Plaintiffs' reply to the separate answer of Ellen E. Wilson was a general denial of all new matter therein contained. Defendant then filed a motion to dissolve the temporary injunction granted by the probate court." Upon the trial of this cause the court sustained the motion to dissolve the injunction, and dismissed plaintiffs' bill. From this judgment this cause is brought here for review.

Norton, Avery & Young, for appellants.
Martin & Woolfolk, for respondents.

FOX, J. (after stating the facts). There is no dispute as to the testimony in this cause. It substantially appears from the evidence introduced that appellants were husband and wife, and had for many years been occupying the land in dispute, and were residing upon it at the time of the execution of the deed of trust in May, 1897. All the land involved in this suit was procured by the appellant Geo. W. Gladney prior to 1884, and he and his wife were occupying it continuously since 1884. Prior to June 21, 1895, Geo. W. Gladney borrowed two sums of money from the respondent Ellen E. Wilson, giving her two notes therefor. On the 24th of May, 1897, these two notes had not been paid, and amounted to \$428.67. Geo. W. Gladney on that day—24th of May, 1897—took up the two old notes, and executed to Mrs. Wilson one note, including the aggregate amount of the old notes, and to secure

the payment of the renewed note executed the deed of trust which is the subject of this suit. The appellant Clemanda Gladney, wife of Geo. W. Gladney, did not join with her husband in the execution of this deed of trust. It further appears that subsequent to the execution of the deed of trust by Geo. W. Gladney he and his wife, on the 21st day of March, 1890, executed a deed, conveying this same land (except 10 acres) to O. H. Avery, and on the same day O. H. Avery and wife conveyed the same land conveyed to him by Geo. W. Gladney and wife to Clemna Gladney. It is also disclosed by the record in this case that the land embraced in the deed of trust far exceeded the value of the "homestead," as defined by the statute. It is practically admitted that the deed from Geo. W. Gladney and wife to O. H. Avery was a voluntary conveyance, and without consideration. This is a sufficient reference to the testimony in order to indicate the vital questions involved in the controversy.

Under the well-settled law of this state, prior to the enactment of the statute of 1895, it is beyond dispute that the husband could sell or incumber the homestead, subject to the wife's inchoate right of dower, without the wife joining with him, except where the wife had filed her claim as provided by section 5435, Rev. St. 1889. This was clearly announced and determined in the cases of Greer v. Major, 114 Mo. 145, 21 S. W. 481; Tucker v. Wells, 111 Mo. 399, 20 S. W. 114; Kopp v. Blessing et al., 121 Mo. 391, 25 S. W. 757; Markwell v. Markwell, 157 Mo. 326, 57 S. W. 1078. In 1895 the legislature materially altered and changed the rights of the husband in respect to his right to incumber or sell the homestead. This change is embraced in these words: "The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever and every such sale, mortgage, or alienation is hereby declared null and void." If we concede that this was a homestead as contemplated by the statute, which the husband was debarred and incapable of selling or incumbering, notwithstanding it far exceeded the value of the homestead defined by the statute, then there is only one question before us for determination, and that is, was the right of husband, prior to 1895, to sell and incumber the homestead without the wife joining with him, such a vested right as the act of 1895 could not deprive him of? This leads us to the investigation of this all-important question. It is not only a very important one, but equally as interesting, for it is the first time this question has been presented under this marked change in the statute. Vested rights may be created either by the common law, by statute, or by contract. And it makes no difference as to the method of their creation; they are entitled to the same protection. If, in this case, the right of appellant Geo. W. Gladney to convey his homestead,

prior to the act of 1895, without his wife joining with him in such conveyance, was a vested right, it becomes so by the operation of law, and is entitled to the same protection under the Constitution and laws of the land, as though it had been created by contract. A vested right was defined in the case of Marshall v. King, 24 Miss. 85, "to be an immediate fixed right of present or future enjoyment." In the case of Calder v. Bull, 3 Dall. (U. S.) 380, 1 L. Ed. 648, Chase, J., says: "When I say that a right is vested in a citizen, I mean that he has the power to do certain acts, or to possess certain things, according to the law of the land." Judge Story, in the case of Society v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156, held "that upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." Article 2, § 15, of the Constitution of Missouri, provides "that no ex post facto law, nor law impairing the obligation of contracts or retrospective in its operation or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." The reference in this provision to ex post facto laws has special application to criminal cases; but the subdivision of this constitutional provision which is intended to protect every citizen against the impairment of vested rights is that inhibition against the passage of laws retrospective in their operation. The term "retrospective in their operation," as used in our Bill of Rights, is one which relates to civil rights and proceedings in civil causes. Ex parte Bethurum, 66 Mo. 545. Hence the well-settled rule deduced from all the authorities is that "acts of the Legislature are not to be considered as retrospective, unless they impair rights that are vested, because most civil rights are derived from public laws." Rich v. Flanders, 39 N. H. 304, and cases cited and discussed. In view of this principle we are led to the conclusion that an additional question must be answered in this investigation. The first inquiry in this case is, was the right of Geo. W. Gladney to convey or incumber his homestead without his wife joining in such conveyance a vested right, and as such could it be impaired by the act of 1895? The second inquiry is as to the act of 1895—is it to be construed simply as prospective in its operation, or, if it is intended to be retrospective, then is it not in conflict with the Constitution of this state, as quoted herein? It is clear that if Geo. W. Gladney had a vested right in dealing with his homestead prior to 1895, then, if the act of 1895 is intended to impair that right, it would truly be retrospective in its operation. As to the first proposition, we have reached the conclusion that the appellant Geo. W. Gladney had a vested right, in respect to conveying and incumbering his

homestead, prior to the act of 1895, and that act cannot impair such right. To us it seems as one of the highest privileges and dearest rights that can be bestowed upon the citizen. The law that creates the right to deal with your property without being compelled to have some one unite with you in the conveyance truly confers an inestimable privilege. This land was his, and beyond question he had the right to convey it, subject to her inchoate right of dower, prior to the act of 1895, without having his wife join with him in the deed. The fact that his wife could file her claim as provided in section 5435, Rev. St. 1889, heretofore referred to, does not change the rule so far as being a vested right. The right to convey was clearly given him, and the law provided the method how he could be barred of that right, and that was a personal privilege vested in the wife—a right she could exercise or refuse to exercise. The law that created the homestead also created a right in the wife by which she could divest the husband of his right to sell or incumber it; but this by no means contemplated that the Legislature could by enactment bar or impair the right given the husband in respect to his property. It may be said by appellants that this right to convey was merely conditional upon the failure of the wife to file her claim under the statute. The right to convey was not conditional; it was vested. Its duration was optional with the wife. This does not alter or change the principle that the Legislature cannot, by a law retrospective in its operation, impair vested rights. It has no more power under the Constitution to impair this right than it has to impair rights that are not subjected to any limitation as to its duration. No one, under the law, had the right to impair or interfere with his right of alienation, except his wife, and the Legislature cannot step in and exercise that privilege for her. She, and she alone, could exercise it.

Does the act of 1895, if construed as being retrospective in its operation (in other words, as being operative upon persons who were married, and who had acquired the homestead before its passage) impair the vested right of the husband? It certainly does. Before the passage of the act, he could convey himself. After the passage, he is not only barred, but the act says he "shall be incapable of conveying without his wife joins in the conveyance." "Impair" means to "make worse, to lessen the power, to weaken, to enfeeble, to deteriorate." This is as Webster defines it. Is not the power of the husband in respect to this homestead lessened, weakened, and deteriorated by the act of 1895, supra? As was said by the court in the celebrated case of *Calder v. Bull*, supra: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." Did not the husband in this cause

have the power to do certain acts in respect to the property in dispute that the present law prohibits him from doing? That able and illustrious jurist, Judge Story, very tersely places the test when he said in the case of *Society v. Wheller*, supra: "That upon principle every statute which creates a new obligation imposes a new duty or attaches a new disability, must be deemed retrospective." Apply this test to the case at bar. The statute of 1895 imposes upon the husband the new duty, if he desires to convey, of having his wife join in the conveyance. It attaches a new disability, for the very words of the present statute are that the husband is incapable of alienating his property. It is no answer to this question to say that his right to convey is not absolutely destroyed; that it is only partially so. In the case of *Bank v. Sharp et al.*, 6 How. 301, 12 L. Ed. 447, the doctrine is clearly announced that: "One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." The conclusions reached in this case that Geo. W. Gladney had a vested right prior to the act of 1895, and that such right cannot be impaired by a subsequent statute, and that, if the act of 1895 was intended to apply to him, it is retrospective in its operation, and is in conflict with the organic law of this state, are supported by principles announced by this court in analogous cases, and by conclusions reached in other states in cases identical in principle with the one before us. In the case of *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517, Burgess, J., very clearly announced this doctrine as to the vested rights of the husband: "Prior to the revision of the statute in 1889, a husband, by virtue of his marital rights, was entitled to the possession of his wife's lands, held by her as at common law, and could sue therefor in his own name; and the enactment of sections 6860 and 6864, Rev. St. 1889, providing that real estate belonging to the wife should be her separate property, and under her sole control, and empowering her to sue and be sued at law or in equity as a feme sole, did not deprive the husband of such rights in his wife's property which had become vested prior to 1889." In the case of *Leete v. State Bank of St. Louis*, 115 Mo. 184, 21 S. W. 788, the authorities are collated and reviewed. That case settles the law in this state that the Legislature has no power to pass laws retrospective in their operation, so as to affect vested rights. The statute under consideration in the *Leete Case* was the married woman's act of March 25, 1875. It was held that the act "creating a separate estate in the wife's personality, inclusive of her rights of action, and providing that the same shall not be deemed to have been reduced to

the possession of the husband by his use, occupancy, or care, but only by her express assent in writing, is to be construed prospectively, and does not apply to marriages in existence at the time of its passage, or to rights which had then accrued." It was further held that "an application of said statute to marriages then in existence, or to rights which then had accrued, would be violative of the constitutional provision prohibiting the enactment of a law retrospective in its operation." The conclusion reached in that case was that the married woman's act of 1875 could only operate prospectively, and did not apply to marriages in existence at the time of its passage, or to rights that accrued to such existing marriages. So we say in this case that the act of 1895 could only operate prospectively, and is not to be applied to husbands who had acquired homesteads prior to the passage of the act. Geo. W. Gladney, prior to the enactment of this statute of 1895, had the right to convey his homestead without his wife joining him; and, as was very appropriately said by the learned judge in the Leete Case: "These were his rights. But when he woke up on the morning the section mentioned went into operation he found himself, if appellant's position be correct, completely divested of his former vested rights, laboring under a new disability." It is now the settled law of this state that an act of the Legislature "is to operate prospectively only, and not otherwise, unless upon the face of the act itself the exceptions to the prospective rule do plainly and unmistakably appear."

It may be argued that, even though the right of Geo. W. Gladney, prior to the present statute, was a vested one, yet, as he had not availed himself of that right, the present law would be applicable, and that he could not exercise such right after the change in the statute. Perry on Trusts—a work of recognized authority—announces the doctrine upon a question identical in principle with the one before us. He says: "On principle it would seem that the right to reduce the wife's choses in action to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the choses to possession; and so it has been ruled in several cases." This is a complete answer to that argument, for in the doctrine announced by Perry, as above quoted, the principle is the same if the right existed—it makes no difference about the exercise of it—before the passage of the subsequent statute that undertakes to divest it. Upon the question, involved in this case, as to the right of Geo. W. Gladney, prior to the act of 1895, being a vested right, we are of the opinion that the unbroken line of decisions of North Carolina upon a point which in principle is identical with the one at bar are decisive of this question. That all may

fully appreciate the application of the cases to which we hereafter in this opinion direct attention, it would be well in a brief way to refer to the provisions of the Constitution and law of that state. In 1868 the state of North Carolina adopted and ratified its Constitution. The Constitution itself created a homestead defining the amount of land and value, etc., which was exempted from levy of execution. It also provided for the conveyance of the homestead, but declared that no deed executed by the owner of the homestead should be valid without the voluntary signature and assent of his wife. Prior to the adoption of this Constitution, land occupied by the owner and his wife could be conveyed by the husband alone. In the case of *Gilmore v. Bright* (N. C.) 7 S. E. 751, in passing on the question as to the right of the husband to convey the land subsequent to the adoption of the Constitution, the court says: "The case shows that the lands in dispute were the property of Samuel Gilmore long prior to the adoption of the Constitution of 1868, and that he and his wife were married long prior to that time. There never was any allotment of the said lands as a homestead, nor was there ever any petition by the said Gilmore to have such allotment made, nor was there ever any act of his indicating any purpose voluntarily to have said lands, or any portion thereof, dedicated to the purposes of a homestead. He had, prior to the adoption of the Constitution of 1868, the absolute right to sell or dispose of these lands as he pleased, without the concurrence of his wife, and, if he chose to do so, without her consent: and it is too well established by the authorities, federal and state, that this right was not divested by article 10, § 8, Const. N. C., to be questioned now. The state could not, by its Constitution, or its laws subsequently adopted or enacted, deprive him of his vested right to sell or dispose of the land in question, without contravening that provision of the Constitution of the United States which declares that no state shall pass any 'law impairing the obligation of contracts.'" The learned judge cites in support of that principle announced the cases of *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500; *Bruce v. Strickland*, 81 N. C. 267; *Murphy v. McNeill*, 82 N. C. 221; *Reeves v. Haynes*, 88 N. C. 310; *Fortune v. Watkins*, 94 N. C. 304; *Castlebury v. Maynard*, 95 N. C. 281; and the numerous cases cited in these authorities. In the case of *Bruce v. Strickland*, supra, the learned judge, after reviewing all the authorities upon the question as to the application of the enactment of subsequent statutes lessening the power of the husband, under former statutes, in respect to his lands, and reaching the conclusion that such subsequent acts do not affect rights secured under former laws, says: "These decisions rest upon the sanctity of vested rights under the protection of the Con-

stitution, among which is embraced the 'jus disponendi,' or right of alienation. The principle is too deeply imbedded in the fundamental law of free government to require vindication."

It may be said that these North Carolina cases are based upon the fact that prior to the adoption of the Constitution there was no homestead, and the land, not being a homestead, could be alienated by the husband without the wife joining in the deed. That does not alter or change the principle announced as applicable to the case at bar, for in this case the homestead, prior to 1895, could be alienated by the husband alone, subject to her dower, the same as the land mentioned in the Carolina cases; and it is apparent from an investigation of all those cases that they clearly announce the principle that the right of a husband to sell or incumber his land without his wife joining in the conveyance is a vested right, which a subsequent statute, which imposes upon him a new disability, and undertakes to prevent him from performing this act alone, cannot impair.

This brings us to the last contention of appellants. Appellants insist that the statute of 1895 did not impair any vested right of Geo. W. Gladney, but that it simply changed the remedy or procedure of the wife in respect to the homestead. The statute of 1895 does not require a single step to be taken by the wife. She is not required to proceed in any way. But it simply imposes upon the husband a new disability, rendering him incapable of doing an act which, under the prior law, he had a perfect right to do. If the statute had provided that the wife should adopt some other method of preventing the sale or incumbrance of the homestead, then it might be said that it was simply a change in the course to be adopted by her, to prevent the husband from acting. But it must be remembered that this change of the statute does not require her to proceed at all. In effect, the Legislature says in the act of 1895: "Under the former law we provided a remedy for you to prevent the exercise of certain rights of your husband in respect to the homestead. We will now exercise this right for you, irrespective of the fact whether you desire it done or not. We will simply divest your husband of the power to sell or incumber the homestead." We emphatically hold that this alteration and change in the statute is not simply a change in the remedy or procedure, but is, in the clearest terms possible, a deprivation of a right which the husband had prior to the enactment of the statute. We may add that a law which, even if intended simply to change the remedy or procedure, if, in fact it impairs vested rights, is just as obnoxious to the constitutional inhibition as if it in the clearest terms violated the constitutional provision. We have examined the cases cited by the learned counsel for appellants upon this question,

and we are of the impression that they are not based upon similar grounds, and hence are insufficient to change the conclusions reached upon this contention.

Entertaining the views as herein expressed as to the vested rights of Geo. W. Gladney in respect to the land in controversy, we are of the opinion that the action of the trial court in sustaining the motion to dissolve the injunction and dismissing plaintiffs' bill was correct, and it is ordered that the judgment be affirmed. All concur.

BLACK v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

SERVANT — INJURIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE — INSTRUCTIONS — EXCESSIVE DAMAGES.

1. In an action against a railroad for injuries to a servant, the petition alleged that plaintiff went between certain cars to uncouple them "under the supervision of his foreman," and that while plaintiff was in the performance of his duties the engine was suddenly and without warning started backward, whereby he was injured. The court instructed, at defendant's request, that the only negligence alleged was that defendant suddenly started the engine backward. Plaintiff testified that he was not directed to go between the cars. *Held* that, it appearing that the case had been tried on the theory that the negligence complained of consisted in the backing of the train, defendant could not complain on appeal that, in view of plaintiff's own testimony, he had recovered on facts contradictory to the allegations of the petition.

2. In an action against a railroad for injuries to a servant while between cars and endeavoring to uncouple them, the court, at defendant's request, instructed that if the jury believed there were two ways in which to uncouple a car—one safe and the other dangerous—and that plaintiff voluntarily adopted the dangerous way, he could not recover. *Held*, that inasmuch as it would be presumed on appeal that there was evidence tending to show the course taken by plaintiff was not more dangerous than the other, or the instruction would not have been asked, and the jury having by their verdict so found, defendant could not complain that plaintiff, in going between the cars, was guilty of contributory negligence.

3. Whether a railroad switchman, in standing between freight cars, endeavoring to take out a coupling pin, his back being toward the engine, was guilty of contributory negligence, when, as claimed by defendant, he could have stood with his face toward the engine, was a question for the jury.

4. The court instructed that if plaintiff could have turned his face toward the front of the train, and seen any movements thereof in time to avoid injury, then, in turning his face the other way, he was guilty of contributory negligence. *Held* to fairly present the question of contributory negligence to the jury.

5. In an action against a railroad for personal injuries, it was proper to refuse to allow defendant, in cross-examining plaintiff, to ask whether he ever knew of a person injured in a railroad accident getting well until after his case was tried.

6. In an action by a servant against a railroad for injuries sustained while he was standing between freight cars, endeavoring to take out a coupling pin, any error in requiring plaintiff's foreman to state whether he expected

plaintiff to go between the cars was not prejudicial to defendant, or of sufficient importance to justify reversal of a judgment in plaintiff's favor.

7. Five thousand dollars damages for injuries to a railroad switchman was not excessive; it appearing that two ribs and a collar bone were broken, and several bruises sustained, and the evidence as to whether the injuries were permanent being conflicting.

8. The engineer of a switch engine, who backs a train without having received any signal to do so, whereby another servant is injured, is guilty of negligence.

Appeal from circuit court, Pettis county; Geo. F. Longan, Judge.

Action by Samuel A. Black against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin L. Clardy and Wm. S. Shirk, for appellant. John Cashman and Sangree & Lamm, for respondent.

BURGESS, J. This is an action for damages for personal injuries by an employé of the defendant company against it, alleged to have been occasioned by reason of the defectiveness of the coupling of one of its freight cars, and the negligent moving of the car by the servants and employés of defendant. There was a trial in the court below before a jury, and a verdict for plaintiff in the sum of \$5,000. The defendant in due time filed motions for new trial and in arrest, which being overruled, it appeals.

The petition, after alleging that in the train of cars by which plaintiff was injured there was a defective car, whose drawhead had been pulled out, and the deadwood appurtenant thereto so damaged as to let the drawhead of the car to which it was directly attached pass under it, and the two cars come together, and that the damaged car was fastened to the car next to it with a temporary chain coupling (omitting a description of plaintiff's injuries, and other allegations not necessary to set forth), proceeds as follows: That he "was under the immediate supervision of one of defendant's switch foremen, or bosses of a switch crew, and was engaged, in the line of his duty, in aiding in cutting up and making up trains, switching cars, cutting out cars," etc., "in said yards; * * * that it became then and there his duty, in the line of his said employment, to help cut out said defective car from said train, and, under the direction of his said foreman, he was then and there engaged in aiding so to do; that one of defendant's switch engines was attached to said train at the time for the purpose of moving the cars thereof when and where necessary; * * * that while and when said train had come to a standstill the defective car was pushed back by hand by said switch crew, under the supervision of said foreman, so as to admit a switchman to get between it and the next car to uncouple the same as aforesaid, and this plaintiff, in the line of his duty, and under

the supervision and direction of his said foreman, went between the cars to so uncouple them, as was usual and proper for him to do, and while engaged in so doing, and while exercising due care and caution himself, the engine attached to said train was suddenly, violently, negligently, and recklessly, without warning of any sort, and without any knowledge on the part of plaintiff, started back by defendant, acting through its agents and employes, and by such start it drove and smashed said cars quickly together, and thereby catching plaintiff, without any fault on his part, and smashing him between said cars and injuring him as hereinafter set forth; that it was the duty of defendant to use care and caution in manipulating said train, and not to start or back the same without warning and signals; and plaintiff avers that defendant owed such duty and such care to plaintiff, so exposed as he was to peril and harm at the time, and that defendant negligently and recklessly omitted to perform such duty, and negligently and recklessly omitted to use care and caution in starting said train, and negligently and recklessly started said train backward without warning as aforesaid, and plaintiff avers that all his consequent injuries, wounds, hurts, pains, losses, and damages hereinafter referred to were directly caused by the negligence of defendant in the premises. * * * The defenses were a general denial and a plea of contributory negligence. At the time of the accident, July 25, 1898, the plaintiff was a switchman in defendant's yards at Sedalia, Mo., whose duties were to assist in making up trains, taking out and placing cars in trains, and manipulating switches; and on that day, about the middle of the afternoon, a freight train, called "No. 126," ran into the yard from the west. One of the cars of this train had a drawbar pulled out. The switch engine used by the switch crew of which plaintiff was a member hooked onto this train, and pulled it to the east end of the yards, where trains for the east are usually made up. The main line of the Missouri, Kansas & Texas Railroad crosses the main line and the other tracks of the Missouri Pacific in the east end of the Missouri Pacific yards. About the time train No. 126 was pulled into the east end of the yards by the yard engine, a Missouri, Kansas & Texas train pulled up south of the Missouri Pacific tracks for the purpose of crossing and going on north. The Missouri Pacific switch crew had pulled No. 126 east of this crossing, and the switchman in charge of the Missouri, Kansas & Texas crossing switch adjusted the switches to let the Missouri, Kansas & Texas train cross. The switch crew pulled Missouri Pacific train No. 126 east of this crossing, and the plaintiff and other members of the switch crew gave the engineer of the switch engine the ordinary signal to stop; and the plaintiff says he then repeated the signal, as a direction to the engineer to stand still. The switch crew in-

tended to uncouple the chain which fastened the car without a drawbar, to the one next to it, so as to cut that car out for repairs, whilst the Missouri, Kansas & Texas train was crossing the tracks. After the switch crew had stopped Missouri Pacific train No. 126 east of the Missouri, Kansas & Texas crossing, as above stated, the switch-crew foreman, the plaintiff, and another switchman, by the name of Emmert, all went to the car which was chained up, to unfasten it from the car to which it was chained. When a drawbar pulls out, a chain is used to connect the car with the next car to it. The last link of this chain is put into the drawbar of the next car, and a pin run through it; and the chain is then carried through the carry irons of the drawbar of the damaged car and wrapped around the king bolt or center pin of that car, and the hook at the end of the chain is run through one of the links of the chain. This chain, with the link at one end and the hook at the other, takes the place of the ordinary draw bar, link, and pin. When the plaintiff, the switch foreman, Reed, and Emmert got to the car, they found that the drawbar of the car next to the damaged car had pushed under the bed of the damaged car so that it could not be pulled without slacking the engine ahead or shoving the cars apart. Plaintiff says that Foreman Reed said to him: "We can't slack on ahead. We will just shove this car back by hand." Thereupon all three jointly shoved the car west, or, in other words, shoved the cars apart. Reed then got down under the car to hold up the chain, so as to give slack on the link of the chain which was fastened by a pin in the drawbar of the car ahead of it, so that plaintiff could pull the pin, and the chain be thus unfastened. Reed says he did not give plaintiff any orders or directions to go in between the cars to pull the pin; that he went down under the cars to lift the chain and pull the pin himself, as he afterwards did do, without the aid of any one. Plaintiff admits that Reed did not direct him to go in between the cars and pull the pin. Plaintiff went in between the cars to pull the pin, and found it tight, and he thought Reed was not stout enough to give him the slack, so he reached in with his left hand to help Reed hold up the chain. Still he could not get the pin. He then turned around, facing the west, and took hold of the pin with both hands, and got it up a couple of inches. He was in between the cars three or four minutes, and whilst he had hold of the pin, shaking it, the engineer, without any signal or warning, backed the train, and caught him between the cars. The train backed something like 50 feet before plaintiff got out. His shoulder was mashed between the cars perhaps twice before he fell out from between them. His hurts were temporarily dressed, and he was sent to the railway hospital at St. Louis. Reed, who went underneath the car to unchain it, was not injured. No one

notified the engineer that there was a chained-up car to couple, or that the plaintiff was going between the cars to uncouple it. He was merely signaled, when he got clear of the Missouri, Kansas & Texas crossing, to stop and stand still. As soon as the Missouri, Kansas & Texas train crossed over, the engineer, without further signaling, started to back west over this crossing to where the train was to be made up. At this time plaintiff was standing with his back to the engine. There were about 19 cars between him and the engine. Emmert heard the noise of the cars coming back. He testified that it takes two men to pull a pin when a car is chained up, and stated that one man could not do it. Reed, the foreman, however, testified that he never asked any one to help him pull a pin in such case; that he always got down under the car and pulled it himself. He did so that day after plaintiff was hurt. There are two ways of pulling a pin of a chained-up car: One way is to go between the cars and pull the pin, and the other is to get underneath the car and pull it that way. Emmert testified that he would not go in between cars when a drawbar was gone, to unchain them. He considered it too dangerous. Plaintiff was severely injured. The first and second ribs on the left side were fractured, his collar bone broken, and also his shoulder blade (at the lower end), his left hand bruised, and some other minor bruises on the body. There was no fracture or dislocation of the ribs near the sternum, nor any fracture of the shoulder blade up near the shoulder. The evidence was conflicting as to whether or not his injuries were permanent.

Because the petition alleges that plaintiff went between the cars to uncouple them "under the supervision and direction of his said foreman," and he testified that he was not directed to go between them to pull the pin by his foreman, and the evidence shows that he did so voluntarily, defendant contends that he was erroneously permitted to recover upon an admitted state of facts wholly at variance with and contradictory to the allegations of the petition. But this is not all the petition alleges. Upon the contrary, when fairly interpreted, it alleges that while plaintiff was in the performance of his duties as switchman, and exercising due care and caution, the engine attached to said train was suddenly, violently, negligently, and recklessly, without warning of any sort, and without knowledge on his part, started back by its agents and servants, driving the cars together, catching him between them and injuring him. And the case was submitted to the jury upon that theory, as is clearly shown by instruction No. 1 given at the request of defendant. It reads as follows: "The court instructs the jury that the only negligence alleged in plaintiff's petition, which caused the plaintiff's injuries, is that the defendant, through its agents and employes, suddenly and without warning to

plaintiff started its engine attached to train of cars backward, while the plaintiff was between two cars of said train, endeavoring to unfasten one of said cars, which was defective, in having a drawhead pulled out, which allowed said two cars to come together, and by reason of which movement of said engine the cars between which the plaintiff was were driven together, and plaintiff hurt, mashed, and injured." The case having been tried by both parties and submitted to the jury on the theory indicated by this instruction, and one to the same import given on the part of the plaintiff, defendant will not be heard to say in this court that the theory was an incorrect one. *Tetherow v. Railroad*, 98 Mo. 85, 11 S. W. 310, 14 Am. St. Rep. 617; *Whitmore v. Sup. Lodge*, 100 Mo. 47, 13 S. W. 495; *Jenning v. Railroad*, 99 Mo. 394, 11 S. W. 999; *Tomlinson v. Ellis*, 104 Mo. 105, 16 S. W. 201; *Walker v. Owen*, 79 Mo. 583; *Whetston v. Shaw*, 70 Mo. 575; *State v. Chick*, 146 Mo. 645, 48 S. W. 829.

It is said for defendant that there are two well-known methods of uncoupling cars when in the condition that the disabled car was at the time of the accident—one, by getting the cars far enough apart, and then going in between them to pull the pin; the other, by going underneath the cars, slacking the chain, and then pulling the pin—the first of which is much more dangerous than the other, and that the defendant having voluntarily, and without direction or request, adopted the most dangerous method, he must bear the consequences. But upon this phase of the case the court, at the instance of the defendant instructed the jury as follows: "And the court further instructs the jury that if they believe from the evidence that there were two ways in which to pull the pin and uncouple the car chained up to the one next to it—one a safe way, and the other dangerous—and that without being directed by his superior officer to pull said pin at all, or to pull it in any particular way, he voluntarily adopted the dangerous way, and by so doing he was caught, crushed, and injured, then he was guilty of such negligence, directly contributing to his own injury, as bars him from a recovery herein, and the jury will find for the defendant." And it must be conclusively presumed that there was evidence tending to show that the course pursued by plaintiff in attempting to uncouple the cars was not any more dangerous than the other, otherwise the instruction would not have been asked; and the jury having, by their verdict, in effect so found, defendant is in no position to complain on that score.

Whether or not plaintiff contributed to his own injury by first working at the pin with one hand, and, failing to lift it, then in turning his back towards the engineer, and taking both hands in attempting to so do, when he could have turned his face, as contended by defendant, was also a question for the consideration of the jury, and was fairly pre-

sented to them by instruction numbered 3 given in behalf of defendant. It is as follows: "If the jury believe that, in reaching in between the cars to uncouple them, the plaintiff turned his face toward the back end of the train, and away from the engine, so that he could not see any movement of the engine or cars, when he could have turned his face toward the front end of the train, and could thus have seen any movement of the train in time to have avoided injury, then, in turning his face away from the engine and other cars in the train, so that he could not see any movement of the engine or said cars, he was guilty of contributory negligence; and if the jury further believe from the evidence that he would not have been injured if he had turned his face toward the other cars and the engine, or that he was guilty of contributory negligence in not doing so, then the jury will find for the defendant." These were questions of fact to be passed upon by the jury, and they having done so, under an instruction asked by defendant and found adversely to this contention, the verdict should not be disturbed upon those grounds. The evidence shows that plaintiff was in between the cars at the time he was injured, and the jury were evidently of the opinion from the evidence that, even if his face had been turned towards the engine at that time, he could not have seen its movement.

There was no error in the court's refusal to allow defendant, in its cross-examination of plaintiff as a witness, to ask him "whether he ever knew a person injured in a railroad accident to get well until after his case was tried." The inquiry was foreign to any issues in the case, threw no light whatever upon them, and was beyond the bounds of legitimate inquiry.

As to the claim that the court erred in compelling the defendant's witness Reed to answer the plaintiff's question, "Did you expect him [the plaintiff] to come in there?" (meaning between the cars), even if erroneous, which it is unnecessary to decide, was not an error prejudicial in its character, nor of sufficient importance to justify a reversal of the judgment upon that ground.

It is said that the verdict of the jury is contrary to the fourth, sixth, and seventh instructions given in behalf of defendant; but when these instructions are considered in connection with all other instructions in the case, as they should be, defendant has no room to complain. When taken all together, they presented the case very fairly to the jury.

It is said that the verdict is grossly excessive, and evidences the fact that the jury were governed by prejudice or undue sympathy; that the plaintiff was a malingerer, and purposely kept his arm from getting well prior to the trial. The jury had the plaintiff before them, saw his wounds, and saw and heard the witnesses while testifying, which

offered them much better opportunities to judge as to whether or not plaintiff was a malingering, and the extent of his injuries, and whether or not permanent, than we have. There is nothing in the verdict from which it can be inferred that it was the result of prejudice or undue influence. Indeed, much larger verdicts for injuries not more serious have been upheld by this court. *Gurley v. R. R.*, 104 Mo. 211, 16 S. W. 11; *Burdick v. R. R.*, 123 Mo. 236, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528. It met with the approval of the court, and should not now be interfered with by this court.

It is clear that the accident was the result of negligence on the part of the engineer to whose engine the cars were attached that occasioned it. He had stopped the train in obedience to a signal from the plaintiff as switchman. He was also signaled by plaintiff, in accordance with the custom of the yardmen, to stand still; but in disobedience or nonobservance of these signals, and without any signal of any kind whatever, he put his engine in motion, backed up, and caught plaintiff in between the damaged car and the one to which it was attached, thereby crushing his body and seriously injuring him.

The judgment should be affirmed. It is so ordered. All of this division concur.

BLOOM v. STRAUSS.

(Supreme Court of Arkansas. March 1, 1902.)

Concurring opinion.

For majority opinion, see 69 S. W. 548.

BUNN, C. J. (concurring). If the question as to the validity of the will had been definitely raised and insisted upon in argument by counsel for appellant, I should favor a reversal, because I am of opinion that the will is in fact valid under the statute.

HAYES v. GOLDMAN.

(Supreme Court of Arkansas. Feb. 21, 1903.)

LANDLORD AND TENANT—OPTION TO RENEW LEASE—EXERCISE—ABANDONMENT OF TERM—QUESTION FOR JURY.

1. A lease gave the tenant an option to renew for another year. The tenant sent to the office of the landlord's agent a letter, stating that he did not wish to renew, but would like to retain the premises for the first month of the new year. The letter was delivered to a clerk, who read it, and remarked, "That is all right." The tenant remained in possession. It did not appear that the contents of the letter were ever communicated to the landlord or his agent. *Held* to amount to an election by the tenant to retain the premises for another year.

2. Where a landlord takes charge of the premises after abandonment by the tenant merely to protect them from injury, or, knowing that the tenant does not intend to return, rents them on the latter's account, such acts

may not show an assent to the abandonment; but, where he takes possession and rents the premises on his own account, it is conclusive evidence of surrender and acceptance.

3. Evidence in an action by a landlord for rent considered, and *held* to require the submission to the jury of the question whether the landlord's act in renting the premises after abandonment by the tenant was not an acceptance of the surrender, so as to terminate the lease.

Appeal from Jackson circuit court; Frederick D. Fulkerson, Judge.

Action by J. D. Goldman against John C. Hayes. Judgment for plaintiff, and defendant appeals. Reversed.

Goldman was the owner of two store buildings in the town of Newport known as "Racket Stores." On the 30th day of March, 1899, he leased these buildings to one Hayes for a period of nine months from the 30th day of March, 1899, until the 30th day of December, 1899, for a monthly rental of \$75, to be paid in advance. The lease gave Hayes the option to continue the lease for the period of one year from the 30th day of December, 1899, to the 30th day of December, 1900, at the same rental and on the same terms. Goldman lived in St. Louis, and this contract was made and signed by L. Minor, his agent at Newport. On the 30th day of December, 1899, Hayes prepared and sent to the office of Minor the following note: "Mr. L. Minor, Agent J. D. Goldman, City: I have decided to give up the two Racket stores, will not want them for 1900. Would however, like to retain them for the month of January. [Signed] John C. Hayes." This notice was carried by an employé of Hayes to the office of Minor, and there delivered to one Ferguson, a clerk in Minor's office. Ferguson read the notice, and then remarked, "That is all right." Without taking further steps to notify Minor, Hayes remained in the stores. On the 1st of January, 1900, he paid the rent for January in advance. About this time he was told that Minor considered that he had elected to keep the property under his contract for another year. He protested against this view of the matter, and declared his intention of holding only during the month of January. About the last of January he moved out of the stores, and returned the keys to Minor. Before Hayes moved out, Goldman, the owner, learning that Hayes intended to abandon the stores, agreed with one Stewart, acting for the Newport Builder & Supply Company, that he would rent the stores to the company for the remainder of the year at a rental of \$60 per month, and told him that Minor would reduce the contract to writing. When Hayes moved out of the stores he, as before stated, returned the keys to Minor, and shortly afterwards Stewart and his company moved in. After the end of six months Goldman brought this suit to recover the rent of that period from Hayes. Hayes for answer set up that (1) the plaintiff had con-

¶ 2. See *Landlord and Tenant*, vol. 22, Cent. Dig. §§ 364, 365, 367.

sented that he might occupy the premises during the month of January and quit at the end of that time; (2) that about the last of January he had surrendered the possession of the stores to the agent of plaintiff, and that the surrender was accepted, and that he was thus released from further liability under said lease. After hearing the evidence, the circuit court directed a verdict for plaintiff in the sum of \$75, that being the amount due under the Hayes contract if that was still in force, less the amount received from Stewart. Judgment was entered accordingly, and defendant appealed.

Gustave Jones, J. W. House, and M. House, for appellant. M. M. Stuckey, for appellee.

RIDDICK, J. (after stating the facts). There were two questions at issue in this case. The first was whether Hayes had elected to extend his tenancy for a term of 12 months from December 30, 1899, as under his contract he had the right to do. Granting that there was such an election on the part of Hayes, the next question is whether there was subsequently a surrender of such term.

The first question we think must be answered in the affirmative, for the evidence does not show that the notice which defendant claims that he gave terminating the tenancy was ever delivered to either Goldman or his agent, Minor. As defendant held over after the expiration of his term, without any consent on the part of the plaintiff except as shown in the contract, it must be presumed that he was holding under the contract, and had elected to hold the premises for another year. On this point we agree with the argument of counsel of Goldman, in whose brief the decisions bearing on the question are collated. The contention of appellant in reference thereto is overruled.

The contention of the appellant on the second question presented is that there was evidence tending to show that there was a surrender of the lease, and that the circuit judge erred in refusing to submit that question to the jury. Under the evidence, this raises a more difficult point for our consideration.

A surrender has been said to be the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, whereby the estate for life or years is by mutual agreement drowned in the estate in reversion or remainder. 18 Am. & Eng. Ency. Law (2d Ed.) 355. A surrender may be made by agreement of parties or by operation of law, and, when made, the estate of the lessee terminates, and the relation of landlord and tenant ceases. There was no express agreement for a surrender in this case, and the only question we have is whether there was evidence sufficient to go to the jury on the question as to whether

there was a surrender by operation of law. Now, any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to assume possession of, the demised premises on his own account, amount to a surrender of the term by operation of law. 1 Washburn on Real Property (6th Ed.) sec. 739; Williamson v. Crossett, 62 Ark. 393, 36 S. W. 27; Kneeland v. Schmidt, 78 Wis. 345, 47 N. W. 438, 11 L. R. A. 496; Talbot v. Whipple, 14 Allen, 180; 18 Am. & Eng. Ency. Law (2d Ed.) 364. An express agreement to accept the surrender need not be shown, for the landlord's assent may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant. 2 Wood on Landlord & Tenant (2d Ed.) 1173. If the landlord takes charge of the property after the tenant has abandoned it, merely to protect it from injury, or if, knowing that the tenant does not intend to return, he rents it to the account of the tenant, these acts may not show assent on his part; but if, after an abandonment, he takes possession and rents the premises on his own account, this is conclusive evidence of a surrender. Williamson v. Crossett, 62 Ark. 393, 36 S. W. 27; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; and other cases cited above. The law on this point is stated in a recent edition of a work on the subject, as follows: "When a tenant abandons the premises and returns the keys to the landlord, the latter may accept the keys as a surrender of possession, thereby determining the tenant's estate, and relet the premises on his own account, or he may accept the keys and resume possession conditionally by notifying the tenant, or other person returning the keys, that he will accept the keys but not the premises, and relet them on the tenant's account, in which case the tenant may be held for any loss in rent caused by his abandonment and the subsequent reletting." 2 McAdam on Land. and Ten. (3d Ed.) 1283. If the case of Meyer v. Smith, 33 Ark. 632, holds that the landlord may on abandonment take possession and relet on his own account, and still hold the tenant on his contract, it is not supported by any of the decisions, and is overruled by the case of Williamson v. Crossett, supra. But, as we understand that case, it means that the landlord may take possession for the tenant and rent for him without releasing the tenant from his contract.

Now, in this case, the tenant abandoned the premises and returned the keys to the agent of the landlord, and the landlord took possession and rented the premises to another. It is plain that if he took possession for himself, and afterwards rented these stores on his own account, he could not afterwards claim that Hayes was still in possession as his tenant, for his own acts are inconsistent with such a claim. But so far as we can see, there is little, if any, evidence

that shows to the contrary. The only evidence in the transcript to which we are referred tending to show that Goldman took possession and relet for Hayes, and intending still to hold him as his tenant, is found in the testimony of Hayes as brought out on his cross-examination. After Hayes was asked on cross-examination about the notice which he claimed to have sent to the office of Minor on the 30th of December, and which notice the clerk had testified that he delivered to Ferguson, a clerk in Minor's office, the examination proceeded as follows: "Q. How do you know who received it? All you know is just what your clerk told you about it? A. It was mentioned on the 1st day of January by Mr. Ferguson. Q. You were occupying the store at the time they collected the rent for the month of January? A. Yes, sir. Q. You had notice at that time that they would hold you to your contract, didn't you? You were then in the building after the time had expired? A. Yes."

Counsel for plaintiff rely upon these last questions and answers thereto as showing that Goldman did not accept the surrender. This proof, he says, "shows that appellee told appellant that he would hold him to his contract, and that the subsequent entry and reletting by the landlord was for the tenant." But to our minds there is doubt about this. It will be noticed that two questions were put to the witness. To repeat these questions, he was asked, first: "You had notice at that time that they would hold you to your contract, didn't you?" and then, without waiting for a reply to that question, the following question was put: "You were then in the building after the time had expired?" The witness then answered, "Yes." Now the witness, who was also defendant, had admitted—for it was one of the conceded facts—that he remained in the buildings one month after the expiration of the first term for which he rented. He claimed that this was under a new contract of tenancy for a month only, but in any event he was there in the house. The last question, then, he could only answer in the affirmative. So there was no real necessity of putting that question, and, by putting it before the first question was answered, we are left in doubt as to whether the affirmative answer of the witness was in response to that or the first question. But if we concede that his answer was in response to both questions, we are still not free from difficulty, for it is evident that the witness was then speaking of what happened on the 1st of January, when the advance payment of rent for that month was made. If this answer referred to the first question, it is still plain that he was not testifying about a rejection of an offer to surrender, which, if made, occurred about the last of January; but he referred to the contention of Mr. Minor that, by holding over to the 1st of January he had elected to hold the premises for another year, and

they would for that reason hold him to his contract. Now, treating it as proved that Minor had on the 1st of January notified him that the plaintiff intended to treat him as having elected to hold for another year, and would hold him to the contract, we must remember that this was on the 1st of January, before any abandonment or offer to surrender had taken place. The contest at that time was not over an abandonment or offer to surrender, but over the fact that plaintiff and defendant differed as to the duration of the tenancy, one contending that it continued for another year, the other that it expired on the last of January. Afterwards, during the month of January—a month for which defendant had paid the rent—the plaintiff, Goldman, in St. Louis, hearing that Hayes intended to abandon the premises, made an agreement with one Stewart, representing the Newport Bullder & Supply Company, that he would rent these stores to that company. Stewart testified that he went to St. Louis about the 20th of January, and made a proposition to Goldman to rent the property. "He told me," said Stewart, "that Mr. Minor and Mr. Hayes were having some trouble over the place, and he didn't know what to do, and I told him that was not my trouble; I wanted the place, and must have an answer that day. He told me to come back at 4 o'clock that afternoon, and he would give me an answer. I came back at 4 o'clock, and he told me that I could have it, but that he would write to his agent about the matter, and said he would fix up the contract." This, as before stated, was about the 20th day of January, a month for which Hayes had paid the rent. Afterwards Mr. Minor drew up the contract, and Stewart and his firm took possession of the house about the last of January or 1st of February, shortly after Mr. Hayes moved out. But it is said that Goldman made this contract because he had been told that Hayes intended to move out. This is doubtless true, but he made it before Hayes moved out, and without any notice to him, so far as the record shows. Under this view of the facts, we are not able to say as a matter of law that there was no surrender of the premises. On the contrary, we think that the evidence tends very strongly to show that there was a surrender.

Counsel for Goldman, quoting in their brief from Wood on Landlord and Tenant, say that "something more than an abandonment by the tenant, and a delivery to and acceptance of the keys by the landlord, must be shown. It must also be shown that he subsequently dealt with the property in such a manner as to clearly indicate that he regarded the tenant's estate at an end." That is, no doubt, a correct statement of the law, but in this case, in addition to abandonment by the tenant and acceptance of the keys by the landlord, it was shown that the landlord proceeded at once to relet the premises

to another, and, so far as we can see, he did it without any notice to the tenant that the reletting was on his account, and in a way that might well justify a court or jury in finding that he regarded the tenant's estate at an end. *Williamson v. Crossett*, 62 Ark. 398, 36 S. W. 27.

In conclusion, while we are of the opinion that the court correctly ruled that the tenant by holding over became under his contract liable as a tenant for another year, yet we think that the court erred in holding, as a matter of law, that there was no surrender of this extended term. As the case must be remanded for a new trial, and as it seems that the evidence was not all brought out on the first trial, we will express no opinion as to whether the undisputed facts in proof do not make out a case of surrender by the tenant and acceptance by the landlord.

For the error indicated, the judgment is reversed, and a new trial ordered.

BIFFLE et al. v. JACKSON et al.

(Supreme Court of Arkansas. Feb. 21, 1903.)

EQUITY—RENDITION OF DECREE IN VACATION
—EVIDENCE—EFFECT—SUIT TO QUIET TITLE
—IMPROVEMENTS AFTER SUIT—ALLOWANCE.

1. At the January term an order in a suit to quiet title was made, reciting that the cause was submitted, and set for argument on a certain day of court for another district, and that further proof could be taken by both parties, and submitted before argument. The term was then adjourned. A space on the minute book after this order was left for the entry of a decree. Depositions were taken, and in August following the judge formulated a decree, which was entered without date in the space reserved. The decree recited that, the case having been submitted at the January term, and taken under advisement, it was agreed that the decree should be rendered now for then. *Held*, that it sufficiently appeared that the decree was rendered in vacation, and was void.

2. The losing party in a suit to quiet title cannot be allowed for improvements made on the land after suit was instituted.

Appeal from Clay chancery court; Edward D. Robertson, Chancellor.

Bill by B. B. Biffle and another against Fannie C. Jackson and another. Decree for defendant Jackson, and plaintiffs appeal. *Affirmed*.

W. E. Spence and G. B. Oliver, for appellants. J. D. Bloch and T. H. Sullivan, for appellee.

BUNN, C. J. This is a bill in equity by B. B. Biffle and E. D. Hicks in the Eastern District of the Clay county circuit court, filed November 14, 1894, wherein the plaintiffs allege that "they are the owners in fee in the following lands, situated in the Eastern District of Clay county and state of Arkansas, to wit: The north half of the northeast quarter of section fourteen (14), in township twenty (20) north, range eight (8) east, containing 80 acres, more or less. Plaintiffs further state that said land is wild and unoc-

cupied, and that they claim title to said land under the following, to wit: That on the 29th day of August, 1859, the United States government, by its patent of that date executed and delivered, conveyed said land to W. C. Rayburn; that on the — day of —, 189—, W. C. Rayburn died intestate, seised of said land, leaving surviving him the following named heirs, to wit, M. M. Rayburn, Nola Donaldson, Maggie Timberman, Josie E. Panky, Alma F. Stokes, and Roxie E. Webb; that on the 22d day of September 1894, the above-named heirs of W. C. Rayburn, by their deed, duly executed and delivered, conveyed said land to these plaintiffs, which deed was filed for record on the 22d day of October, 1894, as will be seen by reference to a copy thereof, and certificates thereto annexed, herewith filed as Exhibit A, and made part of this complaint. Plaintiffs further allege that on the — day of —, 18—, Luke Thomas, by his deed of that date, sold and conveyed said land to Fannie C. Jackson, one of the defendants; that said Fannie C. Jackson did not acquire any title to said land by virtue of said purchase, for the reason that said Luke Thomas had no title to the land at the time of the conveyance, nor did he afterwards acquire any; that under and by virtue of the act of the Legislature of 188—, Robert Liddell, as clerk of Clay county, deeded said land to J. J. Allen on the — day of —, 1885, for the taxes due thereon for the year 1883; that said Mary Neebauer, one of the defendants, claims title to said land by virtue of the mesne conveyance from said Allen to her; that the sale under which the said Robert Liddell, as clerk as aforesaid, deeded said land to J. J. Allen, and under which the defendant Mary Neebauer claims title to said land, is absolutely void, and has been so declared by the Supreme Court, for the reason of the unequal levy of taxes in Clay county for that year; that all of defendants' deeds to said lands are clouds upon the plaintiffs' title. Wherefore plaintiffs pray that all of defendant's deeds to said land be canceled, set aside, and held for naught; that plaintiffs' title be quieted; and that the title to said real estate be awarded to plaintiffs; and for costs and all other proper relief."

To this complaint the defendant Fannie C. Jackson filed her separate answer and cross-complaint, in substance as follows, to wit: "The defendant Fannie C. Jackson, for her separate answer to the complaint of the plaintiffs and her cross-complaint, denies that plaintiffs are the owners in fee of the north half of the northeast quarter of said section 14; denies that said land is wild and unoccupied; admits that on the 29th day of August, 1859, the United States, by patent, duly conveyed said lands to W. C. Rayburn; admits that the said W. C. Rayburn subsequently died intestate, leaving, him surviving, as his heirs at law, the children named in plaintiffs' complaint; and admits that on

the 22d day of September, 1894, these children and heirs at law of W. C. Rayburn conveyed this land to plaintiffs herein, but denies that they (the plaintiffs) acquired any title by such conveyance, for reason herein-after to be given. Defendant, further answering, states that prior to his death the said W. C. Rayburn conveyed said lands to Luke Thomas, which deed of conveyance was in due form, regularly executed, acknowledged, and delivered, and filed for record at Gainesville, in the recorder's office of Green county, which county at that time included the said Eastern District of Clay county, and that said deed and the record thereof were destroyed by fire in the burning of the courthouse of Green county on the — day of —, 18—, and for that reason cannot now be produced; that defendant claims title by deed from said Luke Thomas; that before purchasing said lands from Thomas, her husband, G. M. Jackson, acting for her, was informed by said W. C. Rayburn, then living, that he had conveyed the same to said Thomas, and that he had a good title thereto, and upon the faith of such representations the said George M. Jackson, acting for her, purchased said land from said Thomas. Defendant, further answering, states that in purchasing said lands she also purchased a large body of other lands adjacent thereto, and in the same body, all included in the same deed; and went immediately into possession of the same, and caused to be erected thereon a large sawmill, sheds, fences, ox lots, stables, houses, and cleared and fenced and cultivated a part of said land; that she had been in possession thereof for more than seven years at the time of the filing of plaintiffs' complaint; that the possession was open and notorious; that she exercised ownership also by cutting and causing to be cut saw logs and other timber on said lands, and removing the same therefrom. Defendant admits that the purchase of her codefendant, Mary Neebauer, was void, for the reason stated in plaintiffs' complaint. Wherefore she prays that the complaint be dismissed for want of equity; that plaintiffs' deed from the children and heirs of W. C. Rayburn be declared null and void, and set aside and canceled; that her title to said lands be declared full and complete, and her title be quieted, and for other relief."

The January term, 1896, of said circuit court for the Eastern District of Clay county began on the 20th January, 1896, and on the twelfth day of said term, the same being the 31st day of January, 1896, the following order appears of record among the proceedings of said court, to wit: "On this day, this cause coming on to be heard, comes the parties thereto by their attorneys, respectively, and by consent this cause is submitted to the court, and it is agreed that the same be set for argument for Tuesday night of the third week of Craighead county circuit court for the Jonesboro District; and it is further

agreed that further proof can be taken by both parties hereto, and that the same can be submitted to the court on or before the day set for argument in said cause." The court appears to have adjourned on that day until court in course. At all events, no further business was transacted for the term, but a space on the minute book seems to have been reserved for the entry of any decree that might be thereafter rendered in the cause. Depositions were taken during the month of March, and the judge of the circuit court considered the cause in August following, and formulated his decree, which was in favor of the contention of plaintiffs, and transmitted the same to the clerk, who was also one of the plaintiffs, and the decree was entered in the space on the record book so reserved as aforesaid without further entry as to the date of the entry thereof. This decree concluded with the following statement of the judge: "This cause having been submitted at the regular January term, 1896, of the Clay circuit court for the Eastern District, and taken under advisement by the court, it is agreed that this decree be rendered now for then; to which finding and decree of the court the defendant at the time excepted, and prayed an appeal to the Supreme Court, which is granted. [Signed] F. G. Taylor, Judge."

No further findings were had in the case, and no further steps were taken in it, until the 28th day of September, 1897, when the children and only heirs at law of Fannie C. Jackson, the defendant, who appears to have died intestate on the 25th day of May, 1896, during the pendency of the suit, and before the decree was actually rendered, filed their petition to have said decree set aside and held for naught, on the ground that the same was rendered in vacation, and when the judge rendering it was holding court in another county in the circuit. The court held that said decree was rendered in vacation, and was, therefore, void, and therefore granted the petition, and revived the action, with said heirs at law as defendants.

This petition, as a part of the final decree, appears to have been formally heard again on proper notice, and in amended form, by the chancellor, after the organization of the chancery district, at the April term, 1898. Said final decree is in form as follows, to wit:

"(1) That Fannie C. Jackson departed this life May 28, 1896, intestate, and that said Josiah A. Jackson, George M. Jackson, Jr., Ama Jackson, and Maud S. Jackson are the children and only heirs of the said Fannie C. Jackson and G. M. Jackson, Sr., her husband.

"(2) That Fannie C. Jackson was the owner of the north half of the northeast quarter, section fourteen (14), township twenty (20) north, range eight (8) east, and that her children above named are now the owners thereof by inheritance, and are entitled to have

their title to said land quieted as against said B. B. Biffle and E. D. Hicks. It is further considered, ordered, adjudged, and decreed by the court that the decree made and entered in vacation, and the original decree confirming the tax title in cause No. 3, be set aside and vacated, and that the said bills be dismissed for want of equity. It is further ordered and decreed by the court that the titles of the said Josiah A. Jackson, G. M. Jackson, Ama Jackson, and Maud S. Jackson to the north half of the northeast quarter, section fourteen (14), township twenty (20) north, range eight (8) east, be quieted against B. B. Biffle and E. D. Hicks, and that the tax title and the title deed of the heirs of W. C. Rayburn to said B. B. Biffle and E. D. Hicks be canceled, and set aside as a cloud upon the title of the said Josiah A. Jackson, George M. Jackson, Jr., Ama Jackson, and Maud S. Jackson, and that B. B. Biffle and E. D. Hicks pay all costs, for which execution may issue."

"From this decree B. B. Biffle and E. D. Hicks prayed an appeal to the Supreme Court, which was granted; and on the same day filed a written motion to modify the decree to the effect that they be allowed the value of improvements made on the land, setting out the improvements."

That the original decree was rendered in vacation is abundantly established by the testimony both of witnesses and the record, since it is shown that the depositions upon which the decree was based were taken after the adjournment of the court at which the decree purports to have been rendered. The chancellor also had ample evidence to find that W. C. Rayburn sold and conveyed said land to Lucas Thomas; that the deed was put on record, and that the same, as well as the record thereof, had been destroyed by fire; and that Thomas afterwards conveyed the land to Mrs. Fannie C. Jackson, his deed to her being exhibited; and that this title was superior to that under which the plaintiffs Biffle and Hicks claim, since their grantors, the children and heirs of W. C. Rayburn, had nothing to convey, since the ancestor had previously conveyed to Thomas; that there was no divestiture of Fannie C. Jackson's title, nor that of her children after her, by reason of any of the alleged tax sales; that the proof fails to show that said Fannie C. Jackson made any conveyance of the land involved to Thomas, or any one else, after her purchase from him; that the exhibit mortgage from Thomas to her did not include in its description the land in controversy; that upon the whole case the decree of the court in favor of the heirs of Fannie C. Jackson was correct, and is affirmed.

As to the motion to modify the chancellor's decree, it appears that the labor expended upon the improvements was paid for by the use of the lands, and that the lumber that went into the improvements was all that

plaintiffs contributed to the making of the same, and that this amounted to about \$75, but this was furnished after the institution of the suit, and in fact after the original decree was rendered, to wit, about the 1st January, 1897. This claim was properly disallowed.

The decree of the chancellor is in all things affirmed.

DOUGLASS v. STAHL.

(Supreme Court of Arkansas. Feb. 21, 1903.)

UNITED STATES COURTS—INDIAN TERRITORY — UNITED STATES COMMISSIONERS — WARRANT FOR ARREST—FALSE IMPRISONMENT.

1. The United States courts for the districts of the Indian Territory are courts of the United States, within Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], which, in conjunction with 29 Stat. 184 [U. S. Comp. St. 1901, p. 499], authorizes a United States commissioner for any offense against the United States to issue a warrant for the arrest of the offender, for trial before such court of the United States as has cognizance of the offense.

2. Act Cong. May 2, 1890, § 41, providing that the judge of the United States court in the Indian Territory shall have the same power to extradite persons who have taken refuge in the Indian Territory charged with crimes in the states or other territories that is exercised by the Governor of Arkansas in that state, and may issue requisitions on governors of states and other territories for persons who have committed offenses in the Indian Territory and taken refuge in such states and territories, does not affect the power under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], and 29 Stat. 184 [U. S. Comp. St. 1901, p. 499], of a United States commissioner, appointed for a district in a state, to issue a warrant for the arrest of a person in such district for an offense committed in the Indian Territory against the laws of the United States.

3. The warrant for arrest issued by a United States commissioner is not void, so as to make the marshal serving it liable for false imprisonment, because after his signature is the designation "Commissioner of the Circuit Court of the United States for the Western District of Arkansas," though in the body of the warrant he was designated "Commissioner appointed for said district," the designation after his name being a clerical error, and such office having been abolished.

Appeal from circuit court, Crawford county; Jephtha N. Evans, Judge.

Action by Robert L. Douglass against Solomon F. Stahl. Judgment for defendant. Plaintiff appeals. Affirmed.

Chew & Fitzhugh, for appellant. F. A. Youmans, for appellee.

BATTLE, J. Robert Douglass was indicted in the United States Circuit Court for the Northern district of the Indian Territory, for murder committed in that district on the 15th day of December, 1897. The marshal of the district thereupon wrote to the sheriff of Franklin county, in this state, for information as to the whereabouts of the defendant, and, by way of identification, stated that his father had a stiff arm. The sheriff replied

that he resided about 12 miles from Ozark, in this state. The marshal in the Indian Territory then sent a copy of the indictment and the letter of the sheriff to Solomon F. Stahl, the marshal of the Western district of Arkansas, and requested him to cause Douglass to be arrested. Stahl then wrote to the sheriff, referred to his letter to the marshal in the Indian Territory, and asked for information as to the whereabouts of Douglass. The sheriff replied, gave the defendant's place of residence, and stated that he was at home. M. C. Mechem, a deputy of Marshal Stahl, upon receipt of the letter of the sheriff, made complaint before H. B. Armistead, a United States commissioner, and he issued a warrant in the words and figures following:

"United States of America.

"Western District of Arkansas.

"The President of the United States to the Marshal of the Western District of Arkansas, Greeting:

"Whereas, complaint on oath has been made before me charging that Robert Douglass did, on the 15th day of December, A. D. 1897, in the Indian Territory, Northern district, commit the crime of murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States:

"Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Robert Douglass and bring his body forthwith before me, Commissioner appointed for said district, whenever he may be found, that he may be dealt with according to law for said offense.

"Given under my hand, Fort Smith, Arkansas, this 17th day of August, 1899.

"H. B. Armistead,

"Commissioner of the Circuit Court of the United States."

The warrant was delivered to Deputy Marshal Lunsford, who went to Ozark, saw the sheriff, and was directed by him to a Mr. Wells, as a man who could conduct him to the place where Douglass resided. In company with Wells, Lunsford went to the place where Douglass lived, arrested him, took him to Ft. Smith, Ark., obtained a commitment for him, and put him in jail.

After this witnesses were brought from the Indian Territory, who testified that Douglass, the prisoner, was not the man who had been indicted for murder; and he was released. He then brought an action against Stahl for false imprisonment. The defendant recovered judgment, and the plaintiff appealed.

Appellant contends as follows:

First. That a United States commissioner appointed for a district in a state is not authorized to issue a warrant for the arrest of a person in such district for an offense committed in the Indian Territory against the laws of the United States.

Second. That the warrant in question was not issued for appellant.

Third. That the warrant is void.

First. The first contention is not true. Section 1014 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 716] is to the contrary, and provides as follows: "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

And section 19 of the act of Congress of May 28, 1896, provides: "That the terms of office of all commissioners of the circuit courts heretofore appointed shall expire on the thirtieth day of June, eighteen hundred and ninety seven; and such office shall on that day cease to exist. * * * That it shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners, at such places in the district as may be designated by the district court, which United States commissioners shall have the same powers and perform the duties as are now imposed upon commissioners of the circuit court." 29 Stat. 184 [U. S. Comp. St. 1901, p. 499].

The United States courts for the Northern, Central, and Southern districts of the Indian Territory are courts of the United States, within the meaning of those words as used in section 1014 of the Revised Statutes of the United States, vested with jurisdiction of all offenses committed therein against the laws of the United States. They were established and organized under acts of Congress, sit in a territory belonging to the United States, and exercise such jurisdiction only as was conferred upon them by that government. Having exclusive jurisdiction of certain offenses committed in their districts against the United States, the offender may, under section 1014 of the Revised Statutes of the United States, be arrested, in any district of the United States where found, by authority of a warrant of a United States commissioner, and removed to the districts in the Indian Territory for trial by such

courts. *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322; *In re Buell*, 3 Dill. 116, Fed. Cas. No. 2,102. As to organization and jurisdiction of courts, see 25 Stat. U. S. 783, § 1; 26 Stat. U. S. 96, §§ 33-35; 29 Stat. U. S. 693, § 1; 28 Stat. U. S. 694, § 2; 28 Stat. U. S. 697, § 9.

Our attention has been called by appellant to section 41 of the act of Congress of May 2, 1890, which provides: "That the judge of the United States court in the Indian Territory shall have the same power to extradite persons who have taken refuge in the Indian Territory charged with crimes in the states or other territories of the United States that may now be exercised by the Governor of Arkansas in that state, and he may issue requisitions upon governors of other states and other territories for persons who have committed offenses in the Indian Territory and who have taken refuge in such states and territories."

From this he argues that a commissioner outside of the territory cannot issue a warrant for the arrest of a person for a crime committed therein. This is not the effect of section 41. It is not inconsistent with section 1014 of the Revised Statutes of the United States, and there is no statute, so far as we know, repealing or modifying the latter section.

Second. The facts in this case show that the warrant issued by Armistead was procured for the arrest of appellant. He was properly described by name, and his father had a stiff arm, as the father of the indicted is said to have had; and there was no evidence that there was any other person of the same name in the same locality at the time the warrant was issued or executed.

Third. Was the warrant issued by Commissioner Armistead for the arrest of appellant fair upon its face? If it is, appellee was protected in its execution, and is not liable for damages on account of false imprisonment. "By this," says Mr. Justice Cooley, "is not meant that it shall be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is that it shall apparently be process lawfully issued, and such as the officer might lawfully serve." Mr. Freeman says: "The true rule on this subject is that a ministerial officer, proceeding regularly and without abusing or exceeding his authority, will be protected in the execution of process committed to him, unless such process is void on its face by reason of apparent want of jurisdiction of the subject-matter or person or precept, or by reason of some defect of substance in the language of the writ." *Savacool v. Boughton* (N. Y.) 21 Am. Dec. 181, and notes. To the same effect this court held in *Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

The warrant in question is not void for want of jurisdiction of the officer issuing it. It is said that it is void because after the

signature of the commissioner appears the designation, "Commissioner of the Circuit Court of the United States for the Western District of Arkansas." In the body of the warrant he designates himself, "Commissioner appointed for said district." The warrant is fair upon its face. The designation by the commissioner of himself as "Commissioner of the Circuit Court of the United States" was a clerical error, and did not render the warrant invalid. There was no such officer as "Commissioner of the Circuit Court of the United States" at the time it was issued. That office had been abolished, and the office of United States commissioner had been substituted for it. Armistead was a United States commissioner. The marshal, appellee, was bound to take notice of that fact, and that there was no such officer as a commissioner of the circuit court of the United States, and in taking notice of these facts he must have known, as the fact was, that Armistead had committed a clerical error in using the words "of the Circuit Court" in the designation of his office.

Judgment affirmed.

MALONEY v. TERRY.

(Supreme Court of Arkansas. Feb. 8, 1902.)

Dissenting opinion.

For majority opinion, see 66 S. W. 919.

BUNN, C. J. (dissenting). Mrs. Sarah Townsend, widow, and Joseph Townsend, as the son and only heir at law, of M. Q. Townsend, deceased, who died intestate, each had an interest in the estate of the deceased, and especially in certain city property known as the "Fair Ground Property." Mrs. Townsend claimed that Joseph Townsend owed her the sum of \$2,750, and brought suit against him in the Pulaski chancery court. She was represented by Messrs. Ratcliffe & Fletcher, attorneys, and Joseph Townsend was represented by Mr. W. J. Terry, who was the administrator of the estate of M. Q. Townsend, as well as attorney, as I understand the matter. Up to this time E. S. & L. C. Maloney do not appear to have had anything to do or connection with the other parties, and never afterwards had as attorneys, as I can see from the record. While Mrs. Sarah Townsend and Joseph Townsend stood in this attitude toward each other and with reference to the estate of M. Q. Townsend, Joseph Townsend, some time in the early part of November, 1898, saw the Maloneys, who were partners in the practice of law, and also dealt in land and other speculations, and engaged them to procure him a loan of \$3,000. He had, it seems, already procured a loan of \$7,000, and, to prevent him from further encumbering the property of the estate coming to him, Mrs. Townsend sued out an injunction against him, and obtained a restraining

order for the purpose aforesaid. This prevented the Maloneys from negotiating the loan of the \$3,000, Joseph Townsend being unable to procure the same. Mrs. Townsend says in her testimony, in substance, that, finding Joseph was about to mortgage the fair ground property to secure this loan, and his guardian being about to make a final settlement with him, she filed the bill for the injunction aforesaid to save said \$2,750. Afterwards Mrs. Townsend and Joseph made a compromise of the matter. Just what the terms of the compromise were, I am unable to discover. She states that at this juncture one of the Maloneys came to her, and asked what was the least she would take for her claim against Joseph Townsend. She agreed with him to take \$1,500, she to pay him \$75 out of the same for his services—presumably services on her behalf. Thereupon, in furtherance of the trade between her and the Maloneys, she executed and gave them the receipt marked "Exhibit A" in the pleadings, for the nominal consideration of \$1 and other valuable considerations, which she states was in full of her claim against Joseph, and thereupon she assigned and transferred her interest in the said land against him to the Maloneys, releasing all claims against Joseph and his guardian.

The Maloneys put this matter in a somewhat different light, but there is a substantial agreement between them. In response to her question as to how Joseph would pay, Maloney says he informed her that he would make Joseph pay a good deal more than he was giving her. He says, also, the beginning of this negotiation between him and Mrs. Townsend was that, in a response to a telephone message from her, he called upon her, and in the course of their conversation she informed him of certain offers she had received from others for her claim against Joseph—one for \$100 and another for \$1,250. That the purchase of the claim by him for \$1,500 resulted as stated. He denies that he ever told Mrs. Townsend that he was representing Joseph in this matter, or in any other matter than at one time he had been engaged to effect the loan of \$3,000, as stated. He says, however, that, seeing an opportunity for making something for himself, he purchased the claim of Mrs. Townsend on account of his firm. Maloney's testimony is not contradicted, except in some minor particulars, by any of the parties who were witnesses in the case, and the differences might well have grown out of misunderstanding of what was said on the occasions referred to in the testimony of witnesses.

It is not exactly clear when Maloney ascertained from Joseph Townsend what he was willing to give to settle Mrs. Townsend's claim against him—whether before or after they had purchased the same from Mrs. Townsend. The only certain effect their dealing with Mrs. Townsend had upon Joseph Townsend so far as their employment by

Joseph to effect the loan was concerned, was that, the Maloneys having bought Mrs. Townsend's claim against Joseph, they were enabled thereby to transfer to him the estate of his father free of incumbrance, so that he might effect the desired loan of \$3,000. But the decree in the case is based upon the theory that the Maloneys, in their dealings with Mrs. Townsend, were the agents of Joseph Townsend, and, receiving from him anything in excess of the \$1,500 paid Mrs. Townsend, they were acting as trustees for him; that in fact they were trustees of an implied trust for the excess of the \$1,850 received from Joseph and the \$1,500 paid Mrs. Townsend. This leaves out, of course, all consideration that the Maloneys were permitted, under the circumstances, to deal with Mrs. Townsend as purchasers for themselves. I do not think the evidence sustains such a view of the case. The appellants occupied a fiduciary relation in all matters pertaining to the interest of Joseph Townsend in the matter of effecting the loan for hire, for that was all they were engaged to do; but in nothing else. If any case of sharp bargaining were declared to be a trust, universal trade and traffic would inevitably cease. The line of demarcation between the two is well drawn. I think there is no merit in the bill, and, of course, that equity courts have no jurisdiction.

SHERMAN v. KING.

(Supreme Court of Arkansas. Feb. 21, 1903.)

BOUNDARIES—PAROL AGREEMENT—EVIDENCE.

1. Owners of adjoining lands, the boundary between which is indefinite or unascertained, may by parol establish a division line.

2. Land sued for is not shown to be within plaintiff's lines, as established by the parties' agreement that a certain survey should be the boundary line, witnesses merely testifying that they were present when the survey was made, and that it showed a portion of plaintiff's land was in defendant's inclosure, but being unable to say how far within the inclosure the survey line ran.

Appeal from circuit court, Johnson county; William L. Moore, Judge.

Action by John J. King against Emmett M. Sherman. Judgment for plaintiff, and defendant appeals. Reversed.

Sherman and King were owners of adjoining tracts of land. The lines between these two tracts had been surveyed in 1869 by a surveyor employed by Odom, a former owner of the Sherman tract of land. The fences on the land afterwards conformed to the lines of this survey. After King became the owner of the other tract, he had the land surveyed by one Laughlin, which survey showed that a portion of his tract was within the inclosure of Sherman. A controversy thus arose between King and Sherman as

¶ 1. See *Boundaries*, vol. 2, Cent. Dig. §§ 215, 216; *Frauds*, Statute of, vol. 23, Cent. Dig. § 112.

to the correct location of the line between them. They agreed to submit this controversy to arbitration, but when the day set for the arbitration arrived they were unable to find suitable arbitrators before whom to submit the matter. They then agreed that King should convey to Sherman a designated strip of land in front of Sherman's house, and along that side of his land extending from the line of the Laughlin survey on that side to the line of the Odom survey, and 10 feet further, for a price to be named by three arbitrators selected by the parties, and that the line between them at all other points should conform to the Laughlin survey. This agreement was made on the 28th of October, 1899, and each party was allowed until March, 1900, to make fences. The question of the price of the land was thereupon submitted to arbitrators on the same day, and they decided that Sherman should pay King \$18 for the land. This sum was paid by Sherman, and King executed his deed conveying to Sherman the strip of land in front of Sherman's house. Afterwards, before the 1st of March, 1900—the time allowed for removing fences—King entered on the land, and removed a part of Sherman's fence, and threw the rails over on Sherman's land. Sherman rebuilt the fence, and from this and other matters a disagreement arose between the parties. Sherman then refused to abide by the agreement or withdraw his fence to the lines of the Laughlin survey. King afterwards brought suit to recover the land which he alleges belongs to him under the agreement establishing the lines of the Laughlin survey as the correct line between the parties. On the trial there was a judgment in favor of King, from which Sherman appealed.

J. E. Cravens, for appellant. J. H. Basham, for appellee.

RIDDICK, J. (after stating the facts). This lawsuit arose out of a disagreement between two proprietors of adjoining land concerning the location of the boundary line between their estates. In this dilemma they agreed to settle the matter by establishing the lines of a survey made by one Laughlin as the correct boundary line between them except on the front of the tract, where one of the proprietors agreed to convey a strip of land to the other so as to give the other access to the public highway. The price to be paid for this strip was to be settled by arbitration. Now, this part of the agreement was executed. Arbitrators determined the price of the land to be sold, the party owning it conveyed the land specified to the other, and the other paid therefor the price named by the arbitrators.

Nothing remains except the removal of that portion of the boundary fence that did not conform to the line established between them by this agreement. If the plaintiff had

shown by the evidence that the strip of land for which he sues was within his lines as established by the agreement referred to, we think the judgment should be sustained; for, when the boundary line between two estates is indefinite or unascertained, the owners may by parol agreement establish a division line between them, which will be binding upon them. This rule is founded on the principle that the effect of the agreement is not to pass real estate from one party to another, but simply to define the boundary line to which their respective deeds extend. 4 Am. & Eng. Ency. Law (2d Ed.) 860, and large number of cases there cited. So far as we can see, no valid reason is shown why the line as established by the parties to this action should not be binding upon them. But the burden of proof was on plaintiff to show that the land for which he sues was within his lines as established by the agreement, and we find in the record no sufficient proof of that fact. There were two witnesses who testified that they were present when the land was surveyed by Laughlin, but they do not say that according to that survey the land in controversy was within the lines of plaintiff's deed. They testify that the survey showed that a portion of plaintiff's land was in defendant's inclosure, but they expressly stated that they could not state how far inside the inclosure the Laughlin line ran. That question was at issue. The burden was on plaintiff, but, as we see the evidence, he has not proved it. For this reason the judgment must be reversed, and a new trial ordered.

KANSAS & TEXAS COAL CO. v. GABSKY.

(Supreme Court of Arkansas. Feb. 15, 1902.)

Concurring opinion.

For former opinion, see 66 S. W. 915.

RIDDICK, J. I concur in the judgment of reversal rendered in this case, but I do so on a ground different from that stated in the opinion. The court, as I understand the opinion, holds that there is no right of action in the parent for the death of a child caused by the willful violation of the provisions of the statute known as the "Miners' Act," for the reason, as stated in the opinion, that "no provision is made in that act for the survivorship of the action." Now, the act in question, after stating that no person under the age of 14 years shall be permitted to work in any mine, provides that for any injury to persons or property occasioned by a willful violation of the act "a right of action shall accrue to the party injured for any direct damages sustained thereby." Sand. & H. Dig. § 5058. It makes no reference to the question as to whether a right of action survives to the heir or next of kin in case death

is caused by a violation of the statute. That question is, then, I think, controlled by the general statute on the subject, which provides that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case an action may be brought in the name of the personal representative, or, if there be no personal representative, in the name of the heir at law, for the benefit of the widow and next of kin of the deceased person. Sand. & H. Dig. §§ 5911, 5912.

In this case, Mrs. Gabsky is the heir of her deceased son, and can, I think, by virtue of this statute, maintain an action for any injury suffered if her son's death was caused by the wrongful act of the defendant, provided that she herself was guilty of no act which precludes her right to recover. This position, I think, is fully sustained, not only by the language of the statutes above referred to, but by the decisions of this court in cases where actions for the next of kin have been brought against those causing death. For instance, we have a special statute, passed in 1891, requiring persons in charge of running trains to keep a lookout, and providing that the company operating the railroad shall be "responsible to the person injured for all damages resulting from neglect to keep such lookout." Sand. & H. Dig. § 6207. This statute is also a special act, and was passed subsequent to the general statute in reference to the survival of actions; but, where death results from the failure to keep such a lookout, it has never been doubted that an action may be brought against the railroad company causing the death for the benefit of the next of kin. The reports of this court show that numerous actions of that kind have been sustained, and this though the statute requiring the lookout to be kept makes no provision for a survival of the action. The action for the benefit of the next of kin in such cases is authorized by the general statute above referred to, which embodies the substance of the English statute known as "Lord Campbell's Act." If an action lies for the benefit of the next of kin when the death of a child is caused by a failure to keep the lookout required of railroad companies, I see no reason why one may not be brought when death is wrongfully caused by a failure of the operator of a coal mine to obey the statute forbidding operators of mines to permit children under the age of 14 years to work therein. There is no reason for a different rule in the two cases, and I am therefore unable to agree to the law as stated in the opinion of the court on that point.

But, though I dissent from the reasons

stated in the opinion of the court, I think the judgment of reversal is right, for the reason that it was shown that the plaintiff, Mrs. Gabsky, permitted her son to work in the mine, and that it was at her request, made through one Reskoski, that permission was obtained for him to work in the mine of defendant where he was killed. The statute says that no person under the age of 14 shall be permitted to enter any mine to work therein. The defendant company, at the instance and request of Mrs. Gabsky, permitted her son under that age to work in its mine. He was killed, and she alleges in this action that his death resulted from the act of the company in permitting him to work in its mine, and she asks for a judgment for damages. But the act for which she complains was brought about through her consent and connivance. In other words, she asks judgment against the company for damages for doing that which she requested it to do.

A statement of the case, it seems to me, is conclusive against her. It is not a question of contributory negligence, as counsel contend, but a question whether one wrongdoer shall recover against another for damages resulting from an act which they jointly participated in and brought about. "*Volenti non fit injuria*" is a maxim of the law; but this case goes further, for Mrs. Gabsky not only consented, she instigated and procured, through her agent, Reskoski, the permission of the company for her son to work in the mine, and she received the benefit of that labor.

The object of the statute was to protect the minor against the dangers of such an occupation. His consent or willingness to work in the mine would amount to nothing, and would bar neither himself nor next of kin from bringing an action. But it seems to me plain that a parent who consents to a violation of this statute, and exposes her child to the dangers against which the law seeks to shield him, cannot, if the death of her child was caused by such violation of the law, recover damages therefor. The law, based on sound public policy, would forbid a recovery in such a case. As the only thing complained of is an act to which she consented, I think the judgment in her favor is wrong, and should be reversed. Cooley, Torts (2d Ed.); Bishop, Noncontract Law, §§ 54, 59; Jaggard, Torts, §§ 189, 190.

But it does not follow, because she consented that her son should work in the mine, that she consented to any want of care on the part of the company towards him after he entered the mine, and whether she could recover if the injury was caused by the negligence of the defendant in the operation of its mine is a different question from the one decided, and need not be considered, for the case was not tried on that theory.

**CHOCTAW & M. R. CO. v. VOSBURG
et al.**

(Supreme Court of Arkansas. Feb. 23, 1903.)

**RAILROADS—STOCK GUARDS—INSUFFICIENCY
—DESTRUCTION OF CROPS—EXTENT OF
LIABILITY—PENALTY—DAMAGES.**

1. In an action for damages to crops alleged to have been sustained by the insufficiency of a stock guard constructed by defendant railroad company, an instruction that if the guard was improperly constructed, or was insufficient, and by reason thereof stock came over the guard and destroyed plaintiff's crops, he was entitled to recover, was erroneous; the railroad company being liable only for the construction of a stock guard as well adapted for the purpose of turning stock as it was practicable to make it, in connection with the safe operation of its road.

2. Sand. & H. Dig. §§ 6238, 6239, provide that, where a railroad fails to provide sufficient guards for turning stock, it shall be liable to the person or persons aggrieved for a penalty not less than \$25, nor more than \$200 for each and every offense. *Held*, that the penalty so prescribed was intended as full compensation to the party injured, and such party was, therefore, not entitled to recover as damages the value of crops destroyed.

Appeal from circuit court, Yell county, Danville district; William L. Moose, Judge.

Action by G. S. Vosburg and others against the Choctaw & Memphis Railroad Company to recover damages to crops by stock, alleged to have been caused by insufficient stock gaps. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

J. W. McLoud and E. B. Pierce, for appellant. John M. Parker, for appellees.

BATTLE, J. On the 12th day of January, 1900, the appellees filed in the Yell circuit court, Danville district, their complaint, which is in words and figures as follows:

"The plaintiffs, G. S. Vosburg and T. W. Briggs, complain of the Choctaw & Memphis Railroad Company, for that the said Choctaw & Memphis Railroad Company, in placing and maintaining a stock gap at the entrance of their line of railroad into the inclosed field, situated on the northeast quarter of section twenty-five, township five north, range twenty-three west, in said district, and other adjoining lands, then in possession of and cultivated in the year 1899 by plaintiffs, so negligently constructed the said stock gap that it failed to keep stock out of said inclosed field, and that horses, cattle, and hogs entered said inclosure over said stock gap, and eat up, knocked out, and tramped under foot all of the cotton then growing on twenty-five acres of land inclosed in said inclosed field, thereby totally destroying said cotton, which cotton belonged to and was the property of these plaintiffs; that the cotton so destroyed was of the value of one hundred and fifty dollars, and therefore plaintiffs allege that by the careless and imperfect manner of constructing and maintaining said stock gap said stock was permitted to enter and destroy said crop, to plaintiffs' dam-

age in the sum of one hundred and fifty dollars."

On August 29, 1900, the defendant filed its answer, which was a general denial of the allegations of the plaintiffs' complaint, and in addition thereto alleged that on the — day of December, 1898, L. L. Briggs, who was at that time the owner of said lands, for a valuable consideration, executed to the defendant a deed releasing all damages to his said property by reason of the construction of defendant's railroad.

There was no issue as to notice. A stock gap was constructed by the defendant. The question was, was it sufficient and properly constructed? Witnesses testified that it did not keep stock out of the plaintiffs' field; that stock went over it and destroyed plaintiffs' crop.

A. H. Kilpatrick testified that he had had 10 or 11 years' experience in investigating the subject of stock guards on railroads; that he was familiar with the kind of stock guards that were generally in use in this part of the country; that he knew the particular kind of stock guards on plaintiffs' farm; that he had examined it; "that it was put in properly; that it is one of the most improved that are in general use; that it is recognized as one of the best there is; that ordinarily this stock guard turns stock; that it turns stock in Oklahoma and Kansas." He stated that here in Arkansas "stock had been found that will cross bridges as high as 38 feet long, and they cross all sorts of guards; that there had been cases where horses had crossed bridges 20 feet long, and they had cases where hogs had crossed bridges 38 feet long, three spans, and some other cases where they had crossed all kinds of cattle guards that they have on the road."

Among the instructions given to the jury that tried the issues in the case, over the objections of the defendant, was the following:

Instruction 3: "Now, if you find from the testimony that the guard was improperly constructed, or that the guard itself was insufficient for the purpose for which it was intended, and that by reason of that fact stock came over the guard and destroyed the crop of the plaintiff, he would be entitled to recover damages for the value of the crop that was destroyed."

The plaintiff recovered judgment, and defendant appealed.

The instruction numbered 3, given by the court to the jury, was erroneous. According to it a railroad company, when it constructs a stock guard, becomes an insurer of its sufficiency to prevent cattle or stock passing over it and entering an inclosure; but this is not true. As said in *Choctaw & Memphis Railroad Company v. Goset*, 70 Ark. 431, 68 S. W. 879, "the law does not impose an impossible or impracticable duty upon the company, and when its stock guard is as perfect and as well adapted for the purpose of turn-

ing stock as it is practicable to make it, in connection with the safe and prudent operation of the road, that is all the law requires, and the company has discharged its duty under the statute." *Andover v. Gould*, 6 Mass. 41, 4 Am. Dec. 80; *Hinsdale v. Larned*, 16 Mass. 65; *Camden v. Allen*, 26 N. J. Law, 398; *Shepard v. Commissioners*, 8 Ohio St. 354; *State ex rel. Gerke v. Board of Com'rs of Hamilton Co.*, 26 Ohio St. 369; *Lang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257; *Victory v. Fitzpatrick*, 8 Ind. 281; *Sutherland on Statutory Construction*, §§ 325, 399; *Sedgwick*

This instruction is defective in another respect. It says that, in the event the stock guard in question was insufficient, the plaintiffs were entitled to recover damages for the value of the crop that was destroyed. This is also not true. The statutes created the duty of the railroad company to construct stock guards. Before their enactment there was no such duty. *St. L., I. M. & S. Ry. v. Walbrink*, 47 Ark. 330, 1 S. W. 545. They prescribe what the liability of the railroad company shall be in the event it fails to perform this duty, and that is, it shall be liable to the person or persons aggrieved thereby for a penalty of not less than \$25 nor more than \$200, for each and every offense. *Sand. & H. Dig.* §§ 6238, 6239. The inference is that the penalty, being recoverable by the party aggrieved, was intended as a full compensation to him for the injury received; and therefore he is limited to the remedy given by the statute. *Stevens v. Jeacocke*, 11 Q. B. 781; *Almy v. Harris*, 5 Johns. 175; *Hancock v. Bank*, 32 Ohio St. 194; *Rex v. Robinson*, 2 Burrows, 800, 803; *Andover v. Gould*, 6 Mass. 41; *Hinsdale v. Larned*, 16 Mass. 65; *Camden v. Allen*, 26 N. J. Law, 398; *Shepard v. Commissioners*, 8 Ohio St. 354; *State ex rel. Gerke v. Board of Com'rs of Hamilton Co.*, 26 Ohio St. 369; *Lang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257; *Victory v. Fitzpatrick*, 8 Ind. 281; *Sutherland on Statutory Construction*, §§ 325, 399; *Sedgwick on the Construction of Statutory and Constitutional Laws* (2d Ed.) p. 343 et seq.; *Endlich on the Interpretation of Statutes*, § 470.

Reversed and remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. VAUGHAN.

(Supreme Court of Arkansas. Feb. 21, 1903.)

EMINENT DOMAIN—CONDEMNATION—DAMAGES—EVIDENCE.

1. In an action to condemn a strip of land adjoining a river for railroad purposes, it appeared that it was the intention of the railroad company to erect an embankment along the river, and witnesses for defendant testified that when the water rose high enough in the river to overflow the embankment it would wash out defendant's lands not taken, but the undisputed evidence of experts was that by the time water could flow over the embankment, back water covering the land would be several feet up the

embankment, and that the current of water over the embankment would be checked, so that there could be no washout of the land owing to the embankment. *Held*, that the defendant's evidence was speculative, or based on an assumed state of facts which did not exist, and was insufficient to support a verdict for damages in excess of the value of the land taken.

Battle and Wood, JJ., dissenting.

Appeal from circuit court, Independence county; Frederick D. Fulkerson, Judge.

Action by the St. Louis, Iron Mountain & Southern Railway Company against C. P. Vaughan. Judgment for defendant, and plaintiff appeals. Reversed.

The appellant railway company filed in the circuit court its petition to condemn a right of way over a portion of an 80-acre tract of land belonging to the appellee, near White river, in Independence county. On a deposit of \$50 being made, the railway company proceeded with its work. The defendant answered, setting up that by the taking of the proposed right of way he was damaged greatly in excess of the value of the amount of land actually taken, which was $\frac{46}{100}$ of an acre. He averred that the particular corner on White river had been allowed to grow up in trees and underbrush for the special purpose of protecting the caving of the river bank in times of overflow. That this part of his land comprised about six acres, and out of this was to be carved the right of way, involving the clearing of $\frac{46}{100}$ of an acre. This, it was alleged, would seriously impair the effectiveness of the precautions taken by defendant for the protection of his land. He also advanced another theory in his answer in enhancement of his damages, to wit: In building the track through this six-acre reservation it would be necessary to construct an embankment several feet high, which, though not high enough to prevent overflow, would, by the flow of water over it, cause injurious washing and gulying and depositing of sand and gravel upon the remaining part of the tract. Alleges that such damage will amount to as much as \$3,000, to which, if the value of the fraction of an acre actually appropriated is added, ought to entitle defendant to recover \$3,050.

Statement of Evidence.

M. A. Hansen, a civil engineer, for over 20 years in the employ of the Iron Mountain Railway Company: He made the survey for this spur track, which was to run from near the station of Newark to a gravel bed on White river. Witness explains to the jury the location of the spur track from a blue print (which was afterwards introduced in evidence), showing that the line ran through the extreme northeast corner of Vaughan's 80-acre tract. Is familiar with the Vaughan land. The amount of land taken is $\frac{46}{100}$ of an acre. The track will be on an embankment two feet high. The top of this embankment would be 23 feet above low-water mark. If the water got high enough to go over the

embankment, it would first overflow the Vaughan land by backing up from the slough north, on the Yancey and Magness land, and a rise of five feet would let the water into the slough. The bottom of the slough is 23 feet below the grade line. At the time of the survey the water was low, and was about two feet lower than the bottom of the slough. By the time the high water reaches the top of the two-foot dump which is on Vaughan's land, it would have completely flooded all the rest of his land by reason of the water having previously come in from the slough. This land of Vaughan's, and that of Yancey, lying immediately north of it, are so situated with reference to the river and the slough as to constitute what is called an "island." Witness was asked if all the other landowners had not donated the land necessary for this right of way through their respective tracts. Objected to, and objections sustained and exceptions saved. On cross-examination witness says the slough is 160 feet wide. Through the slough the dump is 10 feet high. This does not injure Vaughan's land by stopping the natural outlet for the water, but, on the contrary, protects it. It would "check the water, and there would be no washing or scouring." The line runs through no cultivated land, but only through the part covered with trees and brush. This is left intact, except for the 50-foot right of way. There is brush and timber between the track and the river.

Defendant's Evidence.

C. P. Vaughan, the defendant, in his own behalf, testified that his entire tract was 80 acres, with 74 and a fraction in cultivation. That part cornering on the river was left uncleared, so as to protect it from the high water. Gives \$50 per acre, total \$4,000, as the value of the land. The proposed railroad track was about 150 feet from the river. Between it and the river is a country road. On the main proposition, as to whether the land not taken would be injuriously affected, witness says: "The nature of that obstruction would cause the water to pour over there, and wash the land. It is liable to ruin the whole farm. It being of a sandy nature, it would continue to cut and ruin the land." He also says that, "In my opinion, it would cover it with sand and gravel." Witness was asked as follows: "You heard something about the water backing up in time of overflow. This dump, when the water would be high enough, would that afford an obstruction—that two feet there?" The answer of witness was: "If I understand you, no. I think not. It would be up to the embankment. The water would pour over it before it got up to the two feet." Here witness was interrupted by his counsel, and the following occurred: "Q. Now, I'll ask you this question. A. I haven't gone out on the land at the time when the water was the highest — Q. Wait a minute— A. When the river

gets up pretty high, the headwater would come in here first, the headwater from the river. Q. I want to ask you this question— A. It gets 18 inches in the house." Here the inquiry shifted, and defendant was asked why he left the strip of timber there, and he said it was to protect the land. Witness then points out on the plat where the high part of his land is, and testifies generally as to its topography. Says he would not take less than \$200 for the part taken by the railway company. Witness was then asked: "How much damage have you sustained by the location of the railroad, considering the manner in which it cuts it up, the number of acres taken, the inconvenience, etc., taking all the things you have mentioned into consideration, the location and construction of the road and the overflow of your land? Now estimate the difference in value of the land before the building of the road and the value of it now—how much damage have you sustained? A. From my estimate, the farm will be worthless. From washing and covering the land with sand and gravel, the farm would be worthless. Q. What do you say the damage would be then? A. The damage would be the full value of the farm, \$50 per acre, \$4,000. I think the final result would be the farm would wash and cover up with the sand and gravel." Witness was asked on cross-examination if he had seen the road as staked out, and answered in the negative. The rest of the trees are still there between the road and the river. He was asked to explain more fully his theory of complete ruin of the land, as follows: "Q. I am trying to get at your estimate of damages. You estimate the land at \$50 per acre now. Now, the 400 feet embankment, what would be the damage by reason of that? Do you suppose you are injured? A. I think the farm would be eventually destroyed. Q. What would it be worth for that (recurring to the item of 400 feet embankment)? A. I can't answer that question." Then, on redirect examination, his own counsel asked him to explain to the jury just how the embankment would injure the land. His answer was as follows: "In my opinion, after putting the embankment there, it will cause the water to pour over the embankment, give it greater force, and wash the land." This, witness says, is owing to the nature of the land, which is a sandy mixture and sediment. Has known the land 20 years. There is a deposit of sand and gravel on the land now, but it does not interfere with its use for agricultural purposes. When asked if it depreciated it in value, he answered: "No, sir. By reason of the nature of the soil, it is taken off the land and carried away. In my opinion, the embankment will naturally break, and cause a stronger current through there, and cause the land to wash more." Witness referred to the headwater, when he said it would pour over the embankment.

John Dodd, when asked about his acquaint-

ance with the land, said he had never seen it in time of overflow. Witness was asked his opinion as to the effect of the embankment in time of overflow, and replied that "It would cause the water to wash his land." When asked as to the extent of the damage, as well as the nature of it, his answer was: "I can't tell you. It would injure it. How much, I couldn't tell you." He says it would make a difference in value, because of the effect of washing over the embankment and through it if it should break, and would carry gravel and sand on it. Thinks the land is worth now about \$40 an acre. On cross-examination, witness expressed an opinion as to the effect of the embankment in retarding the headwater until the land on the far side of it was filled with backwater. He was asked: "Q. Suppose you raise that two feet, so as to hold the river back until it got two or three feet higher than here, wouldn't the water naturally back in here on the land, and keep it from washing? A. Why, I couldn't tell you about that." Pressed further on this point, witness says, "Why, I think, the current would run over the backwater, and wash it underneath." Witness does not know how much current there is on Vaughan's land, but knows what it did to his (witness') fence "over across the river." And, finally, on redirect examination, witness says, in answer to the question whether he can fix any amount of damages: "It damages it some. I can't tell what."

Ike Magness lives about two miles from Vaughan's land. Says the current strikes that land about the northeast corner. He was asked: "Take this plat. Suppose this timber is cut out, and an embankment 2 or 3 feet high put across there, what would be the effect there in high water? What would be the probable effect?" He replied that the water would go over, and cut the ground. The embankment would be a disadvantage. It would keep on washing from year to year. Thinks the land is worth \$40 an acre. When asked to place an estimate upon the amount of depreciation in the value of the land, he says: "Well, I know the land would be ruined. Everybody knows that." After repeated questions, witness is unable to give any estimate of the amount of depreciation.

Several other witnesses gave opinions similar to the foregoing, placing their estimate of the damage to the land at from 25 to 100 per cent.

M. A. Hansen, recalled for plaintiff, and exhibited plat admitted in evidence, said, in substance: The amount of land taken is $\frac{46}{100}$ of an acre. The embankment is 14 feet at the top; slopes on each side 3 feet horizontal to 1 foot perpendicular, and is 26 feet at the base. Explains why the flowing of water over the embankment will not injuriously affect the land on the other side of it. "Here is an open trestle across the slough, and the water naturally flows in here, and will follow the course of the slough, and,

before the water reaches the height of this here, the water comes in here and meets it—meets the headwater. Q. It comes in and holds the headwater? A. Yes, sir. Q. Would the backwater affect the current through here? A. There would be no current. Q. What do you say as to whether the current of headwater would run under the backwater? A. As soon as it backs up here to the headwater, it equalizes." The backwater would fill up on the side opposite from the river, so that there would be no washing when the headwater is high enough to go over the dump.

J. C. Yancey: His land adjoins the Vaughan land on the north, and the same track will run over it. Says the land was worth \$40 an acre. The value will not be depreciated at all by the dump. He explains why as follows: "For the simple reason that these depressions here will fill up with backwater before the headwater comes in here, and will check the amount. It will naturally fill in here, because water seeks its level." Again: "Rather, I think, it would be a protection, instead of a damage. The river comes down here, and this is all lowland here, and the water would come in here, and fill these depressions, and back up here before the current from the river gets up here. It can't wash over that embankment."

Tom Magness has known the land all his life. Knows where the spur track is to run. Asked whether the building of the two-foot dump will increase or decrease the value of the remaining land, witness says, "It would be increased in value." Asked as to what effect this embankment would have in obstructing the headwater in time of overflow, he says, "Why, surely, the backwater would fill in here to the embankment" within 2 or 3 inches of the top of it. "Q. What effect would it have, then, on Mr. Vaughan's land here in overflow times? Would it be an injury in any way? A. No, it would increase the value to his land back here."

John Austin knows the Vaughan land, and is familiar with the way the spur track will cross it. Asked for his opinion as to the effect of the dump of two feet, he answers (referring to the plat): "The water would fill this low ground here, and back up here, before it got over here. * * * The water would come around in this slough, and back up here," before the headwater got to the top of the embankment and run over. But cannot say that there would be no damage.

Mr. Edwards knows the land, and the location of the spur track. The same question was put to him as to the probable effect of the building of the two-foot dump, and he says he does not think it would be any injury to the land. The backwater comes into the slough, and the low places fill up until the water comes up to the embankment. The land is worth \$40 an acre.

Capt. Parkin, civil engineer, in the employ

of the United States government, and in charge of the river work on White river: Is familiar with the effect of high water on that river, having made a study of it. The question was put to the witness, in connection with the plat showing the locality, whether the dump proposed to be built across the corner of the Vaughan tract would be an injury to the remaining land. It being shown to him that where the track was carried over the slough it was on trestle-work, which left the space open, witness stated that the effect would be "to save the land." By raising the place where the headwater comes in two feet, it would give the backwater more time to come in and fill up the space on the inside of the dump. Asked if the land would be damaged by the headwater pouring over the dump, witness replied, "No, sir; I would consider it a benefit to my land, if I had it." On cross-examination witness said he predicated his conclusions upon the way the locality was represented on the map, and does not think that the current would strike the land where the defendant said it would. Does not think that the dump of two feet would protect the land, nor, if the water got two or three feet higher than the dump, would it cause the land to wash. Witness testifies according to what the plat shows.

Dodge & Johnson, for appellant. J. W. Butler, for appellee.

HUGHES, J. (after stating the facts). It seems from the testimony of witnesses in this case upon the part of the defendant that their opinions were based upon an assumed theory, which was not proven to exist. It is true that under the decisions in this state opinion evidence is competent to prove damages to land caused by a railroad right of way; that it is competent to show by the opinion of witnesses the value of the land before the right of way for a railroad is taken and the value of it after it is taken, the difference being the amount of the damage, to which must be added the value of the land actually appropriated. But we are of the opinion that that kind of opinion evidence must be based upon existing facts, and not merely speculative, based upon an assumption and a theory as to facts that may or may not exist in the future, especially when the assumption and theory is contrary to physical facts that exist in the case. In this case the expert testimony of witnesses was that, when the headwater rose to the top of the dump, and overflowed it, the backwater on the opposite side would be high enough to meet it, and that there would, consequently, be no current over the land, and no washing of the land, by reason of the water coming over the dump or embankment. It is undisputed that the water ran down a slough 160 feet wide when the river was up, and covered the defendant's land as

backwater, and that this backwater reached the dump or embankment of the railroad and was several feet up the side of that embankment before the headwater would flow over the dump, and that thus the current of the headwater would be checked and neutralized, so there could be no scouring or washing by reason of the water coming over the dump. This is the sworn opinion, in substance, of those who were competent to testify in such case, as experts, from their experience and observations. As we view the testimony in this case, there is no evidence to contradict the existence of the physical conditions upon which this evidence is based. Certainly, it is not contradicted by the theory and speculation of the defendant's witnesses that, where water pours over an embankment on uncovered ground unobstructed it will wash and scour and injure the land. This was the theory and assumption of the defendant. It seems that at the time this cause was tried there had been no overflow since the building of the embankment.

The testimony of the defendant's witnesses seems to be speculation upon a state of assumed facts, which were not shown to exist, and which were contrary to physical conditions which were as well established by the opinions of expert witnesses as such testimony could establish probable conditions that might exist. At all events, we think the verdict was excessive, and that the evidence is not sufficient to warrant a finding for the amount of damages awarded thereby. The defendant's evidence is too remote and speculative to support a verdict. *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 171.

The judgment is reversed, and the cause is remanded for a new trial.

BATTLE and WOOD, JJ., dissent.

DANIEL v. FT. WORTH & R. G. RY. CO.

(Supreme Court of Texas. March 9, 1903.)

NUISANCE—DISCOMFORT IN USE OF HOME—DAMAGES.

1. In one action one may recover damages for discomfort of himself and family in the use of their home owing to the erection and use of a neighboring coal hoist, and also damages for depreciation in the value of the property.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action of J. T. Daniel against the Ft. Worth & Rio Grande Railway Company. From a judgment of the Court of Civil Appeals affirming a judgment for defendant (69 S. W. 198), plaintiff brings error. Reversed.

J. W. Parker, W. T. Carlton, and J. B. Keith, for plaintiff in error. West, Chapman & West, for defendant in error.

¶ 1. See Nuisance, vol. 27, Cent. Dig. § 112.

BROWN, J. The Court of Civil Appeals made no findings of fact in this case (69 S. W. 198), but we have referred to the record, from which we make the following statement: Defendant in error was operating a railroad through the town of Stephenville, in Erath county, and J. T. Daniel purchased a lot in said town, about 250 feet west of the railroad track, on which he had resided for some years, when the defendant in error built a platform, 300 feet long, between the main track and plaintiff's residence, between the two side tracks, which were on the west side of the main track. The railroad company also erected near the platform a hoist, about 25 feet high, by which the coal was raised from the platform in iron buckets and dumped into the tenders of engines. There was evidence which tended to prove that the coal dust from coal thus placed in the tender was carried by the wind to and into plaintiff's residence, and settled upon his furniture, the walls, and upon the outside of the house, so as to produce discomfort to the plaintiff and his family. The evidence also tended to show that the noise caused by operating the hoist and buckets, and the noise caused by the engines while taking the coal, prevented the plaintiff and his wife from sleeping at night, and disturbed and annoyed them in their enjoyment of their home.

Plaintiff brought this suit against the railroad company to recover the damages occasioned to him by the depreciation of his property on account of the facts before stated, which were alleged in the petition with sufficient certainty and particularity, and the petition also contained the following allegation: "That, by reason of the things hereinbefore alleged, plaintiff and his wife have experienced and have been subjected to continually, both day and night, great physical and mental discomfort, and been vexed, harassed, and annoyed to a degree almost insupportable, to their great and irreparable injury, and have been thereby damaged to the further sum of \$500." The court charged the jury upon the right of the plaintiff to recover for the depreciation in the value of his property, but refused to submit to the jury the following special charge by the plaintiff: "If you believe, from a preponderance of the evidence in this case, that the plaintiff, J. T. Daniel, and his wife, have been personally annoyed and discomforted in the use and enjoyment of their home by smoke or coal dust, or by vibrating, grating, or disagreeable noises coming from defendant's coal yards and coal hoist into or on the house and premises of plaintiff, then you will find for plaintiff, and award to him by your verdict such damages as in your judgment will reasonably and fairly compensate him for such annoyance or discomfort suffered by himself and wife, not to exceed the amount sued for for annoyance." There was a verdict and a judgment for the defendant,

which was affirmed by the Court of Civil Appeals.

The trial court committed error in refusing the special charge requested by the plaintiff. If the plaintiff was entitled to recover upon the evidence, the right of recovery is not limited to the depreciation in the value of the property, but he may recover damages for the discomfort of himself and family in the use of the home caused by the erection and use of the coal hoists. *Bal. & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 335, 2 Sup. Ct. 719, 27 L. Ed. 739; *Randolf v. Bloomfield*, 77 Iowa, 52, 41 N. W. 502, 14 Am. St. Rep. 268; *Illinois Central Ry. Co. v. Katherine Grabill*, 50 Ill. 241; *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Brown v. C. & A. Ry. Co.*, 80 Mo. 457; *Penn. Ry. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

In *Baltimore & Potomac Railway Company v. Fifth Baptist Church*, above cited, the Supreme Court of the United States expresses the rule in this explicit language: "The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure." The clear statement of the proposition renders argument in its application to this case unnecessary. We have found but one case that holds the contrary doctrine. *Kemper and Wife v. Louisville*, 14 Bush, 87. In which the Court of Appeals of Kentucky incidentally stated that the plaintiffs in the case were not entitled to recover "for loss of time on the part of the occupants on account of sickness caused by the stagnant water, etc."; but the question does not seem to have elicited discussion from that court, and no reason is assigned nor authority cited in support of the decision.

In support of its opinion, the court of Civil

Appeals cites *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268; *Baugh v. Railway Co.*, 80 Tex. 56, 15 S. W. 587; *Railway Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42; and *Railway Co. v. O'Maley*, 45 S. W. 227.

In *Rosenthal v. Railway Company* the right of recovery for personal inconvenience on account of the noises complained of was not in issue, but the plaintiff claimed damages to the property because of faulty construction of the roadbed, and on account of noise, smoke, etc., and the court simply held that under the facts of that case the depreciation in the value of the property was the safest measure of damages.

In *Baugh v. Railway Company* the plaintiff alleged depreciation in the value of his property, but in support of his claim set up matters of a character which would have sustained an action for personal discomfort, showing that the nuisance was temporary, and the court held that under such allegations the plaintiff could not recover for loss in the value of the property.

In *Railway Company v. Hall* the action was for depreciation in the value of property arising from smoke, noise, etc. The railroad was constructed near to, but not on, the land. The question arose under article 1, section 17, of the constitution, it being claimed by the railroad company, that the damage to the property could not be recovered, there being no taking of it, but our Supreme Court held that it could be recovered.

Railway Company v. O'Maley was a suit for damages on account of the location of stock pens near the home of plaintiff, and claim was made for the difference between the value of the property before and after the construction of the pens, upon the allegations that the pens rendered the property uncomfortable for the occupants as a home. There was no claim of damages for personal discomfort, and the court held that under the facts the damages to the property were recoverable.

No case decided by this court justifies the conclusion that, if a structure, permanent in character, is a nuisance from which injury results to adjacent property, and by which nuisance the health of the occupants is impaired or the comfortable enjoyment of it is destroyed, the injured party is limited to compensation for the impairment of the value of the property. To the contrary, it is a rule of our law that full compensation may be awarded in one suit to the owner for all damages sustained from the same cause, and we see no reason why a party, damaged in the value of his property and in his health or the enjoyment of the property, should be denied the right to recover for either or both wrongs. The existence of a permanent nuisance may cause injury by destroying the comfort of a home and not cause loss in the market value of the property, or it may cause injury to both; hence

adequate compensation must embrace all the damage done and no more.

The pleadings and evidence in this case do not present any question of excuse for the railroad company upon the ground that it was reasonably necessary that the coal hoist should be located at that particular place. We therefore do not pass upon that question.

It is ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that this cause be remanded, and that the defendant in error pay the costs of the Court of Civil Appeals and of this court.

AETNA LIFE INS. CO. v. J. B. PARKER & CO.

(Supreme Court of Texas. March 9, 1903.)

Corrected opinion.

For former opinion, see 72 S. W. 168.

GAINES, C. J. In our opinion in this case, in speaking of the action of the Court of Civil Appeals, we inadvertently said that, "after certifying the questions they had affirmed the judgment of the trial court in part and reversed it in part," etc. The use of the word "after" is clearly a clerical error. It should have been "before certifying the questions," etc. As the opinion now stands, it leads to the inference that the Court of Civil Appeals had decided the case while the question was pending in this court, which does that court an injustice. We therefore deem it proper to correct our opinion so as to read "before," instead of "after," in the phrase just quoted. It is accordingly so ordered.

RAYMOND v. YARRINGTON et al.

(Supreme Court of Texas. March 9, 1903.)

APPEAL—CONSTRUCTION OF CONTRACT—NECESSITY OF ARGUMENT—REQUIRING BRIEFS.

1. Where, on appeal, it appeared the right of recovery depended on the construction of a contract, and the construction was not discussed in argument, the case would be referred to counsel, with request for written arguments.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by James H. Raymond, Jr., against A. H. Yarrington and others. From a judgment for defendants, plaintiff brings error. Case referred to counsel for written arguments.

J. W. McClendon and Fiset & Miller, for plaintiff in error. D. W. Doom, D. H. Doom, and West & Cochran, for defendants in error.

GAINES, C. J. The contract between the plaintiff in this case and Yarrington and Harwood contains this stipulation: "We special-

ly agree and bind ourselves not to enter into or conduct a milling agency business in the city of Austin or the territory above designated without the written permission of J. H. Raymond, Jr., or his assigns;" and we are inclined to think that the right of recovery under the allegations of the petition depends upon the construction of this part of the contract. Since the question of its construction was not discussed in the argument, we refer the case back to the counsel for both parties, with the request that they furnish us with written arguments and citation of authorities upon the questions hereinafter propounded. The stipulation clearly provides that Yarrington and Harwood shall not jointly conduct the business of milling agents in the designated territory. But the questions are: (1) Does it bind them that neither shall conduct such business in such territory? and (2) if so, is Yarrington liable for Harwood's individual breach of the contract?

BURTON'S HEIRS v. CARROLL et al.

(Supreme Court of Texas. March 5, 1903.)

ADVERSE POSSESSION—EXTENT OF TITLE— SUBSEQUENT POSSESSION BY HOLDER OF LEGAL TITLE.

1. Where an entryman devised the land, and the devisees conveyed through mesne conveyances, duly registered, to plaintiff, whose grantor had held adverse possession for more than 10 years, the title thereby acquired was superior to the title acquired by the entryman's heirs, to whom a patent was issued after his death, under Rev. St. art. 3347, declaring that, whenever the action of any person to recover land is barred by limitations, the person having peaceable and adverse possession shall have full title, precluding all claims.

2. Where land was patented to an entryman's heirs, the fact that they held possession for three years after plaintiff had acquired title by adverse possession was no defense to plaintiff's title.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by Sidney J. Carroll and others against B. I. Burton's heirs for the recovery of real estate. From a judgment in favor of plaintiffs, defendants bring error. Affirmed.

E. C. Smith, Bates & Board, and Nunn & Nunn, for plaintiffs in error. Davis & Garrett, for defendants in error.

BROWN, J. The Court of Civil Appeals adopted the conclusions of fact filed by the trial court, which are as follows:

"(1) That B. I. Burton, to whose heirs the land in controversy was patented by patent dated December 13, 1850, died about the year 18—, leaving a will, which was duly probated in the county court of Houston county, Texas, in the year 1844, by which he gave all his estate to two of his nephews, each of whom was named B. B. Lacy, in equal portions. That one of the said B. B. Lacys, by deed dated November 17, 1851, conveyed one

half of the certificate by virtue of which said land was located and patented to Thomas George, and the other of said B. B. Lacys, by his deed dated September 10, 1853, conveyed the other half of said certificate to W. H. Cundiff.

"(2) That said Thomas George, by deed dated May 22, 1856, conveyed to said W. H. Cundiff his half of said certificate, and that said Cundiff, by deed dated August 25, 1863, conveyed the land in controversy to Jas. P. Sargeant, and that the plaintiffs have a regular chain of transfer of the land from Sargeant down to themselves.

"(3) In the year 1883 the defendant R. C. Scripture owned two tracts of land adjoining the land in controversy, which he inclosed with a fence. At the same time he fenced the land in controversy, extending the fence around his own land so as to take in this. He fenced this land at the request of J. W. Jagoe, who was the agent of Mrs. Crane, one of plaintiffs' grantors, and who was then the owner of the land, and occupied and used the same by keeping stock upon it, as the tenant of Mrs. Crane, in connection with his own land, which was inclosed with it. He continued such use until July 6, 1895, when he sold his land in said inclosure to defendant C. P. Scripture, who, upon his purchase of R. C. Scripture's land, took possession of the land in controversy at the same time he did that which he had bought, and used it in connection with his own until the 30th day of January, 1894. That prior to the 30th day of January, 1894, neither R. C. nor C. P. Scripture informed Mrs. Crane, her agent, or plaintiffs, that R. C. Scripture's holding of said land as tenant of Mrs. Crane was repudiated, and they had no knowledge that the holding of the Scriptures was in hostility to them.

"(4) From the time R. C. Scripture took possession of said land as tenant of Mrs. Crane to the present time all taxes upon said land have been paid by the plaintiffs and their vendors, and the deed from W. H. Cundiff to Jas. P. Sargeant, one of the transfers in plaintiffs' chain of title, was duly registered in the deed records of Denton county on the 5th day of July, 1878; and the deed from Jas. P. Sargeant to Mrs. Crane, another of said transfers, was duly registered on the 6th day of July, 1878.

"(5) On the 30th day of January, 1894, the defendants, heirs of said B. I. Burton, including the heirs of the two B. B. Lacys, both of whom were then dead, through their attorney, leased said land to the said C. P. Scripture, who entered into a lease contract in writing, whereby he acknowledged himself to be the tenant of the heirs of said B. I. Burton, and he remained in possession of said land as such tenant from the 30th day of January, 1894, to the institution of this suit, on the — day of —, 1900. That J. W. Jagoe, who was the agent of the plaintiffs in reference to this land, learned, soon

after the 30th day of January, 1894, that C. P. Scripture had entered into the lease contract above mentioned."

The application for writ of error presents the two following propositions: First, there is no evidence to show that the Scriptures held the land as tenants of defendants in error; second, the possession by the plaintiffs in error for three years operated to bar the title of the defendants in error, and constituted a good defense to this action.

We are of opinion that there is sufficient evidence in the record to sustain the court's conclusions of fact that R. C. Scripture occupied the land as tenant of Mrs. Crane, and that C. P. Scripture received the possession of the land from R. C. Scripture, and continued to occupy the same for the full period of 10 years.

The solution of the second proposition depends upon the effect the 10 years' adverse possession of defendants in error had on the legal title of the heirs of B. I. Burton. Article 3347, Rev. St., reads as follows: "Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims." By the plain terms of this statute the continuous, peaceable, adverse possession of the land for 10 years, claiming title thereto, conferred upon the defendants in error "full title"; that is, all of the title which had emanated from the state vested in defendants in error as against the claim of any and all persons. *E. T. L. & I. Co. v. Shelby* (Tex. Civ. App.) 41 S. W. 542; *Grayson v. Peyton* (Tex. Civ. App.) 67 S. W. 1074; *Branch v. Baker*, 70 Tex. 190, 7 S. W. 808. The decisions of our court here cited, as well as others, uniformly hold that the effect of the above-quoted statute is to vest in the possessor, who has complied with the statute of limitation, a full and complete title to the land.

In *East Texas Lumber & Improvement Company v. Shelby*, above cited, *Shelby* and others occupied the land in controversy for the full period of 10 years under the circumstances prescribed by the statute as necessary to confer title, and after the expiration of 10 years they abandoned the possession of the land. They had no paper title under which they claimed, and therefore had no record of their title. *East Texas Lumber & Improvement Company* purchased the land from the person who held the paper title without notice of the claim of *Shelby* and others under their 10-years possession. The Court of Civil Appeals held that the title by limitation had become perfected at the end of the 10-years possession, and was not affected by the abandonment, and affirmed a judgment in favor of *Shelby* and others for the land. A writ of error was applied for, and was refused by this court. That judgment could not have been sustained under

any theory other than that the title by limitation was superior to the chain of title, and that the superior title to the land was vested by limitation in *Shelby* and others.

In *Branch v. Baker*, before cited, an outstanding title by limitation in a third person was pleaded by *Baker* to defeat the claim of the plaintiff in that case. It was claimed that *Baker* could not use a title by limitation in a third person as a shield to protect his naked possession. The Supreme Court, speaking by Judge Stayton, says: "If *Baker* had never any claim under the patent issued to himself to the land so long occupied by *Coward*, but without color of right asserted a claim or held possession as a naked trespasser, in an action brought against him by *Branch* it would be a competent defense to him to show a superior outstanding title in a third person. Whether the title of such third person was acquired by a regular chain of transfer to himself from the sovereignty of the soil, or through an adverse possession for the period and under such circumstances as deprived a former owner of title, and cast it upon the adverse possessor, it would seem would be a matter unimportant." The language quoted is clear and explicit, and in consonance with the terms of the statute holding that the effect of adverse possession for a statutory period divests the title out of all other persons, and vests it fully in such possessor.

A title by limitation constitutes a chain of title from the sovereignty of the soil; otherwise it would not support an action of trespass to try title. In the case of *Keys v. Mason*, 44 Tex., on page 142, Judge Moore said: "It is true that the possession of the defendant entitles him to a judgment against the plaintiff, unless the latter shows a prima facie title. He does this when he derails title from the sovereignty of the soil down to himself, or if he shows title out of the government, and subsequent possession for sufficient length of time to toll the right of entry." The point was not involved in that case, but the dictum asserts a correct proposition of law. A defendant may defend his possession, although it be without title, by showing that some other person has a better title than the plaintiff, upon the principle that the plaintiff in an action to recover lands must succeed upon the strength of his own title, and must show a claim good against the world. It being true that a title by limitation may be used as outstanding title for defense of possession merely, and will defeat a regular paper title, it follows that title by limitation is superior to all other claims to that land.

The decisions have added little, if anything, to the forcible language of the article itself, for it clearly and distinctly provides that "the person having such peaceable and adverse possession shall be held to have full title, precluding all claims." Full title embraces legal and equitable title to the proper-

ty, and comprehends that which passed from the government by patent; consequently, if limitation confers full title upon the possessor, then it must divest title out of all other claimants, and vest the same in the possessor under the claim of limitation. It could not be that full title would be vested by limitation in the defendants in error, and yet there would be any title remaining in the plaintiffs in error. We conclude that the effect of limitation was to divest the naked legal title, which the plaintiffs in error had under the patent, out of them, and to vest it in the defendants in error, who held the equitable title; and the plaintiffs in error occupy just the same position as if they had parted with their legal title by conveyance to the owners of the equitable title. They had no title to the land; therefore their three-years possession did not have the effect to bar the claim and right of the defendants in error.

Whether a trustee who holds title for another can, by repudiating the trust, convert the trust into title in himself, which would support three-years limitation, is not before us, and is not decided.

It is ordered that the judgments of the district court and of the Court of Civil Appeals be in all things affirmed, and that the defendants in error recover all costs from the plaintiffs in error.

WILLIAMS, J., did not sit in this case.

NOLAN et al. v. MOORE et al.

(Supreme Court of Texas. March 16, 1903.)

DEEDS—MARRIED WOMAN'S PROPERTY—CONVEYANCE—EXECUTION—JOINDER OF HUSBAND AND WIFE—PRIVY EXECUTION—EXECUTION UNDER POWER.

1. Rev. St. art. 635, provides the husband and wife shall join in the conveyance of the separate property of the wife, and that no such conveyance shall take effect until acknowledged by her privily, and apart from her husband. *Held*, that a deed of a married woman's land, executed by her husband and another acting under a power of attorney from the wife, privily acknowledged by her, is valid.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Lula H. Moore and another against Ernest Nolan and others. From a judgment of the Court of Civil Appeals affirming a judgment for plaintiffs (70 S. W. 785), defendants bring error. Reversed.

Frost, Neblett & Blanding, for plaintiffs in error. Johnson & Knox and Simkins & Mays, for defendants in error.

BROWN, J. On the 22d day of January, 1884, John T. Moore and Lula H. Moore were husband and wife, and have so continued down to the present time. They resided at that time in Jefferson county, in the state of Mississippi. In her separate right, Lula H. Moore owned in Texas the land in contro-

versy; and on the day above stated, she being at home in Mississippi, and John T. Moore being in the state of Texas, the said Lula H. Moore executed and acknowledged, in the manner and form required by the laws of Texas, a power of attorney to James L. Autry, of Navarro county, Tex., by which she empowered and authorized the said Autry to sell and convey the land sued for in this case, as well as other lands in Texas. John T. Moore did not join in the power of attorney, which was forwarded to James L. Autry, and recorded in Navarro county on the 14th day of February, 1884. On the 13th day of August, 1884, John T. Moore joined with James L. Autry, who acted under the said power of attorney for Lula H. Moore, in executing a deed which conveyed the land sued for to F. L. Smithey for a cash consideration of \$900, then paid. At the date of the trial the land was worth \$15 per acre, without regard to the improvements, and with the improvements it was worth \$30 per acre. On the 16th day of February, 1889, Lula H. Moore, joined by her husband, instituted this suit against the plaintiffs in error, who claimed under Smithey, to recover the land, and judgment was given by the trial court in favor of the plaintiffs, which was affirmed by the Court of Civil Appeals.

The following article of the Revised Statutes prescribes the mode by which a husband and wife may convey real estate, the separate property of the wife: "Art. 635. The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to, in the mode pointed out in article 4643." The term "conveyance," as used in the above article, signifies the deed which transfers the title from the wife to the purchaser. *McCabe v. Heirs of Hunter*, 7 Mo. 357. The word "join" means that the husband and wife must unite—that is, act together—in the execution of the deed. The question involved in this case is, must the husband and wife each in person execute the same paper, deed, or power of attorney to make the conveyance their joint act? It has been settled by this court that the husband and wife need not personally sign the deed, but may jointly appoint an agent by a power of attorney, duly executed by them, who, acting for both, can make a valid conveyance of the wife's separate real estate. *Patton v. King*, 26 Tex. 685, 84 Am. Dec. 596; *Warren v. Jones*, 69 Tex. 462, 6 S. W. 775. In each of the cases cited the husband and wife appointed an agent by a power of attorney jointly executed by them, and this court held that the conveyance made by such agent was valid. It has likewise been held by this court that the husband and wife need not execute the convey-

ance at the same time, but, the husband having signed and acknowledged a deed conveying his wife's separate real estate, she may at a subsequent time sign and acknowledge the same instrument, and thereby make it effective from the time of her signature and acknowledgment. *Halbert v. Hendrix* (Tex. Civ. App.) 26 S. W. 911. In the case last cited the husband held a power of attorney from his wife empowering him to sell certain land, her separate estate, which he conveyed, signing his wife's name by himself as agent and his own name as her husband. Two years after that date the wife signed and acknowledged the same deed, and the Court of Civil Appeals of the Fifth District held the deed to be valid from the time of her signature and acknowledgment. This court refused a writ of error in that case, thereby adopting the opinion of the Court of Civil Appeals; there being but one question presented by the application. It is likewise established by this court that the husband may empower the wife to sell her separate real estate, acting for herself and as his agent. *Rogers v. Roberts* (Tex. Civ. App.) 35 S. W. 76. In that case the court likewise refused a writ of error, there being but the one question presented by the application. We conclude that a married woman, by a power of attorney executed and acknowledged by her alone, may authorize a third person to sell and convey her land, and that such person, acting with the husband, can convey her separate real estate.

John T. Moore and his wife joined in the deed to Smithey as effectually as if both had been represented by Autry, or Moore had been represented by his wife, she acting for herself. The privity acknowledgment of the power of attorney guarded the wife against undue influence by her husband, and she had the right to revoke the power at any time before the deed was delivered. The power of attorney was inoperative until the husband joined in the deed which secured his right to manage the property. Every beneficial purpose of the law was accomplished. *Patton v. King*, before cited.

The trial court erred in excluding the power of attorney and deed, for which the judgment must be reversed. We cannot render judgment, because the evidence was excluded; therefore the cause will be remanded, the defendant in error to pay all costs of the Court of Civil Appeals and of this court.

INTERNATIONAL & G. N. R. CO. v. CLARK et ux.

(Supreme Court of Texas. March 16, 1903.)
PERSONAL INJURIES—MEASURE OF DAMAGES
—INSTRUCTION.

1. In an action for injuries the court instructed: "The damages for injuries to her you will estimate the value of the service she was capable of performing, and did perform, in her relation to her duties before said injury, any

impairment of her capacity to perform said services. And if you find these injuries are permanent, you will estimate the value of such services as she would reasonably perform during the expectancy of her life." *Held*, that the instruction was erroneous, as not correctly stating the rule that plaintiff was entitled to compensation for loss already sustained by reason of inability to perform her ordinary duties which had resulted from her injuries, and such loss as might reasonably and probably accrue thereafter.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by T. A. Clark and wife against the International & Great Northern Railroad Company. From a judgment of the Court of Civil Appeals (71 S. W. 587) affirming a judgment for plaintiffs, defendant brings error. Reversed.

S. R. Fisher and N. A. Stedman, for plaintiff in error. W. G. Barber and A. B. Storey, for defendants in error.

GAINES, C. J. This suit was brought by defendants in error, T. A. Clark and wife, against the plaintiff in error for an injury to the ankle of the wife, alleged to have been caused by the negligence of the railway company in not providing a safe means of alighting from a train upon which she was a passenger. There was a verdict and judgment in the plaintiffs' favor, and the judgment was affirmed by the Court of Civil Appeals.

We granted the writ of error because we were of opinion that there was error in the charge of the court as to the measure of damages; and we are still of that opinion. We think the assignments of error upon all other points were correctly disposed of in the opinion of the Court of Civil Appeals, and therefore deem it unnecessary to discuss them here.

The charge of the court as to the measure of damages is as follows:

"If you find for plaintiffs as damages you will find that sum of money as will be a fair and just compensation for the injuries received by Mrs. Clark, the pain and distress of mind she endured, if any, and the expense for medical aid. The damages for injuries to her, you will estimate the value of service she was capable of performing, and did perform, in her relation to her duties before said injury, any impairment of her capacity to perform said services. And if you find these injuries are permanent, then you will estimate the value of such services as she would reasonably perform during the expectancy of her life."

The damages recoverable in this case were: Compensation for the physical and mental suffering Mrs. Clark had endured up to the time of the trial, and such suffering of a like character as she would reasonably and probably undergo in future as a result of her injury; for such reasonable expense as had been incurred in the treatment of her injury; and also compensation for the

loss that had already been sustained by reason of such inability to perform her ordinary duties as had resulted from her injuries, and such loss as might reasonably and probably accrue thereafter from such inability. That the latter part of the charge quoted does not correctly state the measure of damages we think clear. That it is misleading we think equally true. Its structure indicates that some words have been inadvertently omitted—the omission being presumably the result of the haste ordinarily incident to preparing such instructions.

For the error in the charge the judgments of the District Court and that of the Court of Civil Appeals are reversed, and the cause remanded for a new trial.

Ex parte LOCKLIN.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

MURDER—ADMISSION TO BAIL.

1. Though the testimony of accomplices shows nothing less than a cold-blooded assassination by relator, yet, the corroborating testimony not making it absolutely clear and conclusive beyond a reasonable doubt that relator is guilty of a capital offense, he should be admitted to bail.

Appeal from district court, Llano county; Clarence Martin, Judge.

Application by Sam Locklin for habeas corpus. Bail was refused, and he appeals. Reversed.

McLean & Spears and M. D. Slator, for appellant. James Flack and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Relator, being indicted for the murder of Rountree, applied to the district judge of Llano county for the writ of habeas corpus, which was granted, and after trial bail was refused, and he now appeals to this court. We have carefully examined the facts adduced on the hearing, and in our opinion the proof is not evident that relator is guilty of a capital felony; that is, while the testimony of the accomplices shows nothing less than a cold-blooded assassination, the evidence corroborative of their testimony is circumstantial, consisting of the declarations and conduct of relator. These, it is insisted on the part of the state, have a direct bearing on the guilt of relator, and tend to show his connection with the offense. On the contrary, appellant insists that they in no wise connect him with the crime, and have no bearing thereon. This is a controverted question, and we hold that the proof is not evident; that is, absolutely clear and conclusive beyond any reasonable doubt upon this question. It is not necessary here to determine whether or not we would sustain a verdict of murder in the first degree on this evidence. We merely

hold that, in our judgment, the evidence is not of that character which makes the guilt of relator of a capital felony evident. The judgment is reversed, and the bail of relator is fixed at the sum of \$8,000, upon the giving of which in the terms and conditions of law he is to be released.

DORAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL LAW—INSUFFICIENT RECOGNIZANCE—DISMISSAL OF APPEAL.

1. Where the recognizance does not state the amount of the punishment assessed, as required by Code Cr. Proc. art. 887, the appeal will be dismissed.

Appeal from Childress county court; W. G. Gross, Judge.

Lee Doran was convicted of a crime, and appeals. Appeal dismissed.

R. T. Houssels, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Motion is filed by the Assistant Attorney General to dismiss the appeal because the recognizance does not state the amount of the punishment assessed against appellant, as required by article 887, Code Cr. Proc., laying down the form of recognizance to be given on appeal. An inspection of the record shows that the motion is well taken. See May v. State, 40 Tex. Cr. R. 196, 49 S. W. 402.

The appeal is accordingly dismissed.

BURK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

VIOLATION OF LOCAL OPTION LAW—COMPLAINT—JURAT—SUFFICIENCY.

1. Under the statute providing that the complaint must be sworn to by a credible person, it is not necessary that the officer's jurat to a complaint for violating the local option law show that it was sworn to by such a person.

Appeal from Ellis county court; J. E. Lancaster, Judge.

G. V. Burk was convicted of violating the local option law, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

There is neither bill of exceptions nor statement of facts in the record. Appellant filed a motion to quash the complaint and information, first, because it charged no offense against the laws of the state; second, that it does not appear from the jurat of the officer taking the complaint that same was sworn to by a credible person; and,

¶ 1. See Ball, vol. 5, Cent. Dig. § 160.

third, it does not appear affirmatively that the election was held in justice precinct No. 8, Ellis county. It is not necessary for the jurat to show that the witness is a credible person. The law merely provides that the same must be sworn to by a credible person, and, in the absence of any proof on this question, we will presume that the county attorney took the affidavit from a credible person. The affidavit and information are in the usual form, and clearly indicate that the election was held in justice precinct No. 8 prior to the filing of the complaint, and that the same was held according to law. The court did not err in overruling the motion to quash.

No error appearing in the record, the judgment is affirmed.

FORTENBERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

RECOGNIZANCE—SUFFICIENCY.

1. A recognizance which does not conclude with the phrase "in this case," as required by Code Cr. Proc. art. 887, is defective.

Appeal from Knox county court; G. B. Landrum, Judge.

John Fortenberry was convicted of crime, and appeals. Dismissed.

Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The Assistant Attorney General has filed a motion to dismiss the appeal, setting up the fact that the recognizance is defective in not concluding with the phrase "in this case," as required by article 887, Code Cr. Proc. We have examined the record, and find the motion is properly taken. *Oryer v. State*, 36 Tex. Cr. R. 621, 38 S. W. 203; *Duffer v. State* (Tex. Cr. App.) 38 S. W. 997.

The appeal is accordingly dismissed.

SIMMONS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

GAMING—NEWLY DISCOVERED EVIDENCE—TESTIMONY—CERTAINTY.

1. An application for a new trial for newly discovered evidence, after a conviction of gaming, stated that defendant had discovered since the trial that he could prove by certain witnesses facts tending to show that he did not play at the game for which he was convicted. Defendant alleged the use of due diligence, but did not specify the acts of diligence. Some of the testimony sought would have been contradictory of defendant's own witness. It was not alleged that the witnesses would testify that defendant did not play, but that they did not see him play. *Held*, that a new trial was properly denied.

2. In a prosecution for gaming, the state's witness testified that his recollection was that defendant was playing, and that he was pretty

sure of it, but that it was possible for him to be mistaken. *Held* sufficiently certain to justify conviction.

Appeal from Fisher county court; Jesse Wright, Judge.

Will Simmons was convicted of gaming, and appeals. Affirmed.

L. B. Allen, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of gaming, and fined \$10.

The main question is whether or not the court erred in refusing to grant a new trial on the alleged ground of newly discovered evidence. Appellant claims that he has discovered, since the trial, that he could prove, by George Shirley, Jim Boyce, and E. F. Boyce, certain facts that would tend to show that he did not play at the game of cards on account of which he was convicted. He says that he used due diligence to discover their evidence, but that he was not informed of it until after the trial; and that they then told him of what they knew, or told others who told him. He does not state the acts of diligence he used, and the application should have shown this, in order that we might determine whether or not he had been diligent. Ordinarily, in a case of this character, if appellant were uncertain as to the nature of the evidence against him, and of the parties concerned in the game, he would make inquiry of the state's witness or witnesses as to what game and with what parties he proposed to testify the game was played. If appellant had made this inquiry of the state's witness, doubtless the information would have been furnished him. Certainly he ought to have used this act of diligence. If the state's witness had refused to impart the information to him, or had misled him as to the parties in the game, then he would have ground to complain. Not only this, but appellant's own witness, Rufe Simmons, testified that George Shirley, Elmo Boyce, Jim Boyce, Mack Simmons, Raymond Newman, and Claude Allen were there on the particular night when the alleged game was played; that is, the night that the state's witness, Rush Rector, testified that he saw appellant play at the game, and identified George Shirley, Elmo Boyce, and Jim Boyce as being in the game. The testimony of some of the witnesses sought would contradict his own witness, Rufe Simmons. He could have found out from his witness, Simmons, what could have been proven by these witnesses who were present on that occasion. Moreover, we do not understand that these witnesses would testify that appellant did not play at a game of cards that night, but that they did not see him play. Their testimony is not certain on this point, and at most it would seem to be of an impeaching character; and, as to the presence of some of the parties at the time, the impeachment would not only be of the state's witness, but

of appellant's own witness. There was no diligence, and we do not regard the testimony as material.

Appellant also claims that the case should be reversed because the state's witness, Rush Rector, was not certain that appellant played in said game. He testifies on this point: "My recollection is that defendant was playing. I am pretty sure he was playing. -Yes, it is possible for me to be mistaken, but I do not think I am. One reason that makes me positive defendant was playing, was the position that he occupied relative to George Shirley," etc. In our opinion the testimony was sufficiently certain and definite to authorize the verdict.

There being no error in the record, the judgment is affirmed.

HICKMAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

FORGERY—INDICTMENT—SUFFICIENCY—LIMITATIONS—REPUGNANCY.

1. Under the statute barring prosecutions for forgery after 10 years, where the copy of the instrument alleged to be forged, as set forth in the indictment, bears date of more than 10 years back, and there are no explanatory averments, the indictment is bad.

2. Where the copy of an instrument alleged to be forged, as set forth in the indictment, bears date July 2, 1892, and the indictment itself alleges July 2, 1902, as the date of the execution of the instrument, and there are no explanatory averments, the indictment is bad for repugnancy.

Appeal from district court, Wichita county; A. H. Carrigan, Judge.

J. H. Hickman was convicted of forgery, and appeals. Reversed.

G. F. Thomas, J. W. Chancellor, and John Speer, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charges that appellant, on the 2d day of July, 1902, forged the following instrument:

"Wichita Falls, Texas, July 2, 1892. No. —.

"The Panhandle National Bank
of Wichita Falls,

"Pay to R. H. Smith or Bearer
Seven ———Dollars \$7.00.

"Boney McIntire."

The indictment contains neither explanatory averments nor innuendo allegations. Motion to quash was based, first, upon the ground that the instrument itself shows that the offense was barred by the statute of limitations when presented by the grand jury; second, that it was repugnant in its averments, in that the forgery was alleged to have been committed on the 2d day of July, 1902, whereas the instrument showed on its face to have been committed on July 2, 1892. We believe both points are well taken. The

instrument purports to have been executed on July 2, 1892. The indictment was preferred by the grand jury on October 29, 1902, something over 10 years after the purported execution. Prosecution for forgery is barred under our statute in 10 years. The other proposition—that is, that the allegations are repugnant—we think is manifest. While the instrument bears date July 2, 1892, it may have been executed on July 2, 1902, as a matter of fact. This is not explained in the indictment, but the two allegations are left standing, one alleging the execution on July 2, 1902, and the instrument itself showing that it was executed on July 2, 1892. Without some explanatory averments, these matters are totally irreconcilable.

Believing the motion to quash should have been sustained, and the indictment is vicious, the judgment is reversed, and the prosecution ordered dismissed.

HERBERT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL LAW—JUDGMENT—WHAT CONSTITUTES—DEFECTIVE RECOGNIZANCE.

1. A document reciting that the state and defendant were both ready for trial; that witnesses were called; that a motion to quash the indictment was argued and overruled; that a jury of six qualified citizens was summoned by the sheriff and sworn by the court; that the witnesses summoned in the case were sworn and placed under the rule; that one of the attorneys was fined for contempt; that the witnesses having been examined, and the matters of fact as well as law submitted to the court and the jury, the jury retired, and returned with a verdict of guilty, signed by the foreman (setting out the verdict); and that defendant's attorneys gave notice of appeal, etc.—is not a judgment.

2. A recognizance on appeal in which the names of the sureties are omitted is defective.

3. A recognizance on appeal which does not conclude with the clause "in this case," as required by statute, is defective.

Appeal from Sherman county court; W. B. Slaughter, Judge.

Felix Herbert was convicted of crime, and appeals. Dismissed.

W. T. Keith and S. T. Fagan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The Assistant Attorney General moves to dismiss the appeal because of the want of a final judgment. This entire document is as follows:

"File No. 5. The State of Texas vs. Felix Herbert. Charged with playing cards in a house for retailing spirituous liquors.

"State and defendant both announced ready for trial. Witnesses called. J. T. Py-lant, a state's witness in the case not answering, the court ordered that a fine of ten dollars be assessed against the said J. T. Py-lant for contempt of court. The witness later appearing, and offering a valid excuse

¶ 1 See Indictment and Information, vol. 27, Cent. Dig. § 189.

for his absence, the said fine was ordered to be remitted. A motion made and argued by defendant's attorneys to quash the indictment was overruled by the court.

"A jury of six qualified citizens was summoned by the sheriff and sworn by the court to well and truly try the case, as follows: S. H. Vaughan; M. M. Wesley; D. J. Wilson; A. L. Foster; N. J. Green; W. W. Headrick. The witnesses summoned in the case were sworn and placed under the rule. The court ordered the clerk to assess a fine of \$5.00 against Attorney Fagan for contempt of court.

"The several witnesses in the case having been examined before the jury, and the matters of fact, as well as law, having been submitted to the court and the jury, the jury retired for consideration of their verdict, and afterwards, returning into open court, announced the following in writing as the verdict upon which they all had agreed. 'We, the jury, find the defendant, Felix Herbert, guilty as charged, and assess against him a fine of ten dollars and costs. S. H. Vaughan, Foreman.' Defendant's attorneys gave notice of appeal."

It would be useless to undertake to give the reasons why this is not a judgment. It speaks for itself. Without a final judgment, the jurisdiction of this court will not attach.

The recognizance is also defective, in that the names of the sureties are omitted; and it is not in the language, either in fact or substantially, as required by the statute. It omits that portion of the prescribed form which requires appellant to abide the judgment of the Court of Criminal Appeals of the State of Texas "in this case," the latter clause being omitted. The motion is sustained.

The appeal is dismissed.

FORTENBERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

APPEAL—RECOGNIZANCE—SUFFICIENCY.

1. A recognizance on appeal which fails to conclude with the phrase "in this case," as required by statute, is insufficient.

Appeal from Knox county court; G. B. Landrum, Judge.

Lee Fortenberry was convicted of crime, and appeals. Dismissed.

Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Motion is made to dismiss the appeal because of the insufficiency of the recognizance. It binds appellant to abide the "judgment of the Court of Criminal Appeals," but fails to conclude, as the statute requires, "in this case." This precise question came up in *Cryer v. State*, 36 Tex. Cr. R. 621, 38 S. W. 203, and it was there

held that the recognizance was not sufficient. See, also, *Duffer v. State* (Tex. Cr. App.) 38 S. W. 997. The motion is sustained.

The appeal is dismissed.

ADAMS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

APPEAL—RECOGNIZANCE—SUFFICIENCY.

1. A recognizance on appeal, which does not conclude with the phrase "in this case," as required by Code Cr. Proc. art. 887, is bad.

2. A recognizance which binds appellant to appear to abide the judgment of the "Criminal Court of Appeals" is bad for misdescribing the court.

Appeal from Knox county court; G. B. Landrum, Judge.

Lee Adams was convicted of crime, and appeals. Dismissed.

Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The Assistant Attorney General has filed a motion to dismiss the appeal on alleged defects in the recognizance—First, because the recognizance does not conclude as is required by article 887, Code Cr. Proc., in that it omits to conclude with the phrase "in this case"; second, that the recognizance binds appellant to appear "to abide the judgment of the Criminal Court of Appeals of this state." The form prescribed by the statute requires appellant to appear in order to "abide the judgment of the Court of Criminal Appeals of the state of Texas in this case." In regard to the first objection, it has been expressly decided that such recognizance is bad, in that it does not substantially comply with the form of recognizance prescribed in article 887, Code Cr. Proc. *Cryer v. State*, 36 Tex. Cr. R. 621, 38 S. W. 203; *Duffer v. State* (Tex. Cr. App.) 38 S. W. 997; *Lively v. State*, Id.

We are not aware that the second objection has ever been passed upon, but the tendency of our decisions in construing this statute is to require a substantial compliance with the terms thereof. In *Cummings v. State*, 31 Tex. Cr. R. 406, 20 S. W. 706, it was held that the recognizance requiring the appearance of an appellant to abide the judgment of the Court of Appeals was defective, on the ground that it failed to properly name the court of last resort having jurisdiction of the appeal. Here, in naming the court, the word "Criminal" is transposed, so as to term the appellate court the "Criminal Court of Appeals." Instead of the "Court of Criminal Appeals." There is no such court as that used in this recognizance. The legislature, in prescribing the form of recognizance, used the name of the court having appellate jurisdiction of the case—a name prescribed by law. The form is plain in terms, and its object was to simplify

recognizances, and by the least care in perfecting an appeal the prescribed form can be complied with. We hold that the designation of the court here used was not in compliance with said article of the Code of Criminal Procedure, and that the recognizance is defective on that account. The motion is accordingly sustained, and the appeal is dismissed.

GRIMES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

VIOLATION OF LOCAL OPTION LAW—SUFFICIENCY OF EVIDENCE—INSTRUCTION.

1. Evidence, in a prosecution for violation of a local option law, examined, and held to sustain a conviction.

2. A charge in a prosecution for violation of a local option law that, if the evidence showed beyond a reasonable doubt that defendant accepted money from the prosecuting witness under an implied agreement to furnish him whisky, and, pursuant thereto, placed whisky where he could get it, he was guilty, unless he acted as agent for witness in procuring the whisky, and had no pecuniary interest in the sale, in which case he was not guilty, does not place the burden of proof on defendant, nor does it require him to establish his innocence beyond a reasonable doubt.

Appeal from Midland county court; B. B. Bryan, Judge.

R. J. Grimes was convicted of violating a local option law, and he appeals. Affirmed.

Cunningham & Oliver and Woodruff & Hughes, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law, the penalty assessed being a fine of \$25 and 20 days' confinement in the county jail.

The evidence for the state is that the alleged purchaser, Watson, went to appellant's place of business and sought to buy whisky. Appellant declined to sell, stating that he had none to sell. Watson then told appellant that he was suffering from heart trouble, and wanted whisky, and asked appellant to get him some, and, if he could not do any better, to order it from Odessa. And witness further testified that he said to defendant to permit him (witness) to find a bottle of whisky about the place. Defendant made no reply. Witness handed appellant 65 cents, which he put in his pocket, and witness walked away. This occurred about noon. About 10 p. m. the same day, witness went to defendant's place of business. Defendant at the time was in the rear of the building, raffling off a turkey. Witness waited awhile to see appellant, but he remained busy, and witness walked around behind the bar at the front of the building, saw some bottles, and, believing one of them to be for himself, took it and went off with it. In contained a pint of whisky. Witness does not know whether appellant saw him when he got the

bottle of whisky. This occurred on November 27th. On December 13th appellant came to witness and expressed surprise to find that his name was on this information, stating that he did not know witness had gotten the whisky until after he was arrested, and, further, that he had credited witness' account at the restaurant with the 65 cents. Defendant was then running a cold-storage, and had been some months before running a restaurant. Witness fully expected to get the whisky, and went back after it, and did get the bottle of whisky, as testified. Appellant never mentioned the matter to witness until after his arrest in this case, and he never delivered or offered to deliver witness any whisky for the 65 cents after witness got the bottle mentioned. On October 14th prior, appellant had shipped whisky by express from Big Springs, and had a United States internal revenue license issued to Clopton & Grimes, which was dated July 19, 1901, and ran from July 1, 1901, until July 1, 1902.

Appellant testified practically as did witness Watson up to the time of receiving the 65 cents. He states that he then went to the room of Charles Clark in the Mims Building, and bought of Clark a pint of whisky, and paid him the 65 cents for it which Watson had given him; that he got this whisky from Clark about 4 o'clock in the evening, and as an accommodation to Watson, and made no profit in the transaction; that he gave Clark 65 cents that he got from Watson. Appellant did not see Watson get the bottle of whisky, and knows that Watson must have gotten a bottle of whisky belonging to some one else, because the whisky he got for Watson remained there, and was afterwards drunk by himself and the 65 cents credited on Watson's account at the restaurant. Appellant testified before the United States commissioner at Abilene, in the federal court, about December 1, 1901, in regard to whisky transactions, but did not tell of this purchase from Clark. He testified to other sales made by Clark in their clubroom, and he says that the reason he did not mention this was because he was not asked about it; that Clark had the whisky in a jug, and that while testifying in his own behalf in the case tried Saturday, prior to this trial, wherein he was charged with selling liquor to Charles Clark, he did not tell what he now testifies, and gives as a reason that he was not asked about the transaction. He further testified that he was in the saloon business before local option went into effect in January, 1900, and had wine and whisky on hand in the storage room back of Counts' business house when Watson asked for the whisky. But, he stated, this was partnership whisky between Dysart and himself. Sometimes Dysart got some of this whisky to drink, and sometimes he did; but he did not get the whisky for Watson out of such stock, but got it from Charles Clark, as stated.

Appellant's books, in which he kept his accounts, were turned over to George Hogg, but they seemed to have been shipped out of the country; and Hogg and appellant differ widely as to the contents of these books. He said the books only showed some charges of cash to Clark, and did not show any credit sales to him; and that he knew at the time he was testifying at Abilene against Clark, but did not tell about it, though did tell of other transactions in the club. Clark and himself ran the club over his cold storage, and played poker there; and this club consisted of Clark, appellant, and one Fred Lewis, a bricklayer. No one else belonged to the club. His testimony shows that he had decided animosity toward Clark, and was a witness against him at Abilene, and the reason for this was that Clark had made complaints against appellant for selling intoxicating liquor, and these complaints had all been filed before he was taken to Abilene as a witness. He states that he knew of this transaction by Clark at the time he testified at Abilene, but did not mention it.

The witness Hogg's testimony was in direct conflict with appellant's in reference to the books, accounts, charges, debits, etc., and that there were about 100 accounts on the books, cash and goods, and that Clark had an account on said books for both cash and goods, and the accounts related to the restaurant and cold storage. Witness did not know where they were; undertook to find them, and went to the safe where they were kept, and the safe was gone, including the books.

Purcell was placed on the witness stand, and testified that he was on Clark's bond for him to appear before the federal commissioner, and accompanied him to Abilene, and heard appellant testify against Clark. Appellant testified about seeing Clark sell whisky in the clubroom, but did not mention the fact that he bought whisky from Clark in Clark's office on November 27, 1901.

Watson, recalled, testified that after appellant was arrested he did not inform him that he had gotten this whisky from Clark, or mention that Watson got the wrong bottle; simply stated that he did not know Watson had gotten the whisky, and had credited Watson's account at the restaurant with the 65 cents.

Appellant makes two questions: First, the insufficiency of the evidence; and, second, that the charge of the court is on the weight of the evidence, and throws the burden of proof on appellant. We are of opinion that the evidence is sufficient to sustain the conviction. Watson got the whisky, beyond any question. He got it from several bottles of whisky in appellant's place of business. He gave appellant the money with which to purchase the whisky. Appellant says he turned the money over to Clark in payment for whisky that he got from Clark for Watson. When the information was preferred, he informed Watson that he placed the money to

his credit on the restaurant account. These statements are not reconcilable with each other. If appellant had bought the whisky from Clark and turned the money over in payment, he did not have it to place as a credit on the restaurant account subsequently.

The following portion of the charge of the court is criticised: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time he received 65 cents from C. C. Watson, if he did receive 65 cents from the said C. C. Watson, there was an implied agreement that he, Grimes, would furnish said Watson with whisky, and, in pursuance of said agreement, he did place whisky where the said Watson could get it, then he would be guilty, and you will so find and assess his punishment as heretofore instructed; unless you find, on the contrary, from the evidence, that Grimes purchased said whisky from Charles Clark, and that in doing so he was acting as the agent of said Watson in the purchase of said whisky, for the accommodation of the said C. C. Watson, and had no pecuniary interest in said sale, then you will find the defendant not guilty, and so say by your verdict." This charge does not compel appellant to assume the burden of proof; nor does it change the reasonable doubt from its proper mission. The jury were instructed that, if they should believe from the evidence, beyond a reasonable doubt, certain facts, it would constitute appellant guilty; but, on the contrary, if they did not so believe, but believed the facts as stated in the second clause of the charge, they should acquit. We believe this charge is correct, and that it does not shift the burden of proof or require defendant to prove his innocence beyond a reasonable doubt. It required the state to prove his guilt beyond a reasonable doubt; and if the state had not done so, or they should believe the subsequent state of facts existed, the jury should acquit.

No error appearing in the record, the judgment is affirmed.

MARX et al. v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

KEEPING DISORDERLY HOUSE—TRIAL—INSTRUCTIONS.

1. In a prosecution of two persons for keeping a disorderly house, a charge that, if the jury believed that only one or either of the defendants rented the house, they should find both not guilty, while incorrect, was not prejudicial to defendants.

Appeal from Ward county court; J. A. Stewart, Judge.

Herman Marx and another were convicted of keeping a disorderly house, and appeal. Reversed as to appellant Marx.

Howell Johnson, for appellants. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellants were convicted of keeping a disorderly house, and their punishment assessed at a fine of \$200 each; hence this appeal.

There was some testimony tending to show the guilt of Peacock; but if there was any evidence tending to show the guilt of Marx it was of a very meager character, and is not sufficient to sustain the verdict as far as said Marx is concerned.

As to the other appellant, Peacock, we understand him to complain of the following portion of the charge of the court: "If you believe from the evidence that only one or either of the defendants rented, leased, or hired the use of a house for purposes stated, then you will find both of them not guilty." It occurs to us that said charge, while not the law, because the jury could acquit one and convict the other, and the guilt of one was not dependent on the guilt of the other—yet said charge was favorable to appellant, and he cannot complain.

Appellant also complains that the court did not draw a distinction between prostitutes and common prostitutes. We do not find anything in the record in this case that renders such a distinction necessary, even if such a distinction be conceded under our statutes regulating the keeping of disorderly houses.

We have carefully examined the record, and in our opinion the testimony is sufficient to sustain the conviction as to appellant Peacock, but it is not sufficient to sustain the conviction as to the other appellant, Herman Marx. The judgment is therefore reversed and remanded as to said Marx, and affirmed as to appellant Peacock.

CLARK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

TRIAL—IMPARTIAL JURORS—APPEAL—CONSIDERATION OF OBJECTION.

1. On a prosecution for receiving stolen property it was error to allow on the jury some of those who had served on the jury on the trial of the thief and some of those who had heard the testimony on such trial, such testimony having conclusively shown the theft.

2. On appeal in a criminal case the admission of evidence will not be reviewed, where it was merely objected to, without any reason being assigned.

Appeal from district court, Travis county; N. A. Rector, Judge.

Jack Clark was convicted of receiving stolen property, and he appeals. Reversed.

O. Dickens and Walter Corwin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of receiving stolen property after it had been stolen by one Jack McQuirter. The day before appellant was placed on trial McQuirter was tried, nominally under a plea of guilty,

although there was a plea of not guilty entered. By agreement with the district attorney, McQuirter pleaded guilty, and the only witness to be used on his trial was J. C. Pray. Pray testified on McQuirter's trial that McQuirter confessed to him the theft of the property, and further stated that he had thereafter turned it over to appellant. When appellant's case was called for trial, the jurors who sat in McQuirter's case were also called into the jury box. Some of the remaining jurors for the week were sitting about the court room, and had heard McQuirter's trial. Appellant moved the court to set aside and excuse those jurors from sitting in his case who sat in the McQuirter trial, and such of the jurors as had heard the McQuirter trial and become influenced by the testimony. This was refused. We think this was error, although the court certifies that he sustained every cause of challenge where the juror expressed the slightest impression having been made upon his mind by what he had heard in regard to the McQuirter trial. As appellant's case necessarily involved the guilt of McQuirter as the thief, it was necessary for the state to show the guilt of McQuirter in order to obtain the conviction of appellant as receiving from McQuirter. Therefore he was entitled to a fair and impartial jury on both issues. It was almost as detrimental to defendant for the juror to have made up his mind as to the guilt of McQuirter as it was to his own guilt. All the jurors who sat in the McQuirter trial and rendered the verdict of guilty evidently were impressed with his guilt. If the jurors had a conclusion as to the guilt or innocence of either McQuirter or appellant, they should have been excluded from sitting on the jury; and it is, therefore, evident that the jurors who tried McQuirter were absolutely disqualified from sitting on the jury trying appellant.

Bill No. 8 states the district attorney read to the jury the indictment against Jack McQuirter for the theft of the property set out in this indictment as having been received by appellant. "Defendant objected, and excepted to the action of the district attorney in reading the same, and tenders this bill of exceptions, which is given." The same question occurs in bill No. 10, in regard to the verdict of the jury, judgment of the court, and sentence of Jack McQuirter. There are no grounds of exception urged to the introduction of this testimony. The court certifies that he permitted the introduction of this testimony on the issue of McQuirter's guilt as to the theft, and it was so limited at the time of its introduction as well as in the charge. Without an objection on the part of appellant, this court will treat the matter as having been waived. The bills of exception do not present the question. Defendant simply objected to the introduction of these matters, without assigning any reason at all. This court will not assign grounds of objection, and thereby resolve itself into a trial

court. We only review the objections urged, and, as there are none, we refrain from discussing any error or supposed error that might be later on conjured up.

For the error discussed, the judgment is reversed, and the cause remanded.

HOOD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CARRYING CONCEALED WEAPONS—DANGER OF ASSAULT—EVIDENCE—PRIOR QUARRELS.

1. In a prosecution for unlawfully carrying a pistol, evidence that defendant had had several quarrels with other persons just prior to the time he was charged with having had a pistol, and that on one occasion these parties had pursued defendant, was not admissible in the absence of any showing that defendant was in danger so imminent as to prevent him from having the parties arrested.

2. Under the statute providing that, when a party is in such imminent danger of being unlawfully attacked that he cannot notify the officers of the law, he may arm himself, a person is not justified in carrying arms when danger is not imminent, merely because he has reasonable ground to apprehend an attack.

Appeal from Nolan county court; D. I. Durham, Judge.

Albert Hood was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$25.

The first bill of exceptions complains that the court erred in refusing to permit appellant to prove by R. Styles that he and his son, Jink Styles, had had several rows and difficulties with defendant just prior to the time of this difficulty in which he is charged with having a pistol, and that a short time before this they had run and chased defendant and threw rocks at him; that he ran from them, and kept out of their way. There was no error in excluding this testimony. The bill does not make it appear that such danger was imminent, and so imminent as to prevent appellant from having said parties arrested, as the statute requires. The mere fact that a party may have a difficulty with another does not per se authorize such party to carry a pistol.

Appellant complains of the court's refusal to give the following requested charge: "If you believe from the evidence that defendant, Albert Hood, had reasonable grounds to apprehend danger from the Styleses, or either of them, in that event he had a right to go off and arm himself in order to ward off and defend against any unlawful attack upon his person; and it makes no difference where or when he so armed himself, so that he did it after he had been attacked and such apprehension of danger arose." This is not the law, and the court did not err in refusing

this charge. The statute provides that, where the danger is imminent, and there is no time or opportunity afforded appellant to notify the officers, in that event he can arm himself to protect against the danger.

Appellant complains of the court's charge, contending that the same is not the law, was more onerous than the law requires, in that it fixes a greater punishment than the law, and was calculated to prejudice and influence the jury against defendant, for the reason that said charge did not sufficiently explain and define defendant's right to arm himself in case he had been recently attacked and apprehended, or had reasonable grounds to apprehend or fear another unlawful attack upon his person. None of these objections are well taken. The charge, as a whole, is correct. The theory of appellant that he had apprehension or fear of danger or an unlawful attack would not, per se, authorize him to carry a pistol. The record before us shows that he armed himself prior to any assault or contemplated assault, and hence the issue insisted upon by him was not legally presented by the evidence.

No error appearing in the record, the judgment is affirmed.

OSBORN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

GAMING—INDICTMENT—SUFFICIENCY.

1. Under Pen. Code, art. 380, authorizing a conviction for gaming at a public house, including any room attached to such public house and commonly used for gaming, an indictment charging defendant with unlawfully playing at cards in a room overhead, above, and connected with, and attached to and a part of a saloon building, the same being a public house, was insufficient.

Appeal from Stonewall county court; A. S. Forrester, Judge.

Mat Osborn was convicted of gaming, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of gaming, and fined \$10.

The charging part of the indictment is as follows: First count: That appellant "did then and there unlawfully bet and wager at a certain gaming table, to wit, a poker table; said table being then and there kept and exhibited for gaming purposes." Second count: That appellant "did then and there unlawfully play at a game with cards in a room in the second story of a certain building known as the 'West and Davis Saloon Building,' said room being overhead, above, and connected with and attached to and a part of said West and Davis saloon building, the same being then and there a public house; the lower floor of said building being used for the purpose of retailing spirituous liquors." Third count: That appellant "did

then and there unlawfully play at a game with cards, and did wager and bet money on said game of cards," etc. The conviction was under the second count. Appellant filed a motion to quash the indictment. Under the Acts of the Twenty-Seventh Legislature (page 26) it is only necessary to charge that an accused played at a game of cards at a house for retailing spirituous liquors, storehouse, tavern, inn, or to allege some other house and state that same is a public house; or allege that the same was played in a street, highway, or some other public place, naming the same; or in an outhouse where people resort. But if the playing is not done at any of the above-named places, then it is only necessary to allege that said place was then and there not a private residence occupied by a family. It will be noted that the acts of the Twenty-Seventh Legislature do not repeal article 380, Pen. Code, which authorizes a conviction for the playing at a house that is a public house and at gaming houses, and then provides that any room attached to such public houses, and commonly used for gaming, is also included, whether the same be kept closed or open. Neither count in this indictment contains the provisions of this statute. The motion to quash the indictment should have been sustained. For a discussion of the last act of the Legislature, see *Hodges v. State*, 72 S. W. 179, *Hankins v. State*, 72 S. W. 191, and *Wilkinson v. State*, 72 S. W. 850 (decided at the present term).

The judgment is reversed, and the prosecution ordered dismissed.

ANDERSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

MISDEMEANOR—APPEAL—RECOGNIZANCE—SUFFICIENCY.

1. A recognizance on appeal, reciting that appellant "stands charged with the offense of unlawfully carrying a pistol," is defective, as failing to charge any offense.

2. A recognizance failing to show the punishment imposed is fatally defective.

Appeal from Childress county court; W. G. Gross, Judge.

Russ Anderson was convicted of unlawfully carrying a pistol, and appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted under an indictment charging him with unlawfully carrying on and about his person a pistol. The recognizance recites that appellant "stands charged with the offense of unlawfully carrying a pistol," etc. This charges no offense against the law. *Blackshear v. State* (Tex. Cr. App.) 33 S. W. 222. This is the only attempt to show that ap-

pellant stood charged with or was convicted of a misdemeanor. It does not recite, as prescribed by the statute, that appellant was convicted of a misdemeanor, nor does it aver the constituent elements of a misdemeanor, nor does the recognizance state the amount of the fine or punishment imposed. The recognizance is fatally defective.

The motion of the Assistant Attorney General is sustained, and the appeal is dismissed.

FORTENBERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

INFORMATION—ALLEGATIONS—FORMAL DEFECT—AMENDMENT—ASSAULT—EVIDENCE—SUFFICIENCY.

1. Where the counts of an information as originally filed began, "And the said S. A. [naming prosecutor], upon his oath aforesaid further deposes and says," etc., it was proper to permit the county attorney to file what was termed an "amended information," but which was in fact a new information, making the counts begin, "And the said attorney further presents in said court that D. F. [naming accused]," etc.

2. On a prosecution for assault, it appeared that accused and several others attempted to scatter sheep that prosecutor was driving, and that they surrounded prosecutor, and one of them took hold of him, not inflicting any personal injury, when he drew his pistol, and they went away. *Held*, that the evidence showed an assault.

Appeal from Knox county court; G. B. Landrum, Judge.

Baxter Fortenberry was convicted of an assault, and he appeals. Affirmed.

Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The complaint and information contain three counts. The second and third counts in the information, as originally filed, began as follows: "And the said Seth Alston, upon his oath aforesaid, further deposes and says," etc. Motion was made to quash the information because each count so began. The county attorney was permitted to file what is termed an "amended information," which is in fact a new information, making those counts each begin: "And the said attorney further presents in said court, at said term thereof, that Baxter Fortenberry," etc. There was no error in permitting the filing of the second information. It was evidently an oversight in the county attorney making the second and third counts begin as stated, and the filing of the second information, which was proper and legal, cured this matter, and, even if the defect had been a matter of substance, it could have been cured by the filing of a new information. The old information could as well have been amended in the matter complained of, it being simply a question of form, and not of substance. See *White's Ann. Code Cr. Proc. arts. 586-588*, and section 588 for collation of authorities.

The first and second counts of the information are brought under article 600, Pen. Code, which pertains to interference with parties engaged in lawful employment. The third count charges an assault upon Seth Alston. All three counts were submitted by the court in the charge, and evidence was introduced in support of each count. The jury acquitted appellant on the first and second, and convicted under the third count for the assault.

There are some exceptions reserved to the action of the court in regard to the admission of testimony and charges which appertain to the first and second counts. As these are all eliminated by the verdict, we deem it unnecessary to discuss the questions presented by those bills and motion for new trial.

There is a general allegation in the motion for new trial that the evidence does not support the conviction. This will be viewed alone from the standpoint of the verdict; that is, the conviction for the assault. It seems that Alston was driving a considerable herd of sheep near the little town of Clifton, when defendant and several others assembled themselves and followed him a short distance above the town, and undertook to interfere with his driving the sheep through an inclosure along the ordinarily traveled road. They first attacked him by running in among the sheep, and undertook to scatter them and drive them away, making a great deal of noise by hallooing, yelling, and waving their hats. Some of them came back, and made an assault upon him with a knife. This was abandoned, and they betook themselves the second time to chasing the sheep, and running them into an adjoining pasture; and, after chasing the sheep for some time, appellant and three others came back, and surrounded Alston, when one of the number took hold of him. They did not inflict any injury upon him further than as stated. One of them caught hold of him, while the other three were present, and, to use the language of the witness, "surrounded me, and one of them took hold of me." Just at this juncture Alston drew his pistol, and they all stepped back and went away, defendant being among the number. We are of opinion this evidence is sufficient to make out the assault.

The judgment is affirmed.

MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—ILLEGAL SALE OF LIQUOR.

1. A recognizance is insufficient to satisfy the requirement of Code Cr. Proc. art. 887, that it state appellant was convicted of a misdemeanor; it reciting that appellant "stands charged in this court with the offense of knowingly selling intoxicating liquor to a minor, and has been

convicted of such offense," and it not stating the ingredient of the offense that the sale was without the written consent of the parent or guardian, or some one standing in their stead.

Appeal from Stonewall county court; A. D. Forrester, Judge.

Rush Mitchell appealed from a conviction. Motion is made to dismiss for insufficient recognizance. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed a motion to dismiss this appeal, on the ground that the recognizance is defective, in that it does not state that appellant was convicted of a misdemeanor, as required by article 887, Code Cr. Proc. The recognizance in this particular states that appellant "stands charged in this court with the offense of knowingly selling intoxicating liquor to a minor under twenty-one years of age, and who has been convicted of said offense," etc. It will be observed that it does not state the sale was made to the minor, "without the written consent of the parent or guardian, or some one standing in their stead." This is a requisite ingredient of this offense. The motion is accordingly sustained. *Shackelford v. State* (Tex. Cr. App.) 22 S. W. 26, decides the exact question.

The appeal is dismissed.

H. J. Lewandowski

LEWANDOWSKI v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

LARCENY—IMPEACHING EVIDENCE—ADMISSIBILITY—RECALL OF DEFENDANT AFTER CLOSE.

1. On a prosecution for the theft of a pair of blacksmith tongs and a hammer, defendant's evidence that the prosecuting witness had represented in a written statement to the insurance company, after his shop had burned, that all his hammers, tongs, and tools had been totally destroyed, was admissible, as affecting his credibility, after defendant had shown that he had been unable to obtain the written statement.

2. Where, on a prosecution for the theft of a pair of blacksmith tongs and a hammer, the county attorney, in his argument, commented on the fact that defendant while on the stand had said nothing about the tongs, it was error not to allow him to be recalled, on request of his attorney, who stated that defendant could explain his possession of the tongs, and that it was the fault of counsel, not of defendant, that defendant had not made such explanation while on the stand in the first instance.

Appeal from Somervell county court; J. G. Adams, Judge.

Henry Lewandowski was convicted of theft, and appeals. Reversed.

J. Elbert Pearce, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with the theft of one pair of blacksmith tongs and one blacksmith hammer.

The second bill of exceptions complains of

the action of the court refusing to permit witness Shields to testify that prosecuting witness Sanders, soon after his blacksmith shop was burned, in making a written statement to the insurance company in which he carried insurance on his blacksmith establishment and tools, in regard to the loss by fire, stated, in such representations to said company, that all his hammers, tongs, and all of his tools had been totally destroyed by fire. The state objected because the testimony was immaterial and the written statement was the best evidence. Whereupon witness Pierce, in order to lay the proper predicate, and show the written statement was lost, stated that he knew the statement was made to said insurance company, and after this prosecution was instituted wrote several letters to the insurance company at Galveston, attempting to get a copy of said statement. The letters were all returned. That he then wrote to a firm of attorneys in Galveston, asking them to locate the insurance company, and received the information that said company had dissolved, and were no longer in Galveston, but had moved to Dallas; that he went to Dallas in April, 1902, and sought to locate the insurance company, in order to secure the affidavit of Sanders, or a copy of it; that he examined throughout the city, by all the means afforded him, to locate said company or its president, but failed. It is not necessary to detail the means he used in his attempt to locate the company and its officers. The court thereupon refused to permit Shields to testify to said statement. Shields would have testified that he assisted Sanders in making the statement, and that Sanders in said statement and affidavit reported to said company that his shop, and all of the tools therein, including hammers and tongs, had been totally destroyed by fire. Sanders had testified that he did not recollect whether or not he had made such statement, but if he had he was then seeking to secure money from the insurance company, but he was now testifying against appellant. The testimony was offered for the purpose of affecting the credibility of Sanders, and for the purpose of proving the value of the hammer and tongs, and the knowledge of the witness Sanders that said hammer and tongs had no value at the time he made such statement. We believe this testimony should have gone to the jury, and that the proper predicate was laid for the introduction of the testimony of Shields. Certainly it went to the credit of Sanders, whether or not it had any probative force as to the value of the hammer and tongs.

While the county attorney was making his opening argument to the jury, among other things, he criticised defendant while he was a witness in his own behalf, because he did not tell one word about these tongs. Counsel for defendant interrupted the county attorney, and announced to the court that he had overlooked to interrogate defendant while

upon the stand in regard to the ownership and possession of the tongs, and asked the court to again allow him to put defendant on the witness stand, in order that he might explain this matter, and that if permitted to recall defendant he would explain his possession of the tongs in like manner as he had explained the possession of the hammer, and that it was the fault of counsel, and not the fault of defendant, that he had not so explained his possession while upon the stand in the first instance, and that it was necessary to the administration of justice, as well as defendant's ground of defense, that the court permit him to again take the stand under the circumstances. The court refused, upon the ground that he had already been upon the stand, and the testimony had closed, and permitted the county attorney to proceed with his argument, and to further argue to the jury that defendant had failed to explain his possession of the tongs, etc. While upon the stand appellant had testified that the hammer was his, and that it had been made in the shop by himself and his brother, and would have testified, if permitted to be recalled, to the same facts in regard to the ownership and possession of the tongs. The court should have permitted the witness to be recalled. This question was before the court in *Donahoe v. State*, 12 Tex. App. 297. It was material and important to the defense. The *Donahoe* case is so nearly like this we deem it unnecessary to enter into a discussion of the matter, but simply refer to it for support of this ruling.

The matter with reference to the application for continuance is not discussed, for the reason that the witness may be before the court upon another trial, and, if not, the application will be presented under different conditions.

The judgment is reversed, and the cause remanded.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

MURDER—CONTINUANCE—DETENTION OF WITNESS—EVIDENCE—ANIMUS—CONSPIRACY.

1. It was not error to deny a motion for a continuance of a criminal prosecution, based on an allegation, unsubstantiated by proof or tender of witnesses, that the state was holding one of defendant's witnesses under arrest as an accomplice, under pretense that it would indict him, in order to deprive defendant of the full benefit of his testimony.

2. A tender of the witness to defendant for private examination and for use on the trial was a sufficient answer to the motion.

3. In a prosecution for murder, testimony as to a conversation between defendant and witness just before the killing, declaring defendant's intention of following deceased, who had started to walk home with defendant's sweetheart, and, on being warned not to do so, his reply that "he had friends," is admissible as showing the animus of defendant toward deceased.

4. Testimony that the person from whom defendant procured the pistol with which the killing was done got it from witness in a clandestine manner, there being no evidence of a conspiracy between defendant and such person, is inadmissible.

5. It was error not to instruct the jury on the issue of a conspiracy between defendant and the person procuring the pistol, if there was any evidence of a conspiracy.

Appeal from district court, Hill county; W. Poindexter, Judge.

A. J. Moore was convicted of murder in the second degree, and appeals. Reversed.

Chas. M. Smithdeal and Horton B. Porter, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 45 years; hence this appeal.

The record shows that the killing occurred on Sunday night. Deceased and appellant had both gone to church. Deceased before or about the time church was out started to walk home with Susie Jones, who, it appears, was the sweetheart or affianced of appellant. Appellant objected to this. However, Susie persisted in returning with deceased, Mat Hunt, when defendant slapped her in the face, and some words passed between him and deceased. After Susie and deceased had gone, appellant followed with Mary Roberts, the sister of Susie Jones, who lived at the same place; that is, at the servant house of one Bowman, in the town of Hillsboro. When appellant and Mary arrived, they found deceased and Susie sitting on a box in the yard, some eight or ten yards from the servant's house. Appellant and Mary went into the servant's house, and, after they had been there some 10 or 15 minutes, Alex Anderson came to the servant's house, and sat down in the doorway. Directly he pulled out a pistol, and laid it in his lap, and appellant asked him to give it to him. He did not hand it to him, but appellant reached over and took it out of his hand. Appellant then asked Mary to tell Susie to come in; that he wanted to talk with her. This she declined to do. Appellant then went out to where she was, and in a very short time a shot was fired, which killed deceased. The state's testimony tended to show that deceased and Susie were still sitting on the box when appellant came out. He came up to where they were, and slapped Susie, and deceased got up from where he was sitting, and said, "You ought not to hit the girl." Appellant then came around near to deceased, and shot him, the deceased doing no act and making no demonstration of hostility at the time. After the shooting, appellant went back to the house, and Alex Anderson succeeded in taking the pistol from him. Ac-

cording to appellant's theory, which is supported by his own evidence, when he went out where Susie was he found her sitting in the lap of deceased. She being at the time engaged to marry appellant, this incensed him, and he slapped Susie in the face. Mat Hunt, deceased, jumped up, saying, "That is all right, A. J., I am your friend," and ran his hand in his bosom low down about the waist of his pants, like he was about to draw his pistol, and defendant, thinking he was about to draw a pistol in order to kill or hurt him, pulled his pistol, and shot deceased." This is a substantial statement of the facts of the case.

Appellant made a motion to continue the case, his motion being predicated on the allegation that Alex Anderson had been arrested, charged with complicity in the same offense, and that he had not been indicted, but that the state was keeping him in jail under the pretense that it would indict him, in order to deprive appellant of the benefit of his testimony; that, if the case was continued, said Anderson would not be indicted, and appellant would have the benefit of his testimony, untrammelled by the shadow of any prosecution. It is further shown that the offense was committed on the 31st of August; that this was the first term of the court since the homicide; and that the indictment was only returned against appellant on the 2d of October, and this case set down for trial on November 6th. Appellant further offered to prove that an investigation would show that there was nothing against said Anderson, and that the state merely kept said prosecution pending against him in order to deprive appellant of the full benefit of his testimony. This offer was in general terms, no witness being named by whom appellant expected to prove this very serious accusation against the state. The court explains the bill of exceptions and the overruling of the application for continuance by stating "that the grand jury was still in session, and the witness Alex Anderson was still in jail on the same charge, and no bill of indictment had yet been returned against him; and, further, he had the said Alex Anderson brought out of jail, and tendered him to defendant as a witness, and defendant had the opportunity of privately consulting with said Anderson, and after such consultation declined to put him on the stand." If Alex Anderson had been indicted with appellant for said homicide, or indicted separately for the same offense, it would have been competent for appellant to have claimed a severance, and, without objection on the part of said Anderson, to have him tried first, and on his acquittal he might have made a witness of him. But we know of no rule of law providing that, where a party who might be implicated or thought to be implicated in the same offense, and who had not been indicted, the defendant could claim a continuance in order to procure the testimony of said wit-

ness at some future time should he not be indicted. Indeed, the statute in reference to severance provides, and the decisions hold, that a severance, without some other sufficient cause, shall not operate as a continuance to either party. Of course, on a proper showing the state would not be permitted to hold a prosecution over such witness merely for the purpose of handicapping the witness in his testimony. *Price v. State* (Tex. Cr. App.) 40 S. W. 598. Here, however, appellant makes no showing as to by what witness he can prove that the state was merely keeping the witness under the shadow of prosecution for the purpose of depriving defendant of the benefit of his testimony. If he had alleged some facts, and tendered some witnesses by name, another question would arise. As presented, it occurs to us that the tender of the witness to appellant was a sufficient answer to his motion to continue the cause. If the witness had testified in favor of appellant to the effect that there was no conspiracy existing between him and said appellant in reference to the homicide, it would have exculpated the witness; and, if appellant failed to use the witness simply because the witness was then under an accusation in regard to the same offense, after he was tendered to him, appellant has no one to blame but himself. At any rate, the law gives him no relief under such circumstances. *Williams v. State* (Tex. Cr. App.) 44 S. W. 1103.

By appellant's second bill he questions the action of the court admitting the testimony of Hob Baker as to what occurred between appellant and Susie Jones at the church, when deceased started home with her. All this occurred when deceased and appellant were present, except what appellant said to witness Baker in regard to going to Bowman's after deceased and Susie Jones left. This testimony was admissible to show the animus of appellant towards deceased in regard to his associating and going with Susie Jones. When appellant declared his intention of following the parties there, the witness Baker declined to go with him, but told him not to go up there and raise a disturbance at Bowman's, because he would have to pay for it. Appellant replied to this that he had friends, whereupon witness told him he did not have any money to throw away, if he did have friends. We think this testimony, as said above, had a bearing upon the animus of appellant.

When the witness Adam Oliver was on the stand, the state was permitted to prove by him that he lived several miles in the country, and appellant and Alex Anderson and he were cousins; that on Saturday night, before the homicide, which occurred on Sunday night, Alex stayed all night at his house; that witness Oliver had a pistol in the bureau drawer in the room where Anderson stayed; that on the next day—which was the day of the killing—Anderson left the house of witness, and

afterwards, on the same day, witness found his pistol in the possession of Anderson; that he did not consent for Anderson to take the pistol, and did not know he had taken it; that later in the day he took the pistol away from Anderson, and left it in the house of Eliza Davis, but after that, and on the same day, Alex Anderson told him he was coming back and stay all night at his house that Sunday night, and he gave his pistol to him for the purpose of carrying it back to his home; that shortly after this Anderson and witness separated, and witness did not see him any more. The evidence shows that this was the pistol which Alex Anderson gave appellant that night at the scene of the homicide at Bowman's, and was the pistol with which deceased was killed. This testimony was objected to by appellant on the ground that it was not shown that defendant had any connection with or knowledge of the acts of said Anderson in procuring said pistol; that said evidence was highly prejudicial to defendant, because the jury would naturally infer from its admission in evidence that it had some connection with or bearing on the case; and that the same could not be considered by them for any purpose other than to lead them to believe that at the time defendant went to the place of the killing he had already made arrangements with said Anderson to have a pistol there for him with which to do the killing; and that the pistol had been procured by said Alex Anderson by prearrangement between him and appellant. The court explains this bill by stating: "That defendant proved by the witness the fact that witness gave the negro Anderson the pistol to carry back home. The other evidence was admitted to show that Anderson had possession of the pistol before the homicide, it being a question as to whether defendant knew this, and the time at which he received it. This evidence could not have prejudiced the jury against the defendant, as they only found him guilty of murder in the second degree." The explanation of the court does not show that defendant brought out any testimony with regard to said pistol, and its procurement, prior to the introduction of this subject by the state. Of course, after the state had introduced evidence of the procurement of the pistol by Anderson at the house of Oliver, and in a clandestine manner, naturally appellant would want to show that subsequently Oliver knew that Anderson had the pistol, and consented for him to keep it. So we do not think it was important to show how Anderson procured the pistol, unless his procurement of the pistol was by virtue of a conspiracy shown to exist between him and appellant; and, in the absence of such conspiracy, the only issue was, not how Anderson got the pistol, but simply how appellant got it. The court further explains that it was a question as to whether defendant knew of the procurement of the pistol, and the time at which he received it. How this became

a question, the court does not explain. If we recur to the statement of facts, outside of the fact that Anderson came to the house where the homicide occurred, and gave the pistol to appellant, or afforded him the opportunity to take it, there is absolutely no evidence showing that appellant knew Anderson had any pistol, much less that he had arranged with him beforehand to procure a pistol. Of course, if it be conceded that the testimony in regard to Anderson bringing the pistol to the house where the homicide was committed, and giving it to appellant, is evidence of some prearrangement between him and Anderson to procure that pistol for the purpose of the homicide, then the requested charge asked by appellant, submitting the issue of conspiracy with reference to the pistol, which is complained of in another bill of exceptions, should have been given, in order that the jury might determine whether appellant was to be affected by the procurement of said pistol on the part of the witness Anderson. If there is no evidence of a conspiracy in regard to the procurement of said pistol, the court should not have admitted the testimony of Oliver with reference to its clandestine procurement. If there was evidence of a conspiracy between appellant and Anderson with reference to the procurement of said pistol for the purpose of the homicide, then the court should have given an instruction on that subject, in order that the jury might determine the question. If they determined there was no such conspiracy, defendant would not be injuriously affected by the circumstances in regard to the procurement of the pistol. The court further says that this evidence could not have prejudiced the jury against defendant, as they only found him guilty of murder in the second degree. We do not think it follows that, because the jury failed to find appellant guilty of murder in the first degree, the testimony did not prejudice appellant. We cannot always tell what evidence or circumstance may actuate a jury. This evidence with reference to the pistol may have influenced them to find appellant guilty of murder in the second degree, or may have influenced them with reference to the punishment they inflicted. It occurs to us that the testimony was clearly of a hurtful character. The delivery of the pistol by Anderson and the circumstances attending it were of a sinister character, and well calculated to make the jury believe that something had transpired between said witness Anderson and appellant at some previous time in regard to the pistol—that either appellant must have spoken to Anderson at the church, in regard to the pistol, or have sent him word through some one else. We say the testimony would naturally suggest this line of thought to the jury. And then, to re-enforce it with the circumstances connected with the procurement of the pistol by the witness Anderson on the night before was calculated to make the jury believe that, at least in the mind of the court admitting

this testimony, appellant was connected in some way with its procurement. But, as stated, the record furnishes no evidence of this, and, outside of the circumstances attending the delivery of the pistol by Anderson to appellant at the very time or just before the homicide, there is nothing to suggest any prearrangement in regard to the pistol. So we hold that, in the first place, this testimony should not have been admitted; or, certainly, if admitted, it should have been limited by a charge of the court.

Because of the admission of this improper testimony, which was of a hurtful character, and the failure of the court to give a charge limiting it, the judgment is reversed, and the cause remanded.

HAYS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL LAW—CONTINUANCE FOR ABSENT WITNESSES—INSTRUCTION.

1. Defendant, prosecuted for horse stealing, asked a continuance for absent witnesses, by whom he expected to prove that he had ridden many of prosecutor's horses with his knowledge and without objection, and that the purchaser of the alleged stolen horse had said that defendant left the horse with him conditionally, to be disposed of, if prosecutor, the owner, would consent. The testimony at the trial showed that defendant had been told to leave prosecutor's home; that simultaneous with his departure several horses disappeared, one of which defendant traded away in another county, giving another name than prosecutor's as that of the former owner; and that he told one witness that he and two others had stolen five horses from prosecutor, one of which he traded away. Defendant was also shown to have gone under an assumed name in the county where the horse was disposed of. *Held* not error to refuse the continuance, as no ordinarily intelligent jury would have believed defendant's story.

2. Where, in a prosecution for horse stealing, it was undisputed that prosecutor owned the horse, and the only evidence given in regard to the brand on the horse was that offered in an incidental description of it, a charge that such evidence could only be considered for the purpose of identifying the horse, and not as evidence of ownership, was properly refused.

Appeal from district court, Jones county; N. R. Lindsey, Judge.

Jack Hays was convicted of horse stealing, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for horse theft, penalty assessed being two years in the penitentiary.

Appellant sought a continuance on account of the absence of several witnesses. He expected to prove by E. W. Hatcher that shortly before the alleged theft he (appellant) had been riding horses of the alleged owner, Newcomb; that they were wild, and Newcomb had told him that at any time he wanted to ride the horses he could do so; that he had

ridden many of Newcomb's horses with his knowledge and without objection. And, further, that Hatcher, in a conversation with John Huffman, heard Huffman say to him (Hatcher) that defendant let him have the horse conditionally, and told Hatcher at the time that the horse belonged to Newcomb, and would trade the horse, provided he could make it all right with Newcomb as soon as he could see him, and with this understanding left the horse with Huffman. By the other absent witnesses defendant states that he expects to prove the same facts. Viewed from the standpoint of the motion for new trial, the court properly refused the continuance. Newcomb, the alleged owner, testified that defendant was at his house, and remained, without paying board, until he became tired of it, and informed him that he must get to work. Appellant then left, and soon thereafter Newcomb missed several head of his horses from the pasture, and informed the officers, who sent postal cards to the different counties and to Oklahoma in quest of the horses, but failed to locate them. Defendant disappeared at the time Newcomb's horses were taken from the pasture, and shortly afterwards turned up in Jones county, and traded one of the horses to Huffman. The other missing horses, shortly after sending out the postal cards, were found four or five miles north and outside of Newcomb's pasture. Defendant was never seen in possession of them, and the only connection they have with this case is the fact that they disappeared the same night from the same pasture as did the horse appellant subsequently sold to Huffman. Huffman testified there were no conditions attached to the trade, nor did appellant tell him the horse belonged to Newcomb, nor that it would be all right with Newcomb; that witness traded appellant a bay horse for the Newcomb horse, and appellant informed him at the time from whom he had bought the horse, the name being forgotten, but it was not the name of Newcomb. He denied the imputed conversation with Hatcher. To the witness Rogers appellant made a statement of a very decidedly criminative nature. Among other things, that he and two other parties stole five head of horses from Newcomb's pasture, and that he himself brought the one he stole, and traded it to Huffman in Jones county, while the others carried their horses off to Greer county, and that the parties were to meet there at Jim Hays' (appellant's brother), but he never went to the place appointed. Appellant made another statement to this same witness, to the effect that he bought the horse alleged to have been stolen from a party near Newcomb's place, in Kent county, and that he got another horse, belonging to a party who lived near Newcomb's and brought it away with the Newcomb horse to Jones county. He first told this witness that he had bought the horse, but afterwards informed him that he had

stolen it, and carried it to Jones county. At Stamford, in Jones county, appellant was passing under the name of M. L. Smith, where he was arrested for carrying a pistol and placed in jail. We believe from this statement of the record the testimony set out in the application for continuance is not only not probably true, but is entirely improbable. His conduct, acts, and confessions all exclude the idea that he had the authority of Newcomb to ride his horse, and that he rode it into Jones county, and traded it to Huffman conditional upon Newcomb's indorsement. No jury of ordinary intelligence could have ever given credence to such a story in the face of the evidence adduced.

Appellant reserved an exception to the action of the court refusing to charge the jury that the evidence offered in regard to the brand on the horse alleged to have been stolen is only admitted and can only be considered for the purpose of identifying the horse, and will not be considered as proof of ownership. There was no question of ownership raised; the horse had been owned by Newcomb for six years. The evidence referred to by appellant in the special charge only arose in an incidental description of the horse. The question sought to be raised by the special charge was not in the case. There being no error in the record, the judgment is affirmed.

BROCK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

CRIMINAL LAW—APPEAL—SUFFICIENCY OF RECOGNIZANCE.

1. A recognizance which in ending reads, "and not depart without leave of this court, in order to abide the judgment of the Court of Criminal Appeals of this state," and does not conclude with the final clause, "in this case," as required by Code Cr. Proc. art. 887, is insufficient.

Appeal from Knox county court; G. B. Landrum, Judge.

Earnest Brock was convicted of a crime, and appeals. Appeal dismissed.

Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General has filed a motion to dismiss the appeal, contending that the recognizance is defective, in that it does not conclude with the phrase, "in this case," as required by article 887, Code Cr. Proc. In this particular the recognizance reads, "and not depart without leave of this court, in order to abide the judgment of the Court of Criminal Appeals of this state," omitting the final clause, "in this case." Such a recognizance is insufficient, as has been held in *Cryer v. State*, 36 Tex. Cr. R. 621, 38 S. W. 203, and *Duffer v. State* (Tex. Cr. App.) 38 S. W. 997. The motion is accordingly sustained, and the appeal dismissed.

LEACH v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

DISINTERRING HUMAN BODIES—INDICTMENT.

1. An indictment under Pen. Code, art. 367, declaring a penalty for one who without authority disinters, removes, or carries away a human body, which does not state or give a reason for not stating whose body was removed, is insufficient.

Appeal from Stephens county court; W. C. Veale, Judge.

Arthur Leach was convicted under Pen. Code, art. 367, and appeals. Reversed.

W. P. Sebastian, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted under article 367, Pen. Code, which is as follows: "If any person not authorized by law or by a relative or friend for the purpose of reinterment, shall disinter, remove, or carry away any human body, or the remains thereof, or shall conceal the same, knowing it to be so illegally disinterred, he shall be punished by fine not exceeding two thousand dollars." Omitting formal parts, the information charges that appellant "did disinter, remove, and carry away a human body, and the remains thereof, from the place where the same had been buried, to wit, Battle Creek Grave Yard, in said county, the said Arthur Leach then and there not being authorized by law, nor by any relative or friend of said deceased, to disinter, remove, and carry away said human body and remains for the purpose of reinterment." And in the second count that he "did disinter, remove, and carry away a human head, the same being cut off the body, from the place where the same had been buried, to wit, from the Battle Creek Grave Yard, in said county, the said Arthur Leach then and there not being authorized by law, nor by any relative or friend of said deceased, to disinter, remove, and carry away said human head for the purpose of reinterment." This information is attacked as being insufficient in several respects, one of which, we think, is fatal, to wit, it fails to specify whose body was removed; nor is there any reason given in the information why the name was not specified, or the remains named and identified. The dead body should be specified or designated by the name by which it was known, in order to identify the transaction, and point out the particular offense with which accused is charged; and, if this cannot be done, then sufficient reason should be alleged in the pleading for the failure to so specify. The information upon this ground is clearly insufficient.

The judgment is reversed, and the prosecution ordered dismissed.

WILLIAMSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

DISINTERRING HUMAN BODIES—INDICTMENT.

1. An indictment under Pen. Code, art. 367, declaring a penalty for one who without authority disinters, removes, or carries away a human body, should state the name of the person whose body was disinterred.

Appeal from Stephens county court; W. C. Veale, Judge.

J. L. Williamson was convicted under Pen. Code, art. 367, and appeals. Reversed.

W. P. Sebastian and Calhoun & Webb, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted under article 367, Pen. Code, of the offense of disintering, removing, and carrying away a human body, etc., and his punishment assessed at a fine of \$75; hence this appeal.

Appellant assigns a number of errors, but it is only necessary to discuss those which dispose of the case. Appellant made a motion to quash the information, among other things, on the ground that it failed to allege the name of the human body alleged to have been disinterred. Article 367, Pen. Code, provides as follows: "If any person not authorized by law or by a relative or friend, for the purpose of reinterment, shall disinter, remove, or carry away any human body, or the remains thereof, * * * he shall be punished by fine not exceeding two thousand dollars." We are not advised that this statute has been before our courts for construction. However, upon the question here presented, consulting decisions on statutes framed in terms similar to this, the name of the alleged dead person should be set out in the indictment. See *McAfee v. State*, 38 Tex. Cr. R. 124, 41 S. W. 627. And upon this exact question the authorities in other states hold that the name of the dead person is essential. See 2 Bishop, Cr. Proc. sec. 1010, and authorities there cited. An indictment should always describe the offense as set out in the statute, and sometimes more than even the definition contained in the statute should be set out, in order to apprise the accused of what he is called upon to answer; that is, the indictment must set forth the offense charged with such a degree of certainty as will apprise the defendant of the nature of the peculiar accusation on which he is to be tried. If it is held that the want of consent of the relatives or friend of a deceased person is an essential averment, and that the burden is on the state to prove this, as in theft cases, then it would unquestionably follow that the name of the deceased person should be alleged. If, on the other hand, it is held that, while it is necessary to aver such want of consent, the burden of prov-

ing this fact, being peculiarly within the knowledge of the defendant, is to be proved by him, then he ought to be apprised of the name of the deceased person he is charged with disinterring, in order that he might prepare himself with proof of consent, if such be his defense. So, in either event, it occurs to us that the name of the deceased person is a necessary averment in the indictment under this statute.

Appellant's counsel strongly insists that the proof is not sufficient, and that the statute itself is defective in failing to define the offense, and urges us to construe said statute. He maintains that the statute requires the entire body to be disinterred. By disinterment he contends that the statute means that the body, and the whole thereof, should be removed from the grave. He insists that the proof only shows that the grave was uncovered, and only the head displaced and taken therefrom, and that this would not be an offense under the statute; because disinterring does not mean simply uncovering the grave, but includes removing the body therefrom, and that the removal of a part of the body is not sufficient—that the whole body must be taken from the grave. While it is not necessary to decide the question, the writer is inclined to believe that appellant's contentions in regard to this statute are correct, and I would respectfully suggest to the Legislature that a comprehensive and definite statute on this subject is required, inasmuch as the statute we now have is indefinite and uncertain in its terms. Such a statute should only authorize disinterment with the consent of the nearest relative or relatives of the deceased person, or in the interest of public justice in case an autopsy should be demanded, and in such case the exhumation should be authorized by some court. For the statutes on this subject in the various states, see note in vol. 2, *Archbold, Cr. Prac. & Plead.*, under "Offenses Relating to Dead Bodies," and see article 1024, *Code Cr. Proc.*

The judgment is reversed, and the prosecution ordered dismissed.

KRUEGEL v. NASH, Judge.

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

JUDGES—DISQUALIFICATION—EXCHANGE—STATUTES—VALIDITY.

1. *Sayles' Ann. Civ. St. art. 1069*, providing that, when a district judge is disqualified, he shall notify the Governor, who shall designate some district judge in an adjoining district to try the case, and, if it is impossible to exchange, an attorney may be agreed on to try the case, is not in violation of *Const. art. 5, § 11*, providing that, when a district judge is disqualified for causes enumerated, the parties may appoint a proper person to try the case, a subsequent clause of which authorizes district judges to exchange districts, and requires them to do so when required by law.

Application for mandamus by Herman Kruegel against Thomas F. Nash, judge, etc. Application denied.

Herman Kruegel, for the motion.

BOOKHOUT, J. This is an application by Herman Kruegel for permission to file a petition for mandamus commanding the Honorable Thos. F. Nash, judge of the district court for the Fourteenth Judicial District, to permit the parties in the suit of Herman Kruegel against Murphy & Bolanz and others, defendants, numbered 21,260 on the docket of said court, to consent to and agree upon a special judge to try the said cause by reason of the disqualification of said Nash, he being a party to the suit, and to require said Nash to desist from certifying his disqualification to the Governor.

The application shows that defendant, Nash, has not consented to the appointment of a special judge, and only shows by inference that the other parties have consented. It does not give the name of any person as having been agreed upon by the parties. Again, by the terms of the statute it is provided that, when the district judge is disqualified in a suit pending in his court, he shall "immediately notify that fact to the Governor, whereupon the Governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the Governor shall notify both of said judges of such order, and it shall be the duty of such judges to exchange districts for the purpose of disposing of such case or cases, and in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof." *Sayles' Ann. Civ. St. 1897, art. 1069*. This statute is challenged by the applicant as being unconstitutional, in that the right of the parties to the suit to agree upon a special judge to try the cause when the district judge is disqualified is granted by article 5, § 11, of the Constitution, and cannot be interfered with or taken away by statute. This section of the Constitution contains a clause that, "when a judge of the district court is disqualified by reason of any of the causes above stated [one of the causes named being that he is disqualified by reason of being a party to the suit] the parties may by consent appoint a proper person to try said cause." This clause is not mandatory, but permissive, and must be construed as intending to confer a discretionary power upon the Legislature, and not intended to limit the general power conferred in a subsequent clause of the same section, which reads: "And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. The disqualification of judges of inferior tribunals shall be remedied, and vacancies in their offices filled, as may be prescribed by law." The

language of this general clause is mandatory. It provides that district judges may exchange districts and hold courts for each other when they may deem it expedient, and shall do so when prescribed by law. This clause confers authority upon the Legislature to prescribe by law when district judges shall exchange districts, and commands that the judges shall exchange when required to do so by law. *Dulaney v. Walsh*, 90 Tex. 329, 38 S. W. 748. The statute (article 1069, Sayles' Ann. Civ. St. 1897) does not conflict with article 5, § 11, of the Constitution, and must be complied with when the district judge is disqualified by reason of being a party to a suit pending in his court.

The application of Herman Kruegel to file a petition for mandamus is refused.

KENNEDY v. ÆTNA LIFE INS. CO.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

ACCIDENT INSURANCE POLICY—CONSTRUCTION—EXCEPTIONS—ACCIDENTAL DEATH FROM POISONING.

1. Where an accident policy provided that the insurance did not cover an accident or death resulting wholly or partially from "voluntary or involuntary" taking of poison, the term "involuntary," as so used, was not limited to an act forced on insured, but included death from the accidental taking of an overdose of a poisonous medicine, instead of a prescription left by assured's physician.

Appeal from district court, Dallas county; Thos. F. Nash, Judge.

Action by J. R. Kennedy against the Ætna Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Crane, Greer & Wharton, for appellant. Harry P. Lawther, for appellee.

RAINEY, C. J. The following statement, taken from the brief of appellant, shows the nature and result of the suit in the lower court, to wit:

"This was a suit by J. R. Kennedy, appellant, in the court below, against the defendant company, in which it was alleged, substantially, that the defendant company was a corporation with power to issue life insurance policies, etc.; that the plaintiff was a resident of Ellis county, Texas; that the defendant company had issued an accident policy on the life of James Kennedy on the 14th day of June, 1897, for a valuable consideration, and that it was from time to time renewed, the last renewal being on the 11th of June, 1899, and that by its renewal it insured the said James Kennedy in the sum of \$3,000 against death by accident until the 14th day of June, 1900. The terms of the policy were set out with much particularity. It was further alleged that he died on the 17th of November, 1899, by ac-

cidental taking an overdose of digitalis, a poisonous medicine, instead of a prescription left by his physician, which was not poisonous. It was alleged that there was no necessity for administration, etc., and that he died intestate, and that the plaintiff was his only brother; that the father and mother of the insured were both dead, and that the plaintiff was his only heir. The policy was attached to the petition of plaintiff, and it had a printed clause on the back thereof to the effect that 'this insurance does not cover injuries of which there is no visible mark on the body, * * * nor suicides, sane or insane, nor accident, nor death, nor loss of limb, nor sight, nor disability resulting wholly or partially, directly or indirectly, from any of the following causes: * * * Intoxication or narcotics, voluntary or involuntary taking poison, or contact with poisonous substances, or inhaling any gas or vapor.' The defendant company answered, among other things, as follows, by special exception No. 2: 'That because it appeared from the policy sued on, attached to the petition, that the insurance does not cover an accident or death, nor disability, resulting wholly or partly, directly or indirectly, from voluntary or involuntary taking poison, or contact with poisonous substances; and because it further appeared from the petition policy that said Kennedy, on the 17th of November, 1899, accidentally killed himself by accidentally taking an overdose of digitalis, a poisonous medicine, instead of a prescription left by his physician.' A general demurrer was filed that the original petition was insufficient in law. On September 27, 1902, the case came on on demurrer, and the court sustained the second special exception and the general demurrer above stated, and entered a judgment dismissing plaintiff's petition, to which judgment the plaintiff excepted, and gave notice of appeal to this court."

The sole question for solution arises upon the proper construction of the clause of the policy exempting the insurance company from liability in certain contingencies. It is a general rule of construing insurance policies, where there is any ambiguity that render the terms susceptible of two constructions, to give that construction which is most favorable to the insured, always adhering to the principle that in interpreting contracts the inquiry should be what obligations the parties intended to assume, giving to the language used its usual signification in connection with the subject-matter and the circumstances under which it was made. Thus construing the contract under consideration, is the company exempted from liability, the deceased having come to his death by unintentionally taking poison? The allegations of the petition show that death was produced by an accident. The policy was issued to cover accidents, and, unless the exemption clause is sufficiently broad and comprehensive as to such an accident, then the com-

*Rehearing denied March 7, 1903, and writ of error denied by supreme court.

pany should be held liable. The courts which have passed upon similar clauses are not in harmony, some of them going to the extreme limit in construing them against the companies. There is no reasonable theory upon which the conflict can be reconciled. We will therefore follow that line which, in our opinion, conforms to the well-recognized principles governing the construction of contracts.

Death having resulted from the taking of poison, the main contention arises from that portion of the clause which exempts the company from liability for death resulting from the "voluntary or involuntary taking poison." The appellant contends that the terms "voluntary" and "involuntary," as used in the policy, do not include the "accidental" taking of poison. The taking of poison in this instance being unintentional, was not a voluntary taking, as that term is used in the policy; therefore the taking was accidental. The taking of poison being accidental, liability would accrue, unless such an accidental taking is excluded by the term "involuntary." The definition or meaning of this term, as used, is limited by counsel for appellant to an act that is forced upon one, which he cannot help. It is true that the term embraces that meaning. It, however, as commonly used, has a broader and more comprehensive meaning, and there is nothing in the policy limiting it to the restricted sense contended for by counsel. The term is defined in the Century Dictionary & Cyclopædia as, "Not voluntary or willing; contrary or opposed to will or desire; independent of volition or consenting action of mind; unwilling; unintentional." The presence of these very elements in taking the poison is what constitutes the taking accidental. Without these there could be no accident. He did not intend to take poison; he took it by mistake; hence the taking was not willed, but unintentional, and therefore involuntary. One of the definitions given by the Century Dictionary & Cyclopædia of "voluntary" is "not accidental." "Involuntary" is an antonym of "voluntary," and therefore, in this sense, includes "accidental."

It is difficult for us to conceive of a case of taking poison that is not included in either the term "voluntary" or "involuntary," as used in the policy. The usual and ordinary meaning of the terms would include, in one or the other, every manner of taking poison; therefore we do not feel warranted in giving to them a meaning less restricted than they usually import.

The policy in this case does not confine the exemption to self-destruction, as in the case of *Penfold v. Insurance Co.*, 85 N. Y. 317, 39 Am. Rep. 680, cited by appellant. The exemption is broader in its scope. It not only names suicide, but also specifies accident, death, etc., "resulting wholly or partially, directly or indirectly, from * * * voluntary or involuntary taking poison." This, we think, includes any accident or death result-

ing in any manner whatever from the taking of poison.

The judgment is affirmed.

EMERY v. LEAGUE et al.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

OIL LEASE—EXECUTED CONTRACT—CONDITIONS—TIME FOR COMPLIANCE—FORFEITURE—TERMS OF COURT—JUDICIAL NOTICE.

1. The owners of an undivided interest in land made a contract in consideration of the payment of the land's value before development, whereby they leased their interest for the purpose of prospecting for petroleum, minerals, etc. The contract gave the grantee the exclusive right to prospect and the right of entry for this purpose, and to construct railroads, buildings, etc., necessary for prospecting and developing any mineral resources discovered, which on discovery were to become his property, the grantors to have a certain per cent. of the gross output. It was stipulated that the grantee should begin operations within six months after partition, and should have six months after "said period of time aforesaid" in which to prospect the land and complete a well. The contract was to remain in force so long as the parties should faithfully comply with it, and the grantee was empowered to abandon the contract on its becoming unprofitable. By another instrument the grantee agreed to secure a partition. *Held*, that the instrument was not an executed contract conferring on the grantee vested rights, but merely gave him an option, so that compliance with its provisions was necessary to secure a vested interest.

2. To retain his rights under the instrument, it was necessary that the grantee should secure a partition within a reasonable time.

3. The lease was executed March 14, 1901. On July 3, 1901, a third party began partition proceedings, and October 1, 1901, the grantee was informed of the stipulation, which had been made by his agent, for partition. He claimed that his agent had not informed him of it, but that he would comply with it. On February 21, 1902, the lessee filed an answer in the suit already begun, offering to pay the costs of partitioning the interest covered by the contract. Two terms of the circuit court were held between the execution of the lease and the term to which the partition suit was brought. *Held*, that this was not such diligence to comply with the provisions of the contract as would prevent a forfeiture of the grantee's rights.

4. The court of appeals will take judicial notice of the terms of the district court of Galveston county.

Appeal from district court, Galveston county; Wm. H. Stewart, Judge.

Suit by J. C. League against Hugh Jackson and L. L. Emery and others. From a judgment finding that the interest of defendant Emery under an oil lease had been forfeited, he appeals. Affirmed.

L. A. Carlton, for appellant. Wm. B. Lockhart, for appellees.

PLEASANTS, J. This is a partition suit brought by J. C. League against the appellee Hugh Jackson and a number of other defendants to partition a tract of land in Galveston

*Rehearing denied, and writ of error denied by supreme court.

county. The appellant was a party defendant to this suit, plaintiff's petition alleging that he was asserting some interest or claim in the land sought to be partitioned. The defendant Hugh Jackson answered, asserting title to an undivided $11\frac{8}{10}$ acres of the land involved in the suit, and asked as against the plaintiff and all the other defendants that said interest be set aside to him. The defendant L. L. Emery answered, setting up a claim to all of the mineral rights in and under the land claimed by appellee Jackson, and averring that he had acquired said mineral rights under and by virtue of the following instrument executed by the vendor of said Jackson prior to his purchase of said land, and of which the said Jackson had notice at the time he purchased:

"State of Texas, County of Galveston.

"This deed and contract of lease executed and entered into this the 14th day of March A. D. 1901, by and between Nevill Montaut and wife Selestine, and F. Harrington and wife Matilda, hereinafter called party of the first part, and L. L. Emery, hereinafter called party of the second part:

"Witnesseth: That whereas, the said Nevill and Selestine Montaut and F. Harrington and wife Matilda Harrington, party of the first part, being the owner of the hereinafter described property, and being desirous of having same prospected for minerals, coal, mineral waters, artesian waters, natural gas, petroleum and lubricating oils, and being desirous of having the mineral resources of said land fully investigated and developed does hereby for and in consideration of the sum of Ten Dollars (\$10.00) paid by the said L. L. Emery, party of the second part, the receipt of which is hereby acknowledged, and in the further consideration of the covenants, agreements and stipulations hereinafter set forth and undertaken to be done and performed by the party of the second part, grant, demise and lease unto the said party of the second part, — legal representatives, heirs, successors and assigns the following described property, to-wit: Being our entire interests in and to the Montaut estate and being fourteen acres, more or less, in said tract on the western portion of High Island, for the purpose only however, of prospecting said property and premises for minerals of whatever kind or character, coal, mineral waters, natural gas, petroleum and lubricating oils, hereby giving and granting to the party of the second part the exclusive right and privilege to prospect said lands for the purpose of discovering any mineral deposit, coal mine, mineral spring, natural gas, petroleum or lubricating oils, by sinking thereon any shaft or shafts, or by boring thereon any well or wells or by doing any other act or thing on said premises necessary or in keeping with a thorough and complete investigation or prospect of the same for the purposes above enumerated, and hereby giving and granting

to the party of the second part the sole and exclusive right and privilege of developing and operating any mine or deposit or mineral or mineral spring or well or artesian well or natural gas well or wells or mines, or petroleum lakes, deposits or wells or any source, lake or well of lubricating oil, which the party of the second part may discover on the above described land and which when so discovered shall become the property of the second party, subject to the provision of this deed and contract. And the party of the second part, his legal representatives, heirs, successors or assigns shall have the sole and exclusive right to go on and upon said premises at any and all times during the existence of this contract for the purposes above indicated and to build thereon any railroad, tram road and to move and erect thereon any and all kinds of machinery, buildings, warehouses, tanks, pipe lines, shackle works, etc., which may be necessary or useful in prospecting and investigating said lands for minerals, coal, gases, oils, etc. and to operate, develop, manufacture, distill and conduct away, the same when it shall have been discovered for the purpose of putting same in a marketable condition and transporting it to a market. And the party of the second part, his legal representatives, heirs, successors, or assigns shall appropriate and convert to its own use and benefits the proceeds arising from the sale of any such mineral, coal, gases or oils or the by-products thereof, provided, however, the party of the second part, his legal representatives, heirs, successors or assigns shall pay and attorn to the party of the first part $12\frac{1}{2}$ per cent. of the gross crude output or yield resulting from the development or operation of any such mine, mineral spring, artesian well, gas or oil well or deposit and the party of the second part shall pay the market value of said oil every 30 days. And further provided the party of the second part shall begin operations in good faith on the lands hereby leased for the purposes above indicated within six months after the final division setting apart of their respective shares and said party of the second part shall have six months after said period of time aforesaid in which to prospect said land and to complete a well. And said party of the second part shall pay all damages if he interferes with the improvements or growing crops on said land.

"This deed and contract shall remain in force and effect between the respective parties hereto, their legal representatives, heirs, successors or assigns so long as the respective parties hereto comply faithfully and fully with the covenants, stipulations and agreements by each respectively undertaken to be done and performed, provided, however, it is distinctly understood and agreed that the party of the second part shall have the right to cease operations under this contract whenever it shall become manifest that it would be unprofitable not to do so, and if the party

of the second part fails to find oil he shall pull the pipe up to the artesian water supply and said pipe shall become the property of the party of the first part.

"In testimony whereof we have hereunto set our hands, this the 14th day of March, A. D. 1901.

"N. Montaut,

her

"Sestine X Montaut

mark.

"F. Harrington.

"M. Harrington,

"Party of the First Part.

"L. L. Emery,

"Party of the Second Part."

This answer further avers that, as a part of said agreement and contract above set out, he, the said Emery, agreed to secure a partition of said property, and have same set aside to his grantors free of cost to them. This agreement, which is attached to said answer as an exhibit, is as follows:

"The State of Texas, County of Galveston.

"This memorandum witnesseth: That I, L. L. Emery, for and in consideration of the sum of \$1.00 in hand paid by F. Harrington and Nevill Montaut, have this day contracted and agreed and do by these presents contract and agree to secure to F. Harrington and wife and Nevill Montaut, a division of the property left to them by their parents, Mr. and Mrs. John Montaut, setting apart to them their respective shares of said property as aforesaid either by suit at law or otherwise, free of costs to the said F. Harrington and wife and Nevill Montaut, respectively.

"In testimony whereof I have hereunto set my hand this the 14th day of March, A. D. 1901. L. L. Emery, by E. H. Ostrom.

"Witnessed in presence of: A. J. Johnson, P. G. McNeil."

This answer further avers that the defendant Jackson is the owner of the fee in the land covered by said contract, and asks that said interest in the land be set aside to said Jackson, subject to the rights of this defendant under said contract, and that the proportionate cost of making said partition chargeable to the interest in said land covered by said contract be adjudged against this defendant. To this answer the defendant Jackson replied by supplemental answer, in which he admits the execution of the contract set out in the answer of said Emery, and that the interest in the land claimed by him is covered by said contract and was purchased by him with notice of same, but he avers that said contract is void for the following reasons: First. For want of mutuality. Second. For failure of consideration, in that the real consideration for same was the promise and agreement of said Emery to procure, without delay, and free of cost to his vendors, a partition of said land, and to explore,

prospect, and develop said land for oils and other minerals, and that in the performance of said agreements and undertakings the said Emery has wholly failed. Third. Because by the terms of said contract it is provided that same shall be effective only so long as the parties thereto should faithfully comply with the covenants and agreements therein undertaken to be performed, and that said Emery having never performed or offered to perform any of his covenants or agreements prior to the filing herein by this defendant on the 7th day of October, 1901, of his original cross-bill seeking a cancellation of said contract, this defendant by the filing of said cross-bill elected to declare said contract void, and the same is no longer of binding force and effect. Fourth. Because said Emery, by his unreasonable delay in procuring or attempting to procure a partition of said land, forfeited his rights, if any he had, under said contract, and cannot now be heard to assert same. Upon each and all of the above grounds the defendant Jackson asked for a cancellation of said contract. The trial in the court below without a jury resulted in a judgment in favor of the defendant Jackson for the land claimed by him against the plaintiff and all of the defendants, and canceling the lease contract under which the defendant Emery claimed. From this judgment the defendant Emery alone prosecutes this appeal.

The facts disclosed by the record which are material in the determination of the issues presented on this appeal are as follows: The land adjudged to the appellee Hugh Jackson by the court below was purchased by him on the 9th day of May, 1901, from J. C. League, who had purchased same from Nevill and Sestine Montaut and F. Harrington and Matilda Harrington on April 29, 1901. This land was included in the lease contract executed by and between the parties above named and the appellant on March 14, 1901, and appellee Jackson purchased same with notice of said contract. After the execution of said contract the appellant did nothing towards procuring a partition of the land belonging to the Montaut estate, and having the interest of Nevill Montaut and Mrs. Harrington set apart to them. He testified that he did not know that his agent Ostrom, who procured the contract for him, had bound him to secure a partition of the land, until he was so informed by the appellee about the 1st of October, 1901, after he had filed his original answer in this suit, and that he then told appellee that he would abide by his contract in this regard, and would pay appellee's portion of the costs of the partition. Appellee in this conversation with the appellant informed him that he, appellee, did not regard the lease contract as binding upon him, and would fight any claim set up thereunder by the appellant. The appellant was never in possession of any portion of the land, and never made any exploration thereon for oil or minerals, nor made any preparations for

prospecting or developing same. This suit was filed on July 3, 1901, by J. C. League, who was the owner of an undivided interest in the tract of land of which the land in controversy is a part. Appellant's original answer consisted of a general demurrer and general denial. This answer was filed on September 30, 1901. The amended answer, in which appellant set up his contract, and for the first time asked that the land be partitioned, and agreed to pay the proportionate costs of such partition chargeable to that portion of the land covered by the lease contract, was filed on February 21, 1902. The suit was continued from time to time by agreement, and was not tried until March 3, 1902. Appellant actually paid \$40 as a consideration for the lease contract—\$25 to the Harringtons, and \$15 to Montaut. No demand was ever made upon appellant by his lessors that he should begin operations under the contract, nor that he should proceed to secure a partition of the land. The agreement to secure a partition of the land was made by a duly authorized agent of appellant at the time of the execution of the lease contract, and was a part of same, and it is agreed that appellant was charged with notice of the terms of said agreement. At the time the lease contract was made, the lands adjoining that covered by said contract were being prospected for oil, and wells were being sunk thereon. If the land covered by the contract should prove not to be oil land, the amount paid by appellant for the rights conveyed by the contract was equal to the value of the land; but, should oil be discovered on the land, its value would be increased to as much as \$3,000 per acre.

Under appropriate assignments of error the appellant contends that the trial court erred in adjudging that the contract under which appellant claims is void, and ordering same canceled, for the following reasons:

(1) Because said instrument, being supported by a valuable consideration, is an executed conveyance to appellant of an interest in the land therein described and the minerals underlying said land, and appellant thereby obtained a vested right in said property.

(2) Because appellant could not be deprived of his title to the property conveyed to him by said instrument on account of his failure to promptly procure a partition of said land, the contract not providing that such failure should work a forfeiture of the grant.

(3) Because the evidence shows that the appellant acted with reasonable promptness in the matter of procuring said partition.

(4) Because, no demand having been made of appellant to perform his agreement in the matter of the partition of said land, his failure to perform same did not work a forfeiture of said contract.

While the instrument under which appellant claims contains apt words of conveyance, and recites a valuable consideration which the evidence shows was actually paid, it can-

not be held to be an absolute conveyance of the minerals underlying the land therein described, and the title to such minerals was not vested in appellant by the execution of said instrument. The whole instrument must be construed together, and, when so considered, it is apparent that the real consideration therefor was the prospecting and developing, with due diligence, the land therein described, for oil and other minerals. This was clearly the primary purpose of the grantors in the execution of said contract, and it is expressly provided in the instrument that the same shall remain in force and effect only so long as the parties thereto faithfully comply with the covenants and agreements undertaken to be performed. It is well settled that contracts of this kind do not vest an absolute title in the grantee, but only confer upon him the right to acquire title by a compliance with the terms of the contract, and the discovery and development of oils or other minerals mentioned in such contract. In other words, such instruments are not conveyances of title, but are in the nature of options, and can only ripen into a title by a compliance with their terms on the part of the grantee, and the accomplishment of the purpose for which they were executed. The grantee under such instrument, so long as he continued diligently to comply with his agreement to prospect and explore the land for minerals, could not be deprived of his right to acquire title to such minerals by their discovery and development, but no title in such minerals would vest until their discovery, and, unless such grantee begins the performance of his part of the contract within a reasonable time, the grantor can consider the contract abandoned. *Oil Co. v. Teel* (Tex. Civ. App.) 67 S. W. 545; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732; *Huglins v. Daley*, 40 C. C. A. 12, 99 Fed. 613, 48 L. R. A. 320; *Eclipse Oil Co. v. South Penn. Oil Co.* (W. Va.) 34 S. E. 923; *Cowan v. Iron Co.* (Va.) 3 S. E. 120.

The instrument under consideration stipulates that appellant shall have six months after the partition of the land in which to prospect same and complete a well, and further stipulates that appellant shall procure a partition of said land. No time is fixed within which a partition must be secured, but the presumption of law is that the parties intended a reasonable time. It is to be observed that this is not a stipulation that appellant should have six months after the partition to begin his explorations, but shall have the right to prospect the land for that length of time, and it would seem that, under this stipulation, the failure to complete a well within the time named would terminate appellant's rights under the contract. But be this as it may, we think it clear that, unless appellant began within a reasonable time after the execution of the contract to perform his part of same by making a reasonable endeavor to secure a partition

of the land, the grantors in said contract, or their assignee, could treat same as abandoned by the appellant, and decline to recognize any further rights in appellant thereunder. A different rule is applied to contracts of this character from that applied to ordinary leases, and the decisions uniformly hold that contracts in which land is leased for the purpose of being prospected and developed for oil are to be construed most favorably for the lessor. Bryan's Laws of Petroleum, p. 146. In order to preserve his rights under a contract of this kind, the lessee must begin within a reasonable time the performance of his part of such contract, and continue in the performance of the same with reasonable diligence. The reason for this rule is thus forcibly stated in the case of Huggins v. Daley, supra: "While most of the cases have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding upon the lessor, because of want of mutuality; and where the only consideration is prospective royalty from exploration and development, failure to explore renders the agreement a mere nudum pactum, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement."

The payment of a valuable consideration for a lease of this character can in no way affect the obligation of the lessee to proceed with diligence in the performance of his part of the contract. Of course, a lessee might, by the payment of a valuable consideration, procure an option for a fixed time within which to prospect and develop mineral lands, but such is not the character of the contract under consideration. The beginning of the time in which appellant was to prospect and develop the land was not definitely fixed in the contract, and, unless he be held bound to take action within a reasonable time to procure a partition, there

would be no time limit to the option granted him to prospect and develop the land. Under this construction of the contract it would be void for want of mutuality. The primary purpose of the contract being the development of the land, if the lessee was not bound to proceed with such developments the lessor would not be bound to perform his part of the contract. No development of the land could be made until a partition had been procured. The fact that other parties held an undivided interest in the land described in the lease was an obstruction to the development, which appellant undertook to remove. If this obstruction had been a physical one, such as buildings or timber, or any other character of physical obstruction which it was necessary to remove, and appellant had undertaken to remove same, and to complete a well upon said land within six months after the removal of such obstruction, he certainly would not be permitted to wait any length of time he might choose to begin the removal of such obstruction and continue to hold the grantors in the lease bound thereby, but would be required to remove such obstruction within a reasonable time.

Our conclusion being that appellant acquired no vested interest in the subject-matter of the contract under which he claims, and that in order for him to acquire any vested rights under said contract he must have commenced within a reasonable time to perform the undertakings and agreements stipulated to be performed by him in said contract, it only remains for us to determine whether the evidence in this case justifies the conclusion of the trial court that appellant did not begin the performance of his part of the contract within a reasonable time. The lease was executed on the 14th day of March, 1901, and the evidence shows that appellant took no steps of any kind towards procuring a partition of the land, and in no way offered to comply with his contract in this regard until the 1st of October, 1901, after the suit for partition had been brought by J. O. League, and appellant had answered therein. By supplemental petition, appellant seeks to excuse his delay in this matter by the fact that he did not actually know that he had agreed to procure said partition until he was so informed by appellee about October 1, 1901. The agreement to procure said partition was made by appellant's duly authorized agent, and appellant admits that he was bound thereby, and he was charged by law with notice of said agreement, and must be held to the same diligence in its performance as he would be held if said agreement had been executed by him. The suit for partition was filed on July 3, 1901—so far as this record shows, without the knowledge of appellant—and he admits that he did nothing in the performance of his contract to procure said partition beyond filing an an-

swer in the case on February 21, 1902, in which he asks for a partition of the land, and offers to pay the cost of said partition chargeable to the interest in the land covered by the lease. We judicially know that two terms of the district court of Galveston county were held between the time of the execution of the lease and the term to which the partition suit was brought, and no reason is shown why appellant could not have brought such suit to either of these terms of the court and procured a trial and partition of the land. We think the evidence is sufficient to sustain the judgment of the lower court in canceling the contract under which appellant claims, upon the ground that appellant had failed to begin the performance of his part of said contract within a reasonable time, and had thereby forfeited his rights thereunder, and said judgment will be affirmed.

Affirmed.

RIVIERE v. WILKENS et al.*

(Court of Civil Appeals of Texas. Feb. 17, 1903.)

DEED — FORGERY — ANCIENT INSTRUMENT — PROOF FOR RECORD — SUFFICIENCY OF CERTIFICATE — FILING — TIME OF RECORDING — PAROL EVIDENCE — INTERVENTION — LEAVE OF COURT.

1. Under the express provision of Hart. Dig. art. 2760, repealing article 2755, proof of a deed for record by one subscribing witness was sufficient, the deed being offered for record in 1843.

2. In the body of a certificate of acknowledgment of a deed, the officer taking the acknowledgment was declared to be "the clerk of H. county." The certificate was signed by such officer, with the abbreviation "Clk. H. C." appended to his signature. *Held*, that the official character of the office was sufficiently indicated.

3. The fact that the certificate of acknowledgment of a deed in 1843 was without a seal is immaterial, no seal being required prior to the act of May 12, 1846.

4. A deed was proved for record before the recording officer. The words "Filed Apr. 24, 1843, at 3 o'clock p. m.," followed the certificate of acknowledgment. Extraneous evidence showed that the deed was recorded some time in 1843. *Held*, that it sufficiently appeared that it was filed for record.

5. The record of a deed did not recite the date of the recording. The original book of records was produced, and the county court clerk testified as to the date of recorded deeds immediately preceding and following. *Held*, that the evidence was admissible.

6. Evidence, in an action of trespass to try title, considered, and *held* to show that an ancient deed, proved by certified copy of the record, was a genuine instrument, and not a forgery.

7. Defendant in trespass to try title, having deeded the land before suit by an unrecorded conveyance, filed a disclaimer, having previously filed a plea of not guilty. An interlocutory default judgment had been rendered against him, and while this was still in force his grantee, without leave of court, and without an effort to serve other parties, some of whom were nonresidents, and had only been

served by plaintiff by publication, filed what he termed an original answer. *Held*, that grantee occupied the position of an intervener, and his attempt to become a party without leave of court was futile.

8. Depositions taken by a person before he has properly become a party to the suit are rightly suppressed, especially where there are nonresident defendants, who have only been served by publication and have not appeared.

Appeal from district court, Harris county; Wm. H. Wilson, Judge.

Trespass to try title by Henry Wilkens against Joseph Riviere and others. From a judgment for plaintiff and against Riviere, he appeals. *Affirmed*.

Wharton Branch and E. P. Turner, for appellant. Baker, Botts, Baker & Lovett and J. W. Campbell, for appellees.

GILL, J. This suit was brought in the form of an action of trespass to try title, and its apparent purpose was the recovery of 3,211 acres of land lying in three contiguous tracts, all situated on the Hugh Morgan league in Harris county, Tex. The tracts sued for did not cover the entire league, there being 1,217 acres in the south end which was not claimed by plaintiff, but by Waller T. Burns, who claimed it under the same chain of title as plaintiff. As against all the defendants except those under whom appellant claims and said W. T. Burns, the case became one of boundary, and the judgment upon this issue is not assailed by any party to this appeal. The petition was filed on the 19th day of December, 1899, and named S. W. Jones as one of the original defendants. J. H. Wilson, Larkin F. Price, and Wharton Branch, who in 1883 had conveyed the land to Jones in their capacity as attorneys in fact for the heirs of Hugh Morgan, were also made defendants. Appellant, Joseph Riviere, had purchased the land from Jones in 1896, but his deed had not been placed of record when the suit was brought; so he was not sued. On April 3, 1900, Jones answered by general demurrer, general denial, and plea of not guilty. On April 9, 1901, he filed an amendment, stating that he had sold the land prior to the institution of the suit, and disclaiming all interest therein. An interlocutory judgment by default had been rendered against Jones, and while this default judgment was still in force Riviere, without leave of the court, and without an effort at service upon the other parties (some of whom were nonresidents, and had been served by plaintiff by publication), filed what he termed his original answer, in which he asserted claim to the entire Hugh Morgan league, and prayed judgment therefor. This paper was filed September 26, 1901. On October 7, 1901, Jones and Riviere joined in a motion to set aside the judgment by default theretofore rendered against Jones. On the succeeding day this motion was heard and granted. On October 21, 1901, plaintiff, Wilkens, made

*Rehearing denied.

a motion to strike out the answer of Riviere and dismiss him from the case on the ground that it had been filed without leave of the court. On October 31, 1901, plaintiff's motion was sustained. A motion on the part of plaintiff to strike out the depositions taken by Riviere prior to that time was also sustained. On November 1, 1901, Riviere made himself a party by leave of the court, setting up the same claim as in the first paper filed by him, but the court refused to set aside his former orders with reference to depositions theretofore taken by Riviere. The depositions of these witnesses were retaken by Riviere, and were used by him at the trial. On a trial by jury the court submitted the case upon special issues. Upon the answers of the jury the court rendered judgment against plaintiff on the issue of boundary, and in favor of plaintiff and against Riviere on the question of title to the portion of the Hugh Morgan league claimed by plaintiff. From this judgment Riviere alone has appealed, Jones having been dismissed on his disclaimer.

The plaintiff claimed the part of the land to which he asserted a right under a purported deed from Hugh Morgan to A. C. & J. K. Allen, connecting himself therewith by mesne conveyances. Riviere claims under deeds from the heirs of Hugh Morgan, and shows a regular chain of title from them to himself. The deed from Hugh Morgan under which plaintiff claims is assailed by Riviere as a forgery. The jury answered that it was genuine. The validity of this deed is the real issue between plaintiff and Riviere. If it is genuine, the heirs of Hugh Morgan had no title, and could convey none. If it is a forgery, plaintiff had no title, and the judgment is wrong. In support of his title plaintiff offered in evidence a certified copy from the deed records of Harris county showing the record of a deed from Hugh Morgan to A. C. & J. K. Allen conveying the land in controversy. This copy began, "Republic of Texas, County of Brazoria," was dated December 24, 1836, was signed "Hugh Morgan," and named as subscribing witnesses Mosely Baker, Edward Burleson, and Joseph Baker, who were recited to be citizens of Columbia, a town in Brazoria county. The deed purported to have been proved for record in Harris county by Joseph Baker, one of the subscribing witnesses, on April 24, 1843, before W. R. Baker, who names himself in the certificate as clerk of Harris county, and signs the certificate "W. R. Baker, Clk. H. C." Just underneath and to the left of this signature are the words "Filed Apl. 24th, 1843, at 8 o'clock p. m." No seal is noted on the record or in the certificate of acknowledgment, nor does the certificate recite that a seal was appended. The record does not recite in terms the date of the recording of the instrument, but plaintiff showed by Du Pree, present county clerk, the date of the recorded deeds immediately

preceding and following the record in question (the original book of the records being produced), and it was thus shown that the record was actually made in 1843. Du Pree further testified that W. R. Baker was the clerk of the county court of Harris county, Tex., in 1843; that he (Du Pree) was familiar with his handwriting; that the deed was not recorded in the handwriting of Baker, but in a handwriting which occurred frequently in the records at that date. It was also shown that search had been made for the original of this deed, and that it could not be found, but no witness was adduced who claimed to have ever seen it; nor were any of the claimants under it shown to have been in possession of the land or to have paid taxes thereon. The certified copy was admitted in evidence in connection with what has been stated and the testimony of Ex-Governor Lubbock to the effect that he was acquainted with the three subscribing witnesses to said deed, that they resided in Brazoria county at that time, that they were prominent citizens and generally known, and their opportunity for acquaintance with Hugh Morgan was also shown. All the parties to the transaction, including the subscribing witnesses, are shown to have died many years ago. To its introduction Riviere objected: First. That in view of the affidavit of forgery the predicate laid for its introduction was insufficient. Second. That there was no proof of the execution of the original, and the certified copy failed to show that it was proven up for registration by two subscribing witnesses within 12 months of its date. Third. The certificate of the officer before whom the acknowledgment was taken does not indicate the character of his office. Fourth. It does not appear that the officer affixed his seal to the certificate. Fifth. The description in the deed is insufficient. Sixth. Objection was made to all the evidence of Du Pree on the ground that parol evidence was inadmissible to prove the date of a record so as to render admissible a certified copy as an ancient instrument, and the record itself failed to show the date of its record, and on the further ground that the witness was not the clerk in 1843, and could not testify from his own knowledge. Seventh. There was no certificate that the deed had ever been recorded.

If the certified copy adduced was a copy of a valid record over 30 years old, it was admissible as an ancient instrument, just as the original would have been. To be a valid record the instrument recorded must have been properly proved for record before some officer authorized by law to take acknowledgments, and properly certified by such officer. In this case the deed was proved for record by one of the subscribing witnesses. Appellant contends that the law required two, citing article 2755, Hart. Dig. That article was repealed by article 2760, and provision

made for proof of a deed by one of the subscribing witnesses.

We think the objection that W. R. Baker's official character is not sufficiently indicated by the certificate is hypercritical. In the body of the certificate he is declared to be "the clerk of Harris county," which is but another way of saying he is county clerk of that county, for the latter is not only a very usual designation of that official and that office, but the law provided for no other clerk of the county than the clerk of the county court. His official character being thus clearly indicated in the body of the certificate, the meaning of the abbreviations "Clk. H. C." following his name is unmistakable.

The absence of a seal is immaterial, because prior to the act of May 12, 1846, no seal was required; but if this were not true, the vice is cured by the healing and enabling statutes cited and discussed in *Waters v. Spofford*, 58 Tex. 121.

The deed was proved for record before the officer authorized to record same. The words "Filed Apl. 24th, 1843," being of the same date as its proof for record, followed by the fact of its actual record about that time, could mean nothing else but that the instrument was filed for record. The record of an instrument is proof that it has been filed for that purpose. *Copelin v. Shuler* (Tex. Sup.) 6 S. W. 668.

We are of opinion the deed was shown to have been duly registered, and we think the evidence of Du Free as to the date of the record, together with the original records, was clearly admissible and effectively showed that the record was made in 1843. See *Brown v. Heirs of Simpson*, 67 Tex. 231, 2 S. W. 644.

Baker, the clerk, was shown to be dead. Morgan, the grantor, and all the subscribing witnesses were shown to be dead. The testimony of Lubbock showed that the subscribing witnesses were men of standing and repute, and had opportunities to know Hugh Morgan. From the date of the battle of San Jacinto until his death Morgan lived in Liberty county.

When an original deed is assailed as a forgery, proof that it is 30 years old, with proof of possession of it by the grantee and other matters of corroboration, renders it admissible in evidence as an ancient instrument.

Proof of custody of the deed is required in order to show delivery. But where an original is lost and a certified copy of a record 30 years old is offered, the record itself supplies proof of delivery. *Brown v. Simpson*, 67 Tex. 231, 2 S. W. 644; *Holmes v. Coryell*, 58 Tex. 680. But possession of the land under such a deed is not essential. *Holmes v. Coryell*, supra. We think this, with the other proof offered, made a prima facie case for plaintiff, which, unless overthrown by appellant, entitled plaintiff to a judgment.

The testimony offered by appellant on this

issue is interesting, and in some of its features remarkable. Several of the witnesses are very old, one of them being more than 100 years of age, and some of them speak of the battle of San Jacinto and the events of that time as we speak of events of yesterday; but after all the testimony amounts to no more than that Hugh Morgan was severely wounded in that battle, and never afterwards left Liberty county, and we do not think this sufficient to overthrow the presumption which ought to arise from the record of a deed made nearly 60 years ago, and never brought in question until now. It is not unreasonable to suppose that the vendee went to Liberty county and secured the signature of Morgan. There is nothing in the instrument which precludes this presumption.

In the first part of this opinion we set out minutely the circumstances under which Riviere came into the case, and the rulings of the court on plaintiff's motion to strike out his first answer and to suppress depositions taken prior to that time. Several assignments of error are addressed to the course thus pursued by the court, but we do not feel called upon to discuss them at length or dispose of them in detail. Inasmuch as Riviere was finally admitted as a party to the suit, and permitted to present his defenses and assert his claims, and as the depositions suppressed were retaken and used at the trial, nothing more serious than a question of costs is involved. We think appellant occupied the attitude of an intervener, and should have first procured leave to intervene. The depositions taken by him before he properly became a party were rightly suppressed, especially in view of the fact that there were nonresident defendants whose rights were involved who had been served by publication, and who had not answered in person or by attorney of their own selection.

None of the other assignments require our notice. They present no error for which the judgment should be reversed.

As against Riviere the plaintiff made out his case. The verdict of the jury is supported by the evidence, and the judgment of the trial court should be affirmed.

Affirmed.

TEXAS CENT. R. CO. v. O'LAUGHLIN
et al.

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

COMMON CARRIERS—SHIPPING CATTLE—BEDDING—ESTOPPEL—ISSUES FOR JURY.

1. In an action against a railroad company for damages to cattle shipped over its road, resulting from alleged negligence in failing to properly bed the cars, the defendant alleged that plaintiff was present when the cars were bedded, and expressed his satisfaction therewith, and thereupon the defendant ceased to bed the cars, and they were turned over to him to be loaded. *Held*, that such facts, if found, constituted a defense.

Appeal from district court, Eastland county; N. R. Lindsey, Judge.

Action by P. C. O'Laughlin against the Texas Central Railroad Company and others. From a judgment in favor of plaintiff against the Texas Central Railroad alone, it appeals. Reversed as to appellant, and affirmed as to the other defendants.

Warren & Webb and Clark & Bolinger, for appellant. J. M. Wagstaff, for appellee Texas & Pac. Ry. Co. J. R. Stubblefield, for appellee Missouri, K. & T. Ry. Co. W. P. Sebastian and J. H. Calhoun, for appellee O'Laughlin.

SPEER, J. This is an appeal by Texas Central Railroad Company from a judgment rendered against it in the district court of Eastland county in an action by P. C. O'Laughlin for damages to a shipment of cattle alleged to have resulted from the negligence of appellant in failing to properly bed the cars in which said cattle were shipped.

From a careful reading of the testimony contained in the record we conclude that the judgment should be reversed because of the trial court's refusal to submit the special charge requested by appellant upon the issue of estoppel. The charge is as follows: "If you believe from the evidence in this case, that the plaintiff, at Albany, Texas, did undertake to give directions as to the bedding of said cattle at Albany to Texas Central Railroad Company and its agents, and did supervise and direct said agents as to the bedding of said cattle at said point; and if you further believe that the plaintiff did state and make known to the agents of said defendants at Albany, Texas, that the bedding of said cars was satisfactory to him, and did authorize, direct, or load said cattle into said cars at Albany, Texas—then, and in this event, you will find for the defendant Texas Central Railroad Company as against the plaintiff, notwithstanding you may also find that said cattle did sustain damages on account of said cars not being properly bedded." That defense was pleaded by appellant in the following language, viz.: "This defendant, further answering herein, alleges that, if the cars furnished by the defendant to plaintiff were improperly bedded, as plaintiff alleges (which is not admitted, but denied), defendant says that the plaintiff was present at the time when said cars were bedded by the defendant, and plaintiff expressed his satisfaction with the bedding of said cars, and agreed to accept them as sufficiently bedded; and thereupon the defendant's employes ceased to bed said cars, and they were turned over to plaintiff for the purpose of being loaded; wherefore this defendant says that the plaintiff is estopped from now claiming any damages whatever to said cattle by reason of any insufficiency of bedding in said cars."

Appellant's witness, who bedded the cars

for this shipment, testified: "Mr. O'Laughlin came to me, and wanted the cars rebedded. Said that the bedding was not sufficient. I do not remember of Mr. O'Laughlin's raising objection to the bedding in but one of the cars. I told him that there was very little sand at the sand pit, but that I would put it in that car. I did put sand in this car, and also another car, which he asked me to put some sand in. He then came to me, and told me if I would put two bales of hay in the remainder of the cars—there being six in all—that the bedding would be all right. I told him I would have to see the agent about it. I saw Mr. McElroy [the agent of appellant], and told him of the request made by Mr. O'Laughlin about putting the sand in the cars, and he told me to do whatever Mr. O'Laughlin wanted me to do, and to see that he was perfectly satisfied with the bedding, which I did. * * * I put sand in them until he said it was all right, and would do—the balance of the cars. I put two bales of hay in each. * * * At the time Mr. O'Laughlin objected to the bedding, I suggested that we put cinders in the cars; that is, the small cinders taken from the front end of the engine. He said he preferred hay. The cinders taken from the front end of the boiler are very fine, and will absorb the moisture in the cars, and are better bedding for cars than hay. * * * The sand I put in the two cars I got from under the sand pit. * * * I never used all the sand that was there. * * * There was plenty of sand still there when I had bedded those two cars, and he had expressed himself satisfied with the bedding." Another witness testified that O'Laughlin said, after the cars were rebedded, that they were all right. Appellee testified that he did not remember making such statements. It is thus apparent that the issue was fairly raised both by the pleadings and the evidence whether or not appellee, being present and knowing the condition and extent of the bedding in the cars, accepted the same, and expressed to the company his satisfaction therewith, prior to the loading of the cattle at Albany, and was, therefore, himself responsible for the improper bedding, which resulted in the damages to his cattle. If the allegations of the answer in this respect are true, the appellant would not be liable for injuries resulting to the cattle by reason of the improper bedding, even though the duty devolved upon it primarily to attend that part of the shipment. It was the right of appellant to have this issue submitted to the jury by appropriate charge, which was not done.

We think the other assignments are not well taken, and should be overruled.

The judgment against Texas Central Railroad Company is reversed, and remanded for a new trial, but as to the other defendants it is not disturbed.

LEE et al. v. McDONNELL.

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

CONVERSION—DAMAGES—ATTORNEYS' FEES—INSTRUCTIONS—EXEMPLARY DAMAGES.

1. Attorneys' fees are not recoverable as actual damages in an action for conversion.

2. The charge in an action for conversion should refer the jury to the evidence for the value of the property, it not warranting the fixing of the value at the amount alleged, and not state that if they believe, from the evidence, defendant converted it, they will find for plaintiff in any sum not exceeding the amount prayed for.

3. The charge submitting the issue of exemplary damages in an action for conversion should require the jury to find the facts alleged as a basis therefor, or else to find for defendant thereon.

Appeal from Stonewall county court; A. S. Forrester, Judge.

Action by Dave McDonnell against E. A. Lee and others. Judgment for plaintiff. Defendants appeal. Reversed.

C. M. Featherston and Drill Spurlock, for appellants.

STEPHENS, J. Appellee sued appellants for conversion of two bales of cotton of the alleged value of \$74.20, and for special damages in the sum of \$25, to cover attorney's fees, and for exemplary damages in the sum of \$75. From a verdict and judgment in appellee's favor for the general and special damages so claimed and for \$15 exemplary damages, this appeal is prosecuted.

Clearly, the evidence did not warrant the verdict fixing the value of the cotton at \$74.20, for \$86.25 was the highest value it even tended to prove, and we doubt if it warranted a finding for that amount, or whether it raised the issue of value at all.

Neither the pleadings nor the evidence warranted the item of special damages, since attorney's fees, in actions for conversion, are not recoverable in this state as actual damages.

The charge of the court, after stating the case, was as follows: "Now, if you believe from the evidence that the defendants, or either of them, did knowingly take and convert two bales of cotton belonging to plaintiff, Dave McDonnell, to their own use and benefit, and deprive the plaintiff of the value of said two bales of cotton, you will find for plaintiff, Dave McDonnell, in any sum, not to exceed the amounts prayed for by plaintiff." This charge, which was all the charge given, was evidently misleading, and probably accounts for the erroneous verdict. The court should have at least referred the jury to the evidence, meager though it was, for the value of the cotton, or else should have declined to submit that issue at all for want of evidence. Instead of submitting the issue of special damages to the jury, as was done by this charge, the court should have withdrawn that issue from them. And in

submitting the issue of exemplary damages the court should have required the jury either to find the facts alleged as a basis for that recovery, or else to find against appellee on that issue.

The judgment is therefore reversed, and the cause remanded for a new trial.

EL PASO ELECTRIC ST. RY. CO. v. BALLINGER & LONGWELL.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

STREET CARS—COLLISION WITH TRAIN—CONTRIBUTORY NEGLIGENCE—PLEADING AND EVIDENCE—INSTRUCTIONS.

1. Defendant, having specially pleaded the contributory negligence of plaintiff, whose hack was struck by its car, to be in not passing clear over the track, or far enough beyond it for the car to clear it, is not entitled to submission of the issue of contributory negligence on evidence that he drove clear over the track, stopped, and, as the car was about to pass, backed into it.

2. In the absence of a proper requested charge defendant cannot complain of the general charge that verdict should not be against it if it had exercised ordinary care to avoid the accident.

3. A requested charge, in an action for injury to a hack by a street car, that, if the hack was standing near the car track, and as the car approached the hack backed into it, plaintiff could not recover, is improper, as the hack may have stood so near the track that it would have been struck had it not been backed; or it might have been backed, and yet defendant have been negligent in not stopping the car before it injured the hack.

Appeal from El Paso county court; James R. Harper, Judge.

Action by Ballinger & Longwell against the El Paso Electric Street Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Clarke, Fall, Hawkins & Franklin, for appellant. Patterson & Wallace, for appellees.

FLY, J. This is a suit instituted by appellees to recover \$750 damages to a vehicle described as a hack. Appellees recovered the sum of \$250, with interest at the rate of 6 per cent. per annum from the time the injury was sustained.

It was pleaded and proved by appellees that the driver of the vehicle drove upon the track, and was compelled, by obstructions, to stop before the hind wheels had cleared the track, and while in this position the vehicle was struck by a car belonging to appellant, which was slowly moving along the track.

Appellant filed general and special demurrers, and answered by a general denial and special pleas, as follows: "And for a further special answer herein this defendant says that, if it be true that the value of said hack was wholly destroyed by said alleged collision at the time and place aforesaid, then

defendant says that the said plaintiffs, acting by and through their servant and hackman, were guilty of negligence, in this: that the said hackman knew, or by the exercise of reasonable diligence could have known, that said car had stopped in order to let said hack pass over and clear said railway track; and defendant says that if it be true that said hackman passed over said track, and knew, or by the exercise of reasonable care and caution might have known, that at the time he could not, owing to obstructions, or other vehicles in said street at or near the said point, pass or clear said track so as to allow the safe passage of said car over its said track, then defendant says that the negligence of said hack driver proximately contributed to said collision, and that the plaintiffs are thereby precluded from any recovery herein against this defendant; and this, and all of this, defendant is ready to verify. And for a further special answer herein this defendant says that the said hack driver knew, or by the exercise of ordinary care and caution and the use of his senses might have known, that said car was going or moving up said street; that the same had been stopped to enable him to pass over said railway with his team and hack, so as to clear the same for the passage of said car; and that the agents and servants of defendant assumed, as they had the right to assume, that said hackman would pass over and beyond said track as aforesaid; and that, if he did not do so, or if he stopped said hack upon said street so near said track and right of way that defendant's car could not safely pass, then defendant says that the said hackman was guilty of obstructing said street, and the right of passage of defendant, and was a trespasser and wrongdoer, and thereby guilty of such negligence as proximately contributed to said collision, and that by reason thereof the said plaintiffs are not entitled to recover herein against it; and this, and all of this, defendant is ready to verify."

The testimony introduced by appellant was to the effect that the vehicle had cleared the track, and had come to a full stop, and, as the car was about to pass, the horses backed the vehicle into the car.

It is a rule that, when negligence of a certain character is specially pleaded by either plaintiff or defendant, the proof, in order to be of any avail, must establish that particular form of negligence set out in the pleading. *Railway v. McClain*, 80 Tex. 100, 15 S. W. 789. Appellant, having specially pleaded that the contributory negligence consisted of certain acts, and neither of said acts consisting in passing over the track, stopping, and then backing the vehicle into the moving car, had no basis for the evidence introduced by it, and cannot complain at the refusal of the court to give the special charge submitting the issue raised by such evidence to the jury.

The court instructed the jury that a verdict should not be returned against appellant

if it had exercised ordinary care to avoid the accident, and, in the absence of a proper special charge, the general charge cannot be successfully attacked on that score. If we view the special charge as bearing upon the question of appellant's negligence, it did not properly present the matter of the backing of the vehicle against the car. It was broadly stated in the requested charge that, if the vehicle was standing near the railway of appellant, and, as the car approached, the vehicle was backed into it, appellees could not recover. The vehicle might have been standing so near the track that it would have been struck regardless of its being backed, or it may have been backed on the track, and yet the car could have been stopped before it injured the vehicle; and, if either of those state of facts existed, appellant might have still been guilty of negligence. But the special charge took the question of negligence away from the jury, and was virtually an instruction that the backing of the vehicle against the car conclusively showed that appellant was not guilty of negligence. It was, therefore, properly refused, whether taken as presenting the question of contributory negligence on the part of appellees or negligence on the part of appellant.

There was evidence to support the amount of damages found by the jury.

The judgment is affirmed.

R. E. BELL HARDWARE CO. v. RIDDLE.*
(Court of Civil Appeals of Texas. Feb. 7, 1903.)

HOMESTEAD—ABANDONMENT—ATTACHMENT
—LIEN—PRIOR UNRECORDED DEED.

1. The owner of a business homestead, by conveying to another, abandons his homestead exemption.

2. Under the direct provisions of Rev. St. art. 4640, the lien of an attachment levy is superior to a prior unrecorded deed of which the attaching creditor has no notice.

Appeal from district court, Eastland county; N. R. Lindsey, Judge.

Action by R. E. Bell Hardware Company against O. R. Riddle. From a judgment for defendant, plaintiff appeals. Reversed.

F. O. McKinsey and Jasper N. Haney, for appellant. Scott & Breisford, for appellee.

STEPHENS, J. This suit was instituted January 19, 1900, by appellant, a private corporation, to recover of appellee a house and lot in the town of Ranger, Eastland county, Tex., and rents. The case was submitted to the court without a jury, and was decided against appellant upon an agreed statement of facts, from which it appears that only a moiety of the property was in controversy. As to it A. S. Riddle was the common source of title, he having conveyed it to appellee January 14, 1898, and appel-

*Rehearing denied March 7, 1903, and writ of error denied by supreme court.

lant having purchased it at foreclosure sale under its own attachment levy made three days after the conveyance to appellee, but a few hours before he had filed his deed for record.

The agreed statement fails to show that appellant had any notice of the unrecorded deed prior to the levy. The property, however, was the business homestead of A. S. Riddle on and before January 14, 1898, but on that day, he not only sold, in connection with the owner of the other half interest, the house and lot so used as his place of business to appellee, but also sold his stock in trade to C. R. Brock, and then and there entirely ceased to do business. No possession was taken by appellee under his deed prior to the levy. Our conclusion, therefore, is that the property ceased to be the business homestead of A. S. Riddle January 14, 1898, and that the attachment levy, made three days later at the instance of appellant, one of his creditors, created a lien which was superior to the unrecorded deed to appellee. As to appellant, an attaching creditor of A. S. Riddle, this deed was void for want of registration, and therefore did not in the least interfere with appellant's levy. It was only important as evidence of the abandonment of the homestead. As appellee had ample time to either file his deed for record or take possession of the property before the levy, he has no one to blame but himself for the consequences of this decision. Rev. St. art. 4640; Willis v. Pounds (Tex. Civ. App.) 25 S. W. 715; Barnett v. Squyres (Tex. Sup.) 54 S. W. 241, 77 Am. St. Rep. 854.

The judgment is therefore reversed, and here rendered for appellant for one-half the property, with rents at \$2.50 per month since the institution of the suit, and costs of both courts, and for possession in common with appellee, the owner of the other half interest.

FELTON v. TALLY.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

CONTRACT—PART PERFORMANCE—RECOVERY.

1. Where, by the contract declared on, plaintiff is to do three distinct things, he cannot recover by proving a part performance only, in the absence of an allegation seeking to recover on a quantum meruit.

Appeal from Williamson county court; Cooper Sansom, Special Judge.

Action by L. P. Tally against W. F. Felton. From a judgment for plaintiff, defendant appeals. Reversed.

A. M. Monteith, Stanton Allen, and Chesher & Wilcox, for appellant. W. W. Nelms and Mantor & Briggs, for appellee.

*Rehearing denied March 11, 1903.

FISHER, C. J. The plaintiff, in his petition, declares upon a contract made between him and defendant, wherein it was, in effect, agreed that defendant would transfer to the plaintiff shares in a certain cotton oil mill to the value of \$500 if the plaintiff would assist the defendant in promoting the erection of a cotton oil mill in the town of Bartlett, and assist defendant in soliciting and securing from the general public a subscription to stock in such mill to the aggregate amount of \$8,500, and to assist defendant in selling and disposing of 100 acres of land to one C. W. Hill. The court, in its charge, instructed the jury that the defendant would be liable if the plaintiff complied with the contract in effect as herein stated. The jury returned a verdict in plaintiff's favor for the sum of \$500.

There is no evidence in the record that the appellant promised to pay the appellee any sum of money, or transfer him any stock, except for the services that might be rendered by appellee in assisting the appellant to sell the 100-acre tract of land to Hill. There was no proof offered on the other branch of the contract, as pleaded by appellee. The contract declared upon is, in effect, entire, and, in the absence of an averment seeking to recover upon a quantum meruit, the plaintiff must prove performance of the entire contract. Under the rule announced in this state, which is indicated in Carroll v. Welch, 28 Tex. 149; Riggs v. Horde, 25 Tex. Sup. 400, 78 Am. Dec. 584; Jemison v. Gaston, 21 Tex. 209—although the contract might be entire, if the plaintiff had proved a part performance of which the defendant received the benefit, he could recover to the extent of the value of the part performed. But the plaintiff (the appellee here) has no pleading that permits this to be done. Therefore, on account of the absence of evidence tending to prove a performance by the plaintiff of the entire contract, the court erred in submitting the case to the jury. The contract, as pleaded, must, in its essential features, be established by evidence; otherwise it is error for the court to charge upon that subject. For the error pointed out, the judgment will have to be reversed, and the cause remanded.

The ruling complained of in the eleventh assignment of error will doubtless not arise upon another trial, as the averments in the abandoned petition will evidently be admitted. Lately it has been so frequently held that the averments of abandoned pleadings can be admitted in evidence that the question is not longer an open one in this state.

We are of opinion that the evidence of the witness Robertson, as stated in connection with appellant's thirteenth assignment of error, was admissible.

The charge requested, as set out in the twentieth assignment of error was, in effect, given in the main charge of the court.

Our ruling on the question of the entirety of the contract, in view of the pleadings and

evidence, in effect disposes of the eighteenth, nineteenth, twenty-fifth, and twenty-seventh assignments of error.

In our opinion, the remaining assignments of error are without merit.

Judgment reversed, and cause remanded.

NATIONAL COTTON OIL CO. v. STATE*

(Court of Civil Appeals of Texas. Feb. 4, 1903.)

ANTI-TRUST LAW—REVOCATION OF CORPORATE PERMITS—CONSTITUTIONALITY.

1. So much of the anti-trust statutes of 1889 and 1899 as authorizes the cancellation of permits to do business within the state are constitutional and valid.

Appeal from district court, Travis county; F. G. Morris, Judge.

Action by the state of Texas against the National Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hutcheson, Campbell & Hutcheson, for appellant. O. K. Bell, Atty. Gen., for the State.

FISHER, O. J. This suit was instituted in the name and on behalf of the state of Texas, by the Attorney General and the District Attorney of the Twenty-Sixth and Fifty-Third Judicial Districts, against the National Cotton Oil Company, a foreign corporation to forfeit the license granted the defendant to transact business in the state for alleged violation of the anti-trust statutes. The state's amended petition, upon which the case was tried, alleged:

"(1) That the National Cotton Oil Co. is a corporation duly organized, chartered, and existing under the laws of the state of New Jersey, and that company is duly authorized and empowered to do and transact business in the state of Texas by reason of a permit heretofore, to wit, on the 2d day of May, 1900, issued to it by the state of Texas, authorizing it to transact business in this state in accordance with its charter and with the Constitution and laws of the state of Texas; which corporation has been heretofore duly cited in this case, and answered herein. That the Southern Cotton Oil Company is a corporation duly organized, chartered, and existing under the laws of the state of New Jersey, and that said company is duly authorized and empowered to do and transact business in the state of Texas by virtue of a permit heretofore, to wit, on the 3d day of June, 1897, issued to it by the state of Texas, authorizing it to transact business in this state, in accordance with its charter and with the Constitution and laws of the state of Texas. That the Taylor Cotton Oil Works is a corporation duly organized and existing under and by virtue of the laws of the state of Texas, by virtue of a charter granted by

the state of Texas on the 25th day of August, 1898, authorizing and empowering it to transact business as such corporation in accordance with its charter and with the Constitution and laws of the state of Texas.

"(2) That each of said foreign corporations were, from the time of the issuance of the permits authorizing them to do business in the state of Texas, and has ever since been, and is still, and that the said Taylor Cotton Oil Works from the date of its charter has been, and is still, engaged in the business of the manufacture and sale of cotton seed oil, cotton seed meal, and other by-products of cotton seed. That the business in which each and all of such corporations were engaged necessitated the purchase of cotton seed, from which the products which they manufactured and sold were made; and that said cotton seed was an article and commodity of merchandise.

"(3) That heretofore, to wit, on or about the 1st day of November, 1901, and on each any every day prior and subsequent thereto since the 2d day of May, 1900, said corporations were and have been engaged in the business of buying cotton seed in the various counties of the state of Texas. That on or about the 1st day of November, 1901, the National Cotton Oil Company made and entered into a combination with each of the other of said corporations, and that each of the other of said corporations made and entered into a combination with the said National Cotton Oil Company and with each other, and that each of said corporations made and entered into a combination with various other persons, firms, and corporations, whose names are to the plaintiff unknown, and that said corporations became members of and parties to a pool, trust, agreement, confederation, and understanding with each of the other of said corporations, firms, and persons, whereby they did, each for itself and with each other, and all together, agree to regulate and fix, and did regulate and fix, the price at which they would buy cotton seed. That they especially regulated and fixed the price of cotton seed throughout the state of Texas at \$14 per ton, and agreed amongst and with each other that they would not give more than said \$14 per ton for cotton seed in any of the towns and communities of the state of Texas.

"(4) That by creating and entering into and becoming a member of and party to such pool, trust, agreement, combination, confederation, and understanding with said other persons, firms, and corporations aforesaid, and by maintaining the agreement to regulate and fix the price of cotton seed aforesaid, the defendant was guilty of a violation of the laws of the state of Texas. That the defendant, in consequence of the acts hereinbefore complained of, has forfeited its permit to transact business in the state of Texas.

*Rehearing denied March 11, 1903, and writ of error denied by supreme court.

"Wherefore, premises considered, plaintiff prays, defendant having already answered herein, that it have judgment canceling and forfeiting the permit heretofore granted to the defendant authorizing it to do and transact business in the state of Texas, and the defendant enjoined from transacting business in the state of Texas, for costs, and for all other and further relief to which plaintiff may be entitled in law and equity."

Defendant did not deny the facts thus alleged, but demurred to said petition upon the grounds: (1) That the petition was insufficient in law to entitle the plaintiff to the relief sought; (2) that there was no valid law of the state prohibiting the acts charged; (3) that the anti-trust statute of 1889 and the provisions of the Revised Penal Code, based thereon, were in contravention of the federal Constitution; (4) that the anti-trust statute of 1895 and the provisions of the Revised Civil and Penal Codes, based thereon, were also in contravention of the federal Constitution; (5) that the anti-trust statute of 1899 was also in contravention of the federal Constitution; and (6) that the anti-trust statute of 1899 was not enacted in conformity with the State Constitution. All the demurrers were overruled, and, the defendant declining to further answer, judgment was rendered in favor of the state in accordance with the prayer of its petition, forfeiting, revoking, and canceling the license which had been granted to defendant to transact business, and enjoining it from transacting any business in the state of Texas except such business as may be and constitute interstate commerce; and the costs of the suit were also adjudged against defendant.

The trial court did not err in overruling appellant's demurrers. While it has been correctly held that certain provisions of the anti-trust statutes are unconstitutional, the Supreme Court, in the case of the State of Texas v. The Shippers' Compress & Warehouse Co., 69 S. W. 61, relying upon the case of The Waters-Pierce Oil Co. v. The State of Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657, holds that so much of these statutes that authorize the canceling and forfeiture of a charter or permit to do business within the state of Texas are valid, and are not in violation of the Constitution.

Judgment affirmed.

SAN ANTONIO & A. P. RY. CO. v. MONTGOMERY.

(Court of Civil Appeals of Texas. Feb. 27, 1903.)

RAILROADS — CROSSINGS — PATH ACROSS RIGHT OF WAY—DUTY TO REPAIR.

1. A railroad company had dedicated to public use a crossing, consisting of a driveway and footpaths on each side thereof, but the city authorities had never established the crossing, and it did not appear on the official city map.

Between the driveway and the footpaths there was a space across the ends of which the company had placed chains, but pedestrians had without objection for a long time been in the habit of crossing these spaces diagonally from one end of the crossing to the other. *Held*, that the railroad company had not, as regards the spaces mentioned, by its acquiescence, assumed the duty to repair damages to the path made by its daily use.

Appeal from DeWitt county court; C. A. Sumners, Judge.

Action by James D. Montgomery against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Proctors, for appellant. Price, Green & Green and Davidson & Bailey, for appellee.

GILL, J. This was an action for damages for personal injuries brought by J. D. Montgomery against the San Antonio & Aransas Pass Railway Company. A trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$750, from which the defendant has appealed.

Plaintiff claimed to have been injured while crossing defendant's right of way at a crossing which it was the duty of defendant to maintain in a safe condition for pedestrians, and his injuries are alleged to be due to the negligence of the company in allowing an iron spike to protrude above the general level of the path, causing him to stumble and fall. Defendant answered by general denial and plea of contributory negligence.

The facts are as follows: The defendant's railroad runs through the town of Yoakum, and it owns in fee simple its right of way through said town. The right of way is 200 feet wide. Just west of and parallel with this right of way is Front street. On the east side is South street, also parallel with and adjacent to it. Gonzales street runs from an easterly direction to South street, with which it connects. On the opposite side of the railroad from this connection, Nelson street, running from the west, connects with and intersects Front street. Between these two points or intersections, the railroad company has opened and established a crossing for vehicles and pedestrians. The city was laid out subsequent to the construction of the railroad, and no crossing at the point in question was ever condemned by the city authorities. So far as appears from the official map of the city, Gonzales street does not cross the right of way, but stops at its intersection with South street. Nelson street stops in like manner on the opposite side of the right of way. The crossing in question was opened and established by the company many years ago, and it has since maintained it for use by the public. The crossing for vehicles was 56 feet in width. At each end of this crossing the company had established gates, which could be raised or lowered at the will of watchmen stationed there for the purpose, and were designed to prevent the

crossing of vehicles when trains were approaching. On the north and south sides of these crossings the company had established a crossing for pedestrians. Each of these were $7\frac{1}{2}$ feet in width, which was ample space for the accommodation of the inhabitants who used that point as a crossing. The wagon crossing and each of the foot crossings were in good condition at the time of the accident complained of, and no complaint is made against them. Between the wagon crossing and each of these footways was a space, across the ends of which the company had stretched chains, extending from the edge of the wagon way to the edge of each footway. In these spaces were the stands on which the gates were swung, also switch stands, as several of defendant's tracks came together at that point. These spaces were not designed to be used by the public, and this fact was plainly indicated by the chains above mentioned, as well as the presence of the two footways, which were distinct and smoothly graveled, and each of which led without obstruction directly across the tracks and right of way. The right of way at this point separated a large part of the residence portion of the city from the business part of it, and at least 75 per cent. of the population crossed at this point. Those who crossed on foot had been in the habit of going around the end of the chains, walking diagonally across the space between the footways and the wagon crossing, proceeding diagonally across the latter, and thus reaching, not only the opposite side of the right of way, but the opposite side of the crossing from the point of approach. About 75 per cent. of the pedestrians who crossed pursued this course, and had been doing so for years without protest from defendant, or any effort on its part to prevent it. In this way a distinct path was formed, leading from a point in the footpath at the northeast corner of the crossing diagonally across the spaces above mentioned, across the wagon way to a point in the footpath on the southwest corner of the crossing.

Plaintiff, whose home was on the west side of the railway, had been traveling this path almost daily since 1898. On January 11, 1902, while pursuing this course, plaintiff struck his foot against an iron spike which protruded about three inches above the level of the path, fell forward, and struck against one of the gate stands, whereby he sustained the injuries complained of. The point where the spike protruded was not in the footway nor in the wagon way, but was in the space fenced off by the chains.

Defendant contends, among other things, that the judgment should be reversed and rendered for appellant because, under the facts, appellant did not owe to plaintiff the duty of maintaining in a safe condition the path so made by public use. This assignment, in our opinion, presents the question which must determine this appeal, and is

therefore the only one which we will discuss.

The facts show, we think, beyond question, that the defendant had by its acts dedicated the crossing in question to the public use, and it is estopped to defend on the ground that the city had never formally condemned and established a crossing at that point. This being true, it owed to the public thus invited to use it the duties usually imposed upon railway companies with reference to established crossings. But it does not follow from this that the company owed any duty to appellee with reference to the maintenance of the space between the distinctly marked wagon crossing and the equally distinct footways. The company owned its right of way at the point in question, and (the city authorities having failed to establish a crossing there) it might dedicate to public use as much or as little of this space as it chose. The wagon way was unmistakably dedicated to the public. So also were the footways. But the space cut off by the chains was as unmistakably reserved.

Plaintiff contends that the long use by the public of the path across the space clothed him with the right to use it, and at the same time imposed upon the company the duty to maintain it in a reasonably safe condition. We do not think the proposition sound. The duties of a railway company with reference to the maintenance of a walkway across its premises do not differ from the duty of a citizen as to a walkway across his premises. If the public should habitually pass across a vacant lot belonging to an individual without protest on his part, and this general use was known to him, it would be clearly his duty to refrain from digging pitfalls or laying traps in the path thus established, and, if he should conclude to use dangerous machinery over or in proximity to such path, his knowledge of the use to which it was put would impose on him the duty to keep a reasonable lookout for those using the path, in order to avoid injuring them. But we have found no authority which holds that it would be the duty of such owner to maintain the path in a safe condition, to inspect it after each flood, and fill or bridge the ditches, or to repair the damage to it occasioned by its daily use. Such a doctrine would in effect impose a heavy penalty on good nature. Mere use by the public without objection by the owner is not sufficient to authorize the inference of an invitation. In such a case the user of the path is a licensee who must accept the premises as he finds them, but in the case of a railway company the duty of lookout is imposed in the operation of its trains, because the situation carries with it the knowledge that some member of the public is likely to be upon the path at any time, and the company is not permitted in the operation of its trains to ignore this knowledge. The true distinction seems to be this: A mere passive acquiescence by an owner in a certain use of his lands by others involves no liability,

but if he, directly or by implication, induces others to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition and suitable for such use, and for a breach of this obligation he is liable in damages to one injured thereby. This liability arises at common law, and has no connection with the duties imposed by statute upon railway companies with reference to public crossings. Thus, the keeper of an inn, or a shop or store to which the public are expected to come and deal, must keep his premises in a reasonably safe condition, for it is clear that the public are expected to use it, and are impliedly invited to do so. But in the case first stated the responsibility of finding a safe and secure passage is thrown upon the user.

That the spaces between the wagon way and footways had never been dedicated to public use is shown by the undisputed facts, and it appears with equal clearness that the company had extended no invitation, either express or implied, to the public to use them as a walkway. Yet the plaintiff propounds the proposition that the company, by its silence and failure to protest, assumed the duty to repair this path, even when its dangerous condition was the result of wear by the footsteps of the public which daily used it. If the doctrine is sound, a like duty rests upon every owner of unfenced lands who acquiesces in the use of such lands for a neighborhood road, and to such a proposition we cannot subscribe. The authorities cited below tend to sustain the views we have announced. *Am. & Eng. Ency. of Law*, vol. 8, pp. 425, 426; *Railway Co. v. Warner*, 88 Tex. 647, 32 S. W. 868; *Sweeny v. Railway Co.*, 10 Allen, 368, 87 Am. Dec. 644.

Because the facts are undisputed and no liability shown, the judgment is reversed, and judgment here rendered for appellant. Reversed and rendered.

ROBERTS v. FIELDER SALT WORKS.*
(Court of Civil Appeals of Texas. Feb. 21, 1903.)

MASTER AND SERVANT—RELATIONSHIP—INJURIES TO SERVANT—LIABILITY OF MASTER—EVIDENCE—QUESTION FOR JURY.

1. Where defendant corporation employed C., and placed him in charge of its shipping department as superintendent, giving him control thereof, defendant was liable for C.'s negligence whereby a laborer employed by him was injured.

2. Plaintiff was employed by defendant's superintendent to dig down certain banks of salt, and as he was doing so such superintendent, without plaintiff's knowledge, began to dig salt with a hoe near where plaintiff was working, and while so doing plaintiff was struck by the superintendent with the hoe, and injured. *Held*, that such facts required a submission of the issue of defendant's negligence to the jury.

Appeal from Van Zandt county court; Jno. W. Davidson, Judge.

Action by J. O. Roberts, by his next friend, against the Fielder Salt Works. From a judgment in favor of defendant, plaintiff appeals. Reversed.

The appellant, a boy about 19 years of age, brought this suit by his mother, Laura Roberts, as next friend, to recover damages for personal injuries received by him by reason of the alleged negligence of appellee while in its employ. After hearing the evidence, the court instructed a verdict for the defendant. The jury returned a verdict in accordance with the instruction, upon which a judgment was entered, and the plaintiff appealed.

The appellee is a corporation engaged in the manufacture, sale, and shipping of salt at Grand Saline, Tex. J. J. Williams is the general superintendent and agent of defendant company. Al. Conner was employed by said company to barrel, sack, and ship the salt manufactured by defendant, and said Conner was paid by the barrel, sack, or ton when he loaded salt in bulk. Conner employed the hands that worked under him, and paid them out of moneys furnished him for that purpose by the defendant company. Conner was employed by the superintendent, Williams, and was subject to be discharged at the will and pleasure of said Williams. Conner exercised control over the hands under him. Conner employed plaintiff. The plaintiff was directed by Conner to dig down certain banks of salt, which he was doing in a careful and prudent manner when Conner, without the knowledge of plaintiff, began to dig salt with a hoe near where plaintiff was at work. While so digging, plaintiff was struck on the right hand with the hoe by Conner, and his hand injured, whereby he lost the use of two of his fingers. The evidence shows that the injury is permanent.

T. R. Yantis and Geo. W. Scott, for appellant. Germany & Davidson, for appellee.

BOOKHOUT, J. (after stating the facts). Appellant insists that the facts raised the issue of negligence on the part of the defendant company, and that the court erred in instructing a verdict for defendant. Conner was the superintendent of the shipping department, and its management was under his control. He employed plaintiff, and directed him as to his duties. The plaintiff was performing his duties as directed by Conner, and was doing so in a careful and prudent manner. He had no knowledge that Conner had begun to dig salt with a hoe near him. He was struck by Conner with the hoe, and injured. Conner was a witness on the trial, and did not attempt to explain how the injury occurred, or show that he exercised any care at the time of the inflicting of the injury. Conner having been employed by the defendant, and placed in charge of its shipping department, and given control of the same, negligence on his part

*Rehearing denied March 7, 1903.

was the negligence of the company. *Shear. & Red. on Neg. sec. 230 (4th Ed.)*.

The evidence was sufficient to raise the issue of negligence, and the court erred in instructing a verdict for defendant. *Washington v. Railway Co.*, 90 Tex. 314, 38 S. W. 764; *Railway Co. v. Hawk*, 69 S. W. 1037, 5 Tex. Ct. Rep. 678; *Jackson v. Railway Co.*, 23 Tex. Civ. App. 319, 55 S. W. 376.

The judgment is reversed, and the cause remanded.

STEWART v. LENOIR.

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

APPEAL—FINAL JUDGMENT.

1. Judgment against P., in an action against P. and J., not disposing of the case as to J., is not a final judgment, and therefore not appealable; plaintiff and P. having agreed to a continuance as to J., because citation was not served on him, and it having been so ordered, and the case having then proceeded to trial by agreement of the same parties.

Appeal from Falls county court; W. B. Hunnicutt, Judge.

Action by W. T. Lenoir against Parazette Stewart and another. Judgment for plaintiff against said defendant, and she appeals. Dismissed.

J. W. Spivey and Wm. Shelton, for appellant.

KEY, J. Appellee brought this suit against Parazette Stewart and Jim Stewart. Upon trial a judgment was rendered in favor of the plaintiff against the defendant Parazette Stewart, and she has appealed.

Though not adverted to by either party, the transcript presents a question of jurisdiction which this court must decide before it can reach the merits of the appeal. As a general rule, the appellate courts of this state have no jurisdiction until a final judgment has been rendered in the court below; and there is nothing to take this case out of the general rule. It is also well settled that a judgment which does not finally dispose of all the parties to the suit is not a final judgment. *Batts' Ann. Civ. St. art. 1383*; *Andrews v. Andrews*, Dallam, Dig. 427; *Simpson v. Bennett*, 42 Tex. 241; *Martin v. Crow*, 28 Tex. 615; *Linn v. Arambould*, 55 Tex. 611; *Railway v. Smith Co.*, 58 Tex. 74; *Mignon v. Brinson*, 74 Tex. 18, 11 S. W. 903; *Mills v. Paul*, 1 Tex. Civ. App. 419, 23 S. W. 189; *Id.*, 4 Tex. Civ. App. 504, 23 S. W. 396, 398. In this case, the judgment recites the fact that the plaintiff and Parazette Stewart agreed to a continuance of the cause as to the defendant Jim Stewart, because citation had not been served on him; and the judgment declares that it was so ordered. By agreement of the same parties, the case then proceeded to trial. But that agreement does not make the judgment that was rendered a

final judgment. That judgment does not dispose of the case as against Jim Stewart, who was a party to the suit, and, therefore, it is not a final judgment, and, not being a final judgment, no appeal can be prosecuted from it. Hence we hold that this court has no jurisdiction, and that the appeal must be dismissed.

Dismissed.

INTERNATIONAL & G. N. R. CO. v. LEHMAN et ux.*

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

JOINT PLAINTIFFS—FAILURE TO APPORTION VERDICT.

1. Under the statute providing that, in actions by two or more plaintiffs for negligent death, the jury shall apportion a verdict for the plaintiffs among the several parties plaintiff, failure to do so is not reversible error, where plaintiffs do not object, a general verdict for all of plaintiffs being sufficient to bar a subsequent action by any of them.

Appeal from district court, Milam county; J. C. Scott, Judge.

Action by John A. Lehman and wife against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. Monta J. Moore and Hefley, McBride & Watson, for appellees.

KEY, J. This is a statutory action by a father and mother to recover damages on account of the death of their child, which was run over and killed by a railroad train in the town of Thorndale. From a judgment in favor of the plaintiffs for \$3,500, the defendant has appealed.

The case has been in this court once before (66 S. W. 214), on which occasion most of the questions now involved were decided against appellant.

The verdict of the jury involves findings to the effect that the defendant was guilty of negligence in the manner charged in the plaintiffs' petition, and that the plaintiffs were not guilty of contributory negligence, and that, as a result of the defendant's negligence, the child was killed, and the plaintiffs sustained pecuniary loss to the extent of \$3,500. After a careful reading of the statement of facts, we cannot say that these findings are not supported by testimony. Hence the objections to the verdict are overruled.

The court's charge, in connection with special charges given at the request of the defendant, submitted the case to the jury fairly and correctly.

The point made in reference to the verdict and judgment not apportioning the damages between the plaintiffs is not believed to pre-

*Rehearing denied March 11, 1903, and writ of error denied by supreme court.

¶ 1. See *Death*, vol. 15, Cent. Dig. § 149.

sent grounds for reversal. In our opinion, the provision of the statute in reference to apportionment was intended for the benefit of the plaintiffs; and if, as in this case, all the plaintiffs are adults, and do not ask for such apportionment, nor complain because it was not made, the defendant cannot be heard to object. In other words, we hold that in the case at bar the judgment is binding upon the plaintiffs as well as the defendant, and will preclude either of them from maintaining another action against the defendant upon the same cause of action here presented.

No reversible error has been shown, and the judgment is affirmed. Affirmed.

WESTERN UNION TEL. CO. v. WOFFORD.

(Court of Civil Appeals of Texas. Feb. 18, 1903.)

APPEAL—DELAY IN FILING TRANSCRIPT—AFFIRMANCE ON CERTIFICATE—WRIT OF ERROR—DEATH OF PARTY.

1. Leave to file as an appeal the transcript for appeal presented for filing 10 months after the appeal was perfected, will be refused, the evidence showing no sufficient excuse for the delay.

2. Where appeal is abandoned, the transcript not being filed in time, and a writ of error is sued out, appellee may not have an affirmance on certificate filed after the term at which the transcript should have been filed, though he demanded from the clerk a certificate during that term, he having abandoned it on being told by the clerk that on account of being busy he could not then furnish it.

3. A writ of error proceeding against a dead person will not be considered the suing out of a writ of error, but the new petition and bond against his heirs, filed five days later, on discovery of his death, is part of one and the same effort to obtain a writ of error, and not the abandonment of one writ and the suing out of another.

4. Defendant may prosecute a writ of error, though plaintiff has died; but the defendants therein should be designated by name in the petition and bond, and not as "heirs of" deceased; and service should be had on them, service on deceased's attorney of record not being authorized; and, this not having been done, the writ should be perfected in the lower court, and a further transcript filed showing it.

Error from district court, Gonzales county; M. Kennon, Judge.

Action by W. D. Wofford against the Western Union Telegraph Company. Judgment for plaintiff. Defendant attempted to appeal and bring error. Appeal disallowed. Proceeding in error continued.

Norman G. Kittrell and Burgess, Hopkins & Rainbolt, for plaintiff in error. Thos. McNeal and J. W. Ragsdale, for defendant in error.

JAMES, C. J. An appeal in this case was perfected on March 5, 1902. The transcript for appeal was not presented to the clerk of this court for filing until January 9, 1903. The motion for leave to file it as an appeal

will be refused, because the evidence submitted to us in connection with the motion shows no sufficient excuse for the delay. Appellant, in a later motion, filed January 24, 1903, alleges that its counsel, being advised that its original motion would be resisted, did, on January 17, 1903, file its petition for writ of error with supersedeas bond, and caused citation to be issued thereon, which was, on January 18th, returned with indorsement that Wofford had died before the petition and bond were filed, of which fact appellant and its counsel had no knowledge prior to such return. On January 22, 1903, it filed its further petition for writ of error with supersedeas bond against the heirs of Wofford as parties. In the new or supplemental motion filed here January 24, 1903, appellant alleges that it did not know that Wofford left heirs, nor who, if any person, is his administrator, nor, if he left heirs, who they are, or where they reside, and has not yet had time nor been able to ascertain the facts in this connection. The record on appeal presented here for filing on January 9, 1903, was not filed by the clerk, and as it now appears there have been added to it the petition for writ of error and the bond against the "heirs of Wofford," with a citation thereon served on Wofford's attorney of record, and the motion now before us is a motion to allow Western Union Telegraph Company to be heard either upon said appeal or writ of error, as it may be entitled. As already explained, the motion to allow the case to be heard on appeal is overruled.

On January 30, 1903, appellee filed a motion to affirm on certificate. It will be observed that the term at which the appeal was returnable expired about July 1, 1902, and appellee had ample time to file the motion during that term, but did not do so. In a reply filed January 19, 1903, by appellee's counsel, resisting the motion to file the transcript on appeal, counsel make known the fact that early in June, a short time after the expiration of the 90 days after perfecting the appeal, and before the end of that term of this court, he demanded from the clerk a certificate with which to make a motion to affirm; that the latter replied that, on account of being busy, he could not then furnish it; and counsel, not being able to procure it, abandoned the same.

So far as we have been able to find, affirmance on certificate has occurred in cases only when the certificate was filed at the term to which the record was returnable. Here we have one which was filed after the term, and appellee's counsel declares that he undertook to obtain a certificate for the purpose during that term, and saw fit to abandon it. The rule on the subject appears to be that an appeal may be abandoned, and a writ of error sued out; but the right to the latter, under such circumstances, is subject to be the absolute right to have the judgment affirmed on certificate at the term at which the tran-

script should have been filed. *Ins. Co. v. Clancey*, 91 Tex. 471, 44 S. W. 482.

The first writ of error proceeding was against a dead person, and that effort can hardly be considered the suing out of a writ of error. The new petition and bond against the heirs, filed five days later, upon discovering that Wofford had died, was really a part of one and the same effort to obtain a writ of error, rather than the abandonment of one writ and the suing out of another.

For the above reasons, we overrule the motion to affirm on certificate.

The defendant in the judgment has the right to prosecute a writ of error. The record, however, is prematurely brought here, the defendants not being designated by name in the petition and bond, but generally as the "heirs of Wofford," and no service had. Service on Wofford's attorney of record, Wofford being dead, we think, is not authorized. But plaintiff in error may perfect the writ, and get citation on the proper parties. It is not our function to direct the details of such proceedings, which must be had in the district court, and brought here by transcript in due time.

Under the authority of *Hohenthal v. Tur-nure*, 50 Tex. 3, the record will be allowed to be filed in this court as a proceeding by writ of error, but no further action will be taken thereon until the writ is perfected in the district court, and a further transcript filed here showing that it has been perfected. Due diligence will be required of plaintiff in error in such proceeding, to be passed on hereafter, if necessary.

ÆTNA LIFE INS. CO. v. J. B. PARKER & CO. et al.*

(Court of Civil Appeals of Texas. Nov. 27, 1902.)

ACCIDENT INSURANCE—FAILURE TO PAY POLICY—PENALTY—RIGHT OF SUBROGATION—LOSS—DEFENSE—ACTION ON POLICY—VARIANCE—MATERIALITY.

1. Rev. St. art. 3071, authorizes a recovery of 12 per cent. of the loss and an attorney's fee as a penalty for the failure of an insurance company to pay its policy within the time specified. The article is found in chapter 3, tit. 58, entitled "General Provisions," but which deals with foreign insurance companies. Chapter 4 concerns "Home, Life and Accident Insurance Companies," but contains no such provision. *Held*, that the penalty could not be exacted from an accident insurance company.

2. The fact that insured, injured through the negligence of his employer, settled with the latter, and released it from liability, is not a defense to an action for his accident insurance, on the theory that the insurer was entitled to be subrogated to insured's action against his employer, identity of damage in the two causes of action being wanting.

3. A petition on an accident insurance policy described it as No. 188,695, issued to William Shelby, and alleged an assignment of policy No. 188,695, issued to William Shelby, to plaintiff. The policy introduced in evidence was No. 138,695, issued to William Selvey, and the

assignment introduced in evidence was of policy No. 138,695, by William Shelvy to plaintiff. Insured testified that his name was William Shelvy, and identified the policy as the one delivered to him by the company's agent, and on which he had paid premiums, and which he had assigned. The judgment correctly described the policy. *Held*, that the variance was immaterial.

Appeal from Smith county court; Geo. W. Cross, Judge.

Action by J. B. Parker & Co. and others against the Ætina Life Insurance Company. Judgment for plaintiffs, and defendant appeals. Modified.

Harry P. Lawther, for appellant. A. Morgan Duke and N. W. Brooks, for appellees.

GARRETT, C. J. This action was brought by J. B. Parker & Co. against the Ætina Life Insurance Company of Hartford, Conn., to recover of the defendant a stipulated indemnity for injuries received by the insured during the life of a certain policy of accident insurance issued by the company to William Shelvy, and which had been assigned by the said Shelvy to the plaintiffs; and as a penalty for the further sums of 12 per cent. of the amount of the indemnity due under said policy, and a reasonable attorney fee, which was alleged to be \$50; the total amount for which judgment was prayed aggregating \$371 and costs. William Shelvy intervened in the suit as plaintiff, and alleged that the amount due under the policy had been assigned to the plaintiffs, J. B. Parker & Co., to secure an indebtedness to them of \$225. He adopted the pleadings of plaintiffs, and joined in the prayer for judgment against the defendant, and asked that the balance, after deducting the amount due by him to the plaintiffs, be directed to be paid to him. The defendant pleaded as a defense to a recovery upon the policy the right of subrogation to the claim of Shelvy against the railway company for damages on account of the injuries for which indemnity was claimed, and its deprivation of the right by the settlement of Shelvy with the railway company and the release of it from all liability for said injury. A demurrer by plaintiffs to so much of the answer as set up this defense was sustained, and it was stricken out. Shelvy was injured, as alleged, while in the service of the St. Louis Southwestern Railway Company of Texas by getting caught in a turntable of said company while cleaning the tank of an engine, and was disabled for 28 weeks and 5 days, for which time the company was liable to pay him indemnity at the rate of \$10 a week, amounting to \$287.14. Judgment was rendered in favor of all the plaintiffs as prayed for.

Three questions arise upon the record:

1. Does article 3071 of the Revised Statutes, authorizing the recovery of 12 per cent. of the loss and an attorney fee as a penalty for failure of the insurance company to pay

*Rehearing denied.

within the time specified in the policy apply to accident insurance? Statutes imposing penalties receive a strict construction against the penalty. A very clear distinction is made between life and health and accident companies in the provisions of the Revised Statutes relating to insurance. Article 3071, imposing the penalty, is found in chapter 3, tit. 58, entitled "General Provisions," but dealing with foreign insurance companies. Chapter 4 is concerning "Home, Life and Accident Insurance Companies," but contains no provision for a penalty in case of failure to make prompt payment. In the case of *Ætna Life Ins. Co. v. Hicks*, 56 S. W. 87, in which this court affirmed a judgment upon an accident policy of insurance for a penalty as provided by article 3071, Rev. St., the question of the applicability of the statute was not raised, and its constitutionality only was passed on. The question does not appear ever to have been decided by the Supreme or Appellate Courts of this state, but the federal Circuit Court of Appeals for the Fifth Circuit had decided the precise question, and held that the statute has no application to accident insurance companies. *Fidelity & Casualty Co. of New York v. Dorough*, 46 C. C. A. 364, 107 Fed. 389. The opinion in the case quotes from the statutes, and gives reasons for the decision which, we think, are conclusive of the question. We are of the opinion, therefore, that the court below erred in adjudging the penalty provided in Rev. St. art. 3071, against the defendant.

2. Did the court err in sustaining the plaintiffs' demurrer to the answer setting up defendant's right of subrogation to the claim of Shelyv against the railway company, and its discharge by reason of the fact that it had been deprived of this right by Shelyv's act in settling with and releasing the railway company from further liability to him? The right of subrogation of the insurer to the claim of the insured for loss or damage to property covered by a policy of fire insurance, caused by the negligence of the carrier, is well established. 2 May on Ins. sec. 454; *Sheldon on Subrogation*, sec. 229; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013. But there is an essential distinction between a liability for loss of property which has been insured and that for damages on account of injuries inflicted upon a person by the negligence of another. In the case of the destruction of property by fire in the first instance the damage or loss which has been caused by the carrier and that indemnified against is identical. It is the value that has been destroyed. But where a person has received personal injuries, caused by the negligence of another, several elements enter into the estimate of damages besides the mere stipulated indemnity for loss of time contracted for in the accident policy, and the loss is by no means identical. In the one there may be included

full compensation for mental and physical suffering, loss of time, diminished capacity to earn money, etc., and in some instances punitive damages; while the other is a stipulated sum for loss of time only, which may or may not be full indemnity even for that. The accident policy undertakes to indemnify the insured, whether his injuries are the result of negligence or not, while the person or corporation inflicting the injuries can be held liable only for negligence; and, since so many elements enter into the estimate of the loss in the case of one that do not enter into or from any part of the other, there is wanting that identity of damage or loss that would entitle the insurer to subrogation on payment of the claim against him.

3. It remains to consider whether the court erred in admitting in evidence the policy of insurance, and in rendering judgment thereon over the objection to it on the ground of variance. The petition described a policy No. 188,695, issued to Wm. Shelyv. The policy introduced in evidence was No. 138,605, issued to Wm. Selvey. The petition declared an assignment of accident policy No. 188,695, issued to Wm. Shelyv; and the assignment introduced in evidence was of accident policy No. 138,695 by Wm. Shelyv to J. B. Parker. Plaintiff testified that his name was Wm. Shelyv, and that the policy introduced in evidence was the one delivered to him by defendant's agent, and on which he had paid premiums, and had transferred to Parker & Co. The judgment correctly describes the policy introduced in evidence. The similarity of the names and numbers, together with the evidence as to the identity of the transaction, leaves no doubt that the policy sued on was the identical one issued to the plaintiff, Shelyv, and the defendant could not have been misled by variance; and, if it could not have been misled, and the judgment will protect it from another suit, the variance is not material. *Bank v. Stephenson*, 82 Tex. 435, 18 S. W. 583.

The judgment of the court below is affirmed except as to penalty of 12 per cent. on the amount of the indemnity and the attorney fee, as to which it is reversed, and judgment will be finally rendered here in favor of the plaintiffs for the amount of the indemnity only.

Affirmed in part; reversed in part.

BROWNE v. BACHMAN et al.*

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

MUNICIPAL CORPORATIONS—STREETS—EXCAVATIONS—GUARDS—ORDINANCES—VALIDITY—LICENSEES—INJURIES—VIOLATION—NEGLIGENCE PER SE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—DRUNKENNESS—ADMISSIBILITY—INSTRUCTIONS.

1. A city ordinance provided that any one who should dig any excavation in a street,

*Rehearing denied March 11, 1903.

within the city limits, and leave the same unfenced, or not securely covered, should be guilty of a misdemeanor. *Held*, that such ordinance was valid, and admissible in an action against a licensee of the city for injuries caused by plaintiff's falling into a ditch in a public street in the nighttime, which such licensee had left open.

2. A violation of such ordinance by such licensee constituted negligence per se.

3. An ordinance, making it a misdemeanor for any person to leave an excavation in a highway unfenced or insecurely covered does not apply to the city, nor render the city's failure to comply therewith negligence per se.

4. The fact that a city granted B. a franchise to excavate in its streets for the construction of a waterworks plant did not render the city liable for B.'s failure to comply with an ordinance requiring excavations in streets to be fenced or securely covered.

5. Where a city granted a franchise to B. to excavate in its streets for the construction of a waterworks plant, and B. failed to properly fence or cover such excavation, as required by a city ordinance, by reason of which plaintiff was injured, the city was only liable to plaintiff for a failure to exercise reasonable diligence to protect such excavation, after notice of B.'s failure to do so.

6. In an action for injuries sustained by B.'s failure to properly guard or cover excavations in a street, as required by a city ordinance, making a failure to so guard or cover such excavations a misdemeanor, punishable by a fine, such ordinance is admissible, as against the city, on the issue of negligence vel non.

7. An instruction that plaintiff could not recover for injuries sustained by falling into an unprotected ditch in a city street, if he had previous notice of the existence of the ditch, was erroneous.

8. In an action for injuries sustained by plaintiff's falling into an unprotected ditch in a city street, evidence that for the last 15 or 20 years plaintiff had been addicted to the excessive use of intoxicants was inadmissible.

Appeal from district court, Caldwell county; L. W. Moore, Judge.

Action by J. W. Browne against J. A. Bachman and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

McNeal & Ellis, for appellant. E. B. Coopwood, M. C. Jeffrey, and A. B. Storey, for appellees.

KEY, J. Appellant brought this suit against J. A. Bachman and the city of Lockhart, to recover damages caused by the plaintiff's stepping into a ditch in the nighttime in a public street, within the corporate limits of the city of Lockhart. The trial in the court below resulted in favor of the defendants, and the plaintiff has appealed.

We sustain the first assignment of error, which complains of the ruling of the court in not permitting the plaintiff to introduce in evidence an ordinance of the city of Lockhart, plead by him in his petition, and which he charged the defendants with violating. The ordinance referred to reads as follows: "Chapter 2, art. 31. Anyone who shall dig or cause to be dug, any excavation on or adjoining any highway, street, alley or side-

walk, or upon any uninclosed lot or square within the limits of this city, and shall leave the same unfenced, or not securely covered, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one nor more than five dollars." We hold that this ordinance was valid, and if the defendant Bachman violated it, such violation on his part was negligence per se; and if, as a result thereof, the plaintiff was injured, without fault on his part, Bachman will be liable to him for such injury. City of Corsicana v. Tobin (Tex. Civ. App.) 57 S. W. 319; Sullivan v. City National Bank (Tex. Civ. App.) 65 S. W. 40; H. B. & N. Railway Co. v. Pollard (Tex. Civ. App.) 66 S. W. 851. However, as the city of Lockhart is a municipal corporation, we hold that the ordinance does not apply to it; and, therefore, a violation of the ordinance would not, as against the city, constitute negligence per se. Ritz v. City of Austin, 1 Tex. Civ. App. 455, 20 S. W. 1029; Fleming v. Loan Agency, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250; Seagriff v. City of Austin (Tex. Civ. App.) 42 S. W. 857. As a matter of fact, it cannot successfully be contended that, because the city of Lockhart granted Bachman a franchise which authorized him to excavate in the streets for the purpose of putting in a waterworks plant, therefore it would be a party to Bachman's failure to comply with the ordinance. If the city is liable at all, such liability must rest alone upon the theory that Bachman failed to properly guard the excavation, and that, after due notice thereof, the city failed to exercise reasonable diligence to accomplish that purpose itself. However, we think the ordinance was admissible against the city itself upon the issue of negligence vel non, upon the same principle that rules and regulations made by railway companies for the guidance of their employes are admissible against such companies upon the issue of negligence.

We also sustain some of the criticisms urged against the fifth paragraph of the court's charge. It assumes that the plaintiff could not recover if he had previous notice of the existence of the ditch; whereas, he might have known that the ditch had been dug, but had no notice of the fact that it had not been securely covered, as authorized by the city ordinance. Of course, if he knew that an open ditch was there, and voluntarily stepped in it, such conduct on his part would prevent a recovery if it constituted contributory negligence. Said paragraph of the charge was also somewhat confusing, as pointed out in appellant's brief.

We also sustain the eleventh assignment of error, which complains of the action of the court in permitting the defendants to prove that for the last 15 or 20 years the plaintiff had been addicted to the excessive use of intoxicants. Whether or not the plaintiff was drunk on the occasion in question was a legitimate inquiry, but proof of drunk-

eness, or the excessive use of intoxicants, on other occasions, was not admissible. *Railway v. Johnson*, 92 Tex. 380, 48 S. W. 558; *Railway v. Ives*, 71 S. W. 772, 6 Tex. Ct. Rep. 410.

Assignments presenting other questions of law are overruled; but this, however, does not involve any expression of opinion by this court upon the merits of the case as developed by the testimony.

For the error indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

CORRALITOS CO. v. MACKAY.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

PARTNERS—ACCOUNTING—INTEREST—STATEMENT OF FACTS—STRIKING OUT.

1. Where the trial judge was misled by the misrepresentations of appellant's attorney into signing a statement of facts not agreed to by the parties, nor made out by the judge from statements submitted to him by the parties, and which did not give a true statement of the facts produced at the trial, it was not error to strike out such statement on motion.

2. Where, in an action for a partnership accounting, it appears that the defendant kept all the property, books, and accounts; that a certain amount became due to plaintiff on a certain date; and that defendant, though frequently requested, refused to render a statement of the account, and wrongfully claimed that plaintiff was indebted to defendant, and refused to pay plaintiff anything—interest should be allowed from such date.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Action by Hugh Mackay against the Corralitos Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Millard Patterson and C. N. Buckler, for appellant. R. V. Bowden, for appellee.

FLY, J. This suit was instituted by appellee to procure an accounting between him and appellant, and to recover from appellant the sum of \$1,972.08, with interest at the rate of 6 per cent. per annum from the 22d day of April, 1899. A trial by jury resulted in a verdict and judgment for appellee in the sum of \$1,460.20, with interest at 6 per cent. per annum from April 22, 1899.

After the record in this case had reached this court, a motion to strike out the statement of facts was made by appellee, which was not considered by this court, on the ground that the district court alone could correct its record. Appellee then filed his motion in the district court to strike the statement of facts from the record for the following reasons:

"First. Said alleged and pretended statement of facts is neither a correct nor complete statement of the material facts proved in said cause; and, second, because in more than one instance, as will be hereinafter

shown, it misstates the testimony as to matters material to plaintiff's rights, and omits a large amount of testimony material to plaintiff's rights, as will be also shown; and, third, because said alleged and pretended statement was presented to the trial judge for his certificate and signature without the consent or knowledge of plaintiff or his attorney, and without any effort being made by defendant's attorneys to agree with plaintiff's attorney upon a statement of facts to said cause; and, fourth, because the certificate and signature thereto of the Honorable A. M. Walthall, the judge of this court before whom this cause was tried, was procured by defendant's attorney, C. N. Buckler, by stating, and thereby wrongfully creating upon the mind of the said judge the impression and belief, that said alleged and pretended statement of facts was substantially in accordance with plaintiff's contention of what it should be, when in truth and in fact it is not nor was not so; fifth, because said alleged and pretended statement of facts was not prepared by the Hon. A. M. Walthall, the judge of this court, before whom said cause was tried, and whose certificate and signature are attached to same, nor was it examined or read over by him, nor were the contents thereof known to him at the time he signed the same, and same was signed and certified by said judge without having examined any statement of facts prepared and furnished by plaintiff, and without giving plaintiff any opportunity to be heard concerning said statement, or to present a statement of facts, said judge being led into so doing by the improper action and said incorrect statements of defendant's attorney, C. N. Buckler."

Appellant appeared, and answered to the motion, and it was tried before the Honorable A. M. Walthall, who had tried the cause on its merits, and, after hearing the testimony, he entered the following order: "Now, on this 3d day of November, A. D. 1902, came on for hearing the motion of the plaintiff heretofore filed in this cause to strike out from the records and files the statement of facts heretofore filed in this cause by the defendant in the office of the clerk of this court, which bears the clerk's file mark of date March 3, 1902, and it appearing to the court that defendant was duly served with notice of said motion, and defendant having answered to said motion, and agreed that the same be set down for hearing on this date, and both parties appearing by their respective attorneys, and announcing ready for trial on said motion, the court proceeded to hear same, and after hearing and considering said motion and the exhibits attached thereto, with all affidavits and defendant's answer and affidavits made a part thereof, the court doth find that said statement of facts so filed is not a statement agreed upon by the parties or their attorneys, and signed by them, and approved by the judge after

*Rehearing denied March 11, 1903, and writ of error denied by supreme court.

finding same to be correct, as provided by article 1379, Rev. St.; nor is the said statement a correct statement of facts made out by the judge from respective statements submitted to him by the parties and from his own knowledge of the facts proven on the trial, and ordered filed and made a part of the record, as provided by article 1380, Id., and that the certificate of the trial judge to said statement of facts should not have been given, nor said statement of facts filed in this case: It is therefore ordered and adjudged by the court that said motion be sustained, and that said statement of facts so filed by the defendant in this cause in the office of the clerk of this court, and bearing file mark of the clerk of this court the 3d day of March, A. D. 1902, and appearing to be a statement prepared by the trial judge, be, and the same is hereby, stricken from the records and files in this cause, and for naught held, and that plaintiff recover of and from the defendant, the Corralitos Company, all his costs in and about this motion laid out and expended, for which execution may issue."

The proceedings on the motion were embodied in a supplemental transcript, which, by agreement of the parties, was made a part of the record in this cause.

The proceeding in connection with the statement of facts is well sustained by decisions of the Supreme Court, which have been followed by this court. *Railway v. Culbertson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805; *Bogges v. Harris*, 90 Tex. 478, 39 S. W. 585; *Willis v. Smith*, 90 Tex. 636, 40 S. W. 401; *Ennis Mercantile Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946; *Johnston v. Arrendale* (Tex. Civ. App.) 71 S. W. 44. The district judge having heard the testimony and found from the same that the statement of facts was improperly in the record, we conclude that this court must be governed in reviewing this proceeding as in all others, and, if there is evidence to sustain the judgment, it must be sustained. Regardless, therefore, of what might have been the action of this court in the premises in an original proceeding, we find, in deference to the judgment, that the district judge was misled into signing a statement not agreed to by the parties, and which was not a statement of facts made out by the judge from statements submitted to him by the parties. We further find that an attorney for appellant presented two statements of facts to the trial judge, saying that one was a statement prepared by appellant's attorneys and the other by the attorney for appellee. He also stated that the parties could not agree upon a statement of facts, and that appellee's attorney had made pencil notations upon the margin of the statement prepared by appellant's attorneys, and that the said statement, with the marginal notations made by the attorney for appellee, embodied the testimony as contended for by appellee's attorney, and that, with the marginal notations added to

the said statement, only minor differences between the two statements remained. Upon this representation the district judge signed his name to a certificate to the statement of facts prepared by the attorneys of appellant, which certificate had been attached to the statement of facts by the attorney for appellant before it was presented to the judge. The statement of facts, with the notations on the margin, did not give a true statement of the facts produced on the trial, nor what was contended for by appellee's attorney, and the statement of facts was not made up from the two statements and the memory of the judge, and was signed by the judge upon his faith in the representations made by the attorney. The court did not, therefore, err in striking the statement of facts from the record, and it will not be considered on this appeal. In view of the facts, it cannot be maintained that the want of a statement of facts was brought about by a neglect of duty upon the part of the district judge, but was caused through the acts of an attorney for appellant.

All of the assignments of error gain their support from, and are based on, the facts, and the suppression of the statement of facts disposes of them. It is unnecessary, therefore, to consider them, and only the seventh assignment, which raises the question as to whether it was proper to allow interest until there had been an accounting between the parties, will be discussed.

It is alleged in the petition: "That on or about the — day of October, 1895, the plaintiff and the defendant entered into a contract in writing whereby the defendant employed the plaintiff to conduct and operate for it a tannery owned by defendant at the town of Corralitos, in the state of Chihuahua, in the Republic of Mexico, for a period of one year from the 1st day of November, 1895. That by the terms of said contract defendant agreed to furnish all material necessary and pay for all expenses required in the operation of said tannery, and for all cattle hides furnished the tannery by defendant it should be allowed the sum of five dollars each, and for all sheep hides so furnished defendant should not be allowed anything, except that the tannery should remove the wool, and turn the same over to defendant. For hides tanned the defendant was to allow the tannery the following prices for all hides turned over to the defendant: Cattle hides for harness and saddles, 75 cents per pound; soles, in general, 60 cents per pound; and sheep skins for upper leather, \$6 per dozen. It was further provided by said contract that plaintiff's expenses should be incurred upon his individual account, and that he should not receive any salary, but that the tannery should be liquidated yearly, and the net proceeds be equally divided between plaintiff and defendant. * * * That prior to the expiration of said written contract plaintiff and

defendant modified the same by oral agreement, whereby the duration of same was extended indefinitely, without any time specified for the liquidation of the accounts, and subsequently there was a further oral modification of the said contract, whereby it was agreed that the tannery would pay the defendant 15 cents each for sheep skins, and defendant would take all the wool obtained from said skins at the price of 20 cents per pound. That during the period of the operation of said tannery by plaintiff under the terms of said contract beginning on the 1st day of November, 1895, and ending on the 22d day of April, 1899, the defendant expended on behalf of said tannery for labor and material for use therein, and for general expenses in conducting same, the sum of \$27,445, and received the net products of same, which amounted to the sum of \$36,965, leaving the net profit of the operation of said tannery the sum of \$9,520, of which plaintiff owned and was and is entitled to one-half, or \$4,760. * * * That plaintiff's personal account with the defendant was also kept by the defendant, and said account, and the books in which same was kept, are in the possession of the defendant, and plaintiff cannot give the items thereof; but that defendant has advanced plaintiff by way of supplies and money from time to time a considerable sum, which, after paying all salaries earned and expenses incurred by plaintiff in defendant's service prior to the execution of the contract above mentioned, amounts to about the sum of \$1,505.80."

If a corporation could enter into a partnership, the allegations of the petition doubtless indicate that a partnership was formed between appellant and appellee, and that the object of this suit was to have an accounting between the partners. It is the rule, however, that a corporation cannot form a partnership with an individual or with another corporation, unless it should have the power to enter into such partnership, granted in express terms by its charter. But where an attempt has been made to enter into such partnership, the rules as to accounting between the partners will be applied, and a court of equity would not permit the value of the services or the property to be taken from the individual because the corporation could not legally enter into a partnership. *Van Kuren v. Trenton L. & Mach. Mfg. Co.*, 13 N. J. Eq. 302.

It is the general rule that no interest is allowed on partnership accounts prior to the time when the accounting is had and the balances ascertained, but, where an accounting is delayed through misconduct or fraud, the partner guilty of such misconduct or fraud will be charged with interest for the time an accounting has been thereby delayed. There being no statement of facts, the only question that presents itself is as to whether the allegations form a basis for

charging interest before the accounting took place. It is alleged in the petition that the amount claimed became due on April 22, 1899, and, further, "that, although frequently requested so to do by plaintiff, the defendant has failed and refused, and still fails and refuses, to render plaintiff a true, correct, and full statement of the accounts pertaining to the operation of said tannery, but has only rendered a partial, incomplete, and incorrect account of the same, and wrongfully claims that plaintiff is indebted to it, and has refused, and now refuses, to pay the plaintiff any sum whatever." The allegations are sufficient to admit proof of misconduct, and, in the absence of a statement of facts, the presumption will be indulged that the evidence sustained the verdict.

The judgment is affirmed.

MERCHANTS' & PLANTERS' OIL CO. v. BURNS et al.*

(Court of Civil Appeals of Texas. Feb. 20, 1903.)

MASTER AND SERVANT—SERVANT'S DEATH—ACTION BY WIDOW—JOINDER OF MOTHER-IN-LAW—SAFE PLACE TO WORK—PROXIMATE CAUSE—ASSUMPTION OF RISK—FELLOW-SERVANT DOCTRINE—INSTRUCTIONS—APPLICABILITY.

1. Rev. St. arts. 3021, 3022, provide that an action for death shall be for the sole benefit of the surviving husband, wife, children, and parents of the decedent, and may be brought by all of the parties entitled, or by any one or more for the benefit of all. Article 3027 provides that the damages recovered may be apportioned by the jury. *Held*, in an action by a widow for negligently causing the death of her husband, that the failure to join the husband's mother as party plaintiff was not prejudicial, in view of her joinder as defendant and the fact that the jury awarded the entire recovery to plaintiff.

2. Decedent was killed by the throwing down of a platform on which he was at work repairing a cable over railroad tracks, the accident being occasioned by the smokestack of an engine striking the cable. The premises were those of the decedent's employer, and were inclosed by a high fence, railroad trains having access thereto. It was customary for an engine to whistle when about to enter, and the employer had a man to open the gate, but there was no one to warn employes engaged in the work decedent was. An approaching engine was not visible from the platform where decedent was stationed. On the occasion in question the gateman was absent when the engine entered. *Held*, that the employer was negligent in failing to furnish a safe place to decedent in which to work.

3. The employer's negligence in failing to have a watchman was a concurring proximate cause with the negligence of the railroad company in entering the yard without a signal and in colliding with the cable, so as to charge the employer.

4. The employer requested an instruction that it was entitled to a verdict if the jury should believe that an ordinarily prudent man would not have stationed a lookout to watch for approaching engines. *Held*, that a refusal of the instruction was not error, it being inapplicable to the facts, in view of the absence of the gateman when the engine entered.

*Rehearing denied, and writ of error granted by supreme court.

5. The engine occasioning the accident had entered the yard once before that morning, and the employer's superintendent instructed decedent's foreman, in decedent's presence, not to go to work until the engine left the yard. After the engine left and the gate had been closed, decedent went to work. On its return the engine gave no signal. Held, that decedent did not assume the risk.

6. Where a master intrusts to another the duty of providing his employes with a safe place in which to work, in that respect he is the agent of the employer, though in the performance of his other duties he might be the fellow servant of the other employes.

Error from district court, Harris county; Wm. H. Wilson, Judge.

Action by Maggie Burns against the Merchants' & Planters' Oil Company and others. Judgment for plaintiff, and the defendant company brings error. Affirmed.

Hutcheson, Campbell & Hutcheson and Baker, Botts, Baker & Lovett, for plaintiff in error. J. B. Brockman, O. T. Holt, and J. M. Cobb, for defendants in error.

GARRETT, C. J. Maggie Burns brought this suit in the district court of Harris county originally against the Merchants' & Planters' Oil Company and the Texas & New Orleans Railroad Company to recover damages for the death of her husband, Ben Burns, which she alleged resulted from injuries received by him caused by the negligence of the defendants. Amos and Fannie Burns, mother and father of the deceased, were made parties defendant. Amos died pending the suit, and the cause was discontinued as to him. This is the second appeal. 63 S. W. 1061. The first appeal was by the plaintiff from a judgment in her favor against the oil company for the sum of \$500 and in favor of the defendant Texas & New Orleans Railroad Company. The judgment was also against Fannie Burns that she take nothing. Plaintiff alone appealed, and the judgment in her favor against the oil company was reversed, on the ground that it was insufficient in amount. The oil company, by cross-assignments of error, denied any liability for the death of the plaintiff's husband, because it was the result of the negligence of a fellow servant of the deceased, and because the oil company was a corporation, and not responsible for the negligence of its servants or agents. These assignments were overruled. The judgment in favor of the railroad company was affirmed, and as to Fannie Burns, who did not appeal, it was left undisturbed. Deceased was killed by the running of a switch engine by the employes of the railroad company into the premises and yard of the oil company against a cable suspended over the track, and which the deceased and other servants of the oil company were repairing, and throwing down a platform upon which they were at work; and the petition alleged negligence on the

part of the oil company in failing (1) to station a special watchman to look out for the approach of engines; (2) to close its yard gate after the departure of the engine upon its first trip that day; (3) to keep a watchman at the gate while it was open; and in permitting the gate to remain open and the engine to enter without the usual signals. The defendant pleaded general denial; that death of the deceased was caused by the negligence of his fellow servants and himself; assumption of risk and contributory negligence. There was a trial by jury, which resulted in a verdict and judgment in favor of the plaintiff against the oil company for the sum of \$2,450, and that Fannie Burns, the mother, take nothing by the suit.

The deceased was in the employment of the defendant oil company in the operation of its mill as a roustabout. On the morning of October 22, 1896, he and other employes of the defendant were at work upon a platform at the end of one of defendant's seed houses, repairing a two-inch wire cable, stretched between that and a platform to another seed house, connecting the machinery in the two, and extending over three railroad switch tracks running between the seed houses and used by the Texas & New Orleans Railroad Company and the International & Great Northern Railroad Company in delivering and receiving freight to and from the defendant. The cable had been lowered for the purpose of repairing it, and while the men were at work an engine of the Texas & New Orleans Railroad Company ran into the yard along one of the tracks, and the smokestack struck the cable and threw down the platform to which it was attached, and killed Burns. The engine had been in the yard once before that morning, and had only left it about 20 minutes when it returned and caused the accident. The yard and the premises of defendant were inclosed by a high fence with a gate, where the railroad tracks entered, which was kept closed. The tracks were straight, and there was nothing to obstruct the view between the gate and the cable, a distance of between 200 and 400 yards, but the platform upon which the deceased was at work was at the far end of the seed house from the gate, and the persons operating the engine could not see those at work on the platform; nor could those on the platform see an engine coming along the track. At the time of the accident the machinery in one of the seed houses was running and making considerable noise. In using the tracks the railroad engines passed under the cable, which, when in proper position, was high enough to allow the engines to pass safely. But in order to repair the cable it was necessary to take it from the pulleys upon which it worked and slacken it. When thus slackened it swung low enough to be caught by the smokestack of a passing engine. In order for an engine to gain admittance to the defendant's yard, it was the

† 6. See Master and Servant, vol. 34, Cent. Dig. § 393.

custom for the engineer to approach the gate and give four blasts of the engine whistle, when the gateman, an employé of the defendant, upon the order of the weighmaster, another employé, would open the gate and let it in. The defendant had no regular watchman to look out for the approach of engines and trains, but the weighmaster gave the warning to workmen in the yard when any was given. It did not appear who opened the gate for the engine when it returned and ran against the cable. The gateman let it in that morning, and after it went out the first time he closed the gate, but left it unlocked, as it was the custom to do during the day. The engine usually came into the yard only once during the day, and rarely returned in the morning.

Defendant's superintendent instructed the foreman of the gang charged with the work, in the presence of deceased, while the engine was in the yard, not to go to work upon the cable, and not to go upon the platform until the engine had left the yard, and the foreman waited until the engine left the yard and the gate had been closed before he commenced work or went upon the platform. It seems that upon its return into the yard the engine gave no signal. The foreman under whose direction the deceased was working had no power to employ or discharge the men under his supervision. He was simply in charge of the particular work. At the time of the accident some of the men in the gang were at work, and others were standing around looking on, but none was down on the track keeping a lookout for engines. There were enough men to have spared one for this purpose.

The deceased and the plaintiff were married April 27, 1898. They had no children. He was receiving \$1.25 a day. At the time of his death he was 28 years old, and in good health. Plaintiff was 30 years of age at the time of the trial, and in good health. She testified that the plaintiff gave all his earnings to her. It was not shown that his mother received anything. Our conclusion is that the death of the plaintiff's husband was caused by the negligence of the defendant, without fault on his part, and that she sustained damages to the amount of the verdict.

1. The first error assigned by the defendant is that the court erred in permitting the plaintiff, as the widow of the deceased, to maintain the suit in her sole name, and for her exclusive benefit, and against Fannie Burns, the mother of the deceased, as a party defendant. The statute provides that the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death has been negligently caused, and that it may be brought by all of the parties entitled to damages, or by any one or more of them for the benefit of all. Rev. St. arts. 3021, 3022. And the damages recovered may be apportioned

by the jury in their verdict. Article 3027. Even if the mother, Fannie Burns, should not be concluded by the former judgment, from which she did not appeal, as we think may be the case, we think that, as she was before the court, with the opportunity to assert her right to a part of the recovery, and the jury having found that she was not entitled to any of it, it would not be error requiring a reversal of the judgment for the plaintiff to fail to join her in the petition as a plaintiff, or to aver her refusal to join, especially since the petition alleges that she is the mother of the deceased, and asks that the damages be apportioned among the parties entitled thereto, as shall appear upon the trial. The petition having alleged the facts necessary to enable the jury to apportion the damages, and they having heard the evidence and awarded the full amount thereof to the plaintiff, while the only other person who could claim any benefit therein was before the court, we cannot think that the error, if any, in not making the mother a party plaintiff, was material.

2. It is contended by the second assignment of error that the judgment should be reversed because the uncontradicted testimony shows that the defendant used due care to furnish a safe place for the deceased to work, and that there was no evidence to justify a finding in plaintiff's favor under the issues raised by the pleading and submitted in the charge. The issue was properly and correctly submitted to the jury. There was sufficient evidence to require the submission of the issue of whether the defendant should not have had a watchman to warn the deceased of the approach of the engine, or to keep some one at the gate. It was shown to have depended upon the custom of the engineer to sound four blasts of the whistle whenever an engine was about to enter the yard, and that it had a man whose duty it was to open the gate, and one to let the engine crew know what work was required to be done; but there was no one whose duty it was to warn such of the employés as might be engaged in work, as the deceased was, attended with danger from the approach of an engine along the track between the seed houses. Although the gate may have been closed, it was left unlocked, and the evidence shows that the gateman was not at the gate when the engine returned, and did not know who opened it. The rule for the protection of the deceased seems to have been no more than a general rule to keep the gate closed, though unlocked, and to have a certain employé to open it when the whistle sounded, which did not require even the giving of notice to employés working in the yard and likely to be put in danger. The occasion required a special watchman, and the evidence required the submission of the issue, and was amply sufficient to support the verdict. The evidence also showed that the defendant failed to keep a watchman at the gate, and

inferentially that it failed to keep the gate closed, because, when the engine entered the second time, it did so without the knowledge of any employé of the defendant, and without giving any signal for the gate to be opened.

3. It may be true that the persons in charge of the engine were negligent in entering the yard without giving the customary signal, and in running against the cable, which was in plain view, but that was not the direct and proximate cause of Ben Burns' death. It was concurrent negligence with that of the defendant. What happened was just what might have been reasonably anticipated by the defendant if the gate was left unguarded and an engine was allowed to enter the yard and approach the cable without warning. The third assignment of error, that the negligence of the Texas & New Orleans Railroad was the direct and proximate cause of the accident, is therefore overruled.

4. The fourth and fifth assignments of error are to the effect that a peremptory instruction should have been given to the jury to return a verdict in favor of the defendant, and that the plaintiff failed to show by any evidence that the defendant failed in any of the particulars alleged to use ordinary care to furnish the deceased a reasonably safe place to work. The disposition made of the second assignment, and of the third, and of those noticed further on, renders it unnecessary to give further attention to these.

5. The refusal of the court is complained of under the sixth assignment to give special charge No. 3, requested by the defendant, requiring the jury to return a verdict in its favor if they should believe that an ordinarily prudent man would not under the conditions then existing have stationed a lookout to watch for approaching engines or cars. The first and tenth paragraphs of the general charge, and special charge No. 2, given at the request of the defendant, were sufficient to present this issue, and the failure to give the special instruction No. 3 was not error, even if it should be conceded that it was applicable to the facts of the case; and it was not applicable, because the evidence showed that the gate watchman was not present when the engine returned, and that the gate had been left unlocked. Special charge No. 7, the refusal of which is complained of under the seventh assignment of error, was properly refused, because it is upon the weight of the evidence, and the facts grouped therein do not present a defense to the plaintiff's cause of action.

6. The submission of the measure of damages is made the subject of the eighth and ninth assignments, the charge given by the court and the action of the court in refusing special instruction No. 9, requested by the defendant, having been assigned as error. The charge given is correct, but not so full as it might have been. But while the requested instruction is also correct, and presents the measure of damages more fully

than the charge given, yet the amount of the verdict does not suggest any injury that the defendant is likely to have received from the failure to give it also.

7. There was no error requiring a reversal of the judgment in the court's definition of ordinary care, or its refusal to give to the jury special charge No. 4, requested by the defendant. The set definition given by the court is not positive error, being not worse than a definition that does not define; but in other portions of the charge ordinary care is more fully defined, and is defined according to the rule requested by the defendant. The charge given on proximate result was a sufficiently correct statement of the law. Hence we think that the tenth, eleventh, and twelfth assignments of error present no ground for the reversal of the judgment of the court below.

8. It is quite clear to our minds that the question of an assumption of the risk that resulted in the death of Ben Burns does not arise under the facts of the case. There was no error in the refusal of the court to give the jury special charge No. 6, by which the defendant sought to submit to them the question of assumed risk.

9. The doctrine of fellow servant does not apply to the facts. It was the duty of the defendant to use due care in providing a safe place for the deceased to work, and any person to whom any duty in this respect should be intrusted by the defendant would, for that purpose, be its agent, although in the performance of other duties he might be the fellow servant of the deceased. The court therefore properly refused to give the jury in charge special instructions Nos. 5 and 8, set out in the fourteenth and fifteenth assignments of error.

10. There is no error in the charge of the court in defining the duty of the defendant to furnish a safe place for the deceased to work. It is apparent from the charge that it was only required to exercise ordinary care to do so. The sixteenth assignment of error is overruled. The judgment of the court below is affirmed.

Affirmed.

EL PASO & N. W. RY. CO. et al. v. McCOMAS.

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

SERVANT-INJURIES—DEFECTIVELY LOADED CAR—DUTY OF MASTER—ASSUMPTION OF RISK—NEGLIGENCE—PROXIMATE CAUSE—WHAT LAW GOVERNS—EVIDENCE—ISSUES FOR JURY.

1. When there is no evidence to support an issue raised by the pleadings, it is error to submit such issue to the jury.

2. Testimony that after an accident to a servant, alleged to be owing in part to the use of a car with defective wheels, the car was placed on a switch at a certain point, where it remained for three days, and that in going to and from such point the car was jolting, taken in connec-

tion with evidence that wheels worn flat from the sliding resulting from the application of brakes will cause a car to jolt, establishes only the fact of jolting, but does not prove the cause of it, or warrant the court in submitting the issue whether the wheels were defective.

3. Plaintiff, while riding in a box car assigned to the use of the bridge gang of which he was a member, was struck and injured by a piece of lumber, which fell off of an improperly loaded flat car in front and was precipitated into the box car. *Held* that, though plaintiff assisted in loading the flat car, it was loaded under the supervision of the foreman of the bridge gang, whose duty it was to see that it was properly loaded before it was placed in the train, and plaintiff had the right to assume that the foreman had discharged his duty.

4. While riding in a car, an employé was struck and injured by a piece of lumber falling from another car, alleged to have been negligently loaded. The car was loaded in New Mexico, but the injury occurred in Texas. *Held*, that the laws of Texas would determine defendant's liability.

5. Where a flat car is negligently loaded with lumber and placed in a train for transportation, and such negligence is the proximate cause of injury to an employé, the railroad's liability for the consequences of the injury is established; and it is not essential to plaintiff's recovery that defendant should have anticipated that a piece of lumber would fall from the car, and be precipitated into the car on which plaintiff was riding, and cause the injury.

Appeal from district court, El Paso county; J. M. Goggin, Judge.

Action by S. S. McComas against the El Paso & Northwestern Railway Company and the El Paso & Northeastern Railroad Company. Judgment for plaintiff, and defendants appeal. Reversed.

The appellee sued appellants for \$20,000 damages for personal injuries alleged to have been inflicted by the latter's negligence. He recovered judgment for \$5,000, from which this appeal is prosecuted. After alleging that appellant companies were engaged together in operating a continuous line of railway, extending from El Paso, Tex., to Alamogordo, N. M., the appellee alleges, in substance, as his cause of action against them, that on the 17th day of July, 1900, he was in their employment as a bridge carpenter, and one of a bridge gang whose duties were to construct and repair bridges; that on said day he, with the other members of the bridge gang, left Alamogordo for Ft. Bliss, Tex., under defendants' instructions, over their road, on a mixed train, which carried both freight and passengers, riding in a box car assigned by defendants to them for transportation and to keep their provisions and bedding, etc.; that in front of this car there was a flat car, carrying material, consisting of lumber, bolts, nails, etc., for work to be done on defendants' bridges near Ft. Bliss; that the flat car was negligently received and kept by the conductor and other agents and employes of defendants in the train in an unsafe condition, which caused part of the lumber to fall therefrom, and that the lumber was carried thereon in a negligently and dangerously unsafe condi-

tion; that the flat car was out of repair, and had defective wheels, which defective and bad condition caused jolting and shaking of said car and lumber loaded thereon, greatly more than would have occurred had said car been in reasonably safe condition; that the defective and unsafe condition of said car, as well as the unfastened condition of said lumber, was known to defendants, or by reasonable diligence might have been known to them and their employes operating said train, though such bad conditions of the car and lumber, and the danger thereof, were unknown to plaintiff; that it was wholly through the negligence of defendants, and without fault or negligence of his, that the lumber struck and injured plaintiff, afterwards alleged in his petition; that while plaintiff was sitting opposite the open side door of the car in which he was riding, and the train was nearing Ft. Bliss, the lumber on the flat car was so shaken and jolted by reason of the aforesaid negligence that a piece of it was precipitated from the car, one end of which struck the ground and the other entered the door of the car where plaintiff was, and with great force struck and knocked him down insensible on the floor, broke and strained his jaw, knocked out his teeth with a large piece of jawbone, rendering his jaw shattered and still; that the blow and shock injured his spine, loins, legs, arms, and chest, causing debilitation and pain in all these parts to plaintiff—to his damage, etc. The defendants answered by a general denial and pleas of contributory negligence and assumed risk.

Clark, Fall, Hawkins & Franklin, for appellants. Beall & Kemp, and P. H. Clark, for appellee.

NEILL, J. (after stating the facts). The undisputed evidence shows that the appellee, who was employed as a bridge carpenter by the appellants, was, while riding in a box car assigned to the use of the bridge gang, of which he was a member, knocked down and injured by a piece of timber thrown with great force into the car through the open door in its side, when he was sitting in front of it. While it is contended by appellants that the evidence is not sufficient to show that the piece of timber inflicting the injury fell and was thrown from a flat car of the train in front of the box car in which appellee was sitting, yet in view of the testimony it is practically impossible to conceive of its having come from anywhere else, or to have been thrown into the box car in any other way than by falling from the flat car in front. For the purpose of this appeal, we will take it as sufficiently proven that the piece of timber fell and was precipitated from such flat car into the car on which the appellee was riding. The injury to appellee being shown to have happened in this way, the main issues of fact for the jury to deter-

mine from the evidence were whether appellants committed either or both of the acts charged by the appellee in his petition to be negligence, and, if it did, whether such acts, operating together or separately, were negligence such as proximately caused the injuries.

The acts of negligence averred are (1) appellants' failure to fasten and secure the lumber on the flat car, and in placing and operating the flat car in the train without so doing; and (2) the flat car upon which the lumber was so loaded was out of repair and had defective wheels, causing the car and lumber thereon to jolt and shake more than it would, had it been in a reasonably safe condition. That the car was placed and operated in the train with the lumber on it unfastened may be regarded as sufficiently shown by the evidence; but upon the issue as to whether this constituted negligence the testimony is conflicting. If, however, it should be held negligence, appellants' contention is that the evidence shows that the car was loaded by the bridge gang, whose duty it was to do it properly, and, if they failed to do so, it was their fault, and not appellants' negligence, and that appellee was present and assisted the gang in loading the car with the lumber, knew that it was unfastened, and, if the way it was loaded was negligence, he was chargeable with and responsible for it. There is no evidence that we can find in the record that tends in the least to show that the car upon which the lumber was loaded was either out of repair or had defective wheels.

In its charge the court instructed the jury that if they believed, from the evidence, that the lumber was unsafely and negligently loaded upon the flat car, and that a wheel or wheels of said car were flat or defective, and a piece of lumber was thrown or fell from said car, and struck and injured the plaintiff, and that under all the surrounding facts and circumstances it was negligence on the part of the defendants, or either of them, to operate said flat car so unsafely loaded, and with its wheel or wheels in such defective and unsafe condition, and that such negligence, if any, was the proximate cause of said piece of timber being thrown from or falling from said car and striking plaintiff, then to find for plaintiff, unless they should find he assumed the risk. This part of the charge is quoted in view of appellants' fourth assignment of error, which complains of the court's refusal to give the following special charge to the jury: "You are instructed that there is not sufficient evidence before you to show that the flat car mentioned in the evidence, from which it is charged the piece of lumber came which struck and injured plaintiff, if you believe from the evidence he was struck and injured, was out of repair, or that the wheels thereof were in a defective condition, and you are instructed that you cannot find for

plaintiff on this issue." When there is no evidence to support an issue raised by the pleadings, it is error to submit such an issue. *Railway v. Tierney*, 72 Tex. 312, 12 S. W. 586. It was the evident purpose of appellants' counsel, in asking the special charge, to have the court correct such an error, appearing in that part of its charge above recited, by withdrawing an issue made by appellee's pleadings, upon which there was no evidence, from the jury.

As we have stated, we have been unable to find any evidence in the record tending to show that the flat car in which the lumber was loaded had defective wheels. It is insisted by appellee that the testimony to the effect that, after the accident, the car was placed on a switch at Ft. Bliss, where it remained about three days, and that when it was going into El Paso from Ft. Bliss, and returning from there to Alamogordo, a witness testified that it was jolting, is, when taken in connection with evidence that wheels worn flat from the sliding caused by the application of brakes will cause the car to jolt, evidence of such defects. This testimony established only the fact of the jolting of the car on those trips, but did not prove the cause of the jolting, or tend to show that the wheels were worn or in any way defective, or what was the cause of such jolting. *Railway v. Kizziah*, 86 Tex. 88, 23 S. W. 578. We must, therefore, conclude that the court erred in the part of its charge referred to and in not giving the special charge for the purpose of correcting such error.

While contributory negligence was pleaded by the defendants, and there was evidence introduced upon such issue, the court, though requested by appellants to give a special charge upon it, failed in its charge to submit it to the jury; for it cannot be said that the submission of the question of assumed risk was a submission of the one of contributory negligence. We do not think, however, the special charge asked by appellants, the refusal of which is made the basis of the first assignment of error, is a correct enunciation of the law arising from the pleadings and evidence upon this issue. Though the appellee may have assisted in loading the car, or have been present when it was done, he may not have known that it was improperly loaded (if it was so loaded), have known the danger, or have reasonably anticipated its occurrence in consequence of the way the car was loaded. It was loaded under the direction and supervision of the foreman of the bridge gang, appellants' vice principal whose duty it was to see that it was properly loaded before it was placed in the train; and, in the absence of knowledge to the contrary, appellee had the right to assume and act upon the assumption that appellants, through their vice principals, had discharged this duty. The special charge was defective (1) in that it required

the jury to find appellee guilty of contributory negligence as a matter of law, if they found that he assisted in loading the car, and that by reason of the improper loading a piece of lumber fell from the car, and struck and injured him, ignoring the question of his knowledge of the defective loading or of the danger incident to it; and (2) in ignoring appellants' duty to use reasonable diligence to properly load the car, and to see it was so loaded, when placed in the train for transportation, as not to endanger its employés. *Railway v. Nass* (Tex. Civ. App.) 57 S. W. 910; *Railway v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Railway v. Hughes* (Tex. Civ. App.) 54 S. W. 264; *Railway v. Smith* (Tex. Civ. App.) 57 S. W. 1001. There is no distinction between the preparation and inspection of a car itself as a fit instrument to be placed in a train, and the preparation and inspection of a loaded car to be placed in the train for transportation. *A. T. & S. F. Ry. Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104. Though the special charge was defective, it suggested an issue made by the pleadings and evidence, not charged upon, that appellants were entitled to have submitted to the jury.

There was no error in the court's refusing to allow appellants to prove that under the laws of New Mexico they would not be liable, if the injury sustained by appellee was caused by the acts of his fellow servants. The injury occurred in Texas, and, if it was caused by the negligence alleged, the laws of this state, and not of New Mexico, would determine the liability of appellants for the injury. If the flat car was negligently loaded and placed in the train for transportation, and such negligence was the proximate cause of appellee's injury, it is not essential to his recovery that appellants should anticipate that a piece of lumber would fall from the car, and be precipitated into the one where he was riding, and thereby cause his injury. If its negligence was the proximate cause, its liability for the consequences of the injury is established.

For reason of the errors indicated, the judgment of the district court is reversed, and the cause remanded.

LANE v. DOWD.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

JOINDER OF CAUSES OF ACTION—FORM OF JUDGMENT—HARMLESS ERROR—RECITAL IN JUDGMENT—INTRODUCTION OF EVIDENCE.

1. Under Rev. St. 1899, § 593, authorizing plaintiff to unite in the same petition several causes of action, whether they be such as have been heretofore denominated "legal" or "equitable," or both, where they arise out of transactions connected with the same subject-matter, there may be united a count in ejectment and a count under section 650, alleging that plaintiff is the owner of the land in dispute and that de-

fendant makes some claim to it, and praying the court to ascertain and declare the title.

2. Even if the judgment should have been in the form of one on demurrer, instead of by default, this is harmless; it having been rendered a month after the overruling of the demurrer to the petition, during which no steps to answer were taken, and it not being claimed that any rights in respect to answering were denied.

3. A recital in the judgment that "proof was adduced" is conclusive, on appeal, that evidence was introduced.

Appeal from circuit court, Phelps county; L. B. Woodsdale, Judge.

Action by T. Lane against F. E. Dowd. Judgment for plaintiff. Defendant appeals. Affirmed.

This was an action in ejectment. Judgment was rendered in the trial court for the respondent. From this judgment this appeal is prosecuted. The original petition in this cause was filed on the 8th of February, 1899. As the only question involved in this controversy is in respect to the pleadings, we here insert them.

Omitting the caption of the original petition, it is as follows, to wit:

"Plaintiff for cause of action states that on the 1st day of October, 1898, he was the owner and entitled to the possession of the following described real estate, situate, lying, and being in the county of Phelps, Missouri, to wit, the southwest quarter, east half of lot one, northwest quarter, west half of lot one, northeast quarter, and west half of southeast quarter, of section five, and the southeast quarter and south half of southwest quarter of section six, all in township thirty-five, range eight west of the fifth principal meridian; and, being so entitled to the possession thereof, the defendant, on the 2d day of October, entered into the premises aforesaid, and unlawfully withholds the possession thereof from this plaintiff, to his damage in the sum of two hundred dollars. Plaintiff further states that the monthly value of the rents and profits of said premises is ten dollars. Wherefore plaintiff prays judgment against the defendant for the possession of said premises, and two hundred dollars damage for the unlawful withholding of the possession of the said premises by said defendant from plaintiff, and ten dollars per month from the rendition of judgment until possession is restored to plaintiff, and for all costs.

"Thos. M. & Cyrus H. Jones,

"Attorneys for Plaintiff."

On said petition summons was issued by the said clerk of the circuit court, and placed in the hands of the sheriff of Phelps county, who made return thereon as follows:

"Executed the within writ in the county of Phelps and state of Missouri, on the 13th day of February, 1899, by delivering to F. E. Dowd a copy of the writ, together with the petition and summons.

"J. C. Harvey,

"Sheriff of Phelps County, Missouri."

On the 29th day of March, 1899, plaintiff filed in the circuit court of Phelps county,

during its session, the following amended petition, to wit:

"Plaintiff for amended petition states that on the 1st day of October, 1898, he was the owner and entitled to the possession of the following described real estate, situated, lying, and being in the county of Phelps, Missouri, to wit: The southwest quarter, east half of lot one, northwest quarter, west half of lot one, northeast quarter, and west half of southeast quarter, of section five, and the southeast quarter and south half of southwest quarter of section six, all in township thirty-five, range eight west of the fifth principal meridian; and, being so entitled to the possession thereof, the defendant, on the 2d day of October, entered the premises aforesaid, and unlawfully withholds the possession thereof from this plaintiff, to his damage in the sum of two hundred dollars. Plaintiff further states that the value of the monthly rents and profits of said premises is ten dollars. Wherefore plaintiff prays judgment against defendant for the possession of said premises, and two hundred dollars damage for the unlawful withholding of possession of said premises by said defendant from plaintiff, and ten dollars per month from the rendition of judgment until possession is restored to plaintiff.

"Second. Plaintiff for another cause of action states that he is the owner of the following described real estate, situate, lying, and being in the county of Phelps, state of Missouri, to wit: The southwest quarter, east half of lot one, northwest quarter, west half of lot one, northeast quarter, and west half southeast quarter, of section five, and southeast quarter and south half of southwest quarter of section six, all in township thirty-five, range eight west of the fifth principal meridian. Plaintiff further states that the defendant is claiming title to said real estate as aforesaid, and is claiming an estate in said property. Wherefore plaintiff prays the court to ascertain, determine, and adjudge plaintiff's title and interest in said real estate, and adjudge the plaintiff title thereto, and for all proper relief.

"Thos. M. & Cyrus H. Jones,
"Attorneys for Plaintiff."

Afterwards, on the 18th day of September, 1899, being the first day of the regular September term of the circuit court of Phelps county, the defendant filed in this cause the following demurrer, to wit:

"Now comes the defendant, and demurs to the plaintiff's amended petition, because the second count, since the filing of the original petition, has been misjoined and improperly united therewith, in this: The original petition is an action of ejectment for the recovery of real property, with damages and rents and profits, in which the right of possession of real estate is the sole issue, and the second count in the amended petition raises an issue of title solely, independent of any right

of possession of the real estate described, and belongs to a different class of actions.

"A. Corse,

"Attorney for Defendant."

Said demurrer, upon being taken up and argued, was by the court overruled. Whereupon, on the 25th day of October, 1899, the court entered its judgment as follows, to wit:

"Now, at this day, this cause coming on to be heard, the plaintiff appears by his counsel and announces ready for trial; but the defendant, although duly summoned with process more than thirty days before the first day of this term of court, comes not, but makes default. Whereupon, on motion of plaintiff, by his attorney, the petition herein is taken against the plaintiff as confessed. Wherefore plaintiff, by his attorney, waives a jury, and submits this cause to the court upon the pleadings and proof adduced; and the court, having duly heard and considered the same, finds for plaintiff and assesses his damages one cent. It is therefore considered by the court that the plaintiff recover of defendant the possession of the lands in the petition described as follows, to wit: The southwest quarter, west half of lot one, northeast quarter, and west half of southeast quarter, of section five, and the southeast quarter and the south half of southwest quarter of section six, all in township thirty-five, range eight west of the fifth principal meridian, together with one cent for his damages, and for all costs of plaintiff laid out and expended in this case; and the court doth further order that an execution issue to restore to the said plaintiff the possession of said lands and tenements aforesaid, and for his damage as aforesaid, and for all costs in this behalf laid out and expended."

Defendant filed his motion in arrest of judgment, which was by the court overruled, and this cause is brought here by appeal.

Crites & Garrison, for appellant. Thos. M. & Cyrus H. Jones, for respondent.

FOX, J. (after stating the facts). Appellant urges very earnestly: First, that the demurrer filed to the amended petition should have been sustained, for the reason that it improperly joins two causes of action of distinct classes; secondly, that the judgment is erroneous, because it purports to be a judgment by default, when it should have been a judgment upon the demurrer; thirdly, it is insisted that the court rendered the judgment without any evidence being introduced to support it.

That the plaintiff had the right to file an amended petition is undisputed, in view of the provisions of section 661, Rev. St. 1899, which substantially provides that the petition may be amended without cost at any time before the answer or reply is filed. This section, of course, contemplates that the amendment is one that is authorized under

the statute. There is a long and unbroken line of decisions drawing the distinction as to the method of taking advantage of a defective petition. If there are two causes of action that can be united in one petition, but are improperly joined in one count, this defect is reached by a motion, before the trial is begun, to elect upon which cause of action the plaintiff will proceed. If the petition contains two causes of action that are of such character that they cannot legally be joined in one action, then demurrer is the proper pleading to reach the irregularity. This is what the cases cited by appellant hold. Hence, as there is no dispute on that proposition, it is unnecessary to further refer to those cases.

There is no question but what the appellant filed the appropriate pleading to reach the defect, if one in fact existed; but the vital point upon the first contention is, are the two causes of action united in separate counts in the same petition of such a character that, under the law, they cannot be united in the same petition? Section 593, Rev. St. 1899, under its first subdivision, in treating of the nature of the causes of action that may be united, provides: "The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transactions or transaction connected with the same subject-matter." It will be observed that the causes of action under this provision need not necessarily arise out of the same transaction; but a different transaction, if connected with the same subject of the action, would fall within the provision of this section of the statute. The obvious purpose of the Code in making this provision was to avoid multiplicity of suits, where the same parties and subject-matter were to be dealt with.

Let us apply this statute to the case before us. The amended petition in the first count is an ordinary action, in usual form, in ejectment. The second count in the petition is a cause of action based upon section 650, Rev. St. 1899, alleging substantially that the plaintiff is the owner of the land in dispute and that defendant makes some claim to it, and praying the court to ascertain the title and declare it in its decree. The same party defendant and the same subject-matter are before the court. Both of these actions are statutory. We see no legal reason why they cannot be united in the same petition. While there is a legal fiction that ejectment is a possessory action, yet we know in reality that in every ejectment suit we try title. The plaintiff must recover upon the strength of his legal title. But, aside from that, the subject-matter of the action is "the land," and it is involved in both counts of the petition; and the mere fact that one of the counts is a mere possessory action, and the other involves the title, can-

not change the proper application of this statute. To say that plaintiff, where the same defendant was claiming the land, must be first compelled to bring his suit for possession, and then bring a separate suit under the act of 1897 to declare his title, the same party and the same subject-matter being involved, would be requiring the plaintiff to do just what the statute contemplated remedying, and what the statute intended that he should not be required to do. The case of *Morrison v. Herrington*, 120 Mo. 665, 25 S. W. 568, is decisive of this question. In that case, the original petition was an ordinary action of ejectment. An amended petition was filed, and an additional count was inserted in the petition, asking the court to cancel certain deeds to the land in controversy. This was a much greater departure from the original cause of action than the case at bar. The causes of action were different classes—one at law, the other in equity; but under the broad provisions of our statute, the same defendant and the same subject-matter being dealt with, the court, speaking through Black, J., very correctly held that they could be united. With these views, this point must be ruled against the appellant.

As to the second contention, plaintiff urges that the form of the judgment is erroneous and should be reversed. Upon this point of contention, we will say that the record discloses that the demurrer was overruled on the 23d of September, 1899. The record is silent as to any further action of the court until the 25th of October, 1899, a month or more after the demurrer was overruled. No leave taken to answer, and, in fact, no requests are made of the court upon its action overruling the demurrer. This silence must be construed as a refusal to plead further. It is not pretended, in the complaints of appellant, that he was denied any rights in this respect; but he insists that the judgment should have been technically in the form of a judgment upon demurrer. While it may be conceded, for the purposes of this case, that the form of the judgment is somewhat irregular, yet does the judgment, if you want to so name it, by default, affect the appellant in any way different, so far as the results are concerned, than a formal judgment upon the demurrer? The defendant refused to answer. In effect, he was in default. The result of the judgment is the same, whether in the form as rendered or in the form contended for by appellant. The doctrine as to judgments was correctly announced in the cases of *Trumbo v. Flournoy*, 77 Mo. App. 324, and *Farley Bros. v. Cammann*, 43 Mo. App. 168—"that judgments are now tested by matters of substance, rather than by the measure of any particular draft or form." The error in this contention complained of does not justify the reversal of this judgment.

This leads us to the last point or error in-

sisted upon by the appellant—"that the record does not disclose any evidence to support the judgment." This case was never tried upon its merits. It was no part of the duty of the respondent to preserve in the bill of exceptions the evidence introduced. If the evidence was insufficient, or no evidence at all offered, it was incumbent upon the appellant to preserve this error by proper bill of exceptions. The judgment in this cause does disclose that evidence was introduced. It recites, as to the evidence: "Wherefore plaintiff, by his attorney, waives a jury, and submits this cause to the court upon the pleadings and proof adduced; and the court, having duly heard and considered the same," proceeds to render the other formal parts of the judgment. It will be observed that this judgment recites the fact that "proof was adduced." This must be taken as conclusive that evidence was introduced, and the contention upon this point is not well taken.

Finding no error in the action of the trial court which warrants the disturbance of this judgment, it is ordered that the judgment be affirmed. All concur.

**WERTHEIMER-SWARTS SHOE CO. v.
UNITED STATES CASUALTY CO.**

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

INSURANCE — AUTOMATIC SPRINKLERS — POLICY — CONSTRUCTION — NEGLIGENCE — INSTRUCTIONS — APPEAL — RIGHT TO ALLEGED ERROR — VERDICT — CONCLUSIVENESS.

1. A clause in a policy insuring against accidental discharge of an automatic sprinkler, providing that assured shall immediately notify insurer of any known defect which shall render the sprinkler system more than usually hazardous, and shall cause such defect to be immediately repaired, applies to defects in the sprinkling machine only, and has no reference to defects in any of the other appliances in assured's building.

2. Where a servant whose duty it was to close iron shutters on the building placed the fastening rods over the pipes of an automatic sprinkler, breaking them, but it was not alleged that he knew that the consequence of so doing might be the discharge of the machine, such act was not the willful act of assured, within a policy insuring against the accidental discharge of such apparatus, providing that it did not cover loss resulting from or caused by the willful act of assured.

3. A clause in a policy against the accidental discharge of an automatic sprinkler, providing that assured should not be liable for loss caused by assured's neglect to use all reasonable means to preserve the property insured thereunder, referred to means to be used after the accidental discharge of the machine, and had no reference to the care required to prevent the accident.

4. A policy against the accidental discharge of an automatic sprinkler provided that, in the event of loss, assured should immediately protect the property from further damage, separate the damaged property, put it in the best possible order, and make a complete inventory. A subsequent clause declared that the policy did not cover loss caused by assured's neglect to use all reasonable means to preserve the prop-

erty insured thereunder. *Held*, that the subsequent provision excepted such avoidable loss from the policy, but did not exempt the insurer from a loss caused by the negligence of one of insured's servants.

5. Where the evidence is conflicting, a verdict thereon is conclusive.

6. Where, in an action on a policy insuring against the accidental discharge of an automatic sprinkler, the court, in certain instructions, erroneously adopted defendant's construction of clauses in the policy, and such instructions were more favorable to defendant than the law warranted, defendant cannot object to such instructions on appeal.

Appeal from St. Louis circuit court; Jas. E. Withrow, Judge.

Action by the Wertheimer-Swarts Shoe Company against the United States Casualty Company. From an order granting defendant a new trial, plaintiff appeals. Reversed.

This is a suit on a policy insuring against the accidental discharge of an automatic sprinkling apparatus, designed as a fire extinguisher, erected in plaintiff's establishment. The terms of the policy covered loss or damage, to the limit of \$7,500, to property in plaintiff's shoe factory, caused "by the accidental discharge or leakage of water from the automatic sprinkler system" in plaintiff's place of business. The petition set out the terms of the policy, and averred that plaintiff's goods were damaged, to the amount named, by the accidental discharge of the apparatus, etc. The answer admitted the issuance of the policy, denied all other averments, and set up several affirmative defenses, founded on certain claims in the policy therein pointed out, viz.: Clause 7, which requires the assured to immediately notify the company, in writing, of any known defect in the apparatus, rendering it more than usually hazardous, to cause it to be repaired, and in the meantime to use such additional precaution as safety required. Then it stated that a defect known to plaintiff existed at the time of the accident, and had existed for a long time before, which defect consisted in hooks attached to iron shutters in the building, that were suffered to become worn or bent so that when the shutters were closed the hooks so adjusted themselves, or were so adjusted by plaintiff or its servant, as to extend over and catch upon a pipe in the sprinkler machine, and thereby render the system unsafe and more than usually hazardous, for that, when a force would be applied to the shutter, it was liable to break the pipe; that plaintiff failed to notify defendant of this defect, failed to repair it, and failed to use additional precautions in regard thereto. Also clause 9, which declares that the policy does not cover loss resulting, among other causes, from "the willful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder, * * * nor from any loss or damage caused by an employé of the assured under twelve years of age." Then the answer

states that the damage resulted from the willful act of the plaintiff, in this: that on the date of the alleged injury "certain large and heavy iron fire shutters at one of the windows in the sixth story of the building occupied by plaintiff, and mentioned in said policy of insurance, were partly, but not tightly, closed by the servants and agents of the plaintiff, and certain hooks or rods attached to said shutters, and intended to be fastened in the sill of said window in order to form brace rods to prevent the closing of said shutters when opened, were by the servants, agents, and employes of the plaintiff voluntarily, intentionally, and deliberately fastened to, or hooked around and over, a pipe forming part of said automatic sprinkler system, said pipe being located underneath a workbench in said sixth story, near to the said window, and at about the height of the said window sill; that, because of being so fastened to the sprinkler pipe aforesaid by means of said brace rods, the movement or swaying of one or both of the said iron shutters produced a pulling strain on the sprinkler pipe, and by said strain the pipe was bent and broken, and water was discharged at the point of the breakage so caused by the willful act of the plaintiff's servants and employes. And defendant says that said discharge of water would not have occurred, nor would the alleged injury of plaintiff's goods have ensued, except for the aforesaid voluntary and willful conduct of the servants and employes of the plaintiff, and that by the said conduct of its servants and employes the plaintiff's goods in the premises aforesaid were by the plaintiff voluntarily exposed to great, unnecessary, and needless danger, and to a risk not within the contemplation of said policy of insurance, and not insured against by this defendant, and that the plaintiff's loss resulted from its own neglect to use all reasonable means to save and protect the insured property, in this, to wit: that the window shutters above mentioned were provided with certain devices for closing and fastening the same, which plaintiff suffered to become defective, so that they would not close as they were designed to do, and that in consequence the servants of plaintiff, the day before the accident, being unable to fold the rods in their proper places, allowed them to project into the room, and either fastened them on the pipe of the sprinkler, or left them where they were liable to fall on it, and the consequence was that on the next day (Sunday), when everybody was absent from the premises, the iron window shutters swayed, and put a strain on the pipe, through one of the rods, and thereby broke the pipe, and the apparatus was discharged; that plaintiff's servants had, for a considerable time prior to the injury complained of, fastened the rods to the pipe in that way, and plaintiff knew it or would have known it if it had exercised ordinary care; and that it had never instructed its servants not to do

so." A further defense set up in the answer was that it was shown by a schedule attached to the policy that the value of the property covered was \$75,000, and the policy provided that if, at the date of an accident thereunder, the value of the property should exceed that amount, the defendant should not be liable "for more than such proportion of the aggregate liability hereunder than the cash value so stated in said schedule shall bear to the total cash value of such property at the time of said loss," and the answer averred that the value of the property at the time of the accident was \$125,000. Reply, general denial.

There is little, if any, dispute about the facts. Plaintiff's establishment, which is a shoe factory, was supplied with an automatic sprinkler. It was a device having pipes running through the factory, under the workbenches, etc., designed to discharge water into the building in case of accidental fire. It was set to discharge itself when the temperature about it should reach a given degree. But it was of such a character that it was liable to be discharged by accident, and so to flood the premises with water when there was no fire to be extinguished. It was to indemnify the plaintiff against such accidental discharge that this contract of insurance was entered into. The windows in plaintiff's factory were provided with iron shutters, for the fastening of which, when closed, there were iron bars, and for holding them open during the day there were iron brace rods, about three feet long, with hooks at the end to fit into eyelets on the sills. When the shutters were closed, the bars were designed to be thrown into a socket, to hold them, and the brace rods were to be folded on the window sills. The duty of closing these shutters and adjusting the bars and brace rods for the windows near his workbench devolved on an employe of plaintiff named Whittaker, aged 19 years, who had been in the employ of plaintiff about three weeks, and whose main work was cutting shoe tongues. There was a pipe of the sprinkler under Whittaker's workbench, but he testified that he did not know what it was, and that no one had instructed him in regard to it. There was testimony, however, tending to show that he had been instructed in the manner of closing the shutters, throwing the bars, and folding the brace rods. He testified that during the two or three weeks he was engaged in work there he had usually closed the shutters to the window in question, and, instead of folding the brace rods on the window sill, had drawn them into the room and laid them on the sprinkler pipe. At closing time on the Saturday evening before the accident, after closing the shutters to the window nearest his workbench, he experienced some difficulty in throwing the bar that was to hold them closed, so he merely closed them, and drew the brace rods into the room, and laid them on the sprinkler pipe.

He said: "I closed them as usual, putting the rods over the pipes, and I could not close the bar; and I stayed there until every body had gone, and finally could not close it, and left. Q. Did you ask anybody to help you to close it? Did you do anything about getting anybody? A. There was no one there. * * * Q. What reason did you have for going away and leaving the shutters and rods in that condition? A. I never was told any different. I thought the pipe would support the rods—hold the shutter." It appears that on the next day, Sunday, in the afternoon, when there was no one in the factory, the unfastened shutter was blown open by the wind, pulling the brace rod which was attached by its hook to the sprinkler pipe with it, breaking the pipe's connection, and causing the sprinkler to be discharged. The apparatus was supplied with an automatic fire alarm, which immediately gave notice to the fire department, and in 15 minutes the salvage corps was on hand, and the deluge was stopped. The parties selected arbitrators—one each—who agreed on the award of \$6,850.15, which amount, with interest, was the jury's assessment of damages. There was testimony tending to show that at the time of the accident the value of the property covered by the policy did not exceed \$75,000. The cause was tried by a special jury called at the instance of the defendant. The verdict was for the plaintiff for \$7,158.21. Defendant filed a motion for a new trial, which the court sustained; assigning as the ground therefor that it had given erroneous instructions. From the order granting a new trial, the plaintiff appeals. The points presented in the brief for respondent, as relating to the instructions, are that the first instruction for the plaintiff was erroneous, the modification by the court of the fourth instruction as asked by defendant was erroneous, and that the peremptory instruction for defendant should have been given. The purport of the instructions complained of will be referred to hereinafter.

Lyon & Swarts, for appellant. Percy Werner and W. E. Flisse, for respondent.

VALLIANT, J. (after stating the facts). 1. Our attention is first directed to the issue made by the pleadings. The answer sets up several affirmative defenses, founded on certain clauses in the policy making conditions in the insurance. Of these, the first pleaded is clause 7, which is: "The assured shall immediately notify the company in writing of any known defect which shall render the said sprinkler system more than usually hazardous, and he shall cause such defect to be immediately repaired, and shall in the meantime use such additional precaution as may be required for safety." Then the answer sets up as a breach of that condition the alleged defect in the fastening of these window shutters, and the manner of their use. That

defense rests on a misconception of the meaning of the policy on that point. The reference made in that clause of the policy is to a defect in the sprinkling machine, against whose accidental discharge the contract for indemnity was entered into. The clause has no reference to a defect in the fastenings of the window shutters, nor to any other contrivance in the plaintiff's establishment. Clause 9 is as follows: "(9) This policy does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam boilers or steam pipes; nor resulting from any interruption of business or stoppage of any work or plant; nor resulting from freezing; nor resulting from fire or violation of law; nor resulting from or caused by the willful act of the assured, or by the neglect of the assured to use all reasonable means to save and preserve the property insured hereunder; nor resulting from or caused by invasion, insurrection, riot, civil war or commotion or military or usurped power, or by order of any civil authority; nor resulting from or caused by earthquakes or cyclones, or by blasting or explosions of any kind; or by the fall or collapse of any building or buildings; nor does this policy cover any loss or damage to accounts, bills, or currency, deeds, evidences of debt, money, notes or other securities, curiosities, drawings, jewels, manuscripts, medals or models; nor any loss or damage caused by an employé of the assured under twelve years of age." The answer founds two defenses on this clause, viz., first, that the injury "resulted from and was caused by the willful act of the plaintiff"; second, that it was caused by plaintiff's failure to "use all reasonable means to save and preserve the property insured." In support of the charge that the injury was caused by the willful act of the plaintiff, the answer specifies that the servant, in closing those window shutters, "voluntarily, intentionally, and deliberately placed the brace rods, with their hooks, over the pipes of the sprinkler, with the result that, when the shutter swayed, the rods pulled the pipe out of connection. Even if the willful act of a servant could be construed in that connection as the willful act of the master, which is not conceded, still there is nothing in the answer to indicate that the servant intended to set the sprinkling machine in operation. The most that can be said of the conduct of the servant, as there stated, is that he was negligent. It is not stated that he knew that the consequence of putting the rods where he did would be the discharge of the machine. There is scarcely ever a negligent act that has not, somewhere in its source, some act having the appearance of having been intentionally done. The servant intentionally laid the rods on the pipe, but he did not intentionally discharge the sprinkling apparatus. A man sometimes intentionally throws down a lighted match, but it does not necessarily follow that he thereby intentionally caused

the conflagration that was started as a result of his match falling where it did the mischief. Mere negligence, even of the insured himself, does not defeat the policy. "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed, one of the principal objects of insurance against fire is to guard against the negligence of servants and others; and therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others. The law looks only at the proximate cause of the loss." 2 May on Ins. (4th Ed.) § 408. The specifications in the answer under this head are not sufficient to support the general charge that the damage complained of was the result of the willful act of the plaintiff, and therefore there is no such issue in the case. The second defense under this ninth clause is founded on the subdivision which declares that the policy does not cover loss or damage "caused by the neglect of the assured to use all reasonable means to save and preserve the property insured thereunder." In support of that charge, the answer reiterates what was before averred in regard to the defect in the shutter appliances and their uses, and that plaintiff had suffered them to become defective and remain so, and had failed to instruct its servants not to fasten the rods to the sprinkler pipes. The "reasonable means to secure and preserve the property" referred to in that subdivision of clause 9 are means to be used after the accidental discharge of the machine, to prevent greater loss than necessary. It has no reference to the care the plaintiff should take to prevent the accident. The term "to save and preserve the property insured hereunder" carries the meaning of property in peril and in need of preserving, and in the connection used, it can have no other reference than the occurrence of the peril insured against. Clause 3 of the policy is: "In the event of loss hereunder, the assured shall immediately protect the property from further damage, separate the damaged property and put it in the best possible order. He shall make a complete inventory," etc. Whilst that clause prescribes certain duties to be performed by the assured in case of loss, yet it does not in express terms except from the insurer's liability loss which might have been avoided, notwithstanding the accident, if the assured had used all reasonable means at that time to secure and preserve the property insured. The subdivision of clause 9 now under discussion supplements the requirement of clause 3, and excepts such avoidable loss from the risk taken by the insurer. If we should construe this clause to mean, as

defendant contends, that the plaintiff cannot recover for the damage to his goods if by reasonable care he could have guarded against the accident, then it takes all the life out of the policy, and renders the defendant liable only when the plaintiff and his servants have been without negligence. What indemnity would there be in an insurance policy purporting to cover property in a factory like this, where there are perhaps hundreds of servants, if the insurer were liable only in case no one was negligent? If the insurer did not intend by this policy to take the risk of negligence of the insured, why did it specify that it did not take the risk of loss by the insured's willful act? And, if it did not intend to take the risk of the negligence of plaintiff's servants over 12 years of age, why did it specify that it did not take the risk of the negligence of a servant under the age of 12 years? If there was any doubt as to this construction of the clause in question—if it was as susceptible of the construction contended for by defendant as of that above given—the rules of construction would require us to construe it most favorably to the insured, as the following cases cited in the brief of appellant hold: *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517, 518, 9 L. Ed. 512; *Louisville Underwriters v. Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399; *Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 200, 19 South. 540; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Showalter v. Ins. Co.*, 3 Pa. Super. Ct. 448; *Karow v. Continental Ins. Co.*, 57 Wis. 68, 15 N. W. 27, 46 Am. Rep. 17; *Catlin v. Springfield Ins. Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494; *Guaranty Co. v. Mechanics' Bank*, 26 C. C. A. 146, 80 Fed. 706. Clause 8 of the policy is to the effect that if, at the date of the accident, plaintiff's goods in the factory amounted in value to more than \$75,000, the defendant would be liable only for such proportion of \$7,500, the limit of liability, as \$75,000 bears to the actual value of the stock of goods at that date. The answer states that the goods at that date were of the value of \$125,000. There was substantial evidence to the effect that the goods at the date of the accident did not exceed in value \$75,000, and, although there was some evidence to the contrary, yet the question was submitted to the jury under proper instructions, and their verdict is conclusive on that point. If the above analysis of the answer is correct, there are no issues of fact in the case, except those tendered by the petition, and the general denial in the answer and the plea relating to the value of the goods. And even as to the general denial, it was almost, if not quite, overcome by the affirmative averments in the answer showing how the accident occurred.

2. The first instruction given for the plaintiff stated the contract of insurance as contained in the policy, and then stated that if

the jury believed from the evidence that the plaintiff's goods were damaged "by the accidental discharge or leakage of water from said automatic sprinkler," etc., the plaintiff was entitled to recover. "And the court further instructs the jury that by the words 'accidental discharge or leakage of water' is meant discharge or leakage of water which happened by chance or out of the ordinary course of things, and without the willful act or design of the plaintiff. And the court instructs the jury that, even though they believe from the evidence that the plaintiff's servant Whittaker was negligent in permitting the hooks attached to the shutters to extend out over or around the sprinkler pipe, yet, unless the jury believe from the evidence that said negligence caused the damage complained of, and was known to the plaintiff, or might, by the exercise of ordinary care and diligence, have been known to the plaintiff, or unless the jury believe from the evidence that the plaintiff failed to use such means to save and preserve the aforesaid property as a reasonably prudent person would have used under like circumstances and conditions, then such negligence, if any, will not defeat the right of the plaintiff to recover." The argument against this instruction is that it was improper to refer to the act of Whittaker as an act of negligence; that he was not guilty of any negligence, because he had not been properly instructed; that his act was the act of the plaintiff, and the plaintiff's act in failing to properly instruct its servant was, in the language of the policy, a failure "to use all reasonable means to save and preserve the property insured hereunder." There was evidence tending to show that this boy had been instructed to close the shutters, and how to place the brace rods. There was no evidence that any one told him not to hook them on the sprinkler pipe, and, if the plaintiff was guilty of any negligence, it was in failure to give that caution. How the plaintiff, or any one else, could have anticipated that this boy would have hooked those rods on that pipe, is not suggested by anything in the record. It seems that he had been laying the rods on the pipe for two or three weeks, but it does not appear that any one knew it. Besides, merely resting the rods on the pipe would not have produced this result, if the boy had fastened the shutter. It was the leaving of the shutter ajar and unfastened that produced the result. The boy had never left it unfastened before, and the plaintiff had no notice and no reasonable opportunity to discover that he had left it unfastened on that occasion. There is no dispute but that he was ordered to close the shutter, and was shown how to fasten it. Therefore, even if this policy excepted losses caused by the neglect of the insured, there was no evidence that the insured was guilty of any negligence which caused this loss. It was the negligence of the servant only. It is com-

plained that the instruction was erroneous in not defining the term "willful act of the plaintiff." There was no foundation in the evidence for a defense based on the theory that the injury resulted from a willful act of the plaintiff, and there was no occasion for an instruction on that point. The only error in the instruction was that it was more favorable to the defendant than it should have been, in this: that it applied the requirement "to use all reasonable means to save and preserve the property" to the plaintiff's duty in discovering how the boy was conducting the business of closing the shutter, whereas that requirement applied, as we have seen, only to avoiding unnecessary damage after an accident. But the instruction adopted the defendant's construction of the clause of the policy, and the cause was submitted to the jury on that theory, the jury found the issue for the plaintiff, and that is the end of it. The complaint as to the modification of the fourth instruction as asked by the defendant is of the same character, and follows the same line of argument, as that in relation to the first instruction for the plaintiff, which we have above discussed. The instruction, as modified and given, is as follows: "The court instructs the jury that, under the terms of its policy offered in evidence, the defendant did not insure the property of the plaintiff therein mentioned against loss or damage caused by or resulting from the neglect of the plaintiff to use all reasonable means to save and preserve such property from loss or damage by water discharged from the sprinkler system mentioned in the policy; that by the expression, 'use all reasonable means to save and preserve the property,' used in the policy, is meant that the plaintiff and its employes, while acting in the scope of their employment, should use every means that a person of ordinary prudence and caution, in a like or similar situation, would adopt in the management, operation, and control of said sprinkler system, to prevent any discharge or leakage of water therefrom, and to protect the property from the consequences of any such discharge or leak. The degree of care which the plaintiff and its employes were required to exercise under the circumstances was such care as was reasonably commensurate with the situation, and the danger of a discharge or leakage of water reasonably to be apprehended, in view of the character, location, and construction of this sprinkler system, the arrangements of the building in which it was located, the nature of the property insured, character of the business carried on by the plaintiff, the number of persons employed by it in its business conducted in this building, the nature of their duties, and the circumstances that might produce an interference on their part with this sprinkler system, together with such other circumstances as would reasonably influence and govern a person of ordinary prudence similarly cir-

cumstanced. If the jury believe from the evidence that the loss or damage here sued for was caused by or resulted from the failure or neglect of the plaintiff, or its employes acting within the scope of their employment, to use all reasonable means to save and preserve the insured property from loss or damage through the leakage or discharge of water from the aforesaid sprinkler system, as defined in this instruction, and *that such failure or neglect was known to plaintiff, or by the exercise of ordinary care and diligence might have been known to plaintiff, in time to have prevented any discharge or leakage of water from said sprinkler system*, then the jury will find in favor of the defendant." The modification is indicated by the words in italics. This instruction, like that given at the request of the plaintiff, was more favorable to the defendant than the law sanctioned. It, in effect, excepts from the risk loss occurring through the negligence of the insured or its servants. The proposition is thus expressed in the brief of defendant's learned counsel: "We submit that, under the terms of this policy, no injury can be regarded as an accidental injury which could have been avoided by reasonable effort on the part of plaintiff." To sustain that proposition would be to overthrow a well-established principal that lies at the foundation of insurance. This argument is followed up by the counsel who say that the failure of the plaintiff to instruct its employe concerning this machine is such want of care as to preclude a recovery, and, in their argument on the point of willfulness, they say that the failure to so instruct the servant took his act out of the category of negligence, and made it the willful act of the plaintiff. Counsel say that this policy differs from one of fire insurance, and is peculiar. If it is correctly interpreted by the counsel, it has very little, if any, force as insurance against an accident. The criticism of the court's modification is that it does not direct a verdict for the defendant merely because the discharge of the machine was caused by the neglect of the plaintiff or its servant, but required the jury, also, to find that that neglect was known to the plaintiff, or by the exercise of ordinary care would have been known. It is argued that an instruction that the plaintiff knew, or by the exercise of ordinary care would have known, of its own negligence, is meaningless. That criticism is founded more on the form of the expression than the substance or the meaning. No juror of ordinary intelligence would have any difficulty in understanding that it related to the plaintiff's knowledge of its servant's negligent act. There was not a particle of evidence that this plaintiff knew, or by the exercise of ordinary care could have known, of the negligent act of this servant which resulted in this catastrophe. He had for two or three weeks been in the habit of laying the brace rods on the sprinkler pipe, and it may

be argued that in that period the plaintiff had an opportunity to have discovered that practice. But no injury resulted from that practice, and it is not suggested how any injury could have resulted from it. That act became a dangerous factor in bringing about the result when it united with another act—that of leaving the shutters ajar and unfastened. That act was never done but that one time, and the evidence shows that it was unknown to plaintiff, and could not, without extraordinary watchfulness, have been discovered. The instruction should have been refused, but since the court adopted the defendant's theory as to the negligence feature of clause 9, in so far as to apply it to plaintiff's duty before the accident, the modification still left the instruction more favorable than defendant was entitled to.

On the conceded facts of the case, the plaintiff was entitled to recover, and no judgment for the defendant could have been sustained. There was no error in the instructions of which the defendant has any right to complain. The court erred in sustaining the motion for a new trial.

The judgment is reversed, and the cause remanded to the circuit court, with directions to overrule the motion for a new trial, and enter judgment in accordance with the verdict. All concur.

STATE ex rel. HAMILTON v. BROWN, Collector of Revenue.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

TAXATION—ERRONEOUS ASSESSMENT—TAX COLLECTOR—MANDAMUS.

1. Rev. St. 1890, § 8067, provides that the county clerk shall make a school tax book, subdivided according to the school districts in the county, and place in the proper subdivision a list of the names of all persons owning personal property in the district, and the school taxes assessed thereon. *Held* that, where personal property properly taxable in one school district is erroneously listed by the county clerk as taxable in another district, mandamus will not lie at action of taxpayer to compel the collector to accept the taxes for the proper district, which are at a lower rate than the tax in the district in which the property was erroneously listed, and correct the list; the collector having no authority to make any change in the list as presented to him, and the remedy of the taxpayer being merely to resist the collection of the illegal tax.

Appeal from circuit court, Lincoln county; E. M. Hughes, Judge.

Mandamus by the state, on the relation of George A. Hamilton, against Frank D. Brown, as collector of revenue, to compel respondent to accept a tax for a certain district. From a judgment denying the writ, relator appeals. Affirmed.

Martin & Woolfolk, for appellant. Geo. T. Dunn and Norton, Avery & Young, for respondent.

FOX, J. On the 9th day of December, 1898, the appellant presented his petition to the judge in chambers, and alternative writ of mandamus was issued. The petition was, in substance, as follows: Geo. A. Hamilton alleges that he was the curator of Chas. M. Hamilton, and that he (the curator) was a resident of School District No. 2, township 49, range 1 east; that he was appointed curator in 1888, and had charge of all the minor's personal property; that the same was in notes, moneys, bonds, and he (the curator) at all times kept these securities at his residence in said District No. 2, and before the year 1897 the property had always been assessed and taxes paid in School District No. 2; that in 1897 the assessor assessed the same and located it in said District No. 2, but that the county clerk, in making up the school tax book, extended it in School District No. 4, township 49, range 1 west, and delivered the same to the collector, and that the collector was then threatening to collect the taxes as shown by said school tax book as per estimate of said School District No. 4; that the rate of taxes in said District No. 2 is 40 cents, and in said District No. 4 is 100 cents, on the \$100; that the collector is in legal possession of said school tax book so erroneously made by the said county clerk, and is attempting to collect the taxes as extended by the clerk, and, if he is not prevented, he will collect the same, and pay it in the county treasury to the credit of said District No. 4. A tender is then pleaded of all the taxes shown by said tax bill except the school tax, and a tender of 40 cents on the \$100 school tax. The prayer of the petition is for a writ of mandamus against said collector commanding him to accept and receive the amount so tendered according to the estimate furnished by District No. 2, and that, when so paid, the respondent be required to pay the school tax so collected into the treasury to the credit of School District No. 2. The alternative writ was issued, and the respondent first filed a demurrer on the grounds that the statement in the petition did not warrant the relief prayed for. This was overruled, and the respondent at the time excepted. Respondent then filed his answer, which was as follows, in substance: Your respondent, for reason why he should not obey the commands of the said alternative writ, states that he is collector of Lincoln county, Mo., and that Geo. A. Hamilton is curator of the estate of Chas. M. Hamilton, a minor; that the school tax book under authority of which he is demanding and collecting these taxes was duly certified to him by the clerk of the county court of Lincoln county, Mo., and received by him; that the same charges the said Chas. M. Hamilton with the school tax as assessed in School District No. 4, township 49, range 1 west, at the rate of 100 cents on the \$100; and that this respondent has no authority to alter, or in any way change, the said school tax

book, and it is his duty as collector to collect the taxes as assessed therein. The respondent further says that this court has no jurisdiction by writ of mandamus to compel him to change, or in any wise alter, the assessment as certified to by the said county clerk, and, if there is any error in the assessment, that the county clerk alone, under authority of the county court, or by proceedings brought against him, has authority to hear and alter such erroneous assessment, and that this court has no jurisdiction in this action. It is further alleged that the petition or alternative writ does not show that the minor, Chas. M. Hamilton, at the time the writ was sued out or at any time theretofore, was a resident of School District No. 2. He alleges that at the time the assessment was made he was a resident of District No. 4. Denies that the money should be paid to District No. 2, and denies all and every other allegation in the petition or alternative writ not specially admitted.

Upon an examination of the record, we find the facts, as stated by the trial judge in his written opinion, substantially correct. At least, the difference as to the facts as stated by relator and the trial judge have no material bearing upon the legal questions involved in this controversy. Hence we adopt the statement of the trial judge as to the facts: "In the year 1883 one Charles Hamilton, with his wife and minor child, Charles M. Hamilton, resided in the town of Troy, Lincoln county, Missouri. The town of Troy was then and is now in School District No. 4, township 49, range 1 west. During that year Charles Hamilton died, and his widow and minor son continued to reside in Troy till her death, in 1888, when she too died. The minor at that time was about nine years old, and his uncle, the plaintiff herein, was appointed by the probate court guardian and curator of said minor in 1888, and continues to hold such position. The guardian and curator resides in, and had for at least twenty years, in School District No. 2, township 49, range 1 east, in Lincoln county, Missouri. Immediately after the death of his mother the minor was taken by his aunt in another portion of Lincoln county, and continued to reside with her till the year 1897, attending school in the meantime at various places. The property of the minor, consisting of notes and other securities, in the hands of the curator, was assessed by the assessor of Lincoln county, who indorsed on the list the location of said property as in District No. 2, township 49, range 1 east. The clerks of the respective school districts made their estimates of school expenses and names of resident taxpayers in their districts as required by law. The clerk of District No. 2, township 49, range 1 east, made no return of plaintiff guardian and curator in his said district. The clerk of District No. 4, township 49, range 1 west, listed plaintiff, as such curator and guardian, in his district. The

county clerk, in making up the school tax book, proceeded to assess the amount of the estimates of the various districts, and among them the above-named district, and in so doing returned plaintiff guardian and curator in District No. 4, township 49, range 1 west, in accordance with the enumeration list, and extended the tax on the personal property under the rate of such district. The school tax book, in this shape, went to the collector, who now holds it in the same condition, and the effort is now made by plaintiff to compel the collector by writ of mandamus to receive the school tax according to the estimate of District No. 2, and at the rate fixed by such district, and when so paid to turn the same over to the treasurer to the credit of District No. 2." Upon a full hearing of the application for writ of mandamus in this cause to compel the collector to receive the taxes according to the rate of taxation in School District No. 2, and pay the amount so collected from relator into the treasury to the credit of School District No. 2, the writ was denied, and judgment for cost in favor of defendant and against the plaintiff. From this judgment, plaintiff appeals to this court, to the end that this court may review the action of the trial court.

The trial court, in a written opinion filed in this cause, said, upon the subject as to the remedy sought: "The duty of making the school tax book devolves upon the county clerk, which book shall be subdivided corresponding to the districts in the county, and numbered accordingly; and he shall place in the proper subdivisions, first, a list of the names, alphabetically arranged, of all persons owning any personal property in the district, total value thereof, and the amount of school tax assessed thereon; second, a list of all the lands and town lots, etc. Section 8067, Rev. St. 1899. The enumeration lists inform the county clerk of the amount required and rate of taxation in each district, and also the names of the resident taxpayers in such district; while the assessment of the county assessor, as returned in his list, informs the clerk of the property owned by such resident taxpayer. From these two sources of information he is enabled to make up the school tax book. The county clerk of Lincoln county, in making up the school tax book containing the assessment complained of, proceeded in the manner above indicated. The plaintiff, as curator of Hamilton, was returned by the district clerk as being in District No. 4, and the county clerk, without ignoring the enumeration lists, could not have placed him elsewhere. The assessor is not required or authorized to determine the school district of a taxpayer. The assessor's book which he makes up—legally made up—contains no such information. The assessor has to do with no particular tax, but his duty is ended when he has ascertained and listed all the taxable real and personal property in his county, with the

name of the respective taxpayer (section 7531, Rev. St. 1899, amended by Laws 1893, p. 216), and made his assessment book therefrom. The assessor's book, when turned over to the county court, would not contain the number of the school district of any taxpayer, and hence the equalization board could not remedy any such wrong as is here complained of. The alleged wrong first arises when the county clerk, after the assessor's books are corrected and adjusted, makes out the school tax book, and then fails to proceed in so doing as the law directs. Section 7579, Rev. St. 1899, refers to the power of county courts to determine erroneous assessments or mistakes or defects in description of lands 'on application of any person who shall by affidavit show good cause for not having attended the county board of equalization.' Conceding this to apply to personal property (which is doubtful from the phraseology), yet it must be an erroneous assessment which existed and could have been remedied by the board of equalization, which in a case like this never existed at such time. Section 7644 in terms applies only to erroneous assessments of lands. But in this case there is no erroneous assessment complained of; it is simply an erroneous taxation alleged. If plaintiff is taxed in the wrong district or wrong county, then it is illegal, and its collection cannot be enforced. The payment of an illegal tax by him would not relieve him from the payment of a tax where it legally belongs. Under the authority of the school tax books certified to the collector, he is bound, in the discharge of his duties, to proceed and act in accordance with its commands. If this tax is properly due District No. 2, then the fact appears it has never been assessed or extended by the county clerk for District No. 2, but has been assessed or extended at a different rate in another district, and how then, can the collector be compelled to collect a tax for District No. 2, which has never been extended by the county clerk? If the county clerk had no right or authority to assign the curator to District No. 4, and assess a tax against him according to the rate fixed by said district, then such taxation is simply illegal and void, and his property is not subject to levy to pay the same, and, if seized and sold by the officer, may be recovered by the plaintiff in an action of replevin against the purchaser. *St. L. & S. F. Ry. Co. v. Lowder*, 138 Mo. 538, 39 S. W. 799, 60 Am. St. Rep. 565. If he is sued for the tax, he may set up the illegality, and defeat the action. No injunction would even lie, for there is no multiplicity of suits to avoid, which alone gives jurisdiction to courts of equity to restrain the collection of illegal taxes. *Michael v. City*, 112 Mo. 610, 20 S. W. 686. Hence my opinion is that the plaintiff has misconceived his remedy." We think clearly that the trial court was right in denying the writ. The facts, as disclosed

in this case, show that the county clerk extended the taxes to the respective school districts. Whether his action was in pursuance of the provisions of the statute, whether legal or illegal, the collector was not answerable for the acts of the clerk. After the tax books were adjusted and turned over to the collector, he had but one duty to perform. That was to collect the taxes, and apply them as indicated by the tax book. The collector has no power over the tax books. He is not authorized by any statute, that has been brought to the attention of this court, to alter or change the tax books at pleasure. He is responsible for the taxes as they appear upon his books; and if they are changed in any manner, except in pursuance of the statute, however just the change might be, it would afford him no protection. Mandamus is a remedy sought to compel the performance of some ministerial duty which is required to be performed by the law of the land. No such duty as was requested of the collector in this cause is enjoined upon him by the law. A number of cases are cited by appellant in support of the doctrine that mandamus is the proper and appropriate remedy in this case. An examination of those cases will demonstrate that they are not applicable to the case at bar. The applications and the issuance of the writs in these cases were all predicated upon the refusal to perform a duty which the law required to be performed. In the case of *State ex rel. v. Schnecko*, 11 Mo. App. 163, it will be observed that, on the person applying for certain credits upon his taxes, there was a statute which required the collector to give such credits. So, in the case of *State ex rel. v. G. A. Burkhardt*, 59 Mo. 75, two parties were claiming the money of the defendant collector. Relator claimed that the money was collected for the school district of which he was treasurer, and that the collector refused to pay it over. The case of *State ex rel. v. Dougherty*, 45 Mo. 294, is similar to the Burkhardt Case, supra. The collector in this case refused to obey the commands of a statute requiring him to pay over money. In the case of *State ex rel. v. Riley*, 85 Mo. 156, was the issuance of a writ of mandamus directed to the clerk of the county court, requiring him to perform his duty in respect to extending and assessing the school taxes. He was required, under the statute, to perform that duty, and, refusing to do so, mandamus was the proper remedy. The same may be said of all the cases cited—that the duty was one directed by statute, and, on the failure to perform it, mandamus could appropriately be resorted to. That is not this case. To issue the writ in this case would be compelling the collector to do something not only not provided by the statute, but to do an act which the law prohibits him from doing—the altering and changing of the tax books. The

action of the trial court was right, and will not be disturbed by this court.

As to the other proposition—as to what district these taxes should properly go—it is unnecessary to determine that question, and perhaps it would be better to wait until that question in a proper proceeding is before the court. I will say, speaking for myself individually, and not for the court, that it depends upon the form and manner of assessment. Section 9144, Rev. St. 1899, provides that the "assessor or his deputy or deputies shall call at the office, place of doing business, or residence of each person required to list property and shall require such person to make a correct statement of all taxable property owned by such person or under the care, charge or management of such person. Under this provision the guardian or curator of a minor may have the personal assets of the minor's estate assessed to him, as indicated, in the case of *State ex rel. v. Burr*, 143 Mo. 289, 44 S. W. 1045, he having the property of the minor under his management and control. If this is done, we think clearly the taxes on this character of assessment would go to the district in which the guardian resides, for in that assessment he treats the property as his own, and is personally liable for the taxes, and has it assessed to him individually. On the other hand, if the personal estate is assessed to the minor, or the estate of the minor, the taxes apportioned to the districts would follow the domicile of the minor. The provision of the statute requiring the taxpayer to list not only his own property, but also the property "under his care, management, and control," does not necessarily require a guardian of a minor to make out two lists, one for his individual property, and one for the property of his ward; but he may, as is frequently done under the broad provisions of the statute, list it as his own. In the case of *State ex rel. v. Burr*, supra, Gantt, J., speaking for the court, says: "That the care and management of the ward's estate conferred by the statute is such care, charge, and management of the estate as is contemplated by the revenue law, we think cannot be disputed, and is such as makes it incumbent upon him to list it to the assessor. If listed by and assessed to the curator, it is his personal duty to pay the taxes out of the moneys in his hands as curator." Hence we see that the ownership of the property as indicated by the assessment has a strong bearing upon the question as to the apportionment of the taxes to the school districts. Will say, however, we do not mean, by the views herein expressed, that, if the minor has a settled place of residence, the guardian has the absolute power, by reason of residing in another school district, to defeat the district in which the minor resides out of its taxes upon the property of the minor; for it

is the policy of the revenue law to assess property to the true owner, and the assessor has ample authority to ascertain the true owner of the property, and make his assessment accordingly. The assessor, as to the personal assets of a minor, may assess it to the minor or to his estate, or he may permit the curator of the ward to list it, under the statute heretofore discussed, as his property, it being under his management and control; in either event, the domicile of the person to whom the property is assessed would indicate the school district to which the taxes should be extended.

The opinion of the learned trial judge filed in this cause fully sustains the action of the court in denying the writ. The judgment will be affirmed. All concur.

TURNER v. OVERALL et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

TRUST DEEDS — DURESS — IMMUNITY FROM CRIMINAL PROSECUTION — EVIDENCE — APPEAL — EQUITY CAUSES — TRIAL DE NOVO IN SUPREME COURT.

1. On an appeal of a suit to set aside a trust deed for duress, the cause is for hearing de novo in the Supreme Court.

2. In a suit by a wife to set aside a mortgage given on her lands to secure her husband's debt to defendant, as obtained by duress, the husband is a competent witness, under Rev. St. 1890, § 4656, providing that, where a suit is connected with any business had with the husband, he is a competent witness on behalf of the wife.

3. Where, on an appeal of a suit to set aside a trust deed for duress, all the evidence was preserved in the record, error in the admission of testimony by the trial court will not constitute ground for reversal, since the Supreme Court will only consider such evidence as is competent, in making its findings.

4. Where, in an action to set aside a trust deed for duress, defendant, by his answer, put in issue the validity of the indebtedness, he cannot object on appeal to the admission of evidence by plaintiff tending to impeach such indebtedness.

5. In a suit by a wife to set aside a trust deed to her property, given to secure her husband's debt, to prevent his being arrested and prosecuted for forgery in another state, evidence held to show that the acts of the grantee and his companions in possession of a requisition for her husband so deprived plaintiff of her free will and agency in the execution of the deed as to warrant a decree setting aside the same for duress.

Appeal from circuit court, Stoddard county; W. F. Ford, Special Judge.

Bill by Novella Turner against W. H. Overall and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

This is an action by respondent against the appellant W. H. Overall to cancel a deed of trust executed by plaintiff and husband to secure the payment of a note of \$1,350 to W. H. Overall. The petition, answer, and replication in this cause present the issues fol-

ly, and in order to intelligently understand just what the issues were, as presented and tried by the lower court, we here insert them:

Petition.

"Plaintiff, Novella Turner, states that she is now, and at all the times hereinafter named she has been, the owner in fee of the following described real estate, situate in the county of Stoddard and state aforesaid, to-wit: The west half of the northeast quarter of section thirty-five (35) in township twenty-seven (27), range eight (8); that on the 12th day of October, 1896, she and her husband, George Turner, executed a deed of trust on the above-described real estate to the defendant N. M. Fouch, as trustee, for the benefit of the defendant W. H. Overall, to secure the payment of a note of that date for the sum of thirteen hundred and fifty (\$1,350) dollars, payable to the said W. H. Overall on the 1st of July, 1897. Plaintiff states that at the time of said execution of said deed of trust she was, and still is, the wife of the said George Turner, and that at the time she executed said deed of trust there was pending in the circuit court of De Kalb county, in the state of Tennessee, a bill of indictment against her said husband, the said George Turner, wherein and whereby her said husband was charged with the crime of forgery; that her said husband was not guilty of said crime, and that said indictment was falsely and fraudulently procured from the grand jury of said county against her husband by the defendants for the purpose and with the intent of procuring from this plaintiff said deed of trust or other security for the payment of an alleged claim held by them against plaintiff's said husband in said sum of thirteen hundred and fifty (\$1,350) dollars, and on the day aforesaid, to-wit, on the 12th day of October, 1896, the said defendant asked and demanded of the plaintiff that she should sign and execute said deed of trust upon her land above described, which was her home, and all she had to secure the same; that upon her refusal to comply with their demands, and to sign and execute said deed of trust, the said defendants, W. H. Overall and N. M. Fouch, told the plaintiff that they had in their possession extradition papers, duly signed and executed by the Governor of the state of Tennessee, under and by virtue of which they had full and competent authority to arrest the plaintiff's husband, the said George Turner, and to take him back to the state of Tennessee, where he would be prosecuted and convicted and sent to the penitentiary for said alleged offense, and that said defendants did then and there present and show to this plaintiff a large paper, having thereupon the name of the Governor of Tennessee, and a large, red seal thereupon, to which was attached a ribbon, and which they declared was the extradition or requisition paper aforementioned,

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 3630.

and both of the defendants then and there said to this plaintiff that unless she would sign and execute said deed of trust upon her said land to secure the said sum of thirteen hundred and fifty (\$1,350) dollars, which the defendants then claimed against her said husband, the said George Turner, they would immediately arrest her said husband and carry him back to the said state of Tennessee, and would prosecute and convict and send him to the penitentiary, but that if she would sign and execute said deed of trust, as they wished and requested her to do, they would not have her said husband arrested and prosecuted upon the charge aforesaid, and would not inform the officers of the law of his whereabouts; that plaintiff fearing that said defendants would carry out their said threats to have her said husband arrested and prosecuted aforesaid, and relying upon their promise that they would not have him arrested and prosecuted upon said charge of forgery, and that they would not inform the officers of the law of the whereabouts of her said husband, and in consideration of this promise only, she did sign her name to said deed of trust, and did acknowledge the same, which were by the direction of said defendants, and plaintiff did afterwards deliver said deed of trust to the defendants for said purpose. Plaintiff states that when she was informed by the defendants that an indictment was pending against her said husband in which he was charged with the crime of forgery, the same was so sudden, and so excited and unnerved her, that she could not deliberate upon the matter, and in fact did not know what to do; that defendants observed her condition, and took advantage of it, under the circumstances, knowing that plaintiff was greatly confused and disturbed, and that she was easy to be made a victim of their artful and importunate cunning; that defendants refused to give this plaintiff time to consult disinterested friends or counsel, but they demanded that she should act, saying that if she did not act at once they would arrest and take her husband away under said papers, and prosecute him as aforesaid. Plaintiff says that she was not upon equal terms, under the circumstances, with the defendants; that she did not know at the time, and had no idea, that the said charge against her husband had been trumped up by the defendants for the purpose of procuring from her the deed of trust aforesaid to secure the payment of an alleged indebtedness of her husband to them, or one of them, and could not have known so unless she had ample time to think over the matter and to learn the facts in connection therewith, and defendants refused to give her any time to consider the matter or consult with friends, and that, under the circumstances, being ignorant of the facts and greatly agitated, and under the importunity of the said defendants, she was entirely unable to protect herself, and there-

fore signed and executed said deed of trust; that she was overwhelmed with the information that her husband had been guilty of forgery, and, on the 'spur of the moment,' and under the importunity of defendants as aforesaid, and in the hope on her part of saving the family honor, she executed the deed of trust, and delivered the same to these defendants; and that she had no other, further, or definite consideration for doing the same than as above set forth and pleaded. Premises considered, plaintiff prays the court to annul, set aside, and declare absolutely void the deed of trust aforesaid, and to order and decree that the same be delivered to this plaintiff for cancellation; and plaintiff further prays the honorable court to cause the defendants to produce in court, and to deliver to this plaintiff such other and further releases as may be necessary and proper in the premises to fully relieve her title from the cloud and burden cast upon it by said deed of trust, and for all other proper relief in the premises. George Houck & J. L. Fort, Attorneys for Plaintiff."

Amended Answer.

"Now, at this time comes defendant, and files this, his first amended answer, and, for answer to plaintiff's petition, denies each and every allegation therein contained, except that plaintiff, with her husband, executed the deed of trust described in plaintiff's petition, of her own free will and accord, to secure the indebtedness of her husband as described in said deed of trust. Defendant, further answering, states that on the — day of January, 1896, Robert Turner, alias George Turner, husband of plaintiff, and plaintiff were living in the county of De Kalb, in the state of Tennessee; that said husband of this plaintiff at said date became indebted to defendant W. H. Overall in the sum of seventeen hundred dollars; that at said time said husband of plaintiff, Robert Turner, alias George Turner, was in solvent circumstances, and that plaintiff had no estate of her own, except that which she acquired through her said husband; that said Robert Turner, alias George Turner, at said time put all of his available assets into cash, and emigrated, with plaintiff, from De Kalb county, Tennessee, to Stoddard county, Missouri, and, with the assistance of this plaintiff, concealed his whereabouts from this defendant and other creditors; that on the 12th day of March, 1896, said Robert Turner, alias George Turner, purchased with his own money the real estate mentioned in plaintiff's petition, and took the deed in the name of his wife, this plaintiff; that on the 12th day of October, 1896, plaintiff, at her own instance, and without any duress on the part of defendants, or any one for them, and without any solicitation on his part, or on the part of any one for them, but recognizing that defendant could move onto the assets and real estate in her hands for the satisfaction

of her husband's indebtedness to defendant W. H. Overall, executed said deed of trust described in plaintiff's petition to secure her said husband's indebtedness to defendant W. H. Overall, and to which said indebtedness said real estate was liable to be made subject. Defendant states that plaintiff was not surprised by facts concerning said indebtedness of her husband, and that she concealed the whereabouts of her said husband, Robert Turner, alias George Turner, when defendant visited him to collect said indebtedness, and that, before executing said deed of trust, plaintiff had ample time to consider the proper course to pursue, and made a visit to Bloomfield, Mo., after her interview with defendant, and there made an effort to borrow money to discharge said indebtedness, and plaintiff had ample time and opportunity to consult counsel while at Bloomfield, Mo., and before making said deed of trust. Plaintiff further states that on the 7th day of September, 1897, said real estate was sold under the said deed of trust, and according to its terms—James A. Evans, the sheriff of Stoddard county, Missouri, acting as trustee, the trustee, N. M. Fouch, refusing to act; that defendant W. H. Overall was the best and highest bidder at said sale, and became the purchaser of said real estate, and secured the trustee's deed therefor, and is now the owner of said real estate, and is entitled to its possession. Wherefore defendant prays the court to dismiss plaintiff's bill at her costs, and declare the title of said real estate in defendant W. H. Overall, and that defendant W. H. Overall have restitution of said premises, and for such other and further orders, decrees, and judgments as to the court may seem proper and in accordance with good equity. J. R. Young, Attorney for Defendant."

Replication.

"Now comes the plaintiff, and, for replication herein, denies each and every allegation of new matter in defendant's answer set out and pleaded, and again prays judgment. Novella Turner, by George Houck and J. L. Fort, Attorneys for Plaintiff."

It will be observed that the vital issue, as presented by the pleadings in this cause, is as to whether the deed of trust sought to be canceled by the respondent was executed on her part under duress; was procured through threats of the prosecution of her husband for forgery, and under the promise, if she would execute it, that her husband's whereabouts would not be revealed. This case is not dissimilar to that of many others presented to the courts for adjudication. The testimony is very conflicting. The respondent in this cause is a married woman, the wife of one George Turner. They formerly resided in Tennessee. Before leaving that state, her husband, George Turner, became indebted to appellant W. H. Overall. It also appears that George Turner, the husband of respondent,

was charged by indictment in the state of Tennessee with the crime of forgery. Respondent and her husband left Tennessee, and located in Stoddard county, Mo. After respondent and her husband were located in Puxico, Stoddard county, Mo., the Governor of Tennessee issued a requisition on the Governor of Missouri for the husband of respondent. E. A. Fouch was named as agent of the state of Tennessee to execute the requisition. He and his brother, N. M. Fouch, armed with the requisition, set out for Missouri; the appellant in this cause, W. H. Overall, accompanying them, as he says, for the purpose of securing his debt from George Turner, the husband of respondent. E. A. Fouch learned, so he says, through Judge Fort, that the requisition issued by the Governor of Tennessee was ineffective to secure the arrest of George Turner, without its first being presented to the Governor of Missouri, and having him issue the proper authority for the arrest of the husband of respondent. This agent, so far as the record discloses, did not attempt to have his requisition honored by the Governor of Missouri. On October 10, 1896, the two Fouch brothers and appellant Overall went to the house of a Mr. Puckett. Mrs. Turner was there. It is here where the conflict in testimony appears. As we are called upon to pass upon the action of the trial court in entering the decree in this cause, we here insert a portion of the testimony (the most important part) of Mrs. Turner and Geo. Turner: Mr. Turner testifies that he first saw the defendants, after removing from the state of Tennessee to the state of Missouri, in Puxico, Mo.; that at the time the defendants were in Puxico, Mo., he was "kind o' on the dodge"; that Clarence Reed had told him that defendants had a requisition for him; that defendant Overall told him when he went back to Puxico, where Overall was, that there were seven indictments against him in the state of Tennessee. He also says that Overall claimed that he (Turner) owed him \$1,600. Then this question was asked Mr. Turner: "Q. Did you owe him [Overall] \$1,600 at that time? A. No, sir. Q. How much did you owe Overall at that time? A. About \$850. Q. Did Mr. Overall, in that conversation, admit to you that \$850 was all that you owed him? A. Yes, sir. Q. I will get you to state to the court how much you paid him? A. I paid him \$250 in money and gave him a note for \$1,350. Q. Just state how you came to give him \$250 in money and a note for \$1,350, when you only owed him \$850. A. He said he had a paper to carry me back to Tennessee if I did not pay him \$1,600. Q. What did he say he would do if you would pay him \$1,600? A. He said he would go back to Tennessee and make things easy, and there would be no further prosecution. Q. What did Mr. Overall say that Mr. Fouch had the papers for, or what did he say they wanted you back in Tennessee for? A. He

did not say they wanted me back in Tennessee for anything, but said if I did not pay him the \$1,600 he would take me back there. Q. What did Overall say he would do if you would settle with him according to his terms? A. He said that, if I would settle with him according to his terms, he would not take me back and would keep everything quiet, and that I would not be prosecuted or have any further trouble about it. Q. State to the court whether you executed this note of \$1,350 and paid him \$250 in money because he promised you that if you would do so he would see to it that you were not prosecuted. A. That is the only reason I paid him the money and made him the note." Mrs. Novella Turner testified as follows: "Q. What relation are you to the witness George Turner? A. I am his wife. Q. Where did you move from when you came to Stoddard county? A. From Tennessee—De Kalb county. Q. Did you furnish any part of the money that bought the piece of land described in this suit? A. No, sir. Q. Did you know at the time that this deed to this piece of land was made to you that your husband, George Turner, was indebted to parties in De Kalb county, Tennessee. A. Yes, sir. Q. What was your object in having the deed made to you, and in your name? A. Well, in order that if my husband should die in the meantime, and fail to pay the debt, that I would have a home. Q. Now, Mrs. Turner, just tell the court, in your own words, as near as you can, every word that passed between you and Mr. Overall, and you and either one of the Fouches, in the presence of Overall, at that time and place? A. He asked me about my health, and I told him my health was bad, and had been for several months past, and he also spoke to me about looking bad and excited. Then he asked me where my husband was. I told him I did not know. He then said he came for my husband, and had a requisition signed by the Governor of Tennessee and by the Governor of Missouri, and had the privilege of taking him back to Tennessee handcuffed, and would imprison him for forgery, as there were seven indictments against him for forgery, and said that his mother had caused one of them to be found. I told him I did not know anything about it. He asked me if the land was in my name. I told him it was. He said that he had come to collect some money that my husband owed him, and asked if my husband had any money. He asked me if my husband did not have quite a lot of stock, as well as land. Q. Did he show you any papers at that time? A. Yes, sir; he said that Mr. Fouch had a requisition signed by the Governor of Tennessee, and also by the Governor. Mr. Fouch then took the papers from his pocket, and I saw the seal, and saw that they were papers of that kind. Q. Give a description of the papers that Mr. Fouch showed to you, and which he took out of his pocket? A. They were large papers,

bearing the signatures of the Governor of Tennessee and the Governor of Missouri. The paper also had a large, red seal, and a blue ribbon, stamped on the same. Q. Now, did Mr. Overall point to these papers, and say that they were papers authorizing them to take your husband back to Tennessee? A. Yes, sir. Q. Did they arrest and take your husband back at that time on those papers? A. No, sir. Q. What did Mr. Overall say about the number of indictments against your husband? A. He said there were seven indictments against him. Q. What did he say he would do with your husband if you would fix up the claim? A. He said he would go back satisfied, and would conceal the whereabouts of my husband. Q. What did Mr. Overall say about having the proceedings stopped against your husband? A. He said he would have them stopped, and there would be no further trouble. Q. Mrs. Turner, you, of course, know whether you executed that deed of trust willingly or unwillingly? A. I thought that was all that I could do to keep my husband from being carried back to Tennessee handcuffed and imprisoned. Q. Did you execute it voluntarily? A. No, sir. Q. I will get you to state to the court if it was not your purpose, in taking a deed to this piece of land in your name, to keep Mr. Turner's creditors from getting the land? A. Yes, sir. Q. I will get you to state to the court if afterwards your husband was arrested and taken to Tennessee? A. Yes, sir. Q. State if they did not dismiss the prosecutions against your husband when he got there. A. Yes, sir. Q. What was the condition of your health and strength at the time you first met Mr. Overall, at Puxico, and what had been the condition of it for months previous to that time? A. My health was bad, and had been for six months previous to that time, and I was in bed when they came. Q. And you say that Mr. Overall remarked that you looked very bad and weak when he began talking to you? A. Yes, sir. Q. If you have any reasons to give or explanations to make why you did not employ an attorney when you went to Bloomfield, you may make that explanation. A. I thought all I could do was to give the deed of trust, or they would carry my husband back to Tennessee, and I did not think that consulting an attorney would change the minds of these men." George Turner, recalled: "Q. You may state what became of the prosecutions against you when you were taken back to Tennessee, if you know. A. They were dismissed, and I paid the costs." The deed of trust was introduced on the part of the appellant, and he testified, plainly contradicting every statement made by the respondent; that is to say, he contradicted all of her testimony which is important to her right of recovery, and states that the deed of trust was executed willingly and voluntarily, and that he held out no inducements or promises for its execution. The

appellant's testimony is fully corroborated by E. A. and N. M. Fouch, both of whom make about the same statements as to the execution of the deed as the appellant does. It was admitted that plaintiff had the legal title to the land in controversy at the time of the execution of the deed. There was other testimony, but, as it was collateral to the main issue—that of duress—it is unnecessary to notice it in detail. Upon the evidence as indicated herein, the cause was submitted to the court, and it found the issues for the plaintiff, and entered its decree canceling and holding for naught the deed of trust executed by the plaintiff. From this decree, defendants appealed to this court, that the alleged assignment of errors might be reviewed.

J. R. Young, for appellants. George Houck and J. L. Fort, for respondent.

FOX, J. (after stating the facts). Appellant's assignment of errors are: (1) The court erred in admitting testimony tending to impeach the validity of the indebtedness, when there are no allegations in the petition charging that the indebtedness was not correct and just. (2) The verdict and judgment were against the decided weight of the testimony and against the law.

The Issues.

(1) Was the deed of trust obtained by duress, and threats of arrest and imprisonment of respondent's husband? (2) Did appellant promise respondent he would not prosecute her husband if she would sign the deed of trust, and was the execution of the deed illegal and against public policy?

It will be observed that the appellant, in his assignment of errors, directs the court's attention to the complaints he desires reviewed, and, in addition, plainly sets forth the issues involved in this controversy. As was very appropriately said by Sherwood, J., in the case of *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025, "this cause is, to a large extent, a fact case." The learned judge in that case further says, "When an equity cause comes up to this court, it is for hearing de novo, and it will be considered, for the most part, as if it had originated here, and was to be heard for the first time."

As to the first assignment of error, "that the court erred in admitting testimony tending to impeach the validity of the indebtedness, when there are no allegations in the petition charging that the indebtedness was not correct and just." This contention is without merit. Even if this testimony is incompetent and inadmissible, all the evidence is preserved in the record, and as was announced in the case of *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424, "we can consider what is competent, and exclude what is incompetent, in our findings." And it may be further added that appellant is not in a fa-

vorable position to insist upon this error, for the reason that he invited by his answer this character of testimony, putting in issue the validity of the indebtedness. However, will say that this court is of the opinion that this decree is based upon the allegations in the petition, and must be supported by the evidence upon that issue.

The second assignment of error is of more importance, because the result of our conclusions upon that assignment settles this controversy. Learned counsel for appellant very ably presents in his brief the legal principles by which controversies of this character should be measured. The doctrines announced in the numerous cases cited are not in dispute. After going over the entire field, it must be remembered, we are led back to the one proposition, and that is, did the testimony in this cause support the conclusions reached by the chancellor in his decree? We take it, and doubtless it will not be seriously disputed, that, if the testimony offered by respondent is to be believed, then the judgment of the lower court was right, and supported by every principle of equitable jurisprudence. On the other hand, if the testimony offered by the appellant is to control, then this cause should be reversed. If plaintiff, Mrs. Turner, was deprived of her free will and agency in the execution of the deed of trust by the action and conduct of the appellant, and those who were acting with him, in respect to the arrest and prosecution of respondent's husband, this was duress in contemplation of law, of such character as to avoid her deed. *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912. In the case of *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505, there is quoted with approval the following from *Earle v. Norfolk*, 36 N. J. Eq. 188: "Whatever destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunities, or any other species of mental or physical coercion."

Before proceeding to discuss the testimony in this cause, it would be well to merely mention what we deem the correct rule as to the admission of testimony in equitable cases, of the character of the one presented to us for our determination. Great latitude must necessarily be allowed in the investigation of cases like the one at bar. All the acts and declarations of the parties tending to throw any light upon the issue should be admitted. As is said by the counsel for respondent, "actions speak louder than words." Conversations may apparently be immaterial, yet, if they show the tendency of the mind as to the subject before the court, they should be received. With these elementary principles before us, we are led to the investigation and discussion of the testimony in this cause.

Will say at the outset that we have care-

fully read in detail the entire testimony in this cause. If the simple words of the testimony are to be considered, the evidence greatly preponderates on the side of the appellant; but, on the other hand, if the situation of the parties, the acts of the appellant and those in company with him, the entire surroundings of the transaction when it was consummated, and the final results of the transaction, with all proper and legitimate inferences to be drawn from such acts and surroundings, then the preponderance of evidence is with the plaintiff, Mrs. Turner. "Preponderance of evidence" does not necessarily mean the greatest number of witnesses, but it means that character of evidence, full of strength and weight, when it is all considered, that is stamped with strong and reasonable probability of truth. It is admitted by the record that Mrs. Turner at the time of the execution of the deed of trust had the legal title to the land embraced in the deed. She was a married woman, and in bad health. It appears that the appellant Overall and the Fouch brothers went out to Puxico to see Turner; that they found Mrs. Turner at Mr. Puckett's house. They met Mr. Puckett at the front gate. Did not inquire for Mr. Turner, but inquired if Mrs. Turner was there. They all three went in, and the appellant Overall said he wanted to have a private conversation with Mrs. Turner. Puckett went out, and left the three men (Overall and the Fouch brothers) in conversation with Mrs. Turner. If it was a private conversation he wanted with the respondent, why was it so necessary for her neighbor Puckett to retire, and the Fouch brothers to remain present at this private conversation? The Fouch brothers were not interested in the debt of Overall. Why the necessity of their presence, and the necessity of the absence of Puckett, who lived there in the neighborhood? The fact of these three parties (Overall and the Fouch brothers) being constantly together on this trip would strike the average man as a little bit peculiar. E. A. Fouch is selected as the agent of the state of Tennessee to arrest George Turner, a fugitive from justice. The presumption is that he wanted the fugitive. His brother accompanies him on this trip. Nothing unusual in that. But how does it happen that the appellant obtains knowledge of this trip, and avails himself of this opportune time to collect a debt? He evidently concluded that there was some force in the requisition that could aid him. He says in his testimony that he told Mrs. Turner that, if he could see her husband, he was satisfied that her husband would settle with him; that they had been friends. If that was true, and the Fouch brothers were going to return with George Turner to Tennessee, he would certainly have an opportunity of seeing him then. Moreover, if the purpose of that long and expensive trip was to arrest this man, and the only thing wanting was the authority from the Governor of Missouri,

it strikes me it would have been but a slight delay to have secured that authority after coming to Missouri. After being informed by Judge Fort that it was necessary to have the authority to arrest Turner from the Governor of this state, not the slightest step is taken to have Missouri's Governor honor the requisition; and this record is absolutely silent as to any explanation why the main purposes of their trip were so suddenly abandoned. If they just simply concluded to abandon for the present any efforts to arrest Turner, did it take all three of them to talk with Mrs. Turner about the debt owing the appellant Overall? If appellant's theory of this case is right, it would have been much more appropriate for Mr. Overall, who alone was interested in the debt, to have gone over to see Turner and his wife; but, instead, all three go over to see Mrs. Turner, have a private conversation with a lone woman, in bad health, with a knowledge that her husband was being prosecuted, and now insist that she was on equal footing with appellant in this transaction. Mrs. Turner testifies that this land, it is true, was purchased with her husband's money; that she took the title to the land for the reason that in the event of her husband's death she might have a home. What induced her to give up this home for her husband's debt? It was a legitimate inference from all the surroundings of this case that some extraordinary power or influence was instrumental in securing this deed. The conclusion is inevitable that had not respondent's husband been under a criminal prosecution, and the appearance of these parties in Missouri, in a private conversation with Mrs. Turner, with a requisition for her husband, the deed would not have been executed. In the case of *Bell v. Campbell*, supra, Sherwood, J., in discussing that case, which has some similarity to this, in respect to a woman being influenced to execute a deed of trust, says: "On the very morning that this most indefensible transaction found its blameworthy consummation, this poor, ignorant, illiterate old woman, fast verging on the biblical limit of three score years and ten, for over three hours was kept on the rack of varying emotions. Within that time every argument that could be advanced was used, every chord of human feeling and affection that could be played upon was struck by the sordid hand of self-interest or the tremulous hand of anticipated punishment, in the endeavor to swerve her from her purpose. How well it succeeded is a matter now of record." If Mrs. Turner is to be believed, she was in about the same ordeal that the learned judge described the woman to be in the foregoing case. It was a rational inference, under the facts disclosed in this case, that the respondent did not willingly and voluntarily execute the deed in dispute. Immediately after securing this deed of trust, in which one of the Fouch brothers was made the trustee, they returned—all three of them—to the state of

Tennessee. Came to Missouri to arrest a fugitive from justice, and return to their state entirely satisfied with a deed of trust on a married woman's land! This is not a mere expression of sentiment, but is the plain statement of a result of a trip to this state, which we think has a strong tendency to corroborate the statement of Mrs. Turner, the respondent in this cause. It further appears in the testimony of Mr. Overall that he says that Mrs. Turner "says she signs it [meaning the deed] freely and voluntarily on her part." What necessity was there for her to make these statements, if nothing had been said to induce her to sign it? One of the Fouch brothers says, in the conversation at Puckett's, that Overall asked the plaintiff to pay this debt; that he came at the suggestion of an attorney; that he came to give her a chance to settle without any cost. Why did he say this to this woman? She did not owe the debt. This sort of talk would indicate to any intelligent mind that the appellant was there, knowing that this woman owned the land, to get her to secure this debt. And from his anxiety to accomplish his purpose, we take it, from the facts disclosed in the record, that he was not very conservative in his inducements held out on that occasion.

It is insisted by appellant that the court erred in permitting the husband of plaintiff, George Turner, to testify, and that his testimony was incompetent and irrelevant. It will be observed that this proceeding is connected with a transaction between the husband of plaintiff and appellant Overall. In fact, this suit is to cancel a deed of trust given to secure that debt. Under section 4653, Rev. St. 1899, it is provided in one of the subdivisions that, where the suit is connected with any business had with the husband, he is a competent witness in behalf of the wife. Aside from the statute, upon the broad ground as announced in the case of *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, and approved in the cases of *Moeckel v. Heim*, 134 Mo. 576, 33 S. W. 226, and *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752. This being a case in which a fraud is alleged to have been perpetrated upon a married woman, the defendant is in no position to ask, in the investigation of the fraudulent transaction, that the mouth of the husband be closed. As to the relevancy of Turner's testimony, will say, as heretofore stated in this opinion, that the appellant created this issue by his answer, and is in no position to object to testimony being offered upon it, and it is competent and relevant, independent of the issue as to the validity of the debt, because it is as to declarations of the appellant indicating the appellant's determination to have the debt secured, and, further, as tending to show the methods to be adopted in order to obtain the security for the debt desired. It is further urged, if respondent executed the deed of trust to prevent her husband from being taken back to Tennessee,

or for concealing his whereabouts, that she and appellant are in pari delicto, and therefore cannot recover. This contention is fully answered by the cases of *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505, and *Green v. Carrigan*, 87 Mo. 359. They were not on equal footing, and do not fall within the denunciation of that maxim.

Complaint is also made by appellant that plaintiff has no right to be heard in this proceeding, because the debt is an honest one, and the land held by respondent was paid for by her husband. There is no merit in this contention. While we have a high conception of the duty of the citizen as to paying his honest debts, and while we are by no means commending the character of George Turner, yet he did, in securing this home to his wife, what is frequently done by good husbands in the way of providing homes for their wives. It is sufficient to say that the title to this land was in the wife, and she has an undisputed right to have her interests protected under the law. We have endeavored to call attention to the testimony in this cause, and have simply suggested the criticism that the testimony of the appellant is subject to, as disclosed by the record. It may be that the entire trip of appellant and Fouch brothers from Tennessee to Missouri, and their actions in the consummation of this transaction, may be susceptible of a reasonable explanation. If so, the record fails to disclose it. All the circumstances, and the condition and situation of the parties, corroborate the testimony of the respondent.

The trial court had the plaintiff and her husband before it, and had the depositions of the witnesses offered by appellant, and all the other testimony offered in the cause, and, from all the evidence offered, reached the conclusion that is fully indicated in the decree, and its judgment will be affirmed. All concur.

STATE v. PARKER.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—DYING DECLARATIONS OF DECEASED—ADMISSIBILITY—ANTECEDENT TRANSACTION—RES GESTE—WITNESSES—REPUTATION—PEACEABLENESS—CROSS-EXAMINATION—INSTRUCTIONS—DEFINITIONS—REQUESTS—REVIEW.

1. Where surgeons had advised deceased that he could not live, and the scrivener who took down his statements was summoned to the hospital because the surgeons regarded his death inevitable, and he stated that he believed he was mortally wounded, and in the immediate presence of death, and without hopes of recovery, his statement was admissible, in a prosecution for his homicide, as a dying declaration, though his wife denied that he thought he was going to die when he made the statement.

2. Statements in a dying declaration that deceased had never made any threats against defendant in his life; that deceased had not touched a drop of liquor for over a month; knew no reason why defendant shot him, ex-

cept as stated; never had made any threats against defendant, and did not think defendant was going to shoot him, as he had never given him any cause to shoot him, and that he had never had a quarrel with defendant—were inadmissible as referring to matters anterior to the killing, and not a part of the *res gestæ*.

3. In a prosecution for homicide, statements in deceased's dying declaration that just prior to the firing of the fatal shot he saw defendant was mad, and that that was the first he knew that he was mad, and that deceased spoke first to defendant, and asked him what he was mad about, were admissible as *res gestæ*.

4. An instruction that decedent's dying declaration should be received by the jury as such, but that the jury were not bound to believe it because it was a dying declaration, but they were to give it such weight as they thought it should have when considered in connection with the other facts and circumstances in evidence, was proper.

5. It was not error to refuse instructions requested, the subject of which was fully covered by the instructions given.

6. Where, in a prosecution for homicide, defendant had introduced his son as an eyewitness on the first trial of the cause, and on the second trial did not offer the son as a witness, it was not error for the prosecuting attorney in argument to refer to such fact simply by asking the jury why the son was not produced.

7. An instruction that if the jury found that defendant willfully, premeditatedly, and of his malice aforethought, did, with a revolving pistol, etc., shoot deceased, and inflict on him a mortal wound, they should find him guilty of murder in the second degree, and then defining each of the words "willfully," "premeditatedly," and "malice aforethought," was not erroneous for failure to use the word "feloniously."

8. In a prosecution for homicide it was not error to refuse to permit defendant to prove that at the time witness heard deceased make a threat against defendant, 18 months prior to the homicide, in defendant's absence, deceased had a knife in his hands.

9. Where, in a prosecution for homicide, a witness had testified to defendant's good general reputation for peaceableness, it was proper to permit the state on cross-examination to ask him whether or not he had heard of particular acts of defendant tending to show that he was not a peaceable, law-abiding citizen.

10. Where, in a prosecution for homicide, a witness had testified that defendant had a good general reputation for peaceableness, a question, on cross-examination, as to whether witness had heard that when defendant ran a saloon in the T. House he had gotten into a shooting scrape, and shot four times at a man, and the bullets lodged in the wall, was objectionable in so far as it referred to the particulars of the number of shots fired, etc.

Appeal from criminal court, Jackson county; Jno. W. Wofford, Judge.

James W. Parker was convicted of murder in the second degree, and he appeals. Reversed.

From a conviction of murder in the second degree in the criminal court of Jackson county at the September term, 1901, of said court, the defendant prosecutes this appeal. The indictment was preferred on the 27th day of October, 1900, and the defendant was duly arraigned, and pleaded not guilty. He was tried at April term, 1901, and convicted of murder in the second degree, but a new trial was granted, and the case was again

tried at the September term of that year, and again resulted in a conviction of murder in the second degree. It is not deemed necessary to reproduce the indictment, as it is in all respects sufficient, and such as has met the approval of this court on numerous occasions. The facts developed on the trial were substantially the following: The defendant was the father-in-law of the deceased, Edward R. Carl, and on the day of the homicide, the 9th day of June, 1900, they were, and had been for some months, both residing in the same house, No. 1240 Jefferson street, in Kansas City, Jackson county, Mo. The defendant was the proprietor of the house, and the deceased and his wife were staying with him; the deceased having no regular employment at the time, but was assisting in a general way about the house. The defendant was keeping a boarding house at the time. The defendant's evidence and the dying declaration of the deceased were the only testimony as to what occurred at the time of the homicide. The defendant testified that on the morning of the 9th day of June, 1900, he arose somewhere between 7 and 7:30 o'clock, and went to a closet in the back yard of the premises, and, returning, went upstairs to wash in a room in which deceased was dressing himself. He testified that he went to a washstand, picked up a washbowl, and emptied the water into a receiver, and started to or picked up a pitcher of water to put some water in the bowl to wash. Just then Carl, the deceased, said, "I am going away to-day," to which defendant replied: "I am very glad of it. Sallie [the wife of deceased] will have some satisfaction." Deceased said, "You old s—n of a b—h, I will fix you now." "I turned, and as I turned he kicked at me. I went on, and when I got down on the steps four or five steps, at the turn of the stairs, the banisters came around, and I turned my head around. Mr. Carl [the deceased] was coming right on, and I turned my head around. Carl was coming right on, and said, 'You old s—n of a b—h, I will cut your guts out.' He had a razor in his hand. I reached back in my pocket this way [indicating], and shot. I didn't know whether I hit the man or not. I didn't take any aim. When I got down to the bottom of the steps, I met my son and daughter. When I went out to the closet, I had on my pants, shoes, and stockings, and my undershirt. I had my pistol in my right hip pocket. I had my pistol in my pocket when I went upstairs. When I entered the front room up stairs—the southeast room—Carl was wiping his face with a towel at the washstand, which stood a little past the center of the room on the east side. When Carl said, 'I'll fix you now,' I turned, and as I turned he kicked at me. I walked straight out, and he reached over, and picked up his razor with his left hand. I was 2 or 3 feet from him when he reached for the razor, and probably 4 or 5 feet from me when I got to

the door of the room, east of me. We were both walking. I went out, and turned to the right, to go down the steps. I got down four or five steps, when I shot him. He was still at the top of the steps. He didn't make a swipe at me, but had the razor in his hands. When I shot, my back was to him, and in a northwestern direction from him 4 or 5 steps." Defendant also testified that Mrs. Steele, some two or three weeks prior to the homicide, told him deceased had said he intended to kill him before he left his house, and that Mr. and Mrs. Bradley had also communicated to him threats made by deceased against him. Defendant testified he met his daughter and son, Jim Parker, at the foot of the stairs immediately after he shot. That James had testified on the former trial that he was eyewitness to the shooting.

The dying declaration of the deceased described the homicide as follows: "Kansas City, June 9th, 1900. I, Edward Carl, realizing and believing that I am mortally wounded, and in the immediate presence of death, and that I have no hopes of recovery, make this statement of the circumstances of my shooting: I was upstairs in the room of Robinson and Wright, second floor, 1240 Jefferson street, this morning, when Mr. Parker came up. I had been in the room about ten or fifteen minutes—long enough to shave, and had shaven—and was standing close to the mirror, wiping my face, when Mr. Parker came upstairs. The first thing he said was, 'Are you going to leave here?' I said, 'Right away; I am fixing to go now.' I saw he was mad. That was the first I knew he was mad. He said, 'Go right at once, or I will see that you do.' I said, 'I am going right now.' He then walked downstairs. I had finished wiping my face, and had started into another room, where the wardrobe was, to get another pair of trousers to put on. I had just gotten between the doors of the two rooms, and right by the head of the stairs, when he came up the stairs. I saw him first when he was about three or four steps from the top. I spoke first, and said: 'What in the world is the matter with you, Jim? What are you mad about?' He said, 'I will kill you,' and I think he said, 'you son of a bitch,' in addition; something like son of a bitch, anyway. He shot just after he uttered this threat. I had turned and faced him when I saw him coming. I had on neither coat nor vest, and my hands were hanging naturally by my side. I had no weapons on me, and was not expecting trouble of any kind. When he shot, I rushed into the room where the wardrobe was, and slammed the door to, and held it. He shot but once. I did not say an unkind word to him. Did not make a threat [and never had made a threat against him]. [I did not think he was going to shoot me, as I had never given him any cause to shoot me.] [I had never had a quarrel with him.] [I had been out of regular work about a year, and part

of the time I was not able to pay board. He had not said anything to me, but yesterday morning he had a quarrel with his wife, and said something about me lying around there. The last time I saw Mr. Parker was last night about 8:30. I was sitting out in the front of the house. He said nothing. We had been on friendly terms, and I did not know that he had any enmity toward me until yesterday morning, when my wife told me Mr. Parker was mad.] I never made any threats against him in my life. I had not touched a drop of liquor for over a month. When he came upstairs the first time, he did not have his revolver; but when he came up the second time he had it in his hand. I know of no reason whatever why he shot me except as above set out. Edw. Carl." All that portion of the declaration within brackets was excluded.

Dr. J. M. Langedale, who was assistant coroner under Dr. Lester at the time of the homicide, made a post-mortem examination of the body of deceased the day after he was shot. He found a gunshot wound on the left front of the abdomen, slightly to the left of the median line, about $4\frac{1}{4}$ inches above the navel. This wound penetrated the abdomen, passed downward, backward, and to the left. In its passage downward it cut one of the small guts, and passed through the body of the left kidney near the middle, and passed out through the rear wall. He turned the body over, and found an incision on the back, which he presumed was made by some one in removing the bullet. The bullet was not deflected in its course, which was downward and backward. This wound was a mortal one. The exit of the bullet was some two inches below the point of entrance. He noticed no other injuries to the body of deceased. Frank Fredericks, a surgical nurse at the hospital, corroborated Dr. Langedale as to the character of the wound and course of the bullet. He was present when bullet was extracted. They took it out at the junction of the vertebra and twelfth rib. Edward Carl died at the hospital from the effects of this wound. Miss Bell Kelly testified she lived at 1238 Jefferson street, Kansas City, in the house next to No. 1240. She had a confectionery there. There was a little passageway between the two houses. She knew defendant and deceased. On the morning of the homicide she was at home in the front part of her house, and heard the pistol shot. Immediately after hearing it, she went to her front door, and saw Mrs. Parker, wife of defendant, and his son, James Parker, coming out of the Parker house. Jim went towards Twelfth street, and Mrs. Parker came to the house of witness, and called to witness to "go in quick, Mr. Parker had shot Mr. Carl." She went at once, and met defendant in the hall. He said, "Good morning, Miss Kelly." She inquired of him where Mr. Carl was, and he said, "Upstairs," and "I shot him." She went up to look for Carl, and,

after hunting, found Mr. Carl on the floor, lying on his left side, facing the door, with his head north. He had nothing in either hand. Asked him what was the matter, and he said he was shot. She asked him what for, and he said Mr. Parker asked him if he was going to get out of there—get out of his house—and he said as soon as he got his pants on. "Well, he went down, and got his revolver and shot me." His wife came in after he had told her this. She helped him on the bed; took his shoes off. He had on his pants and shirt, but no coat or vest. She stayed 15 or 20 minutes, and went down, and said to Parker, the defendant, "Mrs. Carl sent me down, and wants to know what you done with the revolver." He said he would take care of that himself; I need not bother about it." She asked him what he did it for, and he said a man got tired sometimes. He was sitting there, putting some buttons in his shirt. Officer Carry testified he was notified of the shooting, and got to the house about 7:30 that morning. He asked defendant what was the trouble around the house, and he said there was no trouble. He was sitting by the window, apparently fixing the cuffs of his shirt. "He was cool and calm. I told him I thought there was trouble, from the appearance of the crowd outside." He then started to investigate further, having received no satisfaction from defendant. He went to another room, and inquired, and still got no information. When he turned from that door, the defendant said "Mr. Carry, you need not go any further. I am responsible for what occurred this morning." He saw a pistol on a couch by the window where defendant sat. He identified the pistol in evidence as the one he got there at that time. He then went upstairs, and found Carl lying on the bed. Mark J. Kelly testified he boarded at Parker's house, 1240 Jefferson street, on the day of the shooting. Last saw Edward Carl alive that morning at breakfast, about 6:30. Carl waited on him at breakfast. There was nothing unusual about him at the time. Deceased was working there. He went to the grocery in the morning, waited on the table, and did chamber work—whatever was necessary about the house. The brother of deceased, ex-sheriff of Barton county, testified to seeing defendant carry the pistol. The deceased was 41 years old, and weighed about 190 pounds. The deceased was for a time employed as train director at the Union Station in Kansas City, and later as conductor on Pullman car. Something like a year previous to the homicide he had an accident by falling into a sewer hole, and after that had no regular work until the time of his death. The witnesses Mrs. Steele and Mr. and Mrs. Bradley testified to threats by deceased against defendant, and to their communication. There was evidence as to the general good character of defendant as a peaceful and law-abiding man, and evidence tending to prove Carl was quarrelsome when

drinking. Other facts will be noted, if necessary, in the course of the opinion.

Jno. M. Dougherty, Ralph S. Latshaw, and Jos. S. Brooks, for appellant. Edward C. Crow, Atty. Gen., and Jerry M. Jeffries, for the State.

GANTT, J. (after stating the facts). 1. The most important point discussed by counsel on this appeal is that raised by the admission of the dying declaration of deceased. As to the preliminary objection that it was not admissible because not made under the belief that his dissolution was near at hand, and after he had abandoned all hope of recovery, we think the court properly admitted it in evidence. The surgeons had advised him that he could not live, and Mr. Walker, who took down the statement, was summoned to the hospital because the surgeons regarded his death inevitable. The fact that the wife of deceased denied that he thought he was going to die did not affect the competency of the evidence. Upon the preliminary proof made, we think the statement, so far as otherwise competent, was admissible. *State v. Draper*, 65 Mo., loc. cit. 339, 27 Am. Rep. 287; *State v. Elkins*, 101 Mo., loc. cit. 350, 14 S. W. 116. We are thus brought to the objection that portions of this statement were incompetent because it was not confined and restricted to the identification of the accused and the deceased, and to the act of killing, and the circumstances immediately attending said act, and forming a part of the *res gestæ*. Dying declarations are admissible as to those facts and circumstances constituting the *res gestæ* of the homicide, but as to all other matters occurring anterior to the killing, and not immediately connected with it, they are incompetent. This is the settled law of this state. *State v. Draper*, 65 Mo., loc. cit. 340, 27 Am. Rep. 287, and the cases cited; *State v. Vansant*, 80 Mo., loc. cit. 76; *State v. Bowles*, 146 Mo. 16, 47 S. W. 892, 69 Am. St. Rep. 598; 1 Greenleaf on Ev. sect. 156; *State v. Parker*, 96 Mo., loc. cit. 392, 9 S. W. 728. The portions of the statement to which defendant objected, outside of those excluded by the court and included within brackets, are the following: "I never made any threats against him in my life." The state, by its counsel, conceded that the words "in my life" should be stricken out, and the defendant objected to striking out those words without striking out the whole of that sentence. We think the court erred in not striking out the whole of said sentence. It necessarily referred to matters anterior to the fatal encounter, was not a part of the *res gestæ*, and, under the rule just announced, was inadmissible. It cannot be said that it was harmless, as it tended directly to disprove the evidence of defendant's witnesses that deceased had made threats of violence toward defendant, and they had been communicated to defend-

ant. Other parts of the statement to which exception was taken were: "I had not touched a drop of liquor for over a month." "I know of no reason why he shot me, except as above set out;" "and never had made a threat against him;" "I did not think he was going to shoot me, as I had never given him any cause to shoot me;" "I had never had a quarrel with him." Each of these statements is subject to the same objection as the one above noted. They do not purport on their face to be statements of any facts which occurred at the killing. They refer either to the absence of threats anterior to the homicide or the conclusions drawn by deceased that defendant had no cause to shoot him. We think they should likewise have been excluded. *State v. Elkins*, 101 Mo. 344, 14 S. W. 116. Counsel do not insist in this court that the clauses, "I saw he was mad"; "that was the first I knew he was mad"; and the words "I spoke first, and said, 'What in the world is the matter with you, Jim; what are you mad about?'"—should have been excluded. Neither do we think they were incompetent. They were facts which the deceased observed then and there, and the colloquy between the defendant and deceased was a part of the *res gestae*—"verbal acts"—and admissible. The admission in evidence of those parts of the statement which we have indicated as incompetent was reversible error.

2. Instruction No. 17 was not erroneous. It was in these words: "The court instructs the jury that the statement read to you as the dying declaration of Edward Carl should be received by you as such declaration; but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have, when considered in connection with all the other facts and circumstances in evidence." It will be noted that the court was careful to avoid the error of instructing the jury that such dying declarations should have the same degree of credit as the testimony of the deceased would have if he had testified under oath as a witness. This court, in *State v. Vansant*, 80 Mo. 67, repudiated the instruction given in *Green v. State*, 13 Mo. 382, and in giving its instruction the trial court followed *State v. McCanon*, 51 Mo. 160, and *State v. Vansant*, 80 Mo. 67.

3. There was no error in refusing defendant's seventh instruction, as the court had already fully instructed the jury as to the purpose for which the threats were admitted in evidence.

4. Neither was there any error in refusing instruction No. 6, prayed by defendant, on the subject of self-defense. The court fully and liberally instructed on that point in its instruction No. 16.

5. During his argument the prosecuting attorney said to the jury: "Where is Jimmy Parker, the son of this defendant, who was eyewitness to this transaction, and testi-

fied at the other trial of this case? Where is Jimmy Parker?" The ground of this objection is that James Parker had not been subpoenaed nor offered by defendant as a witness. The record discloses that defendant himself testified that he shot the deceased when he (defendant) was on the fourth or fifth step of the staircase descending into the office; that as soon as he shot he continued his descent, and when he reached the bottom his daughter and his son, James Parker, were standing there. He also testified that this son, James Parker, had testified as an eyewitness on the former trial of this case, and the record further discloses he did not testify at this trial. In *State v. Emory*, 79 Mo., loc. cit. 463, this court, speaking of the contention that the judgment should be reversed on account of remarks of the prosecuting attorney, said: "The subject of the remarks and the substance thereof was the failure of the defendant, after having the witness subpoenaed, to place him on the stand, because he knew he was guilty of the charge, and was afraid he would be condemned if he did," etc. "We see no reason why it is not as legitimate for the state to call the attention of the jury to facts from which unfavorable inferences may be drawn as it is for any other suitor in the courts." We are cited to *State v. Weaver*, 165 Mo. 1, 65 S. W. 308, 88 Am. St. Rep. 406, but in that case counsel for the state, in his argument, animadverted on the failure of two co-indictees to testify in favor of defendant, and said their failure to do so raised a presumption of the guilt of defendant. We held that neither of them was competent to testify, and this statement was a misstatement of the law and highly injurious. In *State v. Moxley*, 102 Mo. 392, 14 S. W. 969, 15 S. W. 556, the remarks were to the effect that it was the defendant's duty to have explained to his neighbors how his wife came to her death. "The neighbors expected it of him. Your neighbors expect it of you, and, gentlemen, you would expect it of yourselves." The defendant had not testified in his own behalf. This court held (and most properly so) that this was an adroit and insinuating method of avoiding the plain command of the statute, which forbids any attorney to refer to the failure of an accused person to testify in his own behalf. It is obvious those cases are wholly dissimilar to the one before us. In this case defendant had testified at length in his own behalf. He had placed his son at the foot of the stairway, where he could readily have seen him when he shot deceased. This son had once testified on the trial of the case as an eyewitness. If his evidence would corroborate defendant, the presumption is he would have called him. If it would not, that he would not call him. All that the prosecutor did was to ask where he was. He stated no fact which was not in evidence. We think it was legitimate argument.

6. Again, it is urged that the court improperly defined murder in the second degree, because it left out the word "feloniously." It is just as essential to-day as it was at common law in charging murder to charge that the assault and homicide was "feloniously" committed; but it by no means follows that it is incumbent on a court to use that word in its instructions to the jury. The object of the instructions is to advise the jury what facts, if proven, will constitute the felonious killing. Hence, when the court instructed the jury, as it did, that if they found that the defendant willfully, premeditatedly, and of his malice aforethought, did, with a revolving pistol, loaded with gunpowder and leaden balls, shoot Edward Carl, and inflicted upon him a mortal wound, they would find him guilty of murder in the second degree, and then defined the meaning of each of the words "willfully," "premeditatedly," and "malice aforethought," it properly gave them the elements which constituted the crime of murder in the second degree. This court, in *State v. Scott*, 109 Mo., loc. cit. 232, 19 S. W. 99, said, through Judge Macfarlane: "The word 'felonious' is descriptive of the grade of the offense, rather than the criminal act which constitutes the offense, and ordinarily has no place in an instruction. When used, it is most frequently but a repetition of what is expressed in other and simpler words, * * * and can be omitted altogether without affecting in the least the correctness and sufficiency of the instruction." It was also held that, if used, it was wholly unnecessary to define it. *State v. Parker*, 106 Mo. 223, 17 S. W. 180; *State v. Cantlin*, 118 Mo., loc. cit. 111, 23 S. W. 1091. There was no error in leaving out the word "feloniously" in telling the jury the constituents of murder.

7. There was no error in refusing to permit the defendant to prove by Mrs. Miller that at the time she heard deceased make a threat against defendant at least 18 months previous to the homicide, and at a time defendant was not present, deceased had a knife in his hands. As ruled by the court, it was wholly immaterial.

8. John P. Stroud, among others, testified to the good general reputation of defendant as a peaceable, law-abiding man. On cross-examination he was asked: "Did you ever hear of Parker, about four years ago, at Seventeenth and Genessee streets, having tried to kill his two sons? Did you ever hear of Parker at the stockyards, when he ran a saloon in the Transit House, having gotten into a shooting scrape, and shooting four times at a man, and bullets having lodged in the wall?" The witness answered he had not. No specific objection was made to these questions at the time they were propounded, but afterwards counsel said, "We object to those questions," but the court ruled they were proper, and counsel then excepted. The prosecuting attorney had a right to test

the knowledge of the witness as to the general reputation of defendant by inquiring of him if he had not heard of conduct which tended to show he was not the peaceable, law-abiding man his evidence had tended to prove him to be. We think, however, it was objectionable to descend into the particulars of the number of shots fired in the Transit House difficulty. Greenleaf lays it down that "in testing a witness who speaks to good character it will expose the untrustworthiness of his testimony if he admits that rumors of misconduct are known to him, for the knowledge of such rumors may well be inconsistent with his assertion that the person's reputation is good. Accordingly, the propriety of inquiring whether he has not heard that the person whose reputation he has supported has been charged with this or that misdeed has usually been conceded. A few courts only, through a misunderstanding of the real purpose of the inquiry, and supposing it to be in violation of the rule against proving particular acts of misconduct, have forbidden it." 1 Greenleaf, Ev. (16th Ed.) sec. 461, d. 4, p. 568, and cases collated.

It results that this case must be reversed because of the admission of those parts of the dying declaration which we have indicated. Otherwise the record is free from error.

BURGESS and FOX, JJ., concur.

STATE ex rel. LINN COUNTY v. ADAMS et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

COUNTY CLERK—COMPENSATION—MEMBER OF BOARD OF EQUALIZATION—LIABILITY OF SURETIES.

1. Rev. St. 1899, c. 149, § 9130, creates in each county a board of equalization, consisting of the county clerk, as secretary, and others. Sections 9131, 9133, and 9135 point out the duties of the board, and provide that the clerk shall keep an accurate record of the proceedings, and adjust the taxbook according to the orders of the board; and section 9136 provides that the members shall receive \$3 a day for each day they shall act as such board. Held, that the county clerk is entitled to \$3 a day, and not entitled to any other fees or compensation; the clerical duties imposed on him being in his capacity as county clerk.

2. Where the county clerk was ex officio a member of the county board of equalization, and received, as secretary of such board, fees to which he was not entitled as compensation, and failed to account therefor in his return of fees received, the sureties on his official bond as county clerk were liable, notwithstanding that he received the fees as "secretary of the board of equalization."

Appeal from circuit court, Linn county;
Jno. P. Butler, Judge.

Action by the state, on the relation of Linn county, against George W. Adams, as clerk thereof, and the sureties on his official bond. From a judgment for plaintiff, defendants appeal. Affirmed.

A. W. Mullins, W. K. Amick, and Harry K. West, for appellants. E. B. Fields and Thos. P. Burns, for respondent.

BRACE, P. J. This is a suit by Linn county against George W. Adams, clerk of the county court of said county, and the sureties on his official bond, to recover the sum of \$167.32, which it is alleged he received as fees of his office in excess of the amount which he is by law allowed to retain, and which he refuses to account for. The judgment was for the plaintiff, and the defendants appeal.

The determination of the questions raised in the case depends upon the construction of the following provisions of the revenue act (Rev. St. 1899, c. 149):

"Sec. 9130. There shall be in each county of this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year.

* * *

"Sec. 9131. Said board shall have power to hear complaints, and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and having each taken an oath administered by the clerk fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation, and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value.

* * *

"Sec. 9133. The said board shall hear and determine all appeals made from the valuation of property made by the assessor in a summary way and shall correct and adjust the assessment accordingly. The county clerk shall keep an accurate record of the proceedings and orders of the board, and the assessor shall correct all erroneous assessments, and the clerk shall adjust the tax book according to the orders of said board, and the orders of the state board of equalization. * * *

"Sec. 9135. In case the report from the state board of equalization be not received at or during the session of said county board, then it shall be the duty of the county clerk to adjust the tax books according to such report when received.

"Sec. 9136. The members of the county board of equalization shall receive the sum of three dollars per day for each day they shall act as such board."

"Sec. 9381. The county clerk shall be allowed fees at the same rate for making out the railroad tax book as he may receive for like services in making out tax books under the general revenue law of the state."

These provisions are to be considered in

connection with section 3239, Rev. St. 1899, which prescribes the fees allowed county clerks for their services.

At the session of the Linn county board of equalization in April, 1899, the said George W. Adams was present, and discharged the duties imposed upon him by the foregoing statutory provisions. The board was in session four days. Afterwards, at the May term of the county court, and on the 2d of May, 1899, he presented to said court the following account: "Linn county to George W. Adams, Debtor: Four (4) days' services, secretary of the board of equalization, \$12; publishing proceedings of the board of equalization, \$10.50; notifying banks et al. of action of board of equalization, \$2.50; recording proceedings of board of equalization, \$56.70; adjusting assessment books, 137,894 words and figures, total \$219.60. I, George W. Adams, do hereby certify the above account to be correct, and no part thereof paid. George W. Adams, Secretary County Board of Equalization." Which was allowed by said court, a warrant ordered therefor, and duly paid. For the year 1899 the said Adams received, as county clerk, the sum of \$3,697.73, not including said sum of \$219.60 so paid him as aforesaid. Including that sum, he received \$3,917.33. Of his receipts, he was entitled to retain the sum of \$3,750 as salary and deputy hire for that year. So that, including that sum, he received \$167.33 more than he was entitled to retain as county clerk, and, excluding it, received less than he was entitled to retain. And the question is, was he entitled to said sum of \$219.60 as county clerk, or was he entitled to it as a member or secretary of the board of equalization? The circuit court, in effect, held that he was entitled to only \$12 thereof as a member of the board of equalization, and to the remainder as clerk of the county court, and rendered judgment in favor of the plaintiff for \$155.32. From this judgment the defendants appeal, and their counsel contend that he was entitled to all of said money as compensation for his services as secretary of the board of equalization.

1. In order to maintain this proposition, some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. *Jackson County v. Stone*, 168 Mo. 577, 68 S. W. 926; *State ex rel. v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *State ex rel. v. Brown*, 146 Mo. 401, 47 S. W. 504; *State ex rel. v. Wofford*, 116 Mo. 220, 22 S. W. 486; *Givens v. Daviess Co.*, 107 Mo. 608, 17 S. W. 998; *Gammon v. Lafayette Co.*, 76 Mo. 675. A mere application of these principles to the statute determines the question in hand. No provision is therein to be found giving any compensation to the sec-

retary of the board of equalization. The county clerk is by the statute made *ex officio* a member of the board, and its secretary, but no clerical duties are imposed upon him, and no provision made for compensation for any clerical duties to be performed by him. As a member of the board, he is allowed \$3 per day while acting as such member, and no longer; and so the circuit court correctly ruled and allowed him \$12, or \$3 per day as a member of the board for the whole time he could have acted as such member. The clerical duties required to be performed in connection with the action of the board, for which Adams also received pay from the county in addition to said sum of \$12, were imposed upon him, not as a member of the board, nor as secretary thereof, but as county clerk. And in the act imposing those duties no provision is made for compensation for his services in performing them, and but for the provisions of section 3239, allowing fees for such services to him as county clerk, he would have no right to any compensation whatever therefor. He can point to said section 3239 as authorizing the compensation to him as county clerk for the clerical services for which he charged the county, but he can point to no statute authorizing such compensation to him as secretary of the board of equalization. Hence the circuit court correctly held that he was entitled to such compensation as county clerk, and not as secretary of the board of equalization. The contention of the defendant receives no support from the case of *State ex rel. McGrath v. Walker*, 97 Mo. 162, 10 S. W. 473, to which we are cited. In that case there was a statute expressly providing a *per diem* compensation for the members of the state board of equalization. Rev. St. 1879, § 6669. And the only question was whether the Secretary of State, in view of the constitutional provision as to the salary of such officer, was entitled to such *per diem* compensation.

2. It is next contended that, although the judgment against the defendant Adams be correct, yet the judgment against the other defendants, his sureties, is erroneous. This contention is based on the fact that the certificate to the correctness of the account is signed by said Adams as "Secretary Board of Equalization," and the order of allowance is in the following form: "George W. Adams' Account Allowed. It is ordered by the court that George W. Adams be allowed the sum of \$219.60 for services as secretary county board of equalization, and that a warrant be drawn for said sum." There is nothing in this contention. The obligation of the defendant sureties was that the said Adams should faithfully perform his duties as county clerk, and pay over all moneys that might come to his hands by virtue of his office. It was his duty to perform the services imposed upon him by the statute, to collect from the county the fees allowed by law to him as such clerk for the performance of those duties,

and to account for the same in his returns of fees received as required by the statute. Sections 3265, 3266, 3267, Rev. St. 1899. He performed the services, and collected the fees therefor, but failed to return them in his statements, and failed to account for them as required by law, and, in failing to do so, was guilty of a breach of his duty and of his bond, for which his sureties are liable, and this liability is in no way affected by the means he may have used in collecting the money.

The judgment of the circuit court will be affirmed. All concur.

ROBERTS v. BEST.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

JUDICIAL SALES—SUBROGATION.

1. Administrators, who had paid debts of the estate from their own funds, obtained a decree against all the heirs but one, subrogating them to the rights of the estate creditors whose claims they had paid, and land belonging to the estate was sold under the decree. *Held*, in an action to recover an undivided interest in the land by the heir not served against a remote grantee of the purchaser at the judicial sale, that the purchaser acquired no right to be subrogated to the original rights of the administrators as against the heir not a party to the decree.

Appeal from circuit court, Clark county; E. R. McKee, Judge.

Action by Louisa Roberts against Benjamin Best. From a judgment for defendant, plaintiff appeals. Reversed.

Suit in ejectment for an undivided one-fourth interest in 120.17 acres of land in Clark county, in this state. Plaintiff claims the land as an heir at law of one William Bartlett, her deceased father. Defendant's answer to plaintiff's petition is, first, a denial that plaintiff has any title to the land; then an equitable count is interposed in which the following allegations of fact are made: "That plaintiff's ancestor, William Bartlett, was at his death the owner of the land in suit, together with other land and a large amount of property. That said Bartlett, at the time of his death, was largely indebted to divers persons, firms, and corporations. That administration was had on his estate, and that one John Roberts (the husband of the appellant) and Henry Bartlett were duly appointed, qualified, and acting administrators of his estate. That all of the debts and claims against the estate of said Bartlett were duly probated against said estate, and judgment rendered thereon, which were liens against his estate. That the personal property belonging to his estate was exhausted in the payment of said claims, and was insufficient to fully pay off and satisfy said allowed claims against his estate. That from time to time, under orders from the probate court of said county, real estate was sold for the purpose of paying said claims, and the pro-

ceeds thereof were applied to the payment of the same. That the said administrators, believing that there was enough personal property, with the real estate already sold, to pay off and discharge the indebtedness of the estate as allowed by said court, in good faith out of their own money paid off and discharged a large amount of the indebtedness of said estate as allowed by said court, and made settlement of said estate, which was approved. That afterwards these administrators commenced a suit in the circuit court of this county, asking to be subrogated to the rights of the creditors of said estate whose claims they had paid, and that the lands still remaining belonging to said estate be sold to satisfy such subrogated claims, which was the lands mentioned and described in the petition of the appellant. That afterwards in said cause in said court said administrators recovered a judgment and decree subrogating them to all of the rights of the creditors of said estate whose demands they had paid off and satisfied, and that the lands be sold for the payment thereof. That afterwards the said lands were sold in pursuance of and in obedience to said decree by a commissioner appointed by said court in said decree, and that one Lucy Bartlett purchased said lands at said sale, paid the purchase money thereof, which purchase money was paid to said administrators in full satisfaction of their claims found by said decree. That afterwards the circuit court in all things approved said sale and all of the acts of the commissioner in that behalf. That said commissioner made, executed, and delivered a deed to said lands, conveying to said Lucy T. Bartlett the lands mentioned in the petition. That said Lucy T. Bartlett, by deed of general warranty dated the 11th day of April, 1888, conveyed said lands to Lucy F. Selby and Joseph Selby, her husband. That Joseph Selby, by deed of general warranty, conveyed his undivided one-half interest in said lands to said Lucy T. Bartlett, dated the 24th day of April, 1888. That said Lucy T. Bartlett, by deed of general warranty dated the 25th day of April, 1888, conveyed to Lucy Selby the lands mentioned and described in the petition. That on the 1st day of May, 1891, said Lucy F. Selby and her husband, Joseph Selby, by deed of general warranty, conveyed said lands to one Lizzie Barnett; consideration, six thousand dollars. That said Lizzie Barnett, with her husband, by a deed of general warranty, dated the 22d day of February, 1892, conveyed said lands to this defendant, Benjamin Best; consideration, six thousand dollars. That each and all of the grantees held the possession of said lands under and by virtue of the deed aforesaid, and that the defendant, Best, at the date of his deed, took possession of said lands, and was at the time of the commencement of this suit in possession of the same, under his said deed. That by reason of the premises said defend-

ant is subrogated to the rights of his prior vendors, and is entitled to be subrogated to the rights of the creditors of said estate, to wit, the said John Roberts and Henry Bartlett; and he asks to be subrogated." The defendant also filed a third count in his answer, setting up estoppel, and, fourth, a count setting up advancements made by William Bartlett in his lifetime to the plaintiff; the particulars of which last two counts, however, are of no concern in this appeal, since upon them the court found for the plaintiff, as it also did upon the issues presented in the first count. To the second count of defendant's answer plaintiff's reply was (and the facts on this appeal admit it to be true) that plaintiff was not made a party defendant in the subrogation proceeding which resulted in the sale of this land and its purchase by Lucy T. Bartlett (through whom defendant claims the land). As the issues raised by the third and fourth counts of defendant's answer were found against him by the trial court, this detail now is of no concern on this (plaintiff's) appeal from the finding of the trial court in defendant's favor on the issue raised by the second count of his answer. The trial court also found for the plaintiff upon the issue tendered in the first count of defendant's answer, and, as above indicated, found for the defendant on the second count, and rendered its decree accordingly. This appeal is prosecuted by the plaintiff from the action of the trial court in its regard.

As the decree rendered in the case discloses so fully both the facts found and the theory upon which the case was tried and considered below, it will be here inserted, and is as follows:

"Now, at this day comes the plaintiff herein, by her attorneys, W. T. Rutherford, and J. W. Howard, and the defendants by their attorneys, Charles Hiller, Berkhelmer & Dawson, and Blair & Marchand, and this cause coming on to be heard upon the answers returned by the jury to the interrogatories heretofore submitted to them by the court, and the motion of the plaintiff to disregard the findings aforesaid and make a finding and enter a decree and judgment for plaintiff in accordance with the prayer of her petition, and the court, being fully advised in the premises, doth find that the plaintiff was on the 1st day of February, 1899, entitled to the possession of the undivided one-fourth of the following described lands and premises situated in Clark county, Missouri, to wit: Two and seventeen one hundredths (2.17) acres, beginning at a point on the north line of section No. twenty-nine (29), township No. sixty-five (65), range No. six (6) west, eleven (11) chains east of the northwest corner of the east half of the northwest quarter of said section No. twenty-nine (29), and running thence south seven and twenty-five one hundredths (7.25) chains, thence east three (3) chains, thence north seven and

twenty-five hundredths (7.25) chains, thence west three chains to the place of beginning, and being in the north part of the east half of the northwest quarter of said section No. twenty-nine (29); the south half of the south half of the southwest quarter of section No. twenty (20); and fifty-two acres off of the north end of the northeast quarter of section No. twenty-nine (29); and twenty-six (26) acres off of the north end of the west half of the northwest quarter of section No. twenty-eight (28); and twenty-six (26) acres off of the north end of the east half of the northwest quarter of section No. twenty-nine (29)—all in township No. sixty-five (65), range No. six (6) west. The court further finds that plaintiff, being entitled to the undivided one-fourth part of said lands and premises as aforesaid, defendant, Benjamin B. Best, afterwards, on the — day of —, 1899, entered into possession of said lands and premises, and unlawfully withholds from plaintiff the possession thereof, to her damage in the sum of one cent, and that the monthly rents and profits of the undivided one-fourth part of said lands and premises is six and twenty-five one-hundredths dollars (\$6.25). It is therefore considered, adjudged, and decreed by the court that plaintiff recover of defendant the possession of the undivided one-fourth part of the lands and premises hereinbefore mentioned and described, together with the sum of one cent for her damages aforesaid, assessed by the court, and also the sum of six and $\frac{25}{100}$ dollars per month, the monthly value of the rents and profits of said lands and premises, until the said plaintiff be restored to the possession of the said lands and premises; and the court doth further order that an execution issue to restore to the said plaintiff the possession of said lands and premises, and for her damages, and the value of the monthly rents and profits aforesaid, and for her costs in this behalf laid out and expended. The court further finds that one William Bartlett departed this life on the — day of March, 1876, leaving as his sole heirs at law his widow, Lucy T. Bartlett, his two sons, Richard F. Bartlett and Henry C. Bartlett, his two daughters, Louisa A. Roberts, this plaintiff, who in the year 1858 intermarried with one John Roberts, and Lucy F. Morris, the wife of Simpson J. Morris, and since intermarried with Joseph Selby; and that said Richard F. Bartlett departed this life at Clark county, Missouri, on the — day of March, 1877, leaving as his sole heirs at law his son, William F. Bartlett, and his daughter, Hattie Bartlett. The court further finds that said William Bartlett, deceased, was at the time of his death the owner of a large amount of real and personal property situated in Clark county, Missouri, and that on April 19, 1876, said Henry C. Bartlett and John Roberts were, by proper proceedings had in the probate court of Clark county, Missouri, duly appoint-

ed administrators of the estate of the said William Bartlett, deceased; filed their bond; and took upon themselves the administration of said estate. The court further finds that said deceased was at the time of his death largely indebted to diverse persons; partnerships; and corporations; and that all of the debts due and owing by decedent at the time of his death were presented to and allowed by the probate court of said county as demands against said decedent's estate. The court further finds that said administrators sold all of the personal property belonging to said estate, and applied the proceeds thereof to the payment of said allowed demands. The court further finds that Lucy T. Bartlett, widow of deceased; on August 14, 1877; and at the August term, 1877, of the probate court of Clark county, Missouri, filed her petition in said court, alleging, among other things; that she was the widow of said William Bartlett, deceased, who died the owner in fee of the lands and premises hereinbefore mentioned and described in her petition, and praying the court to appoint three commissioners, resident householders of said Clark county, Missouri, to first set out to her a homestead in said lands and premises; and then to assign and set off to her dower in the residue thereof; and that afterwards, to wit, on August 14, 1877, and at the August term, 1877, of said probate court, said court made an order of record duly appointing Henry C. Campbell, Joseph Z. Barnett, and Oscar F. Hsain commissioners to set off the homestead and assign the dower of said Lucy T. Bartlett in the lands mentioned and described in her petition thereto. The court further finds that afterwards, on November 12, 1877, and at the November term, 1877, of said probate court; said commissioners appointed as aforesaid made and filed in said court their report setting out and assigning to said Lucy T. Bartlett as and for her dower and homestead interest in the lands and premises of which the said William Bartlett died seised, and being the lands and premises hereinbefore mentioned and described, and that, it appearing to the court that said commissioners had proceeded according to law and the order of the court in reference thereto, their said report was by said probate court in all things duly approved and confirmed. The court further finds that, the personal property belonging to said estate being insufficient to pay off and discharge all of the indebtedness and allowed demands against said estate, said administrators, for the purpose of paying off the same under various orders of the probate court of said county, sold all of the real estate belonging to said decedent at the time of his death, save and except the lands and premises hereinbefore mentioned and described, and applied the proceeds thereof to the payment of said allowed demands. The court further finds that before the October term, 1884, of the circuit

court of Clark county, Missouri, said administrators filed their petition in said court returnable to said October term thereof, alleging, among other things, that theretofore, on the — day of —, 18—, they had, as such administrators, in good faith, and for the benefit of said estate, and not officiously and voluntarily, paid off with their private funds debts due by decedent at the time of his death, and which had been duly allowed as demands against said estate, to the amount of seventeen hundred and sixteen and $\frac{95}{100}$ dollars, and that the object and general nature of said suit was to obtain a decree of said court subrogating them to the rights of the creditors whose claims they had so paid off and discharged, and praying for a decree of the court declaring an equitable lien against the lands hereinbefore mentioned and described, and that said lands, or so much thereof as might be necessary, be sold, subject, however, to the homestead and dower interest of said Lucy T. Bartlett, for the purpose of satisfying said decree and costs. The court further finds that all of the heirs of said William Bartlett, deceased, were made parties to said suit, and served with process therein, except this plaintiff, and that all of the heirs so served with process as aforesaid appeared in said court, and filed their answers therein to the petition of said plaintiff administrators. The court further finds that on October 20, 1887, plaintiff in said suit obtained a decree in said suit subrogating them to the rights of the creditors of said estate, whose claims they had so paid off and discharged, declaring the same an equitable lien against all the lands and premises hereinbefore mentioned and described, subject, however, to the homestead and dower interest of said Lucy T. Bartlett therein, and that Charles Hiller be appointed a commissioner to sell said lands as lands are sold under execution, and out of the proceeds thereof pay the costs of the proceedings therein, including his commission therefor, and next pay plaintiff's claim of nineteen hundred and seventy-seven $\frac{9}{100}$ dollars, with six per cent. interest per annum from the date of said decree, and pay the balance, if any, into court; and that said commissioner, in pursuance of said decree, did sell, subject to the homestead and dower interest of said Lucy T. Bartlett therein, all of the right, title, and interest of the said Lucy F. Morris, William F. Bartlett and Hattie Bartlett, John Roberts, and Henry C. Bartlett in and to the lands and premises hereinbefore mentioned and described. The court further finds that said sale was had and held on April 11, 1888, and at said sale Lucy T. Bartlett became the purchaser thereof, and received a deed therefor from said commissioner conveying to her all the right, title, and interest of John Roberts, Henry C. Bartlett, Lucy F. Morris, William F. Bartlett, and Hattie Bartlett in and to said lands,

paying therefor the sum of twenty-two hundred and twenty-five dollars, and that afterwards said Lucy T. Bartlett, on said 11th day of April, 1888, by her deed of general warranty, duly executed, acknowledged, and delivered, for a purported consideration therein expressed, one thousand and twenty-five dollars, conveyed said lands to her daughter Lucy F. Selby and her husband, Joseph Selby, and reserving unto herself a life estate in and to the lands and premises so conveyed as aforesaid; and that afterwards said Joseph Selby, on the 24th day of April, 1888, by his deed of general warranty, duly executed, acknowledged, and delivered, for a purported consideration of one dollar, therein expressed conveyed his undivided one-half interest in said lands to said Lucy T. Bartlett, and subject to the life interest of the said Lucy T. Bartlett therein as aforesaid; and that afterwards, to wit, on the 25th day of April, 1888, said Lucy T. Bartlett, by her deed of general warranty, duly executed, acknowledged, and delivered, for a purported consideration therein expressed of one dollar, conveyed to her daughter, Lucy F. Selby, all her right, title, claim, and interest in and to said lands, including her life estate reserved in her former deed, so that said Lucy F. Selby shall own said land herein described in fee simple. The court further finds that afterwards, to wit, on the 1st day of May, 1891, said Lucy F. Selby, with her husband, Joseph Selby, by their deed of general warranty, duly executed, acknowledged, and delivered, for a purported consideration therein expressed of six thousand eight hundred dollars, conveyed said lands to Lizzie Barnett, together with forty acres of other lands, and that on the 22d day of February, 1892, said Lizzie Barnett, with her husband, Gurden C. Barnett, by their deed of general warranty, duly executed, acknowledged, and delivered, conveyed said lands, together with forty acres of other lands, to Benjamin B. Best, this defendant, for a purported consideration therein expressed of eight thousand dollars. The court further finds that on the 25th day of April, 188—, said Lucy F. Selby went into possession of said lands and premises, and that she and her grantees have ever since been in possession thereof, including this defendant, Benjamin B. Best, who is now in possession of said lands and premises. The court further finds that on the 13th day of May, 1888, Henry C. Bartlett and John Roberts, administrators as aforesaid, filed in the probate court of Clark county, Missouri, their final settlement in the estate of William Bartlett, deceased, together with proof of notice thereof, showing a balance due said administrators of two hundred and fourteen dollars and fifty-five cents, which said settlement was by said court duly approved, and said administrators duly discharged; and that said Lucy T. Bartlett, widow of William Bartlett, deceased, depart-

ed this life at Clark county, Missouri, on the — day of May, 1896. The court further finds that said commissioners, in the deed made to said Lucy T. Bartlett, in describing part of the lands so conveyed, made a mistake in the description thereof as follows: That the lands intended to be conveyed by said deed, and which were mentioned and described in said decree to be sold, is described as follows, to wit, twenty-six (26) acres, the north end of the east half of the northwest quarter of section No. twenty-nine (29), township No. sixty-five (65), range No. six (6) west, in Clark county, Missouri. The court further finds that said Lucy T. Bartlett, grantee of said Commissioner Charles Hiller, by the payment of the purchase money, as aforesaid, by her for said lands and premises, is entitled to be subrogated to plaintiff's proportion of the debts paid off by her purchase of said lands, and that said Lucy F. Selby, and her husband, Joseph Selby, are entitled to be subrogated to the rights of their grantor, Lucy T. Bartlett, by virtue of said Lucy T. Bartlett's deed of general warranty; and that said Lizzie Barnett, by virtue of her deed of general warranty from said Lucy F. and Joseph Selby, is entitled to be subrogated to the rights of her grantors for the proportion of the debt for which their grantor was subrogated; and that this defendant, Benjamin B. Best, is entitled, by virtue of his deed, to be subrogated to the rights of his grantors, Lizzie Barnett and Gurden C. Barnett, for the proportion of the debts of said estate paid by their purchase money. And the court finds that plaintiff should be charged with the sum of four hundred and ninety-four and $\frac{26}{100}$ dollars, together with six per cent. interest thereon from the 11th day of April, 1888, until paid; also for one-fourth of the taxes levied and assessed against said lands and premises in the sum of — dollars for the years 1896, 1897, 1898, 1899, and thereafter; and that defendant pay to plaintiff one-fourth of the monthly rents and profits of said lands and premises, which is three hundred dollars per year, leaving the amount due defendant from plaintiff in the sum of five hundred and fifteen dollars and eighty-five cents, together with interest thereon at the rate of six per cent. per annum. It is therefore considered, adjudged, and decreed by the court that said sum of five hundred and fifteen and $\frac{26}{100}$ dollars be declared an equitable lien on the undivided one-fourth interest of plaintiff in the lands and premises hereinbefore mentioned and described, and that the payment of said sum be declared a condition precedent to plaintiff's right of recovery herein. And the court further finds for the plaintiff and against the defendant on the plea and defense of estoppel as pleaded in the third count of defendant's first amended answer. The court further finds for the plaintiff and against the defendant on the plea and de-

fense of advancements as pleaded in the fourth count of defendant's first amended answer."

W. T. Rutherford and J. W. Howard, for appellant. Charles Hiller, Berkheimer & Dawson, and Blair & Marchand, for respondent.

ROBINSON, J. (after stating the facts). Was this decree, upon the facts pleaded and found to be true by the trial court, warranted? This is the sole question for determination on this appeal. Though not questioning the first proposition urged by respondent—that a deed conveying land operated as an assignment to the grantee therein of all rights and defenses concerning the title and possession which the grantor had or enjoyed, or that the covenants of a deed will inure to the benefit of any subsequent transferee where possession of the land conveyed accompanied the delivery of the deed, and while also recognizing the correctness of the general proposition asserted by respondent that a purchaser of real estate, who has extinguished an incumbrance, lien, or charge thereon, may be subrogated to the rights of the party holding or entitled to said incumbrance, lien, or charge under proper conditions, it is appellant's contention that those essential conditions are not present in the facts of this case. Not only must the purchaser have, by his payment made, extinguished an incumbrance or charge upon the real estate purchased; but, before he can be subrogated to the rights of the party holding such incumbrance, lien, or charge, the purchaser must be able to show that his or her payment was made as either the result of compulsion, or for the protection of some interest he or she had in the property that was threatened or imperiled by the incumbrance, lien, or charge. The rule is universal that, before the equitable doctrine of subrogation can be invoked to reimburse one for money expended in the extinguishment of a debt, lien, or charge upon lands, the payment must have been made by one who at the time had, or in good faith supposed he had, an interest in discharging the demand. Mere volunteers or strangers have no such right. If this be so, where, then, stands defendant, whose only interests in the land in suit is that derived by means conveyances from Lucy T. Bartlett, who at the commissioner's sale under a decree rendered in the subrogation proceeding instituted by the administrator of the estate of William Bartlett, deceased (against all the heirs of said William Bartlett, except this plaintiff), became its purchaser. In the purchase of the land by Lucy T. Bartlett at the commissioner's sale under the proceedings above mentioned she was not only a volunteer; but she had no interest to protect, no rights that were threatened or in any wise impaired by the lien or charge upon the land to be sold. By the decree in

that proceeding, as disclosed by the recitation of facts in the present decree, the land was ordered sold, subject to the homestead and dower interest of said Lucy T. Bartlett, and it was so sold. Not only was Lucy T. Bartlett a volunteer buying at a sale where she had no interest to protect, but she got by her purchase at said commissioner's sale all the interest in the land owned by the heirs of William Bartlett, deceased, who were made parties defendant in the subrogation proceedings begun by the administrators of said estate. That sale was neither void, irregular, nor defective, and the commissioner's deed, made in consummation thereof, was in all things regular and formal. By that deed Lucy T. Bartlett got all the land that was offered for sale, and all interests therein that could be sold, and the money paid therefor by her was used to discharge the claim which the administrators of the estate of William Bartlett, deceased, had caused to be charged against the interests of plaintiff's brothers and sisters in the land in question, and none other. As plaintiff's brothers and sisters, whose interest alone in this land was sold, have made no complaint because plaintiff's interest in the land was not also sold, or because she had not contributed her part to help discharge this lien established against lands in which she and they had a common interest, it is not in the mouth of defendant, whose only claim to the land is that derived from Lucy T. Bartlett, to do so now; or to ask to be subrogated to any of their rights or claims. Defendant's grantor, Lucy T. Bartlett, got by her deed all that was authorized to be sold under the decree empowering the commissioner to act—the interest that plaintiff's brothers and sisters held in the land of their deceased father, William Bartlett; but not the right that came to them as a result of that sale, to wit, the right to have their sister, the plaintiff herein, contribute to them for what they were compelled to give up to relieve lands from a burden which she in common with them should have borne.

From any and every possible view this case may be considered there appear facts to make the doctrine of subrogation invoked by defendant inapplicable, and to show the decree rendered unauthorized. Though Mrs. Lucy T. Bartlett had a homestead and dower interest in the land sold by the commissioner under the decree in the subrogation proceedings of the administrators against the brothers and sisters of plaintiff, at which sale she became the purchaser, that interest was in no way involved at that sale, for by the express terms of the decree in that proceeding, the land was ordered to be sold subject to the homestead and dower interest of said Lucy T. Bartlett therein; and, so far as concerns her purchase at that sale, she is held and treated as any outsider or mere stranger. Not only should she be treated as a mere stranger, but she got all she contracted

to buy at said sale; all that the money expended by her at the time was intended to pay for, to wit, the interest of plaintiff's brothers and sisters (the defendants in that proceeding) in the land sold by the commissioner. And in the disposition of this fund in the hands of the commissioner, as the result of the sale of the land in question, to Mrs. Bartlett, the commissioner was in no sense the agent or representative of Mrs. Bartlett. Its use or misuse by him could not in the least involve or affect her, or the interest in the land purchased by her. The money received by the commissioner of Mrs. Bartlett, and paid by him to the plaintiffs in the subrogation proceedings by the administrators of the estate of William Bartlett, deceased, against plaintiff's brothers and sisters, was paid as the agent and representative of the defendants in that proceeding, to discharge a lien or charge that had been established against their interest in the land sold, and on account of that payment plaintiff's brothers and sisters alone could ask an accounting of plaintiff herein for the proportion of the lien or charge which she, as tenant in common with them of the land sold, should have paid, to relieve their common property of a debt to which plaintiff's interest in the property was as liable as that of her brothers and sisters, had the plaintiffs in the original subrogation proceeding sought to so establish it against that interest. Not only is this so, but if it could be said that Mrs. Bartlett was in any wise concerned with the ultimate disposition of that fund in the hands of the commissioners (as she was not), that fund so used by the commissioner was in fact used by him in the extinguishment of the subrogated claim of the administrators, that was established as a charge against the interest of plaintiff's brothers and sisters in the land sold. So that Mrs. Bartlett got, as a result of that sale and the commissioner's deed issued to her on account of that proceeding, not only the interest of plaintiff's brothers and sisters in the land, but she got it freed from all claims to which it had been liable on account of debts and obligations of their deceased father, William Bartlett, through whom they acquired the land by inheritance. As Mrs. Bartlett, through whom alone defendants have acquired all their rights to the land in controversy, did no act to entitle her to invoke the application of the doctrine of subrogation now sought, it follows that it should be denied to defendant.

The judgment of the trial court is therefore reversed in so far as it decrees that any sum is established as an equitable lien on the one-fourth interest of plaintiff in the land in controversy, and that the payment of said sum by plaintiff to defendant is declared a condition precedent to plaintiff's right to recover, and the cause is remanded that an unconditional judgment for plaintiff be entered. All concur.

PARKER v. BURTON.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DEEDS—DESCRIPTION—SUFFICIENCY—FAILURE TO DESIGNATE COUNTY—TAX SUIT—SERVICE BY PUBLICATION—NONRESIDENCE.

1. In ejectment, a deed of dedication of the land in controversy was not inadmissible because not showing the county in which the land was located, but only the section, town, and range; since the court will take judicial notice of county boundaries, and determine from the section, town, and range in what county the land lies.

2. Rev. St. 1899, §§ 9803, 575, provide that, if the plaintiff or other person for him shall depose that part of the defendants are nonresidents or have absconded or absented themselves from their usual abode, service may be had by publication. An affidavit in a tax suit stated that defendant had "absconded from his usual place of abode in this state." *Held*, that an order authorizing service by publication, on the ground that defendant was a "nonresident," was not a compliance with the statute, and gave the court no jurisdiction.

Appeal from circuit court, Monroe county; David H. Eby, Judge.

Action by George W. Parker against Sarah Burton. From a judgment for plaintiff, defendant appeals. Reversed.

R. B. Bristow, for appellant. W. T. Ragland, for respondent.

BRAOE, P. J. This is an action in ejectment to recover possession of the south two-thirds of lot 2, in block 10, in the town of Holliday, in Monroe county. The petition is in common form. The answer, a general denial. At the close of the plaintiff's evidence the defendant demurred thereto. The demurrer was overruled, and the issues submitted to the jury without instructions. The verdict was for the defendant, and from the judgment thereon in his favor the plaintiff appeals.

Plaintiff claims title under a sheriff's deed dated November 4, 1897, duly executed, acknowledged, and recorded, made in pursuance of a sale, under execution on a judgment of the circuit court of Monroe county, in favor of the state of Missouri, at the relation and to the use of George W. Waller, collector of the revenue of said county, against Samuel Burton et al., in an action for delinquent taxes. On the trial, after showing record title from the government in Thompson Holliday to the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, township 54, range 11, plaintiff offered in evidence the record of a deed of dedication and plat of said town duly executed by the said Holliday, to the admission of which defendant objected, on the ground that "it did not identify the location of the town, except as being in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, town 54, range 11; the county not being designated, and no definite point fixed to

begin the measurements." The court overruled the objection, and this is assigned as error.

1. Courts take judicial notice of county boundaries, of government surveys, and of the subdivisions of land thereunder, and, where the section, township, and range are given, know whether the lands included in the survey are within the boundaries of a given county. 17 Am. & Eng. Encyl. of Law (2d Ed.) pp. 912, 913. Hence it appearing from the plat that the town of Holliday, being in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 3, town 54, range 11, was in Monroe county; and it also appearing from the plat that the town is located on both sides of a railroad running diagonally through the town, the center of the right of way of which, where it crosses the east line of the town, is marked by a star (*), which is stated to be 8.44 chains from the N. E. corner of said N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 3, town 54, range 11; and the lines drawn with reference thereto showing that the east and north lines of the town are coincident with the east and north lines of the 40—the location of each block and lot can be easily ascertained from these lines by the measurements given on the plat, and the court committed no error in overruling this objection.

2. By deed dated August 1, 1878, duly executed, acknowledged, and recorded, Samuel Burton acquired the legal title of said Holliday to lot 2 in block 10 of said town, which deed plaintiff gave in evidence, and then offered in evidence said sheriff's deed, together with the execution, judgment, record entries, pleadings, and files in the tax suit in which such judgment was rendered; all of which were admitted in evidence, over the objections of the defendant. It appeared therefrom that the tax suit was instituted by petition in the usual form for delinquent taxes for the years 1890, 1891, 1892, and 1893, amounting in the aggregate to the sum of \$8.22 against the premises, of which the said Samuel Burton was alleged to be the owner of the record title; that the summons issued thereon returnable to the April term, 1896, of said court, was duly returned served as to the other defendants, but as to him the return was, "Samuel Burton not being found in my county"; that judgment by default was taken against the other defendants, and the cause continued; that afterwards, at the April term, 1897, of said court, the following affidavit was filed: "State of Missouri, County of Monroe—ss.: George W. Waller, of lawful age, being duly sworn, on his oath states that he was on the 31st day of March, 1896, and now is, the collector of the revenue within and for Monroe county, Missouri, and as such he did institute a suit against Samuel Burton, Sarah Burton, Geo. W. Seibert, and Louis Bassett, for taxes due and owing by them on the south two-thirds of lot two (2) in block ten (10) of the town of Holliday, Monroe

¶ 1. See Evidence, vol. 20, Cent. Dig. § 12.

county, Missouri, on the 31st day of March, 1896; that service (personal) has been had on Sarah Burton, Geo. W. Seibert, and Louis Bassett, and that the defendant Samuel Burton has absconded and absented himself from his usual place of abode in this state; that the ordinary process of law cannot be served upon him. Further this deponent saith not. G. W. Waller. Sworn to and subscribed before me this 27th day of April, 1897. Chas. A. Creigh, Clerk of the Circuit Court for Monroe County, Missouri." And thereupon the following order was made and entered of record: "State of Missouri, County of Monroe—ss.: In the Circuit Court of Monroe County, Missouri. State of Missouri ex rel. George W. Waller, Plaintiff, vs. Samuel Burton et al., Defendants. The state of Missouri, to the above-named defendant, Samuel Burton, greeting: Now, on this 27th day of April, 1897, April term, 1897, of said circuit court, comes plaintiff herein by attorney before said court. And the court being duly informed by evidence of the plaintiff herein that said defendant Samuel Burton is a nonresident of the state of Missouri, and cannot be summoned herein by ordinary process of law, it is therefore ordered by said court that said defendant Samuel Burton be notified by publication that said plaintiff by petition herein filed of date Dec. 30, 1895, has commenced suit against said defendant, the immediate object and general nature of which is to enforce the collection of taxes for said state and county due on the following described real estate, to wit: The south two-thirds of lot two (2), in block ten (10), of the town of Holliday, for the years 1890, 1891, 1892, 1893, and all unpaid taxes on said land. And it is further ordered that said defendant be and appear in this court, on the first day of the next term thereof, to be holden at the city of Paris, Monroe county, Missouri, on Monday, the 25th day of October, 1897, and on or before the third day of said term to answer or plead to said petition, or in default therein said petition will be taken and adjudged as confessed, and judgment by default will be rendered against said defendant. It is further ordered that a copy hereof be duly published at least once a week for four consecutive weeks in the Madison Times, a weekly newspaper duly printed and published and circulated in said Monroe county, and duly designated by plaintiff's attorney, and duly approved by said clerk, most likely to give notice to defendant, the last insertion to be at least fifteen days before said next term of said court."

Upon proof of the publication of this order duly made, the court on the 4th of November, 1897, rendered the final judgment in said cause against all the defendants, under which the premises were sold on execution, and purchased by the plaintiff, who claims to have acquired the title of the said Samuel Burton to the premises by virtue

of the sheriff's deed aforesaid, executed in pursuance thereof.

The defendant contends that the court erred in admitting the judgment, execution, and sheriff's deed in evidence, and in refusing to sustain the demurrer to the evidence, on the ground that it appears from the record that the said Samuel Burton was not legally served with process in the tax suit in which such judgment was rendered. In such cases service by publication is authorized. Rev. St. 1889, § 7682 (Rev. St. 1899, § 9903). "If the plaintiff or other person for him shall allege in his petition, or at the time of filing the same, or at any time thereafter shall file an affidavit stating that part or all of the defendants are non-residents of the state * * * or have absconded or absented themselves from their usual place of abode in this state * * * or that they have concealed themselves so that the ordinary process of law cannot be served upon them." Rev. St. 1889, § 2022 (Rev. St. 1899, § 575). Or when "summons shall be issued against any defendant and the sheriff to whom it is directed shall make return that the defendant or defendants cannot be found, the court being first satisfied that process cannot be served." Rev. St. 1889, § 2024 (Rev. St. 1899, § 577).

It appears upon the face of the record in the tax suit that service of notice by publication was ordered on the ground that the court had been "duly informed by evidence of the plaintiff herein that said Samuel Burton is a nonresident of the state of Missouri." In order that nonresidence may afford a basis for an order of publication, the statute requires the allegation of that fact in the petition, or in an affidavit filed with the same or some time thereafter. The petition in that suit contained no such allegation, nor was any affidavit containing such an allegation filed therewith or thereafter. On the contrary, the petition was silent on that subject, the said defendant was sued, and the summons issued against him as a resident defendant; and the allegation contained in the only affidavit filed in the case was that the said defendant "had absconded and absented himself from his usual place of abode in this state." Thus it appeared both affirmatively and negatively that said defendant was a resident, and not a nonresident of the state, and under the statute the court had no authority to order service on him as a nonresident by publication. It may be that the court had authority to make an order of publication against him as a resident "who could not be found," or "who had absconded or absented himself from his usual place of abode in this state." But the order was not based upon any such authority, but solely on the fact that he was a nonresident, which fact was not only not made to appear in the manner required by the statute, but is negatived by the record.

Jurisdiction of the person of the defendant

could only be acquired by a strict compliance with the requirements of the statute; and, it appearing from the record that the statutory provisions authorizing service by publication were not complied with in the tax suit, the judgment therein against the said defendant, Samuel Burton, was and is void. *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Tookey v. Leake*, 148 Mo. 419, 48 S. W. 638; *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971; *Wilson v. Railroad*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 903; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; *Schell v. Leland*, 45 Mo. 289; *State ex rel. Wheat v. Horine*, 63 Mo. App. 1. Some other objections to the judgment are urged, but in view of what has been said they need not be noticed.

It follows that, the judgment being void as to Samuel Burton, his title to the premises was not affected thereby, and was not acquired by the plaintiff under the sheriff's deed; and, as this was the only title which the plaintiff claimed, the court erred in refusing to sustain the defendant's demurrer to the evidence, and in admitting said deed in evidence; for which errors the judgment of the circuit court will be reversed. All concur.

WILSON v. FISHER.

(Supreme Court of Missouri, Division No. 1.
Feb. 18, 1903.)

DEEDS—TAX SALES—SUBSEQUENTLY ACQUIRED TITLES.

1. The owner of certain land conveyed it by warranty deed, and afterwards made a similar conveyance to another. Shortly after this second conveyance the land was sold under a tax judgment against the second grantee, and again under a judgment against him and the purchaser at the first sale. Subsequent to the rendering of this second judgment the first grantee reconveyed his interest to the original grantor, which the second grantee had also done at about the time of the second judgment. *Held* that, since none of the defendants in the tax suits had title at the time of the judgments therein, the title passed by the first grantee to the original grantor did not inure to the benefit of the purchasers at the second sale, and was not within Rev. St. 1899, § 4591, providing that, when a grantor having no title undertakes to convey an "indefeasible estate in fee simple absolute," a legal estate subsequently acquired by him shall inure to the benefit of his grantee.

2. By these reconveyances the original grantor becomes again seised and possessed of an indefeasible estate in fee-simple absolute, which he could pass by a subsequent conveyance.

Appeal from circuit court, Webster county; Argus Cox, Judge.

Action by Eliza Wilson against William Fisher. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action in ejectment for the N. $\frac{1}{4}$, S. E. $\frac{1}{4}$, section 21, township 28, range 16 W., in Webster county. The petition is in the usual form, and the answer is a gen-

eral denial. It is claimed that Henry C. Page is the common source of title. On January 16, 1863, Henry C. Page conveyed the land to Charles E. Page by a general warranty deed, which was properly recorded on August 18, 1865. There is no evidence in this record that Charles E. Page ever was in possession of the land at any time. In 1869, Henry C. Page conveyed the land by warranty deed to Emma S. Page. The plaintiff claims title in the following way: On September 13, 1893, Emma S. Faull (née Page) quitclaimed the land to Henry C. Page. On December 23, 1893, Charles E. Page reconveyed the land by a quitclaim deed to his grantor, Henry C. Page. Thus Henry reacquired all the interest and title he had conveyed to Charles and Emma, and on January 2, 1894, Henry C. Page quitclaimed the land to W. S. Thompson. On March 30, 1894, W. S. Thompson conveyed the land by a general warranty deed to I. S. Wilson, who is the husband of the plaintiff. Just here appears a very unaccountable incident or link in the chain of circumstances. Notwithstanding Charles E. Page reconveyed the land to Henry C. Page on the 23d of December, 1893, Charles E. Page began an action in ejectment for the land against one Jonathan Sherrills, who was in possession of the land, returnable to the March term, 1894. I. S. Wilson (who had purchased from W. S. Thompson as aforesaid, and who in turn had purchased from Henry C. Page, who had reacquired the title from Charles E. Page) voluntarily appeared and was made a party defendant, and defended the suit, with the result that a judgment was entered in his favor, but the costs were, for some unexplained and inconceivable reason, adjudged against him. He did not pay the whole of the costs, and so an execution was issued against said I. S. Wilson, and levied on the land, and it was sold by the sheriff on September 16, 1895, to satisfy said execution for costs, and W. T. Brewer became the purchaser. Brewer quitclaimed the land to Thos. W. Hunt on November 28, 1898, and Hunt quitclaimed the land to Eliza Wilson, the plaintiff herein, and the wife of I. S. Wilson, on the same day. The judgment against Wilson for the costs in the ejectment case brought by Charles E. Page was entered on March 30, 1894. Thereafter, on September 17, 1894, Wilson quitclaimed the land to W. E. Beason, and on the same day Beason quitclaimed the land to Eliza Hunt, who is now Eliza Wilson, the second wife of I. S. Wilson. On the other hand, the defendant claims title in this way: After Henry C. Page had conveyed the land in 1863 to Charles E. Page, he (Henry) on September 29, 1869, conveyed it by warranty deed to Emma S. Page. She afterwards married J. P. Faull. The taxes on the land became delinquent for the years 1874, 1879, 1880, and 1881, and the collector brought suit to recover the same, and made Emma S. Faull and J. P. Faull, her husband,

the parties defendant. A judgment was rendered on September 24, 1861, and on the 18th of March, 1865, the land was sold under said judgment, and Naomi Wilson, the first wife of I. S. Wilson, became the purchaser. She appears to have entered into possession through her tenants, of whom was Jonathan Sherrills, the original defendant in the ejectment suit brought in 1864 by Charles E. Page against Jonathan Sherrills. The taxes for 1867, 1868, and 1869, became delinquent, and the collector brought suit for them, making Emma S. Faull, late Emma S. Page, and J. P. Faull, her husband, and I. S. Wilson, and the unknown heirs of Naomi Wilson, parties defendant. It will be noted that Naomi Wilson was the first wife of I. S. Wilson, and had purchased the land at the first tax sale in 1865, and held the possession through her tenant Sherrills afterwards, and she it seems had died about the year 1868. Judgment was entered in this second tax suit, and the land was sold on March 19, 1864, to Annot A. Marvin. On February 11, 1898, Andrew J. Marvin contracted with the defendant, William Fisher, to sell him the land for \$150, \$25 to be paid on October 1, 1898, and the balance in annual installments of \$12.50, the deed to be made when the purchase price was fully paid. The contract, in its body, recites that it is between Andrew J. Marvin, party of the first part, and Will Fisher, party of the second part, and it is signed "Will Fisher. [Seal.] Annot A. Marvin. [Seal.] A. J. Marvin [Seal.], Agent for Annah A. Marvin." A. J. Marvin testified that he bought the land from I. S. Wilson, giving him therefor a half interest in his institute for the cure of inebriates at Springfield, and that Wilson said that, to clear up the title, he would have the land sold for taxes, and thereby cut out the heirs of his first wife, and that this was done, and that Wilson bought the land in at the tax sale, and had the deed made to his (Marvin's) second wife. Wilson denies all of this, but admits that he acted as agent for Mrs. Marvin in buying the land at the tax sale. This is the defendant's chain of title. The court found for the plaintiff, and the defendant appealed.

L. O. Nelder and Thos. H. Musick, for appellant. A. H. Davis and M. Selph, for respondent.

MARSHALL, J. (after stating the facts). The defendant contends that although Henry C. Page conveyed the land to Charles E. Page in July, 1863, and did not convey to Emma S. Page, through whom the defendant claims title, until 1869, nevertheless that, when Charles E. Page reconveyed the land to Henry C. Page in 1863, the title immediately inured to the benefit of Emma S. Page and those who claim under her, and that the conveyances by Henry C. Page after he so reacquired title in 1863, under which the plaintiff claims title, were ineffective as

against the defendant's title (or that of Annah A. Marvin, if the contract aforesaid be not adequate to vest a right in the defendant). This is the single question in this case. It is conceded that Henry C. Page had no title to the land when he executed the warranty deed to Emma S. Page in 1869. The legal title was then firmly and absolutely vested in Charles E. Page by virtue of the warranty deed from Henry C. Page, made in 1863. Emma S. Page acquired, therefore, nothing at that time by that deed. Neither has Emma S. Page ever attempted to convey any title or right that she had to any one whomsoever except to reconvey it in 1893 to Henry C. Page, her grantor. The title that the defendant sets up was acquired through two sales of the land under two judgments for taxes. The question, therefore, is whether the reconveyance by Charles E. Page to Henry C. Page in 1893 inured to the benefit of the defendant.

The plaintiff contends: First, that under our statute an after-acquired estate inures only to the benefit of the grantee in a prior deed that purported to convey an indefeasible estate in fee simple; and, second, that the tax sale conveyed no title, because neither Emma S. Faull (Page) nor Naomi Wilson had any title at the time the judgments for taxes were rendered, and therefore only an inchoate right of title passed by the tax sales, which could be enforced only in equity, and is not available as a defense under a general denial in ejectment. The statute relied on is as follows: "Where a grantor, by the terms of his deed, undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not at the time of such conveyance, have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee; and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance." Rev. St. 1899, § 4591. In 1825 the first statute bearing upon this subject was enacted in this state. The language of that statute was different from that employed in the present statute. Then the language as to the character of the conveyance was "an estate in fee simple absolute." Now it is "an indefeasible estate in fee simple absolute." The statute of 1825 was construed by the court in *Bogy v. Shoab*, 18 Mo. 365, and it was held that it meant an indefeasible estate in fee-simple absolute, and that it was not intended by the statute that after-acquired titles should inure to the benefit of anyone who held by virtue of a quitclaim deed, or of any deed that conveyed less than an indefeasible estate in fee-simple absolute.

Some doubt was expressed in *Valle v. Clemens*, 18 Mo., loc. cit. 490, as to the correctness of the rule laid down in *Bogy v. Shoab*, supra, but it was also held in that case that the statute did not apply to a title

acquired by a quitclaim deed. It will be noted, however, that the statute, as it now is, applies, by its express terms, only to such estates as the statute of 1825 was interpreted in *Bogy v. Shoab*, supra, to apply to, the change in the statute having been doubtless made to set at rest any question as to the intention of the lawmakers.

In *Bogy v. Shoab*, supra, loc. cit. 378, it was said: "The new title was supposed to inure, by way of estoppel, to the use of the grantee and his assigns."

In *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251, it was held that if one tenant in common conveys to his cotenant by a warranty deed, and the deed does not contain words of perpetuity, the warranty becomes extinct by the death of the grantee, and any after-acquired title by the grantor does not, by virtue of such a deed, inure to the heirs of the grantee.

In *White v. Davis*, 50 Mo. loc. cit. 334, it was said: "Whatever title Maynard had at the time of the execution sale vested in the plaintiff by the sheriff's deed. Whether he had any equitable interest, or whether such equity was vested in Maynard's wife, it is unnecessary now to inquire. It is sufficient to say that at the time of the execution sale Maynard did not have the legal title to any part of this land. A sheriff's deed operates only on the existing title, and does not pass a subsequently acquired title. When a grantor undertakes to convey to the grantee an indefeasible estate in fee-simple absolute, and has not at the time the legal title to the estate sought to be conveyed, but afterwards acquires it, the legal estate so acquired immediately passes to the grantee. See *Wag. St. 135, § 8*. A sheriff can convey only such interest as the defendant has at the time of the sale, and he has no power to undertake to convey a fee-simple absolute when the defendant in the execution has no such estate vested in him."

In *Butcher v. Rogers*, 60 Mo. 138, the deed contained the words "grants, bargains, and sells all the right, title, and interest that Parsley and wife have in the premises in dispute," and contained this additional recital: "Their title being a sheriff's deed, said land being sold as the property of John Butcher, to satisfy an execution in favor of Austin Shine." This court, speaking through Sherwood, J., said: "This deed was in effect a mere quitclaim deed, and inoperative to pass an after-acquired title (*Gibson v. Chouteau*, 39 Mo. 536, and cases cited; *Bogy v. Shoab*, 13 Mo. 365). As this was the case, the title acquired by Parsley, defendant's grantor, at the March term, 1865, as shown both by the record and statement of counsel, could by no possibility inure to the benefit of the defendant, and he therefore showed by the evidence which he adduced at the trial no defense whatever to plaintiff's action."

In *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426, the owner of the land died leaving no

descendants. His widow remarried, and joined her second husband in a deed purporting to convey the land with covenants of warranty, after which she elected, under the statute, to take one-half of the land in lieu of dower. It was held that the title acquired by election did not inure to the benefit of her grantees, nor did her election operate by relation to give effect to her deed. Macfarlane, J., speaking for the court, said: "If the title acquired by the widow, through her election, inured to the benefit of, or vested in, the grantees in her deed of conveyance, in which she was joined with her husband, it was either by virtue of the equitable principles of estoppel or by the operation of the statute. Section 3940, supra. The statute is but a recognition of the common-law doctrine of estoppel, and both may be considered together. The doctrine of inurement, whether under the statute or at common law, is raised upon the covenants of title contained in the deed under which it operates. So it is held that the doctrine does not apply at common law to a deed of quitclaim or release merely. *White v. Patten*, 24 Pick. 324; *Jackson v. Bradford*, 4 Wend. 622; *Dart v. Dart*, 7 Conn. 256; *Chew v. Barnet*, 11 Serg. & R. 389. To the same effect have been the rulings of this court in respect to its operation under the statute. The statute does not intend that a quitclaim deed, although it uses language to pass the fee and not any smaller estate, would therefore pass a new title not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed conveying all right, title, and interest of the grantor.' Such a deed is not supposed to be within the contemplation of the section, because it does not purport to convey an estate in fee-simple absolute. *Bogy v. Shoab*, 13 Mo. 378; *Valle v. Clemens*, 18 Mo. 486; *Rector v. Waugh*, 17 Mo. 22 [57 Am. Dec. 251]; *Gibson v. Chouteau*, 39 Mo. 536; *Butcher v. Rogers*, 60 Mo. 139; *Kimmel v. Benna*, 70 Mo. 52. Under the statute, the wife is not bound upon her covenants contained in the deed, except so far as may be necessary effectually to convey from her and her heirs all her right, title, and interest in the land at the time the deed was made. By the terms of the statute her deed is, in its effect, whatever its form, simply a quitclaim of all her existing right, title, and interest. Such being the effect of the deed, the rulings of the court in regard to inurement under quitclaim deeds would apply to her deed, regardless of its form or covenants. And such I understand to be the rulings of this court. *Barker v. Circle*, 60 Mo. 259; *Reese v. Smith*, 12 Mo. 348; *Bank v. Robidoux*, 57 Mo. 446. But Mrs. Russell would be bound, under her covenants, to the extent of conveying all the title she had when she made the deed. This leads to the inquiry as to what title or interest she had in the land upon the death of her husband. The widow, at common law and under our statute, has dower in the lands of

which her husband dies seised. The law invests her with this right without election or other act on her part, and this is all the law does invest her with, unless, she, herself, does some act required by law. Upon the death of the husband, the title to the land, under the laws of descent in this state, passed to and vested in his next of kin, subject to the widow's right of dower. If the title vested in the heir, it did not vest in the widow. At the time the conveyance was made the title was in the heir, one-half thereof subject to be divested, and vested in the widow upon making and filing her election in the manner and within the time pointed out and prescribed by law. When her election is properly made she loses her dower right altogether, and becomes seised in lieu thereof of an estate in the land. Previous to her election she had no estate, but merely a right in action—a right to have her dower assigned and set off to her out of the land. The right to elect was a mere personal right, which she could exercise, or not, at her pleasure, and by the exercise of which she was enabled to acquire an interest in the land. This right was not in itself an interest, and upon filing her election she became invested with a new and independent estate, as much so as if it had been acquired by deed from the heir. 'It is obvious that, when a right grows out of an election, it cannot arise or come into existence until an election is actually made.' *Welch v. Anderson*, 28 Mo. 298. 'The doctrine is that, when an election creates the interest, nothing will pass until an election is made; and, if no election can be made, no interest will arise.' *Hamilton v. O'Neil*, 9 Mo. 11, citing *United States v. Grundy*, 3 Cranch, 337 [2 L. Ed. 459]. See, also, *Matney v. Graham*, 50 Mo. 562. The interest, then, acquired by Mrs. Russell, through means of her election, did not, either by virtue of the statute or the common-law principles of estoppel, inure to the benefit of her grantees, and plaintiff had no such title as would authorize a recovery in this suit, unless such title was acquired by reason of the operation of other legal principles. It does not seem that counsel for plaintiff insists, with much confidence, on an acquisition of title, from the election of the widow, on the ground of inurement, either at common law or under the statute, but does, with much ingenuity of argument and earnestness, insist that, when the election was made, it took effect by relation, as of the date of the execution of the deed. We do not think the contention can be sustained on any well-recognized principles of law. 'By the doctrine of relation is meant that principle by which an act done at one time is considered, by fiction of law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding, which consummates the conveyance, is held for certain purposes to

take effect, by relation, as of the day when the first proceeding was had. * * * The doctrine of relation is a fiction of law, adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title.' *Gibson v. Chouteau*, 13 Wall. 100 [20 L. Ed. 534]; *Heath v. Ross*, 12 Johns. 140; *Powers v. Hurmert*, 51 Mo. 136; *Slagel v. Murdock*, 65 Mo. 525. It will be seen that the doctrine only applies when there are two or more concurrent acts required to make a conveyance or perfect a right. The first act in the series is preferred, and the last, which perfects the conveyance or right, is, by fiction of law, taken as of the date of the first, and thus injustice is prevented by cutting off wrongful intervening claims of parties and privies and others having notice. Each successive act or proceeding must have reference to the other, and reference to the common conclusion or result. The validity or sufficiency of the right or title is not created or acquired by the doctrine, but the acquired rights are merely protected thereby."

The most exhaustive review of the law upon this subject in this state is that made by *Gantt, J.*, in the case of *Ford v. Unity Society*, 120 Mo. 498, 25 S. W. 394, 23 L. R. A. 561, 41 Am. St. Rep. 711. There a widow, to whom land had been devised for life, remainder to her children, made a voluntary deed to her daughter, purporting to convey a fee simple "in the one divided fourth" of the land. Two years later she acquired the fourth interest of her son, and conveyed it to the son's wife. The question was whether this after-acquired fourth interest inured to the benefit of the daughter or passed to the son's wife. After citing the statute, and reviewing the cases in this state from *Bogy v. Shoab*, 13 Mo. 365, to *Brawford v. Wolfe*, 103 Mo. 391, 15 S. W. 426 (except *White v. Davis*, 50 Mo. 333, which seems to have been overlooked in subsequent cases), and after an exhaustive review of the common-law rule, it was said: "Our conclusion is that a recorded deed by one who has no title, but who afterwards acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think, when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such deeds are not 'in the line of title,' as that term is used by conveyancers and searchers." And, accordingly, the after-acquired title was held not to inure to the benefit of the daughter.

It thus appears that, whatever may be the true meaning of the statute as to after-acquired property, as applied to grantees and those claiming under them by virtue of a conveyance from the owner himself, the rule is settled that a sheriff's deed will not pass an

after-acquired interest of the defendant in the execution, for the obvious reason that only property can be sold under execution, and therefore only such interest in the property as the defendant in the execution had at the time of the sale passes by the sale.

The first judgment for taxes was rendered in 1884, and the second in September, 1893. At neither time did any of the defendants in the tax suit have any title to the land. The judgment could only affect the rights of the persons who were parties to the suit. No title or inchoate right, or otherwise, therefore, passed by virtue of those tax judgments and the sales thereunder. Hence neither Naomi Wilson, nor Annah A. Marvin, nor the defendant, ever acquired any right or title to the land. The defendant, therefore, is not entitled to a judgment on the strength of his own title.

But it does not follow that the plaintiff is entitled to recover. She must recover upon the strength of her own title, not on the weakness of her adversary's. The plaintiff claims by mesne conveyances from Henry C. Page after he reacquired the title from Charles S. Page on December 23, 1893, and from Emma G. Faulk in September, 1893. It will be remembered that Henry C. Page conveyed by warranty deed to Charles E. Page in 1803, and afterwards by warranty deed to Emma S. Page in 1869. Both of those deeds conveyed an indefeasible estate in fee-simple absolute. Afterwards, in September, 1893, Emma reconveyed to Henry, and in December Charles reconveyed to Henry. In this way Henry became again seised and possessed of an indefeasible estate in fee-simple absolute. This title passed by mesne conveyance to the plaintiff. She, therefore, is entitled to recover on the strength of her own title. The judgment of the circuit court was in her favor, and it is therefore affirmed. All concur.

SHIELDS v. HOBART et al. (No. 9,411.)

(Supreme Court of Missouri. Feb. 6, 1903.)

CORPORATIONS—STOCKHOLDER'S LIABILITY—DIVIDENDS—VALIDITY—FRAUD—BURDEN OF PROOF.

1. A holder of corporate stock is liable to creditors of the corporation for any unpaid portion of his stock subscription.

2. In a suit in equity by a creditor of a corporation to enforce a stockholder's liability for unpaid stock subscriptions, it is not necessary to show fraud.

3. Though a going corporation may prefer one creditor to another, a corporation whose assets are insufficient to pay its debts cannot pay its debts to its own officers as against existing creditors.

4. In an equitable suit by a judgment creditor of a corporation against a stockholder to subject the stockholder's liability for an unpaid balance on his stock to the satisfaction of plaintiff's claim, the stockholder may set off a demand which he has against the corporation.

5. Where, in a suit by a judgment creditor of a corporation to reach a stockholder's unpaid stock subscription, defendant claimed a set-off to the extent of certain notes of the corporation, which he as indorser had paid, and the evidence showed that a part at least of the notes were given for money which was unlawfully distributed as dividends, the burden was on the defendant to show what, if any, of the notes were given for legitimate purposes.

6. Rev. St. 1889, § 2773, declares that, if the directors of a corporation pay any dividend which would diminish its capital stock, they shall be personally liable for corporate debts, etc. A corporation whose stock was issued as fully paid, but was in fact only partially so, distributed as dividends notes which it took for the sale of property which constituted its only real capital, and, when these notes fell due and were unpaid, the corporation gave its own notes in renewal, indorsed by stockholders who paid them. *Held*, that the distribution of dividends was illegal, both under the statute and the general law, and the stockholder's claim against the corporation arising from the payment of the notes they had indorsed could not be set off against their liability for unpaid stock subscriptions, in a suit by a judgment creditor to subject such unpaid stock subscriptions to his claim.

In banc. Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Suit by George H. Shields against Byron F. Hobart and others. From a judgment for defendants Hobart and Ambrose, plaintiff appeals. Reversed.

The following is the opinion of the court in division:

GANTT, J. On or about the last days of February, 1887, Lucius Hubbell, of the real estate firm of Wooley, Porter & Hubbell of Springfield, Mo., for \$1,000 cash paid, obtained an agreement from George M. Jones to convey to said Hubbell a tract of land adjoining the city of Springfield, containing about 160 acres of land, for the sum of \$26,000, to be paid in 30 days. Before the expiration of the 30 days said Hubbell obtained the agreement of nine other parties to share said purchase with him, each to pay the sum of \$2,600, and together they paid the \$26,000, and on the 29th of March, 1887, said Jones conveyed the said land to said Hubbell. It was further agreed between the ten purchasers that they would organize a business corporation to take over said land, and that it should be capitalized at \$100,000, and each of said ten purchasers should receive stock in said company of the par value of \$10,000. On the 31st day of March, 1887, these same ten men signed and executed articles of association of the Real Estate Investment Company, reciting therein that the capital stock of \$100,000 had been fully paid up and was in the hands of the persons named as the first board of directors, and that each of the ten signers, to wit, L. W. Hubbell, W. H. Biggs, Geo. A. C. Wooley, W. O. Gray, E. D. Pearce, T. E. Burlingame, J. S. Ambrose, B. F. Hobart, J. T. Gray, and W. G. Porter, Jr., held 20 shares, of the par value of \$500 each. Articles of incorpora-

¶ 4. See Corporations, vol. 12, Cent. Dig. § 1002.

tion were duly filed, and a certificate of incorporation granted, and in due time stock of the par value of \$10,000 was issued to each of said parties as fully paid. The testimony of Hubbell, the promoter, and of Biggs, one of the original board; and of Ramsay, the manager, establishes beyond question that none of these stockholders ever paid anything for their stock, except the \$2,000 which they each paid into the fund to buy the land, which was at once conveyed to the corporation, on its organization, by Hubbell, for a recited consideration of \$100,000, and which land was practically the only asset the company ever had, outside of a switch and a few lots purchased by it later on. As soon as practicable the company caused the land to be laid off as an addition to Springfield, conforming as near as possible to the streets of the city, and filed its plat and published maps of the addition. This was accomplished in September, 1887. The lots were rated from \$150 to \$400 each, according to desirability.

The testimony of Hubbell and Ramsay, who were the managers at different periods, disclose the following modus operandi: The company would sell a lot, and, if the purchaser was not able to build, would advance him the money or materials for his house, and then take back notes, or "real estate bonds," as one of the witnesses denominated them, secured by a first deed of trust on the whole, and then the company would indorse this paper and sell it in the money market. In this manner something like 180 lots were sold in the first three or four years of the company's existence, or up to 1891 or 1892. The money received from the sale of these notes, and sometimes the notes themselves, were distributed as dividends to the corporators or stockholders, to the amount of \$26,000, or near that sum; but the evidence shows that a large number of those notes were not paid by the makers or owners of the lots when due, and, as Hubbell testified, "it was not the policy of the company to allow them to default, and, when the purchasers of the lots failed to make payment, the company stepped in and paid them, so as to keep its paper good"; and it would seem that, to get the money to do this from time to time, the company would make its notes, indorsed by the directors and the banks of Springfield and St. Louis, and, when due, would renew again, until, toward the last, Hobart and Ambrose were compelled to pay them to protect their indorsements. In some instances the company would mortgage the property to raise the money and take second mortgages; but, when the panic of 1893 came, the second mortgages were wiped out completely by the decline in values. Ramsay testified that, when he became manager in 1891, there was from \$12,000 to \$18,000 of the company's paper outstanding, indorsed by Hobart and Ambrose, who were directors of the com-

pany, and in 1893 it had increased to about \$34,000, which came about by paying off interest on the indebtedness, and on account of notes coming back on the company, which it had indorsed, and paying the running expenses and taking up the old notes that had been indorsed.

In February, 1893, the company issued its notes, secured by deeds of trust on unimproved lots, for \$10,000, which it sold through the brokerage firm of H. M. Noell & Co., of St. Louis, \$5,000 to plaintiff, George H. Shields, and \$5,000 to Mrs. Breed. Default was made in the payment of these notes, the deeds of trust foreclosed by sales, and thereupon plaintiff brought suit in the Greene circuit court and obtained judgment for \$6,055.50, the balance due him on the notes held by him. Execution issued on this judgment and was levied on real estate which had theretofore belonged to the company, but which had been sold under other deeds of trust of August 19, 1893, and plaintiff became the purchaser, and the execution was credited with \$158.10, the proceeds of the sale. The five deeds of trust of August 19, 1893, had been made by the company, covering all the land it then owned, to secure certain notes which it had put up as collateral to its notes, already outstanding, which had been indorsed by Hobart and Ambrose, and in some instances by the other directors and stockholders. Hobart and Ambrose were ultimately compelled to pay the notes which they had indorsed, and thereupon caused these collateral deeds of trust to be foreclosed on September 23, 1897, and Ambrose got 60 of the 140 lots covered by these deeds of trust for \$2,005, and Hobart bid \$1,100 on certain of the lots and directed them to be conveyed to the Crescent Iron Company, and for certain other lots he bid \$2,819 and caused them to be deeded to Mrs. Hobart, his wife; these sums being credited on their notes against the company, which they had paid for it. It appears that Hobart in this way paid \$17,243.10 and Ambrose \$6,310. Hobart also produced another note of the company for \$4,000 which he loaned the company.

The plaintiff, in his endeavor to trace the origin of all this indebtedness, endeavored to get at the books; but the defendants did not produce them, and it appeared that Ramsay, the manager of the company, when he learned the plaintiff intended to levy on them, and had applied for an order to produce them, called in a negro porter, Henry Reed, at the Ozark Hotel, in Springfield, and turned over to him the journal, cash book, ledger, sales book, and stock book, which contained all the transactions of the Real Estate Investment Company for the years up to November, 1897, saying to the negro, at the time, they would probably be attached, and to get them out of his office; he "did not care what he did with them, so he took them out of his office"; and when, on that day, the order

of the court to produce them was read to him, or delivered to him, he made return that they were not in his possession. The negro testified he put them in an elevator, where the rubbish around the Ozark House was dumped, and they remained there several days, when he was taken sick, and upon his return to work they had been removed, and he did not know their whereabouts. The witness Ramsay boldly avowed his purpose to prevent the plaintiff getting the information contained in the books, and says he wrote Hobart that day what he had done, and received an acknowledgment of the letter. With the suppression of the books came a significant lapse of all memory of their contents by those who conducted the transactions recorded in them. Ambrose was dead at the time of the trial and was represented by his administrator. H. M. Noel testified that he lived in St. Louis; was in the bond and brokerage business, and that Hobart sold him the \$10,000 in bonds, which witness sold to plaintiff (Shields) and Mrs. Breed; that Hobart informed him at the time that the bonds were amply secured, and only 40 per cent. of the realty belonging to the Real Estate Investment Company was mortgaged; that the company was solvent; that part of the \$10,000 was to pay a note falling due, and the remainder to be paid in betterments. Hobart was present in court and sworn as a witness, but was not offered as a witness in his own behalf to explain the original of the debts which he paid for the company, until counsel for plaintiff in his argument animadverted upon his said failure, and then he was offered as a witness, but the court declined at that time to reopen the case. Other facts may be noted in the opinion in the case. The circuit court found for defendants Hobart and Ambrose, and against the other defendants.

Cause No. 9,411 is a suit in equity by plaintiff, as a judgment creditor of the Real Estate Investment Company, against the defendants, who were seven of the original ten subscribers to and promoters of the said corporation, to subject to plaintiff's judgment the unpaid balance due from the defendants on their stock, on the ground that, although the stock was issued as paid up, they had in fact paid only 26 per cent. thereon, and they were liable to plaintiff as a creditor to the full amount thereof. The circuit court found as a fact that only 26 per cent. was paid on the stock, and that each of the stockholders was liable for \$7,400 for the satisfaction of the company's debts, but found that, as to Hobart and Ambrose, they had paid more than they owed on their stock, in paying their indorsements on the notes of the company, as set forth in the statement and answers of Hobart and Bigbee, administrator of Ambrose. After timely motions for new trial and in arrest, plaintiff appealed from the judgment of the circuit court.

1. The circuit court's finding that, of the

\$100,000 of capital stock of the Real Estate Investment Company subscribed; the stockholders only paid into the treasury of the company \$26,000; or \$2,600 each for the \$10,000 worth of stock at par value allotted to them, is supported by all the testimony in the case; and it follows that under the laws of this state the court's further finding, that each of the defendants in the cause (No. 9,411) was liable to the creditors of the corporation for the unpaid balance of \$7,400 on his 20 shares, followed as a necessary consequence. *Shickle v. Watts*, 94 Mo. 414, 7 S. W. 274; *Liebke v. Knapp*, 79 Mo. 24, 49 Am. Rep. 212; *Shepard v. Drake*, 61 Mo. App. 134; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593. But the circuit court further found that by the payment of the various notes issued by the corporation Hobart and Ambrose had each subsequently more than paid the unpaid balance on their respective shares, and credited them with these payments, and rendered judgment for them as against plaintiff, while giving him judgment against the other defendants; and it is this judgment of the court in favor of defendants Hobart and Ambrose's administrator which forms the basis of this appeal.

As already stated, this is a suit in equity, which is a concurrent remedy with the statutory action at law given by section 2519, Rev. St. 1899, in force when this suit was commenced and the judgment rendered. *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Steam Stone Gutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076. It is not necessary, to enforce a stockholder's liability for his unpaid obligation for his stock, to allege or prove fraud. This was ruled in *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; and while a different view was taken in *Woolfolk v. January*, 131 Mo. 620, 38 S. W. 432, so much of that opinion as announced that it was necessary to allege fraud was overruled and disapproved in *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, by the unanimous opinion of all the judges in banc, and it must now be regarded as settled that it is not necessary to charge fraud to subject the stockholder's unpaid liability to a creditor's judgment against the corporation. The difficulties of the case arise from the uncertainty as to the origin of the debts which Hobart and Ambrose paid for the company. These two defendants contented themselves with showing that in 1893 and prior thereto they had indorsed the company's notes or real estate bonds in the aggregate to the amount of \$23,350, and that to protect the several notes of the company which they had indorsed, one for \$3,000, one for \$1,350, one for \$2,000, one for \$9,000, and one for \$8,000, the company made its additional notes for these several amounts to Frank B. Smith, and gave five deeds of trust, conveying 140 lots of ground, and these notes were indorsed by Smith, and, together with the re-

spective deeds of trust given to secure each, were placed by the company as collateral security with the several banks and individuals who held the notes of the company indorsed by Hobart and Ambrose, and to secure the latter on their said indorsements. The plaintiff endeavored to trace the origin and consideration of the notes indorsed by Hobart and Ambrose, and in a general way, we think, established that a large proportion of this indebtedness grew out of the way in which the corporation conducted its affairs. He established quite conclusively by Hubbell, the manager of the company from 1887 to 1891, that it was the custom of the company to sell its lots, which constituted, in fact, its capital, to various purchasers on credit, or largely so, and take notes and deeds of trust to secure the purchase money, and then either sell these notes and distribute the proceeds as dividends, or distribute these notes with the company's indorsement to the several stockholders as dividends. Many of these notes, thus sold and divided as dividends, were not paid by the makers, the purchasers of lots, when they became due, and the company, to protect its credit, would take up and pay these notes by borrowing money or using the proceeds of other lots.

How many of these defaults occurred during Hubbell's management does not satisfactorily appear, as his memory was very indistinct when questioned on that subject; but they grew more and more frequent under Porter's and Ramsay's management in 1891, 1892, and 1893, by which time the indebtedness had grown, on this account principally, to the bulk of its indebtedness, some \$34,000, at the time it made the bonds for \$10,000, of which the plaintiff became the owner of \$5,000 in 1893. Ramsay says it was between \$12,000 and \$18,000 when he took charge in 1891. Plaintiff endeavored to reach the books; but when Ramsay, the manager, learned of his purpose, he called in a negro porter, and turned them over to him, with the sole injunction to get them out of his office, and when the order of the court was served he answered that these books were not in his possession. All efforts to trace the whereabouts of these books, which contained a history of all the transactions of the company, proved futile; and this accounts for the failure of the plaintiff to show definitely and specifically the origin of the indebtedness on which Hobart and Ambrose were indorsers, and for the payment of which they claim credits on their stock and offsets against their liability to plaintiff. During all this time Hobart was a director of the company, and Ambrose was the president until his death in 1897, and long after the corporation ceased to be a going concern. So that plaintiff could only show, as he did generally, that the corporators divided about \$26,000 among themselves, the proceeds of the company's lots, but a large proportion of which constituted a liability of the company on account

of its guaranty of the notes, and not properly dividends earned. The defendants Hobart and Ambrose could have preserved the books of the company and shown the origin of every debt. After 1891 no dividends were paid. Hubbell testified the stockholders got back in dividends the amount they invested, or about \$26,000; that "we sold notes, the bonds that we received in payment of the lots," and in some instances divided the bonds themselves as dividends; got very little money for the lots; took notes and guarantied their payment. Judge Biggs testified he received his dividend in both cash and notes, and collected the latter. He testified that according to the original understanding the company ought not to have been compelled to issue paper or indorse paper for any purpose.

No reasonable or rational evidence appears in the record to account for so large an indebtedness as was incurred by the company upon any other theory than that disclosed by Hubbell and Judge Biggs, and that is that the indebtedness largely, if not altogether, grew out of the indorsement and guaranty of the company of the notes and real estate bonds it took from purchasers of its lots, and their default in paying the same, and the interest accumulating thereon. With ample opportunity to have rescued the records of the company, when notified by the manager (Ramsay) that he had turned them over to an utterly irresponsible character, and to have condemned his conduct in suppressing evidence to which plaintiff was entitled, Hobart, so far as the evidence shows, permitted the records of the company to lie in the dump pile in the elevator of the Ozark Hotel without a request to Ramsay to secure them. In those books, presumptively, the origin of each note which he and Ambrose indorsed for the company, and each renewal thereof, could have been traced. Those books, also, were or should have been the repository of all the corporate acts of the company, and would have disclosed whether the corporation, through a lawful board, authorized the creation of said debts, or the indorsement thereof by the company's directors; in short, whether these arrangements were the individual acts of Hobart and Ambrose, self-imposed, or were lawful acts of the corporation. That a corporation, while a going concern, may prefer one creditor to another, must now be accepted as the law of this state. *Foster v. Mill Co.*, 92 Mo. 87, 4 S. W. 260; *Meyer v. Folding Chair Co.*, 130 Mo. 188, 32 S. W. 300; *Schufeldt v. Smith*, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. Rep. 628. But it is also settled by our adjudications that, when a corporation has reached a point where its assets are insufficient to satisfy its corporate debts, its managing officers cannot lawfully pay their private debts from the assets, as against the claims of existing creditors of the company, who complain. As to the lat-

ter, such a transaction is prima facie fraudulent. *National Tube Works v. Machine Co.*, 118 Mo. 365, 22 S. W. 947; *Hall v. Goodnight*, 138 Mo. 576, 37 S. W. 916. With these principles in view, it is essential to a proper determination of the respective rights of the parties to this litigation to ascertain, if we can, the true character of the offset which is presented against plaintiff's judgment. Plaintiff's judgment, being founded upon a note executed by the president of the company as such, and having been adjudged the debt of the corporation, is not open to attack in this proceeding by the defendants, who are officers and stockholders of that company, and, indeed, is not questioned, and he has a right to have it satisfied out of any assets belonging to said company.

On the other hand, notwithstanding defendants Ambrose and Hobart only paid \$2,000 each on their subscription for their stock, of the par value of \$10,000 each, under the rule announced in *Savings Bank v. Butchers' & Drovers' Bank*, 130 Mo. 155, 31 S. W. 761, in an equitable suit by a judgment creditor of a corporation against a stockholder to subject the stockholder's liability for the balance unpaid on his stock, the stockholder may set off a demand which he has against the corporation. In that case it appeared that at the suit of one stockholder the defendant stockholder had been compelled to pay the full amount of his unpaid subscription, and it was held to be a full satisfaction of his liability. We are thus brought to the contention of the plaintiff that the notes and bonds offered by defendants Hobart and Ambrose were not lawful claims against the corporation but were the result of a fraudulent and unauthorized reduction and distribution of the capital stock of the company under the guise of dividends, and that the preference which they gave themselves out of assets of the company over plaintiff, who was an existing creditor, is prima facie fraudulent, and the burden devolved upon them of showing that all their secured debts were fair, honest obligations of the company, and justly due them, and that they made no such showing. In *National Tube Works v. Machine Co.*, 118 Mo., loc. cit. 376, 22 S. W. 948, this court quoted with approval the statement of Morawetz on *Private Corporations*, vol. 2, § 789, that "a corporation cannot give away its property, or transfer it, unless in good faith, for value, if its creditors would thereby be left unsecured." What, then, is the nature of the debts which defendants Hobart and Ambrose propose to set off against plaintiff's judgment, and how did they originate?

As already said, a large part thereof grew out of the sale of notes held by the company, and by it indorsed to raise money to distribute as dividends, and in some cases by the distribution of these notes without sale as dividends; and, their makers having de-

faulted, the company borrowed money to make them good and to keep up its credit. It was for this money thus borrowed that the defendants became indorsers, and finally paid these sums for which they ask offsets. If these notes were founded upon other lawful debts of the corporation, the law cast the burden on the defendants to show that fact, and what part of the notes, if any, originated outside of the indorsement of the so-called dividends. They could have protected their records from spoliation, and presumably have shown how every item of the debt originated, and, being directors and trustees of the corporation, were bound to know how its liabilities accrued and upon what basis they assumed to declare dividends, and why it was necessary, if they had earned sufficient profits over and above all liabilities to declare dividends, for the corporation to indorse and guaranty the paper of the purchasers of its property; but they have not done so, and have contented themselves with offering in evidence notes signed by one of them (Ambrose, as president) and indorsed by the other (Hobart), who was a director, without showing that these notes were the legal obligations of the company for debts which it might properly contract. Having the power to show these notes were not, as the evidence tends to show, the result of distributing the capital as dividends, and, failing to do so, we feel justified in starting with the assumption that this was their origin. The statute governing business corporations, like this at the time these transaction occurred (section 277^o Rev. St. 1889), provided "dividend of the profits made by the corporation may be declared by the trustees or directors thereof every six months or oftener, as the directors may elect; but no such dividends shall be made and paid to stockholders while such corporation is in an insolvent condition; and if the directors of any such corporation shall knowingly declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the corporation then existing and for all that shall be thereafter contracted while they shall respectively continue in office: provided that if any of the directors shall object to the declaring of such dividend or to the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objections in writing with the clerk of the corporation and with the circuit clerk of the county, they shall be exempt from the said liability."

Independently of this statute, which gives creditors an additional security against directors, it is a fundamental rule that dividends can be paid only out of profits or the net increase of the capital of a corporation, and

cannot be drawn upon the capital contributed by the shareholders for the purpose of carrying on the company's business. Neither the directors of a corporation, nor even the majority of the stockholders, have any authority to diminish the prescribed capital of the corporation by distributing a portion of it among the shareholders in the shape of dividends; for this would be a fraud upon creditors contracting with it on the faith of its capital stock. *Wood v. Dummer*, 3 Mason, 308-311, Fed. Cas. No. 17,944, was a suit in equity brought by the unpaid creditors of a bank against the shareholders thereof, upon the ground that the bank, while insolvent, had divided three-fourths of its capital stock among the defendants, leaving the plaintiff's debt unpaid. Justice Story ruled that the defendants were liable to refund so much of the assets received by them as was necessary to pay creditors, saying: "If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any person having notice of the trust attaching to it." As to the stockholders themselves, there can be no pretense to say, both in law and in fact, they are not affected with ample notice. 2 *Morawetz on Corp.* § 790; *Bank v. Douglass*, 1 *McCrary*, 86, Fed. Cas. No. 14,375. Dividends can only be properly declared from the profits over and above the capital stock and the debts of the company. *Barry v. Exchange Co.*, 1 *Sandf. Ch.* 307; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162.

Now the capital stock of the Real Estat Investment Company was \$100,000, of which only \$26,000 was paid into the treasury, though the stockholders and incorporators certified the whole amount was paid into the treasury and was in the custody of its directors. The trial court had no difficulty in finding that as a fact only \$26,000 was ever paid in, and that was invested in the 160 acres of land bought from Capt. Jones. Knowing, absolutely, that they never had paid up the capital stock, but owed \$74,000 of it, the evidence is absolutely conclusive that when this company had sold (principally on credit, as Hubbell, the manager at that time, says they got "very little cash") about 180 lots for about \$300 a lot, or \$54,000 in all, and when it was wholly problematical what amount of money they would realize out of these sales, and the sequel shows they did not receive over half of that sum at any time in actual cash for these lots, these directors proceeded to distribute the proceeds of these sale notes as dividends to the amount of \$26,000, and had the corporation guaranty their payment. By no system of bookkeeping could this \$26,000 be said to be profits under the facts brought to light on the trial. Not only was it not in excess of the capital stock of \$100,000, but, if it had been added to the \$26,000 paid in, it would only have swollen the whole assets to \$52,000, making no deduction for the corresponding diminution of the actual capital, which was

all invested in the lots, of which 180 were sold to produce the \$26,000 in dividends.

This action of the directors in thus diminishing the capital stock was in defiance of the law of corporations. While a corporation may, with the consent of its stockholders, on proper notice, reduce its capital stock, it is not pretended that the capital stock of this corporation was reduced after due notice as required by the statutes of this state. The result, however, was reached by the distribution of these sale notes and their proceeds, which were but another form in which the capital of the corporation was invested. It is contrary to fundamental principles to permit shareholders to distribute the capital of a corporation among themselves. But this was exactly what was attempted by the directors and managers of this company under the guise of dividends, and that, too, when each of the stockholders was indebted to the corporation in the sum of \$7,400 on their unpaid liability; and the illegality becomes more pronounced when we consider that they did not in fact have the money, but merely the promises of the purchasers to pay, and to insure the stockholders getting the money the directors indorsed these notes in the name of the corporation, and thus compelling it, when the purchasers defaulted, to further deplete the capital by incurring debts to make good these unauthorized conversions of its capital. It was these notes which the defendants Ambrose and Hobart signed, and thus and in this way they assert the company became indebted to them, and they are entitled to offset that indebtedness against a judgment creditor who had no notice of their methods of business.

In our opinion a debt thus created, however equitable it might be as to the shareholders, who took their share of the capital with full knowledge of the scheme, is not such a claim against the company as can be offset against a judgment creditor. To permit it would sanction the distribution of the whole capital among the directors and stockholders at the expense of the creditors, who have a right to look to the capital stock and assets of the company to satisfy their claims. While it must be conceded that the exact amount of the notes which were sold and guarantied as dividends, and which subsequently fell back on the company, and were paid by it by borrowing money with the indorsement of the directors, is not specifically established, this is no fault of plaintiff, as he was diligent in his endeavor to throw all the light obtainable on the transactions, but was prevented by the intentional suppression of the books; and the burden was not on him, but on the defendants Hobart and the administrator of Ambrose, who pleaded the set-offs of debts which they alleged they held against the company. In the creation of the five deeds of trust, which swept away the great bulk of the unincumbered lots, they had their private interest at stake to protect

their indorsements, which seem to have been voluntarily made by them, and in such cases their acts are subject to the most rigorous scrutiny. *Hill v. Rich Hill Co.*, 119 Mo. 9, 24 S. W. 223, and cases cited. The trust relation which they bore to the corporation required courts of equity to subject the preferences which they take to themselves to the most searching scrutiny, and places upon defendants the burden of showing beyond question that they held bona fide, honest, and just claims against the corporation, which can be allowed as set-offs. *Schufeldt v. Smith*, 131 Mo. 290, 31 S. W. 1039, 29 L. R. A. 330, 52 Am. St. Rep. 628. Prima facie they are fraudulent as against the creditors, and they are in no attitude to complain that plaintiff has not made that absolutely clear and certain which they had the opportunity and means of showing, but which they failed to show, and even declined to testify. The mere production of notes executed and indorsed by themselves falls far short of that proof which a court of equity requires to overcome the presumption of fraud. The plaintiff showed that a large part, at least, was tainted with an illegal conversion of the capital to which he had a right to look; and, where a part is fraudulent, the whole may well be presumed to be, in the absence of a full explanation. The trial court properly found that, in the absence of these set-offs, Hobart and Ambrose's estate each was indebted to the amount of \$7,400 on their unpaid liability on their stock subscriptions; and while it found they had paid more than his balance subsequently, it did not find that these payments were for honest, just, bona fide debts of the corporation, which would have sustained their preferences and constituted valid set-offs, and, as this appeal is on the equity side of the court, we are not bound by the conclusion reached by the circuit court.

In our opinion, it erred, upon the facts proven, in not rendering judgment against Hobart and the estate of Ambrose, that they were liable each for the unpaid balance of \$7,400 on their stock, and that plaintiff was entitled to have his judgment satisfied out of said liabilities, as well as against the other stockholders, defendants; and the judgment is reversed, with directions to so enter the decree. All concur.

Heffernan & Heffernan and Wm. G. Petrus, for appellant. Adiel Sherwood and Benj. U. Massey, for respondents.

PER CURIAM. The above-entitled cause having been heard and considered by the court in banc, the opinion of GANTT, J., in division No. 2, is adopted as the opinion of the court. ROBINSON, C. J., and BRACE, GANTT, BURGESS, VALLIANT, and FOX, JJ., concur in toto. MARSHALL, J., concurs in the views expressed, but is in favor of reversing and remanding the cause for a new trial.

SHIELDS v. HOBART et al. (No. 9,408.)
(Supreme Court of Missouri. Feb. 6, 1903.)

VOID TRUST DEED—SALE—RIGHTS OF PURCHASERS.

1. Notes executed by a corporation and secured by deed of trust were paid by its president and by the indorser, and on sale of the property under the deed of trust the executor of the president and the indorser's wife became purchasers of parts of the property; the bids in each instance being indorsed on the notes, which were paid, respectively, by the president and the indorser. *Held*, that the wife and the executor stood in no better position with regard to the property than the intestate and husband, and, the notes and deed of trust being void as to the latter, as against a purchaser at sheriff's sale of the property covered by the deed, the sale to the executor and wife was also void.

In banc. Appeal from circuit court, Greene county; Jas. T. Neville, Judge.

Action by George H. Shields against Byron F. Hobart and others. From a judgment for defendants, plaintiff appeals. Reversed.

The following is the opinion of the court in division:

GANTT, J. This is a suit in equity by the plaintiff as purchaser at a sheriff's sale, under a judgment obtained by him against the Real Estate Investment Company, of real estate conveyed by it by deeds of trust of August 19, 1893, to Benjamin Massey as trustee, to secure sundry notes executed by said Real Estate Company to one Frank B. Smith, and by him indorsed and delivered to various banks and individuals, which held notes of said Real Estate Company, indorsed by B. F. Hobart, and executed by J. S. Ambrose as president of said company, and which said notes were afterwards paid by said Hobart and Ambrose, and the said lots sold by the trustee, Massey, and bought in by Hobart and Bigbee as administrator of Ambrose. At the direction of Hobart certain lots bought by him were conveyed by the trustee to the Crescent Iron Works, a corporation, and certain other to his wife, Mrs. Emma Hobart, and the amount of his bid indorsed on said notes. Those bid in by Bigbee were conveyed to him, and the bid indorsed on the notes for said Ambrose. This cause was presented on substantially the same record as that filed in *George H. Shields v. Hobart et al.* (numbered 9,411 on the docket of this court) 72 S. W. 669, and the argument of both was heard together.

It is too plain for comment that Mrs. Hobart is a mere volunteer, and that Bigbee stood in the shoes of his intestate as to these transactions; and, as the validity of the notes and deeds of trust held by B. F. Hobart and Ambrose was determined against the plaintiff in the equity suit No. 9,411, above mentioned, it is unnecessary to review the evidence again, but for the reasons assigned in that case it must be held that said deeds of trust and the trustee's

sales conveyed no title as against plaintiff, who was the purchaser of said lots under his judgment against said company.

The judgment of the circuit court was for defendants, and must be, and is, reversed, with directions to enter a decree for plaintiff as prayed. All concur.

Heffernan & Heffernan and Wm. G. Petrus, for appellant. Adiel Sherwood and Benj. U. Massey, for respondent.

PER CURIAM. The above-entitled cause having been heard and considered by the court in banc, the opinion of GANTT, J., in division No. 2 is adopted as the opinion of the court. ROBINSON, C. J., and BRACE, GANTT, BURGESS, VALLIANT, and FOX, JJ., concur in toto. MARSHALL, J., concurs in the views expressed, but is in favor of reversing and remanding the cause for a new trial.

STATE v. GLEASON.

(Supreme Court of Missouri, Division No. 2.
Feb. 3, 1908.)

MURDER—INDICTMENT—SUFFICIENCY—EVIDENCE—INSTRUCTIONS—MISCONDUCT OF JURY.

1. An indictment for murder is not fatally defective, because alleging in its conclusion that the grand jurors upon their oaths say that defendant killed deceased "by the means aforesaid," instead of "in the manner and form aforesaid."

2. Where an indictment for murder charged that defendant "did make an assault," and that said defendant "a certain pistol then and there charged with gunpowder and leaden balls, which said pistol he did discharge and shoot off," etc., the omission of the word "with," before the allegation "a certain pistol then and there charged," etc., did not render the indictment defective.

3. Where the evidence was conflicting, and that of the state tended to show that defendant, after an altercation with deceased in the dining room of a restaurant, operated by the two jointly, went into the front room, armed himself with a revolver, and, returning, presented it at deceased while he was waiting on a customer, and that deceased merely warned off the pistol when defendant shot him, an instruction on murder in the second degree was justified by the evidence.

4. Where alleged misconduct of a juror occurred in the presence of the court and counsel for defendant, and counsel did not at the time except, the finding of the court that there was no misconduct cannot be disturbed on appeal.

5. In a criminal case, a verdict on conflicting evidence will not be disturbed on appeal.

Appeal from circuit court, Dent county;
L. B. Woodside, Judge.

John Gleason was convicted of murder, and appeals. Affirmed.

At the April term, 1899, of the circuit court of Dent county, the grand jury of that county preferred the following indictment for murder against the defendant, John Gleason: "The grand jurors for the state of Missouri,

summoned from the body of the inhabitants of Dent county, being duly impaneled, sworn, and charged to inquire within the body of the county of Dent aforesaid, on their oath do present and charge that John Gleason, at Dent county, Missouri, on the 24th day of December, 1898, in and upon one Harry Nelson, in the peace of the state then and there being, feloniously, willfully, deliberately, premeditatedly, and on purpose, and of his malice aforethought, did make an assault, and that the said John Gleason a certain pistol then and there charged with gunpowder and leaden balls, which said pistol he, the said John Gleason, in his hands then and there had and held, then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did discharge and shoot off, to, against, and upon the said Harry Nelson; and that the said John Gleason, with the leaden balls aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said John Gleason discharged and shot off as aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, on purpose, and of his malice aforethought did strike, penetrate, and wound him, the said Harry Nelson, then and thereby feloniously, willfully, deliberately premeditatedly, on purpose, and of his malice aforethought giving to him, the said Harry Nelson, in and upon the upper part of the left breast of him, the said Harry Nelson, one mortal wound of the depth of six inches and of the breadth of one half inch, of which mortal wound he, the said Harry Nelson, then and there instantly died. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John Gleason him, the said Harry Nelson, then and there, by the means aforesaid, at the county aforesaid, on the day aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did kill and murder, against the peace and dignity of the state." The defendant was duly arraigned, and entered his plea of not guilty.

After two mistrials, the prosecuting attorney elected to prosecute for murder in the second degree only, and defendant was again duly arraigned, and the cause tried, resulting in a conviction of murder in the second degree, and assessing his punishment at 10 years in the penitentiary. From the sentence on that verdict, defendant appeals.

The defendant and Harry Nelson, the deceased, were partners in a restaurant business, in the city of Salem, at the time of the homicide. The deceased, Nelson, was the cook in the establishment. Prior to December 24, 1898, the evidence discloses no bad feeling between the partners, but on the afternoon of that day it appears there was a rush of business, and about 4:30 or 5 o'clock deceased came into the front room of the store, and complained that he must have

more help in the dining room and kitchen, saying that he and his boy Roy Nelson could not do all the work, and that defendant was sitting there smoking his pipe and doing nothing. Another assistant, Rouse, was sent to help him, and deceased returned to the kitchen and dining room to serve the guests, who were complaining of the delay. In a short time—only a few minutes—defendant came to the dining room, and, accosting deceased, inquired what he would take for his interest in the business and get out. Deceased replied, "fifty dollars and his wages." Defendant refused to give that sum, and deceased again made the charge that defendant was not doing his part, to which defendant replied deceased was a liar. Defendant then returned to the front room, and placed a revolver in his pocket—he says in his pants pocket, others say he had it in his right-hand hip pocket. Thus armed, he returned to the dining room, where deceased was just serving some oysters to a guest. Defendant approached deceased where he was standing near the table, and at this point the evidence becomes very conflicting and contradictory. On the part of the state the testimony tends strongly to prove that defendant came into the dining room with his pistol in his hand, and approached deceased, coming within five or six feet of him, and that deceased, seeing the revolver, struck at it as if to ward it off, and thereupon defendant shot him in the breast, giving him a mortal wound, from which he instantly fell to the floor, and expired within 30 minutes; that deceased had made no assault on defendant prior to the presenting of the revolver at him, and then only to avert the shot. On the part of defendant the evidence tended to show that the wordy altercation was renewed, in which each gave the other the lie, and that deceased slapped or struck defendant with his hand or fist, and then reached for a plate on the table. Some of the witnesses say he threw the plate, and others that he reached the plate, but it was knocked from his hands. Still others say he struck defendant and knocked him back, and was pursuing the fight before defendant drew the revolver and fired. This court cannot reconcile the conflicting statements of the witnesses for the state and defendant. There was also evidence that defendant borrowed the pistol that forenoon about 11 o'clock; that when he came back into the dining room, after getting the pistol in the front room, he said, "I'll kill some G—d d—n nigger before sundown." The deceased was a negro man. There was some evidence that, after defendant had shot and killed deceased, he walked out of the dining room through the front room and into the street; that there was some blood on his forehead. There was also evidence that there was a contused wound on his forehead after he was arrested and placed in jail. Other facts may be noted in the course of the opinion.

J. J. Cope, Wm. P. Elmer, and L. Judson, for appellant. Edward C. Crow, Atty. Gen., Sam. B. Jeffries, and Jerry M. Jeffries, for the State.

GANTT, J. (after stating the facts). 1. The indictment is challenged as insufficient, because in its conclusion it does not allege that "the grand jurors, upon their oath aforesaid, do say that the said John Gleason, him, the said Harry Nelson, then and there, in manner and form as aforesaid," etc. It will be observed that the indictment, in lieu of the words "in manner and form," charges that the defendant "then and there, by the means aforesaid, at the county aforesaid, on the day aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose and of his malice aforethought, did kill and murder, against the peace and dignity of the state." The only departure from a correct form of the conclusion in an indictment for murder, of which defendant complains, is that the pleader used the words "by the means aforesaid," instead of "in manner and form aforesaid." The conclusion of an indictment was an essential part of the indictment at common law and such has been the uniform rule in this state. In *State v. Pemberton*, 30 Mo. 376, this court, through Judge Napton, held the indictment bad, because of the omission in the conclusion of the name of the deceased, and that our statute of jeofails did not reach such an omission as this, but only that class of defects mentioned in the statute, such the defendant's title, "with force and arms," etc. In *Ex parte Slater*, 72 Mo. 102, this court held that, when our Constitution ordained that felonies could only be prosecuted by indictment, it meant the common-law indictment and its essentials. In *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, it was again ruled, after a careful review of the common law on the subject, that the conclusion in an indictment for murder is an essential part of the indictment, and without the allegation, "And so the grand jurors, or the jurors aforesaid, upon their oath do say that the said defendant (naming him), in the manner and form aforesaid, him, the said deceased (naming him), willfully, feloniously," etc., "did kill and murder, against the peace and dignity of the state," the indictment only charged manslaughter. And again, in *State v. Rector*, 126 Mo., loc. cit. 341, 23 S. W. 1078, it was ruled that it was necessary to charge in the conclusion that the defendant "did feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought" kill and murder the deceased, and not merely "in manner and form" "did kill and murder," without the qualifying adverbs above noted. See, also, *State v. Stacy*, 103 Mo. 11, 15 S. W. 147; *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427; *State v. Evans*, 158 Mo., loc. cit. 603, 59 S. W. 994; *State v. Sanders*, 158 Mo. 610, 59 S. W. 993, 81 Am. St. Rep. 330. *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am.

St. Rep. 588, to the extent that it approved an indictment which omitted in the conclusion the words "upon their oath," is disapproved.

But, conceding that the conclusion is an essential part of an indictment, we are now called upon to say that the conclusion of this indictment is utterly insufficient, because the words "in the manner" are omitted therefrom. It will be noted that it reads: "And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John Gleason, him, the said Harry Nelson, then and there, by the means aforesaid, at the county aforesaid, on the day aforesaid, feloniously, willfully, premeditatedly, deliberately, on purpose, and of his malice aforethought did kill and murder, against the peace and dignity of the state." Many of the most approved forms of common-law indictments use the words "by the means aforesaid" instead of "in the form aforesaid," and, indeed, they seem preferable. 3 Chitty's Crim. Law, *751; 1 East, P. C. 347, sec. 117.

The indictment is in the full form of the common-law indictment for murder, and recites an assault, the infliction of a mortal wound, and that Nelson died of that wound; and in this part of the indictment the averments are full and technical as to time, place, manner, and all other matters essential. Having alleged all these, what possible fact is omitted when the pleader repeats: "And so the grand jurors aforesaid, upon their oath, do say that the said John Gleason, him, the said Harry Nelson, then and there, by the means aforesaid, at the county aforesaid, feloniously," etc., "did kill and murder." The words mean, and expressly indicate and state, without leaving anything for inference or surmise, the manner in which the death of the deceased was brought about. Mindful as we are of the importance of preserving every essential of a common-law indictment, we are of opinion that the words used are sufficient to make a good indictment; and the words "by the means aforesaid," referring as they do to the exact manner of the homicide, with the other words in the conclusion, are sufficient. It is passing strange, however, that the prosecuting attorneys will not follow the recognized forms and precedents. It was long ago remarked by Lord Mansfield that, while "tenderness ought always to prevail in criminal cases, so far at least as to take care that a man may not suffer otherwise than by due course of law, tenderness does not require such a construction of words as would tend to render the law nugatory and ineffectual, and destroy or evade the very end of it, nor does it require of us that we should go into such nice and strained critical objections as are contrary to its meaning and spirit." 1 Chitty, Cr. Law, 170, 171.

Again, it may be said that the omission of the word "with" before the allegation "a certain pistol then and there charged with

gunpowder and leaden balls," etc., renders the indictment defective, in failing to state with what instrument the assault was made, as in *State v. Ferguson*, 152 Mo. 92, 53 S. W. 427. But, as was pointed out in *State v. Evans*, 158 Mo. 603, 59 S. W. 994, and in *State v. Turlington*, 102 Mo. 651, 15 S. W. 141, the use of the word "with" before the word "pistol" is not only entirely unnecessary, but would mar the strength of the allegation; while it was said in *State v. Prendible* that *State v. Turlington*, *supra*, should not be followed. A careful examination of the most approved precedents will demonstrate that, when the allegation is in the form used in this indictment, the word "with," before the words "a certain pistol," etc., is not only not necessary, but is not in accord with the approved forms. 1 Wharton's Precedents of Indictments and Pleas, 115, 117, 117a, 117b, 117e; Bishop's Directions and Forms, sec. 520; 3 Chitty's Cr. Law, *page 752. So that the omission of the word "with" in the connection noted was proper. This conclusion in no wise conflicts with those cases in which it was held necessary to charge that the assault was made with an ax, or a sword, or other similar instrument. In this indictment, as in the forms which it followed, it is expressly alleged further on in the indictment that "with" the leaden balls the defendant did strike and wound the deceased.

2. It is urged as error that the court improperly instructed on murder in the second degree, when there was nothing more than manslaughter in the fourth degree in the case. To this we cannot give our consent. The evidence was conflicting, but the state's evidence tended to show that defendant, smarting under the charge that he was not doing his duty, became involved in a quarrel with deceased, and that each passed the lie; that thereupon defendant went into the front room, armed himself with the revolver, and returned to the dining room, and had presented it at deceased while he was engaged waiting on a customer, and that deceased did no more than to ward off the pistol when defendant shot him. While defendant's testimony tends to show deceased was the aggressor, and had assaulted him first, an issue of fact was thus presented, and it was the duty of the court to present the law of the case in the alternative. If the jury found that deceased was not the aggressor, but had called defendant a liar, and that, incensed at the insult but without lawful provocation, defendant willfully and intentionally shot deceased in a vital part with a deadly weapon, then he was guilty of murder in the second degree. On the other hand, the court instructed the jury both on self-defense and manslaughter, leaving to them to determine the facts. There was no error in the instructions, and they were exceedingly favorable to defendant. Nor are they open to the criticism that they were not based on the evidence.

3. The defendant complains of certain jurors. The alleged misconduct of the juror Asher occurred, if at all, in the immediate presence of the court and defendant and his counsel, and no objection was taken to it. The court was not requested to admonish or caution the juror, and no mention was made of it until after verdict. Counsel were remiss if they observed misconduct, and failed to call the court's attention to it at the time. But, as a matter of fact, the court found there was no such misconduct. He saw the juror, heard the evidence on both sides, and his finding must settle that issue.

As to jurors Maledy and Horner, neither of them had heard any of the evidence or talked with a witness. Neither had formed or expressed an opinion, and the trial court found as a fact that their answers on their voir dire were true. The rumor that one juror on a former trial had been approached in no way disqualified the juror who had heard it. The examination of these charges against the jurors was before the trial judge, who had an opportunity to weigh the evidence, and there is no ground for finding that he exercised an unwise discretion in denying a new trial on this ground. The defendant had a fair trial, and it was peculiarly a case for a jury to determine the facts.

It is not our province to interfere with a verdict where the contention is merely that the weight of the evidence is against the verdict. We are in no position to weigh the evidence, where the evidence is conflicting, as this was.

The judgment must be and is affirmed.

BURGESS and FOX, JJ., concur.

TUFTS v. LATSHAW.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

PARTNERSHIP ESTATE—ADMINISTRATOR—PERSONAL FUNDS—MINGLING FUNDS—LIABILITY—REFEREE—FINDINGS—APPEAL.

1. Where a suit is brought against the surviving partner by the administrator of the deceased partner to recover the proceeds of property belonging to the partnership estate, there having been added to such property money and property of the surviving partner, a court of equity alone has jurisdiction.

2. The finding of facts by a referee stands as a verdict of a jury.

3. On appeal from a judgment rendered on the report of a referee, an objection that the evidence fails to sustain a certain finding of fact is not available, where not made in exceptions to the referee's report.

4. Where a surviving partner continues the business of the firm, and uses its assets, until he makes an assignment to the defendant, and mixes the property with his own so that it cannot be separated nor the amount of each ascertained, the whole becomes, both in law and equity, the property of the partnership estate.

Appeal from circuit court, Jackson county.

Suit by Freeling Tufts, as administrator of the estate of William G. Harvey, deceased, and in charge of the partnership estate of D. W. Williams & Co., against Henry J. Latshaw, as assignee of D. W. Williams & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Prior to and at the time of the death of W. G. Harvey, which occurred on the 18th day of December, 1889, he and one D. W. Williams were partners, doing business under the firm name and style of D. W. Williams & Co. Harvey died, as before stated, and Williams qualified as surviving partner, and continued the business as before in the firm name. He bought and sold goods and conducted the business as it had been conducted before Harvey's death. In September, 1890, a creditor of the copartnership estate filed in the probate court a motion to require Williams to give a new bond. This motion was heard on the 22d day of September, 1890, and was sustained by the court; and on the same day Williams made an assignment to the defendant, Latshaw, and delivered to him possession of all the property of D. W. Williams & Co., consisting of a stock of merchandise, notes, and accounts, amounting in the aggregate to \$71,316.37. The merchandise, of which the defendant took possession, was appraised at \$30,157.84. This consisted largely of goods that were on hand at the time of Harvey's death. Williams testified that he had, subsequent to Harvey's death, purchased, with the proceeds of goods sold, other goods, and also that he had borrowed money with which he had purchased goods. However, it was conclusively shown by the inventories made by Williams, when he qualified as surviving partner, and by Latshaw, when the deed of assignment was executed, that practically all of the merchandise on hand at the time Williams made the assignment was the same property that was on hand at the time of Harvey's death. The notes and accounts were what remained uncollected of the notes and accounts due the firm at the time of Harvey's death. Williams, subsequent to Harvey's death, speculated in whisky, buying the same in bond. For the purpose of carrying on this speculation, he borrowed money from various parties, and hypothecated warehouse receipts for whisky to secure the same. For the purpose of protecting these individual creditors he made the assignment, and delivered to defendant the property of D. W. Williams & Co., which was in his possession as such surviving partner. The papers in this case, including the bill of exceptions, as also the papers in the assignment and the papers in the copartnership estate, cannot be found, and there is therefore no means whatever of settling any controverted questions as to the facts. The cause seems to have been referred to Hon. F. P. Seabee, as referee, who, after hearing

the evidence, submitted to the court his report, as follows:

"To the Honorable the Circuit Court of Jackson County, Missouri: This cause having been referred to me by the said court, with directions to hear and decide the issues involved therein, I make and submit the following report. After being duly sworn as referee, I proceeded to hear and take the evidence, and herewith return the same.

"Finding of Facts.

"I find the facts to be that on and prior to the 18th day of May, 1889, David W. Williams and William G. Harvey were partners, engaged in the wholesale liquor business at Kansas City, Mo., under the firm name of D. W. Williams & Co. On said date said William G. Harvey died intestate, and the plaintiff, Freeling Tufts, thereupon was appointed, and is yet, the administrator of the individual estate of the said Harvey. The surviving partner of the said firm, David W. Williams, on or about the 23d day of May, 1889, qualified as the administrator of the said partnership estate, and as such took charge of the assets thereof, which at the time were appraised at \$149,062.97; the stock of merchandise on hand, furniture, and fixtures being appraised at \$54,658.58, and the accounts and bills receivable being appraised at \$94,365.59. The liabilities of the firm amounted to \$87,062.18. David W. Williams continued to conduct the business at the same place and under the same name of D. W. Williams & Co., selling and disposing of goods, buying goods, and replenishing the said stock with the proceeds of collections of said accounts and bills, and from sales of goods and from money borrowed, and collecting the accounts and bills receivable, and making payments on the debts of the firm, in the usual course of the business, as it was conducted by the firm before the death of the said Harvey, until the 22d day of September, 1890, when he made a general assignment for the benefit of his creditors to the defendant, Latshaw, which is hereafter referred to.

"The stock of goods, furniture, and fixtures of the partnership estate of D. W. Williams & Co. were of the value put upon them by the appraisers, to wit.....\$54,658 58
And D. W. Williams collected

from the notes and accounts the
sum of 14,154 83

\$68,813 41

"On the 12th day of September, 1890, one of the creditors of the estate of D. W. Williams & Co. gave notice to D. W. Williams, the administrator of the partnership estate, that it would, on the 22d day of September, 1890, or as soon thereafter as it could be heard, apply to the probate court of Jackson county, Mo., for an order on him to give a new bond, as such administrator, for the

reason that the sureties on his bond were about to become nonresidents of Missouri, that they had disposed of and removed their property beyond the jurisdiction of the court, and were insufficient. On the 21st day of September, 1890, the application for a new bond was heard by the probate court, and the said court, found on application to me, made an order on said D. W. Williams to give a new bond in the sum of \$50,000 within five days. On the 30th of September, 1890, the probate court found that said Williams had failed to give such bond, and thereupon revoked his letters of administration, and ordered that he have no further authority over the assets of the estate, and appointed the plaintiff the administrator of the said estate, and ordered the estate into his hands. On the 22d day of September, 1890, the day set in the notice for the applying for the order for a new bond, the said D. W. Williams made the deed of assignment to the defendant, Latshaw, in which was included the said stock of goods then on hand, the book accounts and bills receivable, and the interest of said D. W. Williams in certain real estate. The defendant, H. J. Latshaw, at once qualified as assignee, and took the assigned property into his possession, and had the same invoiced and appraised. The appraisement shows that the assigned estate was of the value of \$71,361.37, made up of the following items, viz.:

Bills receivable	\$ 8,736 32
City accounts	8,372 88
Country accounts	2,167 16
Interest on note.....	31 03
Cash on hand	1 14
Merchandise, including fixtures....	<u>\$9,157 84</u>

Total merchandise, accta., etc... \$71,361 37

"The merchandise assigned to defendant, Latshaw, consisted partly of goods which were on hand at the time of the death of William G. Harvey, partly of the goods purchased with the proceeds of the sales of goods which were on hand at the time of his death, and partly of goods purchased with money borrowed by Williams after the death of said Harvey. But there was no separate account kept of these several lots of goods nor of the sales therefrom, and it is impossible to separate or distinguish the goods of the several lots, or the proceeds of sales that were made from them. The accounts and notes that were assigned to defendant, Latshaw, consist partly of accounts and notes in the conduct of the business after the death of said Harvey, and the proceeds of accounts and notes collected by said Latshaw were derived from both classes of said notes and accounts, but the amount of the collections from each class cannot be determined from the evidence. From the sales of merchandise, furniture and fixtures, and collection of notes and accounts the defendant, Latshaw, received and had on hand,

after paying certain expenses on May 6, 1895, the sum of \$11,241.41, and yet has that amount on hand so far as appears from the evidence.

"After the death of said Harvey, the National Bank of Commerce, a creditor of the copartnership, had two claims allowed against the estate, which still remain unpaid. These are as follows:

August 2, 1889.....	\$12,223 31
" "	8,051 06
	<hr/> \$20,274 37

"These were the only demands allowed against the partnership estate; D. W. Williams having adjusted all the others either by payment in full or by giving notes signed 'D. W. Williams & Co.' The partnership estate has no property unless it is entitled to the fund here sued for, and D. W. Williams is insolvent, and his bond as administrator of the partnership estate is insufficient.

"Conclusion.

"This is a suit in equity, whereby it is sought by the plaintiff, as administrator of the partnership estate of D. W. Williams & Co., to obtain a judgment or decree against the defendant, who is assignee of D. W. Williams, to pay over to the plaintiff all the funds in his possession which he holds as such assignee. The evidence shows, without room for controversy, that the funds now in the assignee's hands are the proceeds of the old stock of the partnership estate of D. W. Williams & Co., with additions added thereto at times by Williams, which were purchased by the proceeds of sales from the old stock and from collections from the old accounts, and from money furnished by Williams from his individual resources; but, as no separate showing was or could be made of that part was purchased by Williams' individual money, it will have to be held that all those funds in the assignee's hands were proceeds of the old partnership estate of D. W. Williams & Co. The evidence also shows that the partnership estate is indebted to the National Bank of Commerce in the sum of \$20,274.37, with interest thereon from August 2, 1889, amounting to between \$27,000 and \$30,000, and that such estate is insolvent, having no property whatever, unless the funds in the assignee's hands belong to it. It is also clear that D. W. Williams received as surviving partner, in merchandise and fixtures, \$54,658.58, and that he collected on the accounts \$14,154.83, making a total of \$68,813.41, and that he paid the debts of the partnership estate to the amount of \$66,787.81. The evidence also satisfactorily proves that D. W. Williams is insolvent, and that his bond as administrator is insufficient.

"Such being the facts, the plaintiff would seem to be entitled to recover, unless one of the following defenses urged by the defendant's counsel should defeat such recovery:

"(1) The first contention of the defendant is that this court has no jurisdiction of the cause of action, as by the law of this state all matters relating to the administration of estates of deceased persons, and the recovery of property belonging to them, belong exclusively to the probate courts. From the finding of facts it will be seen that the money in the hands of the defendant is the proceeds of property belonging to the old partnership estate of Williams & Harvey, there having from time to time been added to such property money and property of D. W. Williams. But the amounts added by Williams were not kept separate, and there is no evidence which tends to distinguish or separate the one from the other. In this state of affairs a court of equity alone has the jurisdiction and power to search out and follow up the trust fund, and direct what disposition shall be made of it; and it has always been held in this state that the probate courts have no such equitable powers, the last case being that of Estate of Glover, 127 Mo. 153, 29 S. W. 982. I conclude, therefore, that the court has jurisdiction of the cause of action.

"(2) The defendant's counsel also takes the position in their brief that, as D. W. Williams had paid or adjusted the debts of the old firm of Williams & Harvey to an amount exceeding by at least \$10,000 the value of the estate that came into his hands as administrator thereof, therefore he had the right to use the property of the old estate in making this assignment, and that the assignment ought for that reason to legally vest the property in the defendant. The position of counsel is founded, first, on a misconception of the facts. It is true that Williams testified that he received merchandise and fixtures to the value of \$54,858.58, and that he collected on accounts \$14,154.83, making a total of \$68,813.41, and that he paid on the debts of the estate an amount exceeding this sum by more than \$10,000; or, in other words, that he paid on the debts more than \$78,813.41. While Williams is no doubt honest in his testimony, still his mistake is so evident that there can be no question about it, for the debts of the estate amounted to \$87,062.18, and \$20,274.37 thereof have never been paid; consequently he could have paid but \$66,787.81, being \$2,025.60 less than the value of the merchandise and the amount collected by him on the accounts. Furthermore, while Williams swears that he collected on the notes and accounts only about \$14,154.83, the evidence fails to show exactly how much more was collected on them by the defendant after they came into his hands, but it does appear that from such collections defendant received at least \$4,345. Therefore, if the position of the counsel were the correct one as to the law, the defense now being considered would not prevent a recovery of the \$6,370.60, as the value of merchandise and collections by Williams and defendant amounted to this and above what Williams paid out on the

debts. But I cannot agree with counsel in their position as to the law. When Williams took charge of this estate as surviving partner there were debts against the estate of \$87,062.18. These debts were entitled to be allowed, and paid pro rata, so far as the property of the estate would pay them. But it appears that the only debts that were allowed against the estate, amounting to more than \$20,000, were the only ones upon which no payments were made, and they remain wholly unpaid. An administrator has no right to pay in full a part of the debts and leave other debts entirely unpaid, and then, with the property of the estate still in his possession, claim that, as he has paid out as much as the property was worth, the property still on hand does not belong to the estate. Such a doctrine as this would virtually place with the administrator the power to prefer creditors, and pay some in full and leave others wholly unpaid. The duty of the administrator is to collect and preserve the estate, and pay it out on the demands allowed pro rata, under orders of the probate court; and when he assumes to do otherwise, until all the debts are given their share, the property in his hands is subject to be used in the payment of such debts, even if he has expended the full value or more of the property of the estate in paying the other debts in full. So, in this case, as the defendant stands in the shoes of Williams, having in charge this trust fund, as much within the reach of the court as it would be if Williams himself held it, it seems to me that justice demands that the court take it and replace it in the hands of the administrator of the partnership estate, to be by him administered according to law. My finding is that plaintiff is entitled to a judgment that the defendant pay over to him the said sum of \$11,214.41, less proper allowances to the assignee for his unpaid services and expenses.

Costs.

F. P. Barnett, as stenographer.....	\$ 12 00
F. P. Sebree, referee.....	150 00
	<hr/> \$162 00

"Respectfully submitted,

"Frank P. Sebree, Referee."

Thereafter, and in due time, the defendant filed his exceptions to said report, which, omitting the caption, were as follows: "Now comes H. J. Latshaw, assignee, defendant, and files his exceptions to the report of Frank Sebree, Esq., referee, both as to the findings of fact and the conclusions of law reported by said referee, and defendant excepts to said report on the following grounds, to wit: First. The findings of the referee are against the evidence and the weight of the evidence. Second. The findings of the referee are against the facts proven in evidence, and his conclusions are against the law. Third. Because the referee found the fact to be that D. W. Williams, surviving partner of the estate of which plaintiff is

now in charge, had not paid out on the obligations of said partnership as much as the combined value of its property and the amount collected from debts due said estate; whereas, the undisputed testimony shows that said Williams had in truth paid out on partnership debts some \$10,000 or more in excess of the total value of said estate. Fourth. Because the referee falls in his report to state any account between the partnership estate of which plaintiff is administrator, and to make any finding as to how much, if anything, is due from D. W. Williams to said partnership estate. Fifth. Because the referee erred in admitting in evidence, against the objections of defendant, the purported list of liabilities of said partnership attached to the original inventory of said estate, and in basing his finding of the amount of partnership liabilities on said incompetent and inadmissible evidence. Sixth. Because the referee erred in his conclusion of law that it was necessary for an accounting to be had in the probate court between plaintiff and D. W. Williams, and an indebtedness by the latter to the estate there found and adjudged, as a condition precedent to the right of plaintiff to maintain this action in the circuit court. Seventh. Because the referee erred in his conclusion of law that it was immaterial even if Williams had paid out the full value of the estate to its creditors, and more besides of his own means, and in holding that plaintiff is entitled to recover the entire fund in controversy, regardless of whether there is any indebtedness from Williams to the estate, and regardless of how small a proportion of the fund may be the proceeds of partnership property, or whether the estate has been fully compensated by Williams for such property. Wherefore, defendant prays that his exceptions to said report be sustained, that the findings and conclusions of the referee be set aside, and that on the evidence and record findings be entered for defendant, and plaintiff's petition dismissed."

Thereafter, upon the hearing of said exceptions, the same were by the court overruled, and to the action of the court in overruling same defendant then and there duly excepted at the time. And thereupon the court rendered the following judgment in said cause: "Now, at this day, come said parties by their respective attorneys, the said plaintiff by C. S. Owsley and Elijah Robinson, his attorneys, and the said defendant by R. E. Ball and C. H. Nearing, his attorneys, and the exceptions heretofore filed by the defendant herein to the report of the referee heretofore filed in this cause coming on to be heard, and being submitted to the court, and by the court duly heard and considered, are by the court overruled, and the said report of the referee is by the court approved and confirmed. It is therefore ordered, adjudged, and decreed by the court that the said defendant, as assignee of D.

W. Williams & Co., as aforesaid, pay to said plaintiff, as administrator of the estate of the said W. G. Harvey, deceased, the funds in his hands, amounting to the sum of eleven thousand two hundred and fourteen dollars and forty-one cents (\$11,214.41); and that said plaintiff have and recover of said defendant said sum, together with his said costs and charges in and about this suit laid out and expended; and that execution may issue to enforce this judgment. And it is further ordered by the court that a fee of one hundred and fifty dollars (\$150) be, and the same is hereby, allowed to Frank P. Sebree for his services as referee in this cause; and that a fee of twelve (\$12) dollars be, and the same is hereby, allowed to Fred. P. Barnett for his services as stenographer in this cause, and that said fees be taxed as costs in this cause."

Thereafter defendant filed motions for new trial and in arrest, which being overruled he saved his exceptions, and brings the case to this court by appeal for review.

C. H. Nearing and R. E. Ball, for appellant. Elijah Robinson and C. S. Owsley, for respondent.

BURGESS, J. (after stating the facts). It has been held by this court in numerous cases that the finding of facts by a referee stands as the verdict of a jury, and, where there is any evidence to support it, the Supreme Court will presume the evidence before him properly weighed, and the proper effect given to it. *Western Boatmen's Benev. Asso. v. Kribben*, 48 Mo. 37; *Franz v. Dietrick*, 49 Mo. 95; *Gimbel v. Pignero*, 62 Mo. 240; *Young v. Powell*, 87 Mo. 128; *Wiggins Ferry Co. v. Chicago & Alton Ry. Co.*, 73 Mo. 389, 39 Am. Rep. 519; *Chew v. Ellingwood*, 86 Mo. 260, 56 Am. Rep. 429; *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461. And especially is this so where the bill of exceptions cannot be found, as in the case in hand, and there is no means of settling any controverted question as to what the evidence was with respect thereto.

It is claimed by defendant that, even if the action be construed as one to impress a fund arising from intermingled trust and individual property, there is no proof, or attempt to prove, that the assets assigned to defendant were any part of the original partnership stock, or that such assets, or any part thereof, were bought with the proceeds of the original partnership estate. But no such point was raised by the exceptions to the report of the referee, and in order to be available upon this appeal they should have been pointed out in the exceptions to the report, and as this was not done they cannot be considered. *Wiggins Ferry Co. v. Railroad*, 73 Mo. 389, 39 Am. Rep. 519; *Singer Manufacturing v. Glvens*, 35 Mo. App. 602; *Ward v. Craig*, 87 N. Y. 550; *Pomeroy v. Underhill*, 7 Hill (N. Y.) 388. But, even if

these questions were properly raised by the exceptions to the referee's report, the evidence before him could only have been preserved by bill of exceptions; and as that was lost, and is not therefore embraced in the record, we have no means before us by which to determine these questions, in the absence of which the presumption must be indulged that the report is in these respects correct.

The point is made by defendant that the evidence did not sustain the allegations of the petition, but we do not agree to this contention. The petition alleges that Williams, instead of settling up the partnership estate, used its assets in the continuation of the business until he made the assignment to the defendant, who then took charge of and sold and disposed of them. Defendant claims that there was evidence tending to show that a portion of the property that went into the assignee's hands was purchased by Williams with his individual funds; but, even if this was so, the law is well settled that, when a person who holds property in a fiduciary capacity mixed his own property with it so that it cannot be separated nor the amount of each ascertained, the whole becomes, both at law and in equity, the property of the trust estate. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693. In *Perry on Trusts*, section 838, it is said: "Upon the same principle, if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without authority in the business, and changes the property many times over, yet the court follows the trust fund through all these changes, and gives the beneficiaries of the deceased partner's estate the capital, and all its proceeds or gains in the business in which it has been employed."

So in *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571, this court approvingly quoted from 2 Story's *Equity*, sec. 468, the following: "An agent is bound to keep the property of the principal separate from his own. If he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him, and so far as he is unable to do this it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal." Many other authorities could be cited in support of the rule thus announced, but it is

not thought that it would serve any useful purpose to do so.

Our conclusion is that the judgment should be affirmed, and it is so ordered. All of this division concur.

WABASH R. CO. v. ORDELHEIDE.

(Supreme Court of Missouri. March 4, 1903.)

RAILROADS — LIABILITY FOR FIRES — CONTRACT TO HOLD HARMLESS — CONSTITUTIONAL LAW — PUBLIC POLICY — PROBATE COURT — JURISDICTION.

1. A contract by which a railroad company allows one to erect a warehouse on its right of way, he to hold it harmless from damage by fire therein, is not unconstitutional.

2. Rev. St. 1899, § 1111, providing a railroad company shall be responsible for damage to one whose property is destroyed by fire communicated by locomotives in use on its road, renders it liable, regardless of negligence.

3. A contract by a railroad company to relieve itself from liability for fire in a building, communicated thereto by its negligence, is not against public policy, not being with a passenger or shipper with regard to a contract of carriage.

4. The probate court, under Rev. St. 1899, § 192, has jurisdiction of a demand for money due under a contract by testator to hold plaintiff harmless from damage by fire.

In banc. Appeal from Circuit Court, Warren county; E. M. Hughes, Judge.

Suit by the Wabash Railroad Company against Alvina Ordelheide, executrix. Judgment for plaintiff. Defendant appeals. Affirmed.

This is a demand presented to the probate court for allowance against the estate of defendant's testator. The claim grows out of the following circumstances: Plaintiff railroad company, in 1892, leased to the testator, Ordelheide, in his lifetime, a portion of the land embraced in its right of way in its switch limits at its station at Wright City on which to erect an elevator and warehouse in which to carry on a business for his own use and benefit. Among other provisions in the lease was the following: "Witnesseth, that the party of the first part (the railroad company) for and in consideration of the sum of one dollar per annum, in advance to said party of the first part paid by said second party and upon the express condition and stipulation that said second party shall assume all risk of fire from every cause, and shall hold and keep harmless said first party from any and all damage whatsoever, from fire or any other cause to any building or buildings that may be erected on the land herein leased or their appurtenances or contents, which guarantee enters into and forms part of the consideration that induces said first party to make this lease," etc. The lessee erected his warehouse and elevator as contemplated in the lease, and business was conducted therein until April 6, 1896, when the building and its contents were destroyed by fire communicated by a passing locomotive on plaintiff's railroad. There was in the

building when it was destroyed an iron safe, of the value of \$400, which was destroyed in the fire, and which belonged to a firm under the name of Ordelheide & Kamp, of which defendant's testator was a member. There was also property stored in the building belonging to the firm of Strack & Astroth, of the value of \$820.25, which was likewise destroyed. Those two firms sued the railroad company for these losses, and recovered judgments, Ordelheide & Kamp, for \$400, and Strack & Astroth for \$820.25. The railroad company defended the suits, and when judgments were rendered against it in the circuit court appealed to the St. Louis Court of Appeals, but both judgments were affirmed in that court. The plaintiffs in both those suits alleged for their causes of action, respectively, that the fire which destroyed the building was communicated by sparks which the railroad company negligently suffered to escape from a locomotive on its railroad. Pending this litigation Ordelheide died, and the defendant in this case qualified as executrix of his will. After those judgments were affirmed in the Court of Appeals the railroad company paid them both in full, and then presented its claim for indemnity under the clause in the lease above quoted against the estate of Ordelheide, deceased. That is what this suit is about. The probate court allowed the claims, and placed them in the fifth class. The executrix appealed to the circuit court, where trial was had, and judgment was rendered for plaintiff for \$1,230.25, from which judgment the executrix appealed to the St. Louis Court of Appeals, and the cause was afterwards transferred to this court in obedience to a writ of mandamus, for the reason that a constitutional question was raised by the defendant's answer in the circuit court.

L. J. Dryden, H. W. Johnson, and C. W. Wilson, for appellant. Geo. S. Grover, for respondent.

VALLIANT, J. (after stating the facts). 1. The answer sets up that the contract sued on is in violation of several provisions of our state constitution, which are specified in appellant's brief as follows: That the railroad company, by attempting to avoid liability for its own negligence, violates section 14, art. 12, which declares railroads to be public highways and railroad companies common carriers. That, the purport of the contract being to convert the right of way into a place for private business, it is in violation of section 20 of the Bill of Rights, which declares that private property should not be taken for private use. That it violates section 7, art. 12, which forbids a corporation to engage in any business not authorized by its charter. That it violates section 5, art. 12, in that it attempts to abridge the police powers of the state. As the learned counsel for appellant have merely stated these propositions in their brief, and have not fortified

them by any argument, we presume that they have concluded that there is no force in them. Without, therefore, entering into a discussion to which we are not invited by the brief of appellant, we will only say that we do not perceive any infringement of the constitution in the contract sued on.

2. The defense in this case, according to the brief of appellant, really rests on two grounds, viz.: First, that the contract sued on was only intended to indemnify the plaintiff for damages that it might sustain in having to pay fire losses under the requirements of section 1111, Rev. St. 1890; and, second, that if it is construed to cover damages plaintiff is required to pay for fire losses caused by its own negligence, it is against public policy, and therefore void.

It would be no defense to this action if appellant's first point should be conceded. Section 1111, Rev. St. 1890, is as follows: "Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages."

That statute renders the railroad company liable when property is destroyed by fire communicated from a locomotive in operation on its road, regardless of negligence. Where the action against the railroad company is based on the fact that the loss occurred by fire communicated by an engine in operation on the railroad, an allegation in the petition that the fire escaped because the engine was defective, or because the servants of the company in charge of it were negligent, is mere surplusage, and tenders no triable issue. A judgment against a defendant on such a petition is not an adjudication that the defendant was guilty of negligence, but that the plaintiff's property was destroyed by fire communicated by a locomotive on defendant's road. The statute makes the railroad company an insurer of the property along its line against loss by fire so communicated, and as if in compensation to the railroad for this compulsory liability the law gives it an insurable interest to that extent in all the property along its line. The law of negligence has nothing to do with a case under that statute. What the law has made immaterial, a party cannot, by inserting it in his pleading, make material. Under the contract sued on the defendant's testator insured the plaintiff against the loss it might sustain on account of fire in that building. The statute gave the plaintiff an insurable interest in the building and the property in it, to the ex-

tent of the plaintiff's liability under the statute, the loss was established in the most conclusive manner, and the plaintiff is entitled to recover.

But if we should admit the question of negligence as an issue in the case the defense has no foundation on that fact. When we say that the law will not permit a common carrier to make a contract to relieve itself from liability for its own negligence, we mean that it will not be allowed to do so in contravention of its duty as a common carrier. As between the shipper or the passenger on the one side, and the common carrier on the other, the latter is liable for its acts of negligence, anything in the contract for transportation to the contrary notwithstanding. But that rule of law, founded as it is on public policy, does not prevent a corporation engaged in the business of a common carrier from taking insurance to indemnify itself against damages it may be required to pay a shipper or a passenger an account of the negligence of its servants.

This very point has been so recently decided by this court that it is unnecessary now to do more than refer to that decision. *R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545. In that case the plaintiff railroad company had taken a contract from the defendant news company for indemnity against damages the plaintiff might have to pay for injury through negligence of its servants to an agent of the news company traveling on the railroad. The same defense was urged there as here—that the contract was against public policy—but this court, per *Brace, J.*, after holding that the news agent was a passenger, said: "But the contract in question is not with a passenger; it is not with a person to whom the company owed a duty as a common carrier of passengers; nor does it in terms, as it could not in effect, attempt to relieve the railroad company from any of its duties or liabilities as such. The contract is simply one of indemnity, by which the news company agreed, for a valuable consideration, to indemnify the railroad company against loss which the latter might sustain by reason of the duty it would incur to the news agent as a common carrier of passengers, in carrying out the contract." Then follows a review of the latest and best authorities on the subject, sustaining that view of the law, and showing that it applies not only to such contracts affecting property in the hands of a railroad company for transportation, but passengers also. Therefore, if it should be conceded that the contract with the defendant's testator was one to indemnify the plaintiff against loss for having to pay damages because of the negligence of its servants in running its trains, still it is a valid contract, and the plaintiff is entitled to recover.

3. It is averred in the answer that the

probate court did not have jurisdiction of this case. As there is no argument made on that point in the brief for appellant, we do not understand the ground on which the plea is founded. The claim is a plain demand for money due the plaintiff under a contract made by the testator in his lifetime. There is no doubt of the jurisdiction of the probate court in such case. Section 192, Rev. St. 1899.

4. It is stated in the briefs on both sides that there was a suit brought by Ordelheide in his lifetime against the railroad company for damages for the destruction of the building by fire, and that that suit is now pending in this court on appeal, having been transferred here from the Court of Appeals. The judgment that may be rendered in that case, however, can have no influence in this case. It is a different cause of action; and although it is between the same parties, yet it involves a different subject-matter, and the issues are not the same. Any discussion of that case would be out of place at this time.

There is no error in the record before us, and the judgment is affirmed. All concur.

JORDAN v. DAVIS.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

ATTORNEY AND CLIENT—ACTION BY CLIENT—COUNTERCLAIM FOR CONTINGENT FEE—DECLARATION OF LAW—WHAT CONSTITUTES—PROPRIETY OF REFUSAL—MEASURE OF DAMAGES.

1. A memorandum filed by the trial court in a suit tried without a jury, stating that all items of counterclaims were barred by limitation, except certain enumerated ones, as to each of which certain amounts should be allowed defendant, is not a declaration of law which can be reviewed on appeal.

2. In an action by a client against his attorney, in which the latter pleads as a set-off the client's failure to furnish costs, wherefor a suit, in which he was to have as a fee one-fourth of the recovery, was dismissed, a requested declaration of law that if the court found that, had the dismissed suit been prosecuted, the sum sued for could have been recovered, etc., then defendant was entitled to recover one-fourth thereof, is properly refused, as fixing an erroneous measure of damages.

3. It was also properly refused as injecting into the action the merits of an independent controversy, as to which there was no evidence.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by M. P. Jordan against H. B. Davis. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by plaintiff against defendant to recover from him the sum of \$881.58, alleged to have been collected by defendant, as plaintiff's attorney, on October 26, 1897, and improperly retained by defendant, although demanded of him by plaintiff.

On September 27, 1898, defendant filed an amended answer, which is as follows:

"(1) And for amended answer this defend-

ant denies each and every allegation in plaintiff's petition contained. This defendant, further answering, and by way of counterclaim, alleges that heretofore, to wit, on the 24th day of July, 1891, plaintiff and defendant entered into a contract in writing, by which defendant, who is a regularly licensed and practicing attorney of the city of St. Louis, Missouri, undertook to carry on as a lawyer, on behalf of plaintiff, a certain cause brought on that day in the circuit court of the city of St. Louis, Missouri, against one Charles P. Chouteau, for the recovery of thirty-one thousand nine hundred dollars, and which case plaintiff agreed to prosecute with defendant as his attorney to final hearing, and for which service this defendant was to receive the sum of seven thousand nine hundred and seventy-five dollars as compensation under said contract, which contract was in words and figures as follows: 'St. Louis, July 21st, 1891. Henry B. Davis, Esq.—Dear Sir: In the case brought by you for me against Charles P. Chouteau, I agree to give you one-fourth of any money recovered, and if there is nothing recovered, then there is no claim on me whatever. Yours truly, Martin P. Jordan.' This defendant, further answering, says that in pursuance of said contract this defendant in all things performed for plaintiff as called for by said contract, but that plaintiff, in violation of his said contract, neglected and refused to perform his part of said agreement, and said cause was dismissed for failure of plaintiff to furnish security for costs in said cause, whereby this defendant was damaged in the sum of \$7,975. This defendant, further answering, says that said contract is herewith filed, and marked 'Exhibit A.' Wherefore this defendant prays judgment against the plaintiff for the sum of \$7,975.

"(2) This defendant, further answering, says, by way of counterclaim, that by virtue of the contract herewith filed, marked 'A,' between plaintiff and defendant, this defendant was induced to bring an action for plaintiff against one Charles P. Chouteau, which action is entitled 'Martin P. Jordan vs. Charles P. Chouteau,' and was filed on the 24th day of July, 1891, and is numbered 85-859 of the circuit court of the city of St. Louis, and in which action this defendant, under the statutes of the state of Missouri, became responsible for the costs, said plaintiff being a nonresident of the state of Missouri; and which action was, on January 5, 1892, dismissed by the circuit court of the city of St. Louis for failure of plaintiff to give security for costs in said cause, whereby this defendant became liable to pay, and did pay, as the security of plaintiff, the sum of twenty-five dollars and twenty cents, for which, with costs, this defendant asks judgment.

"(3) This defendant, further answering, and by way of counterclaim, says that on the 10th day of January, 1893, at the instance and

request of the plaintiff, this defendant paid, laid out, and expended on behalf of the plaintiff the sum of three dollars, which money has never been repaid to this defendant, although frequent demand has been made therefor. Wherefore defendant prays judgment for said sum of three dollars and costs.

"(4) This defendant, further answering, says that on the 10th day of January, 1893, this defendant, at the instance and request of the plaintiff, who was a nonresident of the state of Missouri, brought suit against one Charles P. Chouteau on behalf of the plaintiff in the circuit court of the city of St. Louis, Missouri, which suit was, on the 11th day of May, 1893, dismissed for failure to secure the costs thereof, whereby this defendant became liable, under the statutes of the state of Missouri, to pay and did pay the sum of thirty-five dollars and eighty-five cents, for which, with costs and interest, he asks judgment.

"(5) This defendant, further answering, and by way of counterclaim, says that heretofore, to wit, on or about the 16th day of March, 1894, plaintiff employed defendant to institute and prosecute a suit in the circuit court of the city of St. Louis against the Wm. Garrels Stave and Iron Company, and that in pursuance of said employment this defendant did prosecute said suit to a final determination, whereby plaintiff became indebted to this defendant for said services in the sum of two hundred and ninety-two dollars and thirty cents, which sum remains wholly due and unpaid, although payment thereof has been frequently demanded. Wherefore this defendant prays judgment for said sum of \$292.30, with interest and costs.

"(6) This defendant, further answering, says that on or about the 2d day of January, 1891, plaintiff employed this defendant to defend a cause brought against plaintiff by one M. W. Huff, and to prosecute a suit for plaintiff against said M. W. Huff in the city of St. Louis. This defendant, further answering, says that in all things in said cases he fully carried out the instructions of plaintiff, and that his services in said cases were reasonably worth the sum of twenty-five dollars, for which, with interest and costs, he asks judgment.

"(7) Defendant, further answering, and by way of counterclaim, says that heretofore, to wit, on or about the 27th day of March, 1894, plaintiff employed defendant to furnish plaintiff with a written opinion in a certain contention between plaintiff and a firm known as Terry Bros., in regard to some real estate in the city of St. Louis, and that in pursuance to said employment defendant furnished to plaintiff an opinion in regard to said transactions, which service was of the reasonable value of fifty dollars, for which sum defendant asks judgment, with interest and costs.

"(8) This defendant, further answering, and by way of counterclaim, says that on or about the 12th day of November, 1895, plain-

tiff employed defendant to give to plaintiff an opinion as to the legal effect of a certain letter written to plaintiff by one Louis Werner, vice president of the St. Louis Wooden Gutter Company; that in pursuance of said employment this defendant furnished to plaintiff said opinion. This defendant further says that the reasonable value of defendant's services in furnishing said opinion is twenty-five dollars, for which, with costs and interest, he asks judgment.

"(9) This defendant, further answering, and by way of counterclaim, says that heretofore, to wit, on or about the — day of —, 1895, plaintiff employed defendant to prosecute a suit in the courts of the city of St. Louis against the John Stecher Cooperage Company. Defendant further says that in pursuance of said employment he did prosecute said suit to a final determination, which said service is of the reasonable value of fifty dollars, and for which defendant asks judgment, with interest and costs.

"(10) This defendant, further answering, and by way of counterclaim, says that on or about the 30th day of October, 1897, this defendant, at the instance and request of plaintiff, paid, laid out, and expended on behalf of plaintiff the sum of fifteen dollars and fifty cents for costs in case of plaintiff against the Stecher Cooperage Company, and which sum has never been repaid defendant, and for which he asks judgment, with interest and costs."

On January 12, 1899, during the progress of the trial, defendant, by permission of the court, added another count to his answer, which is as follows:

"(11) For further counterclaim defendant states that from July 24, 1891, to June 1, 1893, at the special instance and request of the plaintiff, defendant rendered professional services for plaintiff in the matter of plaintiff's alleged claim against one Charles P. Chouteau for the recovery of the sum of \$31,900, as follows: That plaintiff consulted with defendant from time to time regarding plaintiff's said demand; that defendant was compelled to make an examination into the merits of said claim, and defendant prepared a petition founded upon said claim, and instituted suit in the circuit court of the city of St. Louis, which suit was subsequently dismissed by the court for plaintiff's failure to furnish security for the costs of said suit; that defendant subsequently again prepared a petition for plaintiff in said matter, and again instituted suit for plaintiff against said Chouteau, which suit was subsequently again dismissed because of plaintiff's failure to furnish security for the costs of said suit; and defendant states that in said suits he also rendered services for plaintiff in the taking of depositions and examination of witnesses, and was compelled to correspond with plaintiff from time to time regarding said suits; that the services so rendered by defendant for plaintiff in

said matter were reasonably worth the sum of two thousand dollars, for which, with costs, plaintiff prays judgment."

Plaintiff replied, denying each and every allegation in the answer, and pleaded the five-year statute of limitation to all matters set up in the answer by way of counterclaim.

The case was tried by the court, a jury being waived. Judgment was rendered for plaintiff for the amount sued for, with interest, less the amount allowed defendant on his counterclaims set up in the fifth, seventh, eighth, ninth, and tenth counts of the answer. The amount of the judgment is \$649.78.

At the time of the rendition of the judgment the court handed down what is called by the respective attorneys the following "memorandum opinion": "All the items of the counterclaim of defendant, except the fifth, seventh, eighth, and ninth, and tenth, are barred by the statute of limitations. On the fifth item \$200 should be allowed, on the seventh item \$25 should be allowed, on the eighth item \$5 should be allowed, on the ninth and tenth items \$35.50 should be allowed."

Within due time defendant filed motion for new trial, which being overruled he appeals.

Theodore Rassieur and Henry M. Post, for appellant. E. T. Farish, for respondent.

BURGESS, J. (after stating the facts). As the only questions presented by this appeal are with respect to the ruling of the trial court in holding that the causes of action counted upon in the first and eleventh of the counterclaims is when the statute of limitations began to run, and whether or not the causes of action were barred, as found by the court, it only becomes necessary to state the facts out of which they culminated and thereafter connected with them.

On the 24th day of July, 1891, plaintiff had a claim against one Charles P. Chouteau, amounting to \$31,900, for commissions on the sale of a large body of land which he claimed to have sold for Chouteau at his instance and request, and placed the same in the hands of defendant, who is an attorney, for collection, under the writing set forth in defendant's first counterclaim. The suit was instituted by Davis on the same day for the amount claimed by Jordan. This suit was dismissed for failure of plaintiff to give security for the costs on January 5, 1893. On the 10th day of January, 1893, the defendant reinstituted the suit. In due time an answer was filed to the petition, and on the 10th day of February next thereafter a motion was filed by defendant's attorney in that case to require plaintiff to give security for costs, which was sustained, and the plaintiff given 10 days to put up the costs; but, having failed to comply with the order

of court, the suit was again dismissed. The evidence was conflicting as to which one of them, by the terms of an agreement between Jordan and Davis, was to secure the costs in that case.

The only instruction asked or given in the case was one asked by defendant, which reads as follows: "The court declares the law to be that, if the court finds from the evidence that the plaintiff was at all times ready, able, and willing to perform the services required of him as attorney for the plaintiff in the litigation of Jordan vs. Chouteau, and that the plaintiff, notwithstanding said fact, permitted said suits to be dismissed for failure on his part to furnish security for the court's costs, and thereafter failed to prosecute said action for the recovery of the amount alleged to have been due him from said Chouteau; and if the court further finds from the evidence that the sum of \$31,900 could have been recovered and collected from Chouteau if such action had been duly prosecuted by the plaintiff, and that Chouteau was amply solvent, and able to respond and pay in full such judgment and costs, if the same had been recovered against him—then, under the contract read in evidence, and referred to in the counterclaim as 'Exhibit A,' the defendant is entitled to a judgment upon the first item of the counterclaim against the plaintiff for one-fourth of the sum which could have been so recovered." This instruction was refused, and defendant excepted.

It has always been held by this court that, where the court, in trying issues of facts, sits as a jury, and gives a general verdict, the judgment will not be reviewed on appeal or by writ of error, unless declarations of law are asked and refused, in order that the appellate court may see upon what theory the case was tried. Unless this is done, the finding of the court is incontrovertible here. *Easley v. Elliott*, 43 Mo. 289; *Wilson v. Railway Co.*, 46 Mo. 36; *Wellandy v. Lemuel*, 47 Mo. 322; *Hamilton v. Boggess*, 63 Mo. 233; *Henry v. Bell*, 75 Mo. 194; *Harrington v. Minor*, 80 Mo. 270; *Gaines v. Fender*, 82 Mo. 497; *Cunningham v. Snow*, Id. 587; *Sleferer v. City of St. Louis*, 141 Mo. 596, 43 S. W. 163; *Sutter v. Raeder*, 149 Mo. 297, 50 S. W. 813; *Swayze v. Bride*, 34 Mo. App. 414; *O'Howell v. Kirk*, 41 Mo. App. 523; *Clafin v. Burkhardt's Adm'r*, 43 Mo. App. 226; *Morgan v. Railway Co.*, 51 Mo. App. 523; *Bozarth v. Lincoln Legion of Honor* (Mo. App.) 67 S. W. 679. In *Hamilton v. Boggess*, supra, it was said: "When a case is submitted to a court, and a jury dispensed with, the facts upon which the court bases its judgment are incontrovertible here. This court has only the power to review the law declared by the court below, and, when that court is intrusted with both the facts and the law, we must assume the facts to be as that court finds them. This observation is not made because in the present case the

facts in evidence did not justify the assumption of the circuit court in regard to them; for there is, in our opinion, nothing unreasonable in the deductions made by the circuit court from the evidence presented, but because we wish it to be understood that it is not our province to determine facts, or review the finding of juries or courts on them, except in chancery cases." The memoranda handed down by the court at the time the judgment was ordered and its final decision was made was not, we think, a declaration of law within the meaning of that term. It does not purport to be such, nor do we think it was so intended, but was merely an announcement of the conclusion reached, in order that the clerk in writing up the judgment might understand it. It does not attempt to declare the law upon any feature of the case, and is not, in either substance or form, a declaration of law, as we understand it. It does not declare anything, and has no proper place in this record; so that, as defendant asked no declaration of law, and none was given, except as before stated, the action of the court in refusing that one will now be considered. That the declaration of law was properly refused is beyond all question. If it is true, as claimed by defendant, that plaintiff refused to comply with the terms of the contract, in consequence of which the suits were dismissed—though the evidence seems to show otherwise—then defendant's remedy, if he complied with the contract on his part, was for damages for breach of the contract, or upon quantum meruit for whatever his services were reasonably worth. But in no event, under the circumstances disclosed by the record, was the measure of damages one-fourth of the sum that might possibly have been recovered at the end of the suit by *Jordan v. Chouteau*, the result of which was at most problematical. The declaration of law as asked is vicious for the further reason that, if it had been given, its practical effect would have been to inject into this suit another entirely different and independent suit, involving both questions of law and of fact—in other words, collateral issues to be passed upon by the court sitting as a jury; and that, too, without evidence, which we think without precedent, and contrary to all rules of law or ethics.

For these intimations the judgment is affirmed. All of this Division concur.

TICE v. FLEMING.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

EJECTMENT—JUDGMENTS—DAMAGES AND RENTS—IMPROVEMENTS—SET-OFF—LIMITATIONS—CONSTITUTIONAL LAW.

1. The statute permitting an occupant of land, who has been ejected, to recover for improve-

ments made by him in good faith prior to notice of the adverse title, is not in violation of Const. art. 2, § 20, prohibiting the taking of property for private use without the consent of the owner, since the owner is presumed to know of his ownership of the land, and what is being done thereon, and is at fault when he permits the occupation to continue and improvements to be made without giving notice of his superior title.

2. Rev. St. 1890, § 4297, limiting the time within which an action can be brought on a judgment to 10 years, does not apply to a judgment recovered before such statute was enacted, and under Rev. St. 1889, § 6796, which fixed the limit at 20 years.

3. Where plaintiff in ejectment recovered judgment of restitution and for damages and rent, and defendant thereafter recovered judgment against plaintiff for improvements, and plaintiff sued to recover on his judgment for damages and rent, the amount thereof, being less than defendant's judgment, should be credited on defendant's judgment.

Appeal from Circuit Court, Texas county; W. N. Evans, Judge.

Action by Perry G. Tice against Frank Fleming to recover on a judgment for damages and rent rendered in a suit for ejectment, and subsequent rent, and which defendant sought to have set off against a judgment recovered by him for improvements. From a judgment allowing the set-off, plaintiff appeals. Affirmed.

On October 7, 1899, plaintiff filed in substance the following petition:

"Plaintiff states that on the 22d day of May, A. D. 1889, in the circuit court of Missouri, within and for Texas county, and at the May, 1889, term thereof, said court being one of general jurisdiction in a certain ejectment suit then therein pending, where this plaintiff was plaintiff and this defendant was defendant, this plaintiff recovered judgment, which was duly given by said court, against this defendant, for the possession of the southeast quarter of section twenty-five (25), township twenty-eight (28), range nine (9) west; said real estate being situate in Texas county, Missouri; also for the sum of \$85.92 for damages and rents; also for \$3 per month from the rendition of said judgment until the possession of said lands hereinbefore described should be restored to this plaintiff; also for his costs, amounting to \$28.40; and also for a writ of restitution to be issued on said judgment. Plaintiff further says that no part of said judgment has ever been paid or satisfied; that the possession of said premises has never been restored to this plaintiff.

* * * Plaintiff further states that after the rendition of said judgment, to wit, on the 22d day of May, 1889, defendant instituted in the circuit court of Missouri, within and for Texas county, said court being one of general jurisdiction, a suit against this plaintiff for improvements made in good faith on the lands aforesaid, and then and thereupon obtained a temporary injunction from the said court, by which the judgment hereinbefore mentioned for the possession of said real estate and damages was stayed, and its execution enjoined; that the said temporary in-

¶ 1. See Constitutional Law, vol. 10, Cent. Dig. § 202.

junction remained in full force for the space of six months, to wit, until the 22d day of November, 1889, at which time the same was dissolved."

The prayer is for \$650.62 and possession of land described in the petition.

The answer, filed November 23, 1899, properly admits the judgment sued on, admits the injunction of May, 1889, denies other allegations, and proceeds as follows:

"Defendant, further answering, states that he obtained an injunction against this plaintiff at the May term, 1889, staying the judgment of plaintiff for the possession of the lands described in plaintiff's petition and the judgment for damages, \$85.92, and rents and profits, and enjoining execution thereon until such time as suit for improvements on said lands made by defendant in good faith were determined, and until whatever judgment this defendant might recover against this plaintiff should be fully paid off and discharged; and that said injunction and restraining order has never been dissolved, but stands in full force and effect. Defendant further states that at the November term, 1889, of the circuit court of Texas county, Missouri, the suit for improvements on the land described in plaintiff's petition, where this defendant was plaintiff and this plaintiff was defendant, was duly tried, and that this defendant recovered judgment against this plaintiff for the sum of \$350 for the value of his improvements made on said lands, together with his costs in said suit, amounting to \$71, and that he retain possession of said lands until said judgment was fully paid off and discharged. Defendant says that no part of said judgment has ever been paid, but that the whole amount thereof, with interest thereon, remains due and unpaid, except \$20 on the costs of said suit, which would leave a balance due on said judgment and costs of \$401, with interest thereon at six per cent. per annum from the rendition thereof. Defendant says that the judgment of plaintiff for damages would be a set-off against the judgment of this defendant to the amount of \$85.92 and rents and profits at \$3 per month for six months, amounting to \$18, making a total of \$103.92, and would be entitled to be credited on defendant's said judgment, leaving balance due this defendant on his judgment for improvements of \$246.08. Wherefore, defendant asks that so much of his judgment for improvements on said land as will satisfy plaintiff's judgment for damages, rents and profits be set off against plaintiff's said judgment for damages, rents, and profits. Defendant, for further answer, says that the rental value of said lands was caused by the improvements placed thereon by this defendant, and defendant says he is not chargeable with rents and profits thereon."

The ten and five year limitation statutes are properly pleaded. The replication is general denial.

W. E. Barton, for appellant. Orchard & Saye, for respondent.

FOX, J. (after stating the facts). It will be observed from the petition in this cause that the plaintiff, in addition to the collection of the money judgment, included in his action the recovery of the land, for which he had recovered judgment, by the judgment upon which this suit is brought. However, will say that, from the brief filed by appellant, this part of the claim, as alleged in the petition, is abandoned; hence will not regard that as being before this court for review. See remark of appellant in brief, "that the only question in this appeal is, can this \$85.92, with interest, be collected?" In the answer in this case, there is pleaded the statute of limitation, and also a judgment for improvements, which is claimed as a set-off against the judgment sued on for \$85.92. This judgment, upon which suit is brought for its collection, was rendered for damages, rents, and profits in the original ejectment suit between these parties. There is no dispute as to the facts; the judgment for improvements in favor of defendant was introduced; in fact, it is practically admitted that said judgment was recovered as alleged. It appears from the record in this cause that appellant, in his motion in arrest of judgment, presented a constitutional question; hence this cause is transferred to this court by the St. Louis Court of Appeals.

There are but two questions involved in this controversy: First. Was the action upon the judgment as alleged in the petition barred by the statute of limitation? Second. Could the judgment for improvement, recovered by respondent in November, 1889, to the extent of the judgment for rents and profits sued on, be applied as a set-off against such action? These questions are very fully and ably presented in the brief of learned counsel for appellant, in the brief filed in the St. Louis Court of Appeals. As to the constitutional question, it is not discussed. However, our attention is directed to it. It is not specifically pointed out in the brief in what particular the judgment is violative of the provisions of section 20, art. 2, of the Constitution of this state; hence, we will assume that it is upon the ground that the trial court was dealing partly with a judgment under the statute for improvements, and the claim of appellant is that it invades the Constitution, because the person having the legal title is made to pay for improvements without in any way consenting to the improvements being made. Numerous cases have been before this court involving the questions of judgment for improvements, and these judgments have invariably been treated as valid, and the statutes upon which they were based regarded as wise provisions, protecting the interests of occupants of land believing they had title, and so believing, in good faith, made valuable improvements.

While it may be said that the holder of the legal title does not expressly consent to the making of the improvements, he is presumed to know of his ownership of the property, and is supposed to know what is being done upon the premises. If he fails to give proper notice of this claim to the property to the person who is occupying it in good faith, believing he has the title, then, upon principles of equity and justice, if he permits such occupant to remain in possession, ignorant of any superior claim, and make valuable improvements, then he should compensate the occupant for such improvements, the benefits of which he subsequently enjoys. We are of the opinion that there is no merit in this contention.

Upon the first question presented to us for review, as to this action being barred by the statute of limitation, will say that we have reached the conclusion that the contention of the appellant is well supported, and the action is not barred by the statute of limitation.

When the original judgment upon which this suit is brought was rendered, the statutory period in which all actions upon judgments of this character were barred was 20 years. Section 6796, Rev. St. 1889. In 1895, the statutory bar was lessened to 10 years. Rev. St. 1899, § 4297. It was under the provision of the statute of 1895 that respondent bases his plea of the statute of limitation. While it may be conceded that the legislature may shorten the statutory period in which actions are to be prosecuted, yet, as to the shortened period fixed, such statute can only be operative after the passage of the act. In other words, the legislature is not authorized to make a statute of limitation retrospective in its operation, and include the period of existence of the cause of action prior to the enactment of the statute. It will be observed the cases cited (*Selbert v. Copp*, 62 Mo. 182; *Callaway Co. v. Nolley*, 31 Mo. 393) announce the doctrine that where the action accrued under a former statute, and subsequently the statute is changed, fixing a different period, before the action is barred, the full period must elapse as fixed by the later statute. This contention is settled by the case of *Cramer v. School District*, 151 Mo. 119, 52 S. W. 232. In that case, the question presented was identical with the one here presented. In that case, *Burgess, J.*, says, in speaking of the act of 1895: "But in the act of 1895 no time is given after its passage in which suits upon judgments of courts of records theretofore rendered may be brought, and if it applies to such judgments it is as to them unconstitutional and void. In that it cuts short the plaintiff's right to sue, thereby depriving him of a vested right." The subject is fully discussed in that case, and the conclusion reached that the statute of 1895 can have no application to judgments rendered prior to its enactment.

This brings us to the only remaining question in dispute in this cause. This contention is sharply presented in the refusal of the court to give the declaration of law requested by the plaintiff, which substantially declared that no part of the judgment for improvements could be set off against the original judgment for rents and profits. The action of the trial court finds support upon this disputed question, not only in the adjudicated cases, but upon the broad and growing principles of equity. The first case that makes reference to this proposition is the case of *Tissier v. Hill*, 13 Mo. App. 36. There it is announced in unmistakable language that "the harsh rule of the common law has become so far relaxed as to allow defendant in ejectment to set off the value of improvements made by him in good faith during his occupancy, to the extent of the rents and profits claimed." In the case of *Fenwick v. Gill*, 38 Mo. 510, the court very clearly announced the doctrine "that the statute contemplates that the party dispossessed may recover compensation for all improvements made by him in good faith on the lands prior to his having notice of the adverse title"; and in that case set off the value of the improvements against the rents and profits. This case was decided under the statute of 1855 (section 20), which is substantially the same as the present statute in respect to that subject. It may be said, as to that case, that the defendant was in possession and claiming title through the plaintiff; but it in no wise alters the rule that one may be set off against the other. The only distinction is as to when and how the value of improvements can be recovered. In case the defendant's possession and occupancy is by claim of title through the plaintiff, then the value of the improvements may be considered in the ejectment suit; but if defendant's occupancy is under a stranger to the title of plaintiff, then his action for improvements must be an independent one, under the statute. *Henderson v. Langley*, 76 Mo. 226. The case of *Stump v. Hornback*, 109 Mo. 272, 18 S. W. 37, refers approvingly to the case of *Fenwick v. Gill*, *supra*. In that case the court says: "The proceedings to recover for improvements were designed merely to supplement and continue the ejectment suit out of which they grew, and enforce the equities of the occupant before the judgment in the original suit had been executed; otherwise, in many cases, the claims for compensation might be wholly fruitless. So, it has been held, as in this case on the first appeal, that the judgment for damages, rents, and profits in the ejectment suit should be set off by the award in the subsequent proceeding for compensation. *Fenwick v. Gill*, 38 Mo. 528." It will be observed that the court announces in that case that the judgment for damages, rents, and profits may be set off against the judgment for value of improvements; then refers

to the case of *Fenwick v. Gill*, supra, as sustaining that position. It does sustain it in principle, for the case of *Fenwick v. Gill* holds that the value of the improvements may be set off against the value of the rents and profits. And the case of *Stump v. Hornback*, supra, just reverses it, and holds that the rents and profits may be set off against the value of the improvements, and relies upon the *Fenwick* Case to support the announcement of the principle. We take it that it needs no argument. If you can set off rents against improvements, then, it is clear, you can reverse it, and set off improvements against rents. But the case of *Stump v. Hornback* goes farther, and announces clearly the inference to be drawn from the statute. The court says: "There is nothing in any section of the statute from which an inference can be drawn that the judgment in the ejectment suit is in any manner modified or affected by the proceeding for compensation, other than that part of it awarding damages, and accruing rents and profits may be reduced or satisfied by the award for the value of the improvements." It will be observed that the court in that case reached the conclusion that a judgment for rents and profits similar to the one sued on in the case at bar could be reduced, or even satisfied, out of the award for the value of the improvements, and we have reached the same conclusion.

The plaintiff in this case procured his judgment for the recovery of the land and the value of his rents and profits; and upon the defendant securing his award for the value of his improvements, the plaintiff practically abandons his judgment, makes no effort to adjust the equities and set off the rents and profits against the value of the improvements, and enforce his judgment; but after a silence for 10 years he undertakes to enforce the money part of his judgment, and insists that the judgment for improvements, to the extent of his judgment for damages, rents, and profits, should not be set off against his action. We cannot maintain this contention. The court, upon every principle of equity and justice, did right in allowing the defendant his set off, and its judgment will be affirmed. All concur.

STATE ex rel. CHICAGO, R. I. & PAC. RY.
CO. v. SMITH et al., Judges.

(Supreme Court of Missouri. March 4, 1903.)

APPEAL—DISMISSAL—INSUFFICIENCY OF ABSTRACT—REINSTATEMENT—INTERMEDIATE APPELLATE COURTS—MANDAMUS.

1. 1 Rev. St. 1899, § 813, provides that on an appeal to the Court of Appeals the appellant shall file within 20 days an abstract containing a certified copy of the record of the judgment appealed from, showing the term and day of the term, month, and year on which the judgment was rendered, etc. Court of Appeals Rule 15 provides that appellant shall file a

printed abstract of the record, setting forth so much thereof as is necessary, etc., and authorizes respondent to file such further abstract as he may deem necessary, etc.; and rule 18 declares that, if appellant fails to comply with rule 15, the court will dismiss the appeal. Held that, where an abstract was filed in time, the appeal should not have been summarily dismissed for its failure to show the day of the month or of the term when the judgment appealed from was rendered, that matter not being material to any question presented for decision.

2. Under Const. Amend. 1884, § 8 (1 Rev. St. 1899, p. 94), declaring that the Supreme Court shall have superintending control over the Courts of Appeals by mandamus, the Supreme Court has power by such writ to order the Court of Appeals to reinstate and decide an appeal which it improvidently dismissed.

In Banc. Mandamus by the state, on the relation of the Chicago, Rock Island & Pacific Railway Company, against Jackson L. Smith and others, judges of the Kansas City Court of Appeals. Peremptory writ granted.

W. F. Evans, W. M. Williams, and Frank P. Seabee, for relator. Peery & Lyons and Harber & Knight, for respondents.

BRACE, J. This is a proceeding by mandamus to compel the judges of the Kansas City Court of Appeals to set aside its order dismissing the appeal in a case pending in said court, and to require them to reinstate the cause on its docket, and to proceed to hear and determine the same. There is no dispute about the facts. At the December term, 1900, of the circuit court of Gentry county, James W. Albin, by guardian, obtained judgment against the relator for the sum of \$1,000, from which judgment an appeal was taken by the relator to the Kansas City Court of Appeals, in which in due time relator filed "a certified copy of the record entry of the judgment * * * appealed from in said cause, showing the term and day of the term, month, and year upon which the same" was rendered, "together with the order granting the appeal," as provided for in section 813, 1 Rev. St. 1899; and the cause in due course was docketed for hearing on the 3d day of March, 1902. By rule 15 of said Court of Appeals it is provided that: "In all cases the appellant or plaintiff in error shall file with the clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof. The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and

the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's abstract and brief aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk." As required by said rule, said appellant in due time filed copies of a printed abstract of the record in said cause, together with a brief containing the points relied on and the authorities cited in support thereof, and delivered copies of the same to the attorney for the respondent therein; the errors assigned and argued for reversal being as follows: "(1) The court committed error in refusing to give the demurrers to the evidence offered by the defendant at the close of plaintiff's evidence and at the close of all the evidence. (2) The court committed error in giving plaintiff's first instruction. (3) The court committed error in refusing to give the third instruction requested by the defendant. (4) The evidence was so strongly in favor of defendant as to convince the impartial mind that the verdict was founded on sympathy or prejudice. (5) Plaintiff's instruction No. 3, defining the measure of damages, is erroneous, in that it authorizes damages to be assessed for future pain and anguish likely to be suffered." Thereupon counsel for respondent in due time delivered to the counsel for appellant a copy of their "brief, points, and authorities cited," and filed copies thereof with the clerk of said court. The first point made in their brief is as follows: "The appeal should be dismissed, because appellant's abstract of the record does not show jurisdiction in this court. It contains no final judgment, order granting appeal, or filing bill of exceptions, or other entry of record, or abridgment of such record entries; and it cannot be ascertained from it when the alleged final judgment was rendered, or the motions for new trial and in arrest were filed." The remainder of the brief is in answer to the points and argument made against the judgment in the brief for appellant. Afterwards, on the 28th of February, 1902, the appellant asked leave, filed with the clerk five copies, and served upon counsel for respondent a copy of an additional abstract. Afterwards, on said 3d day of March, 1902, said cause, coming on in due course to be heard, was argued by counsel in behalf of both appel-

lant and respondent and submitted, and afterwards, on the 7th day of April, 1902, by order of said Court of Appeals, the relator's appeal was dismissed, in pursuance of the following opinion: "Per Curiam. This action is for personal injuries alleged to have been suffered by plaintiff. He recovered judgment in the trial court. The appeal is taken under what is known as the 'short method.' The abstract of the record does not contain the judgment, or the date when it was rendered. Neither does it set forth the time when the motion for a new trial was filed. Nor does it contain any record entry of the filing of the bill of exceptions. Shortly prior to the day when the cause was set for hearing, an additional abstract was filed, supplying the omissions which we have indicated. But this was without consent of opposing counsel. We will dismiss the appeal." Afterwards, on the 12th of April, 1902, the relator filed its motion for a rehearing to set aside the judgment dismissing the appeal, and to reinstate said cause on the docket of said court, which motion coming on to be heard in due course was, on the 5th of May, 1902, overruled; and, said court still refusing to set aside said dismissal and reinstate said cause upon its docket, on application by the relator to one of the judges of this court, the alternative writ herein was issued, to which the respondents demur.

The original abstract is fairly summarized in the brief of counsel for relator as follows: "The abstract consists of 75 pages and an index, and its contents are as follows: First. The title of the cause, the court, and term thereof. Second. The petition, answer, and reply in full, with statements showing their filing. Third. This statement: 'The Trial. And at the December term, 1900, of the said circuit court of Gentry county the trial of said cause was had before the court and a regularly impaneled and qualified jury, and upon said trial and subsequent thereto the following proceedings were had in said cause, as shown by the bill of exceptions [caption omitted] duly filed by the defendant in said court, to wit.' Fourth. Then the bill of exceptions follows, beginning with the heading: 'Bill of Exceptions,' and under that heading the following: 'Be it remembered, that at the December term of the Gentry county circuit court, 1900, this cause coming on for trial before the Hon. Gallatin Craig, judge, and a jury, the following proceedings were had and done, to wit: The plaintiff, to sustain the issues on his part, adduced testimony in words and figures as follows.' Fifth. Then follow 65 pages of the testimony in full of the several witnesses. Sixth. Directly after the testimony the instructions given and refused are set out, together with the rulings of the court thereon, and exceptions thereto. Seventh. The statement of the return of the verdict for plaintiff assessing his damages at one thousand dollars. Eighth. The statement that on the same day the said

verdict was returned the defendant filed motions for a new trial and in arrest of judgment, and said motions are printed in full. Ninth. The statement that on the same day the said motions were filed they were overruled by the court, and to which ruling on each of said motions defendant excepted at the time. Tenth. The filing of the affidavit for appeal by defendant, and granting thereof to the Kansas City Court of Appeals. Eleventh. The statement that the court made an order of record extending the time for defendant to file bill of exceptions to during the March term, 1901, of said court. Twelfth. Then this: 'And now the defendant presents this, its bill of exceptions in the said cause, and prays that the same may be allowed, signed, sealed, and filed herein, which is accordingly done this 7th day of March, 1901. Gallatin Craig, Judge.' This was the end of the bill of exceptions. Thirteenth. After the judge's signature to the bill of exceptions, on page 74 of the abstract, follows a narration of the record proper, which sets out the substance of all the record entries as follows: 'And at said December term, 1900, upon the return of said verdict, the court rendered judgment that the plaintiff have and recover of defendant the sum of one thousand dollars and the cost of the suit. And on the same day of the return of said verdict and rendition of said judgment the defendant filed its motions for a new trial and in arrest of judgment as shown in said bill of exceptions, and the same were overruled by the court, and exceptions saved as shown in said bill. And on the same day of the rendition of said judgment the court made an order of record allowing the defendant to file its bill of exceptions in this cause during the March term, 1901, of this court. And thereupon, on the same day said judgment was rendered, the defendant filed a proper affidavit for appeal of this cause, and thereupon the court made an order granting such appeal to the Kansas City Court of Appeals. And afterwards, on the 8th day of March, 1901, and during the March term, 1901, of said circuit court of Gentry county, the defendant filed in the said circuit court of Gentry county its bill of exceptions in this cause heretofore set forth, the same having been duly signed by the judge of said circuit court; and the said court made an order of record of the filing of said bill of exceptions. Filing thereof was also marked on the back of said bill by the clerk of said court. And afterwards, on the 10th day of July, 1901, the defendant filed in this court a certificate duly made by the clerk of said circuit court of Gentry county, setting forth the said judgment and the said order granting an appeal, and this cause is now duly in this court on such appeal of the defendant.' "

1. While, by section 813, *supra*, the relator, after filing the certified copy of the judgment appealed from, showing the term and day of the term, month, and year upon

which the same was rendered, together with the order granting the appeal, was required, within the time prescribed by the rule of the Kansas City Court of Appeals, "to file printed abstracts of the entire record of said cause," etc., the statute does not contemplate a dismissal of the appeal in cases the abstract filed is not a perfect one, but, on the contrary, provides that the respondent, if dissatisfied therewith, may file a counter abstract, and, if that is not concurred in by the opposite party, provides for bringing before the appellate court a certified transcript of the record of the trial court. There is nothing in this statute authorizing a dismissal of the appeal on the ground that an abstract duly filed and served is simply imperfect. But by section 814, *Id.*, the Courts of Appeals are authorized to make and promulgate rules for carrying its provisions into effect, and by virtue of such authority the Kansas City Court of Appeals made and promulgated rule 15, hereinbefore set out, and rule 18, which is as follows: "If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15." If the appellant had failed to file and serve copies of its abstract and brief within the time required by rule 15, then, beyond question, the appeal might have been summarily dismissed under the rule; but, if the rule is complied with in these particulars, the rule, like the statute, does not contemplate a dismissal simply for the reason that the abstract may be imperfect, but provides for filing a counter abstract by the respondent, and, if the abstract of the appellant filed sets forth so much of the record as is necessary to a full understanding of all the questions presented to the court for decision, together with a brief containing in numerical order the points or legal propositions relied on, with citation of authorities in support thereof, then there is nothing in the rule authorizing a summary dismissal of the appeal. The questions presented to the court for decision in the appeal in question were all predicated upon the rulings of the court below on the evidence and the instructions; and these, with the pleadings, were set out in full, and, in connection therewith, the substance of everything that was done in the case in the trial court is recited in the abstract in narrative form. While this form may not be the best that could have been adopted, it serves the purpose for which an abstract is required, and hitherto has been held sufficient by all the appellate courts of this state. *Badger Lumber Co. v. Stepp*, 157 Mo. 386, 57 S. W. 1059; *Ricketts v. Hart*, 150 Mo. 64, 51 S. W. 825; *Id.*, 73 Mo. App. 648; *McDonald v. Hoo-*

ver, 142 Mo. 484, 44 S. W. 334; Keet Dry Goods Co. v. Brown, 73 Mo. App. 245; Ormiston v. Trumbo, 77 Mo. App. 310; Stewart v. Sparkman, 69 Mo. App. 456. The substance of the judgment and the term of the circuit court at which it was rendered, of the record entry showing that the motion for new trial was filed on the same day that the verdict was returned and the judgment rendered, and of the record entry showing the filing of the bill of exceptions, all appeared upon the face of the abstract. So that of the several reasons assigned by the court for dismissing the appeal the only one that had a show of support was that the abstract did not show the day of the month or of the term when the judgment was rendered—a matter wholly immaterial to the consideration of any question presented for decision in the case, and which, if desired for any purpose, was set forth in the certified copy of the record entry of the judgment filed in the beginning as the basis for all the proceedings in the Court of Appeals. The additional abstract filed by appellant, while somewhat more formal than the original, added nothing to the substance of the latter except the date aforesaid; and as that, in our judgment, was immaterial, and the original abstract in substantial compliance with the statute and the rules of the court, the suggestion as to this additional abstract need not be considered.

That the appeal was improvidently dismissed is, we think, manifest. The serious question in the case is, can this improvident action be rectified by mandamus from this court?

2. The case in question is within the exclusive appellate jurisdiction of the Kansas City Court of Appeals. From its judicial determination thereof no appeal lies to this court, and the writ of mandamus cannot be made to perform the functions of an appeal. Nevertheless, the Constitution provides that this court "shall have superintending control over the Courts of Appeals by mandamus." Section 8, Amend. Const. 1884; 1 Rev. St. 1899, p. 94. And while, under the power conferred on this court by this constitutional provision, the jurisdiction of the Court of Appeals to hear and determine the case cannot be invaded, yet the provision does confer the power and afford the means by which this court may compel that court to exercise its jurisdiction. To the end that it might properly do so, the Court of Appeals, in pursuance of the statute authorizing it thereto, adopted and promulgated certain rules for the presentation of causes in that court for its hearing and determination. As we have seen, the relator, in compliance with the statute and those rules, thus presented its case to that court for its hearing and determination. But the Court of Appeals, owing to an erroneous construction of its rules, re-

fused to hear and determine the cause thus presented, and dismissed the appeal. Thereupon the relator invokes the exercise of the constitutional power of this court by its writ of mandamus; not to invade the jurisdiction of the Court of Appeals, but to compel that court to exercise its jurisdiction by hearing and determining the cause of which it has jurisdiction. This is a proper exercise of the power of this court, and a legitimate use to which the writ of mandamus may be applied, as was ruled in *State ex rel. Bayha v. Phillips*, 97 Mo. 331, 10 S. W. 855, 3 L. R. A. 476, in which case it was held, after an exhaustive review of the authorities in this state and elsewhere, that, where a court of appeals has erroneously dismissed an appeal in consequence of error in a point of practice in such court, or a misapprehension of its own rules, mandamus will lie from the Supreme Court to correct such error, and in pursuance of such ruling a peremptory writ was awarded, commanding the Kansas City Court of Appeals to reinstate a cause in which the appeal had been dismissed by that court. The doctrine of this case has since received the approval of this court in *State ex rel. v. Public Schools*, 134 Mo. 311, 312, 35 S. W. 617, 56 Am. St. Rep. 503. The more recent case of *State ex rel. v. Neville*, 157 Mo. 386, 57 S. W. 1012, 51 L. R. A. 96, is in harmony with it, and it has received authoritative sanction elsewhere. 19 Am. & Eng. Encycl. of Law (2d Ed.) p. 385. As opposed to it, the case of the *State ex rel. v. Smith*, 105 Mo. 6, 16 S. W. 1052, is cited; and while, in the opinion in that case, there is dicta that gives support to respondent's contention, there is nothing in the facts in judgment opposed to it. The appeal in that case was dismissed not on any point of practice in the appellate court, but because the appeal was prematurely taken in the circuit court. *Mackey v. Hyatt*, 42 Mo. App. 443. Dicta in opinions, to be properly understood, must be read in the light of the facts adjudged to which they are intended to apply; and in cases like this the proceedings in the circuit court, the review of which is exclusively within the jurisdiction of the Court of Appeals, must not be confounded with the proceedings in the appellate court, the error in which is sought to be corrected. The other Missouri cases cited—*State v. Field*, 107 Mo. 445, 17 S. W. 896, and *State v. Neville*, 110 Mo. 345, 19 S. W. 491—are not in point. After a careful consideration of the able briefs of counsel and of the cases therein cited, and many others, we think the doctrine stated is well supported in reason and authority, is applicable to the case in hand, and that we are not warranted, upon any considerations of convenience or courtesy, in departing from it.

The peremptory writ will be awarded. All concur.

STATE v. WILSON.

(Supreme Court of Missouri. March 4, 1903.)

HOMICIDE—INDICTMENT—SUFFICIENCY—EVIDENCE—CONFESSION TO OFFICER.

1. An indictment for murder alleging that "defendant, a certain pistol then and there charged with one leaden bullet * * * did discharge," etc., is not defective in omitting the word "with" before describing the pistol.

2. Evidence, in a prosecution for murder, showing that defendant, in company with two others, purchased a pistol and cartridges, and went into deceased's saloon, and ordered drinks, and that, while one of defendant's companions reached over the bar to seize the cash tray, defendant shot and killed deceased, is sufficient to sustain a verdict of murder in the first degree.

3. The fact that a confession of murder was obtained from defendant by an artifice of the officer who arrested him, in telling him that his accomplice had been arrested and had told all about the crime, does not render the confession inadmissible in a prosecution for the murder.

In Banc. Appeal from Circuit Court, St. Louis County; H. D. Wood, Judge.

Henry Wilson was convicted of murder in the first degree, and appeals. Affirmed.

The defendant, a negro man, was indicted, with two other negroes, at the October term, 1900, of the circuit court of the city of St. Louis, for murder in the first degree. The indictment is in two counts, and, as its sufficiency is challenged, it is deemed best to insert it in full, as follows:

"The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn and charged, upon their oath present that Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to the grand jurors unknown), on the twenty-third day of June, one thousand nine hundred, at the city of St. Louis aforesaid, with force and arms in and upon one Thomas Mooney, in the peace of the state then and there being, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did make an assault; and that the said Henry Wilson, a certain pistol then and there charged with gunpowder and one leaden bullet, then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot off at, against, and upon the said Thomas Mooney; and that the said Henry Wilson, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid by the said Henry Wilson discharged and shot off as aforesaid then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did strike, penetrate, and wound the said Thomas Mooney in and upon the body of the said Thomas Mooney, then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, giving to the said Thomas Mooney, with the leaden bullet afore-

said, so as aforesaid discharged and shot out of the pistol aforesaid by the said Henry Wilson, in and upon the body of the said Thomas Mooney, one mortal wound, of the depth of six inches, and of the breadth of half an inch; of which said mortal wound the said Thomas Mooney then and there did languish, and languishing did live, from the said twenty-third day of June in the year one thousand nine hundred, until the twenty-fourth day of June in the year one thousand nine hundred; on which said twenty-fourth day of June, in the year one thousand nine hundred, the said Thomas Mooney, of the mortal wound aforesaid, at the city of St. Louis, did die; and that the said Ben McGowan and 'Fate' (whose true name is to these grand jurors unknown), at the said city of St. Louis, on the said twenty-third day of June, in the year one thousand nine hundred, were then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, present, aiding and abutting, advising and counseling, assisting and procuring the said Henry Wilson, the offense and felony aforesaid to do and commit. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to these grand jurors unknown) the said Thomas Mooney in the manner and form and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the grand jurors aforesaid, upon their oath aforesaid, do further present: That Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to these grand jurors unknown), on the twenty-third day of June, in the year of our Lord one thousand nine hundred, at the city of St. Louis aforesaid, with force and arms in and upon one Thomas Mooney, in the peace of the state then and there being, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did make an assault; and that the said Henry Wilson, Ben McGowan and 'Fate' (whose true name is to these grand jurors unknown) a certain pistol then and there charged with gunpowder and one leaden bullet then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did discharge and shoot off at, against, and upon the said Thomas Mooney; and that the said Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to these grand jurors unknown), with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to these grand jurors unknown) discharged and shot off as aforesaid then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did strike, pene-

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 1196.

trate, and wound the said Thomas Mooney in and upon the body of the said Thomas Mooney, then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, giving to their said Thomas Mooney, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to these grand jurors unknown) in and upon the body of the said Thomas Mooney one mortal wound, of the depth of six inches and of the breadth of half an inch; of which said mortal wound the said Thomas Mooney then and there did languish, and languishing did live, from the said twenty-third day of June, in the year one thousand nine hundred until the twenty-fourth day of June, in the year one thousand nine hundred; on which said twenty-fourth day of June, in the year one thousand nine hundred, the said Thomas Mooney of the said mortal wound, at the city of St. Louis aforesaid, did die. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Henry Wilson, Ben McGowan, and 'Fate' (whose true name is to the grand jurors unknown) the said Thomas Mooney, in the manner and form and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The defendants Wilson and McGowan were duly arraigned, and pleaded not guilty. Thereafter a severance was granted, and defendant Wilson was put on his trial and found guilty of murder in the first degree. The evidence developed that Thomas Mooney owned a saloon at No. 205 North Levee street in St. Louis, on the 23d day of June, 1900, and about 9 o'clock of the night of that day he and a nephew of his by the name of Durkin, a boy about 16 years of age, were in the saloon, and behind the counter. Mooney, the proprietor, was standing near the end of the counter, writing in a small book. Three negro men entered the saloon and ordered the drinks from Durkin. Two of them were identified as Henry Wilson, the defendant herein, and his coindictor, Ben McGowan. The third man, called by them "Fate," does not appear to have been recognized or known by any of the witnesses. Either "Fate" or McGowan said he would take a glass of beer, which Durkin drew, and gave him, and then one or the other of those two said he only had ten cents, but he would take whisky, and Durkin gave him a glass of whisky. He drank a part of it, and gave the remainder to defendant. As the defendant Wilson placed the empty glass on the counter, Durkin testifies that the negro "Fate" reached over the counter to grab the cash-box, which was an open tray, containing silver dollars and half dollars, on the shelf behind the bar, and, as he did that, the de-

fendant shot the deceased with a revolver. "Fate" did not get the cashbox, but turned it over, and it fell on the floor, scattering the money. They all three then ran away. A door or two from Mooney's saloon, a Russian by the name of Burris Ichkowsky kept a clothing store and notions. About 10 or 15 minutes before the homicide occurred, these same three negro men went into Ichkowsky's store, and this defendant bought a pistol and 10 cents' worth of cartridges from him. The pistol was of the bulldog pattern. They then left, and in a few minutes Ichkowsky heard a pistol shot, and came out and learned Mooney was shot. McGowan was afterwards recognized by Ichkowsky, and upon information given by the latter was arrested. Mooney was taken to the City Hospital, and operated on for the purpose of staying the hemorrhage. The surgeon testified the ball pierced the lung and the intercostal artery and the spinal cord. Mooney was paralyzed by the shot, and was kept alive by stimulation until about 11 o'clock in the forenoon of the next day, when he died. The wound was necessarily fatal. The post mortem revealed no other cause of death. Durkin testified that there were no persons present at the killing of his uncle but the three negroes, his uncle, and himself; that Mooney said nothing to the negroes, and was doing nothing when he was shot. When deceased heard McGowan jump on the counter, he turned to look around, and just then defendant shot him. Durkin had never seen the defendants before, but they stood in three feet of him when they were drinking, and he positively identified defendant as the man who shot his uncle. Officers Gaffney and Flynn arrested defendant. He made a statement to them. He fully corroborated Ichkowsky's account of his purchase and Durkin's account of their buying the drinks and of "Fate's" effort to grab the money box, and says the boy knocked it out of his hand, and says that just then Mooney turned and looked as if he was going to pick up something, and then, he says, "I shot right at him;" that they then ran out, and ran south on the Levee three or four blocks, and he threw the pistol in the river. He and McGowan then went over to East St. Louis, and after three or four hours returned to the city and separated, and he went up to 808 North Twelfth street, where he was arrested. He further stated that he went to Mooney's to get some of his money. Said he had only been in St. Louis about three weeks. His home was in Memphis, Tenn. He didn't know "Fate's" other name, and knew McGowan as "Shiner." The officer told him they had arrested McGowan, and that he had told him about the shooting, and then defendant told the officers all about it, as above detailed. The defendant testified in his own behalf, and denied that he was in St. Louis the night of the homicide; denied he ever saw McGowan but once before he

was arrested; denied the officer's evidence in toto.

Louis C. Jones and Henry B. Davis, for appellant. The Attorney General, for the State.

GANTT, J. (after stating the facts). This cause was transferred to the court in banc, owing to a division of opinion as to the sufficiency of the indictment, the insistence being that the indictment was fatally defective, because of the omission of the word "with" after the words "and that the said Henry Wilson," and before the words "a certain pistol," and that, lacking said word, the indictment did not show "with" what weapon the murder was committed. Upon a rehearing in banc, we all hold that the indictment is sufficient. It is in harmony with well-settled precedents at common law, and in this state and other states of the Union. 1 Wharton's Precedents of Indictments & Pleas, 115, 117-117a & b; Bishop's Directions & Forms, § 520; 3 Chitty's Crim. Law, *p. 752. As was said in *State v. Turlington*, 102 Mo. 651, 15 S. W. 141, the use of the word "with" before the pistol or gun, in charging a homicide by shooting another, is not only entirely unnecessary, but would mar the strength of the allegation. While the word was used in that indictment, the contention by the defendant was that it vitiated the indictment, but we held that the needless insertion of the word did not prejudice any substantial right of the defendant. In *State v. Evans*, 158 Mo. 589, 59 S. W. 994, an indictment in all material respects like the one under consideration was unanimously approved by the Second Division of this court, and in that case it was pointed out that there was no conflict between the conclusion therein reached and the minority opinion in *State v. Rector*, 128 Mo. 328, 23 S. W. 1074, and the decision in *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427. In those cases, the homicide was committed with an ax or some heavy weapon or instrument, and it was essential to charge with what instrument the assault was committed, and the omission of the word "with" before the instrument left the indictment lacking an averment of the instrument with which the deceased was killed. *State v. Hagan* (Mo.) 65 S. W. 249, is also cited, but it is to be noted that in that case, while the word "with" was omitted, the indictment was not held defective for that reason, but solely because there was no allegation that of the mortal wounds alleged the deceased "did" die or "died." While it is necessary to charge that an assault was made with an ax, or a sword, or a bludgeon, or "with" some heavy weapon or instrument "the exact nature of which is unknown," the universal idiom in describing an assault or homicide by shooting is to allege that the offender "a certain pistol then and there charged with gunpowder and leaden balls did discharge and shoot off" at, against, and upon the body of his victim,

just as it is averred in this indictment, followed by the averment of the giving of the mortal wound "with" the leaden bullet so shot out of said pistol. The case of *State v. Prendible* (Mo.) 65 S. W. 559, loc. cit. 565, while correctly decided in harmony with *State v. Turlington*, 102 Mo. 651, 15 S. W. 141, because the word "with" did not vitiate the indictment, is not in "some of the language used," in harmony with the views herein expressed. So much of that opinion as disapproves *State v. Turlington* as to the necessity of the use of the word "with" in an indictment for assault or homicide by shooting, and framed after the manner of the one at bar, is itself disapproved. It has already been disapproved by Division No. 2, in *State v. Heinzman* (at this term, not yet officially reported) 71 S. W. 1010. *State v. Evans*, 158 Mo. 589, 59 S. W. 994, in all material respects the counterpart of this indictment, was followed in *State v. Gleason* (decided by Division No. 2 at this term) 72 S. W. 676.

2. The instructions were full and correct on all propositions of law arising in the case necessary for the guidance of the jury.

3. The evidence was ample to sustain the verdict of murder in the first degree. That defendant deliberately provided himself with a deadly weapon, and with his two companions went to the saloon of the deceased for the purpose of robbing him, and slew him in the perpetration of the attempted robbery, admits of no doubt. That his admissions of his guilt were obtained through the artifice of leading him to believe that his companion in crime had already confessed, did not affect its competency. Outside of that, however, he was completely identified as one of the guilty trio who conspired to rob deceased, and murdered him in the prosecution of their felonious enterprise.

The case was fairly and impartially tried, and, no error appearing in the record, the judgment is affirmed, and the sentence of the law directed to be inflicted. All concur.

STATE v. GRAY.

(Supreme Court of Missouri. March 4, 1903.)

MURDER—MOTION FOR NEW TRIAL—AFFIDAVIT.

1. In support of a motion for a new trial, an affidavit was submitted that when defendant, prosecuted for murder, was being conducted to the courtroom, just before opening of court, and while the jury was in an adjoining room, the door to which was open, the widow of the deceased exclaimed in a loud voice, "I want to see the man that murdered my husband; that is the man;" but no showing was made that the jury actually heard these remarks, and it was obvious that no officer of the court had any knowledge of what the widow was going to do. Held, that a refusal of a new trial will not be disturbed on appeal.

In banc. Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Sampson, alias "Bud," Gray, was convicted of murder, and he appeals. Affirmed.

On the 25th day of October, 1901, the grand jury of St. Louis preferred an indictment against Sampson, alias "Bud," Gray, for the murder of George Jones in said city on the night of the 9th day of June, 1901. The deceased and defendant and his coindictor, John Pitts, were all negroes. The deceased and the defendant were laborers in the employment of the Howard & Evans Clay Pipe Company, near Macklin avenue in St. Louis. On the morning of June 10, 1901, the dead body of George Jones was found lying about 200 feet east on Macklin avenue, and about 450 feet north of Manchester Road. There were two bullet holes through his head, and a knife was found sticking in his right wrist. The corpus delicti was fully established, and the identification of the dead body as that of George Jones was established beyond the peradventure of a doubt. The evidence tended to establish that Jones was an industrious man, and was known to have about \$150 on his person on the day he was slain. The defendant and John Pitts were together on that night, and after midnight slept until morning in the same bed at the house of Ben Nelson, another negro. Pitts and defendant were both arrested, and Pitts made a confession, and then the defendant made a full confession. The evidence fails to disclose, under the most rigid cross-examination, any flattery of hope or torture of fear to obtain the confession. The defendant stated that Pitts had seen Jones with considerable money and a watch, and, as it was a custom of deceased to sleep with defendant in the neighborhood of the Sewer Pipe Works, they conspired to kill him to get his money. It was first agreed that defendant should sleep with Jones that night, and leave the door unfastened, and in the night was to give a loud cough as a signal for Pitts to come in the room and kill deceased while asleep. Defendant, however, became afraid that Pitts might strike him instead of deceased, and they abandoned that plan. They then hit upon the scheme of enticing him from the house and killing him by striking him from the rear with a bludgeon. Accordingly they prepared themselves with a pistol, which they secreted, and with a lead pipe; that defendant went to the temporary apartments where deceased was then lodging. He told him that there were some women who wished to see him, and they repaired to the designated place. It had been agreed that Pitts should strike the deceased with the leaden pipe, but Pitts feared to do this, and, because of his hesitation, the defendant drew his pistol and fired at the deceased, striking him in the head. Then Pitts grabbed the pistol and also fired a shot into the head of the deceased; that they took his watch and \$1 in money. The evidence on behalf of the state showed that the defendant had given the watch to one Annie Miller, and by her

direction it was found in a pawnshop, recovered, and identified by the wife of the deceased as belonging to her. She identified it by number and otherwise. The confession was also corroborated by the finding of the pistol in the hands of a woman to whom he said he had given it. The wife of the deceased testified that he had \$150 on his person when he left home on June 9th. The defendant offered no evidence on his part, nor did he offer any instructions.

But a single objection was made to the introduction of testimony, and that objection was sustained. Of course, it follows that no exceptions were taken to the admission of any testimony by the court; and in justice to counsel for defendant, it may be said that no exceptions were warranted. The evidence introduced was relevant, material, and very conclusive. As the indictment is challenged, it is reproduced here:

"The grand jurors of the state of Missouri within and for the body of the city of St. Louis, now here in court, duly impeached, sworn and charged, upon their oath present: That Sampson, alias 'Bud,' Gray and John Pitts, on the ninth day of June, in the year of our Lord one thousand and nine hundred and one, at the city of St. Louis aforesaid, with force and arms in and upon one George Jones in the peace of the state then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did make an assault; and that the said Sampson, alias 'Bud,' Gray and John Pitts a certain pistol then and there charged with gunpowder and one leaden bullet, then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did discharge and shoot off, to, at, against, and upon the said George Jones; and that the said Sampson, alias 'Bud,' Gray and John Pitts, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said Sampson, alias 'Bud,' Gray and John Pitts discharged and shot off, as aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did strike, penetrate, and wound the said George Jones in and upon the head and body of the said George Jones, giving to the said George Jones then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Sampson, alias 'Bud,' Gray and John Pitts in and upon the head and body of the said George Jones one mortal wound of the depth of six inches and of the breadth of half an inch; of which said mortal wound the said George Jones then and there instantly did die. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Sampson, alias 'Bud,' Gray and John Pitts the said George Jones in the manner and form and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder;

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

Henry B. Davis, for appellant. The Attorney General and C. D. Corum, for the State.

GANTT, J. (after stating the facts). 1. The indictment is in all essentials identical with the one which we have this day approved in *State v. Henry Wilson*, 72 S. W. 696, and for the reasons advanced in that case, and without repeating them, the indictment must be held to be sufficient and the criticisms of it unavailing.

2. As already said, there was no evidence tending even to overcome the *prima facie* case made by the state, that the confession was obtained without the hope or flattery or reward, and without being extorted by fear. It was, moreover, strongly corroborated by evidence *alunde*.

3. The motion for new trial was accompanied by an affidavit that, during the recess of the court, the widow of the deceased, just before the convening of court, was in the corridor of the court building, and, as the sheriff was bringing the defendant out to the courtroom, said, in a loud voice, "I want to see the man that murdered my husband; that is the man;" that the jury at that time were confined in an adjoining room, and could have heard this statement; that the door of the jury room was open, and that the sheriff immediately closed the door. The affidavit stating these matters was submitted to the circuit court. It did not appear that the jury actually heard these remarks of the widow of Jones, but it is obvious that no officer of the court knew the woman was going to do what she did, or in any manner connived at it. There is not the slightest reason for believing that the conduct of the woman in any manner affected the jury in arriving at their verdict. We see no reason for disturbing the finding of the court in refusing a new trial on this ground.

The evidence fully established the guilt of the accused, and the verdict of the jury is abundantly sustained by the evidence. The instructions were such as have often met our approval, and the judgment is affirmed, with directions that the sentence of the law be carried into execution. All concur.

ELTING et al. v. HICKMAN et al., Judges.
(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

CONSTITUTIONAL LAW—STATUTES—SPECIAL LEGISLATION—TAXATION—UNIFORMITY—COUNTIES—ROAD DISTRICTS—CITIES—DIVISION INTO CLASSES.

1. Const. art. 4, § 28, declares that no bill shall contain more than one subject, which shall be expressed in the title. Act March 9, 1895 (Sess. Acts 1895, p. 253), entitled "An act to provide for working and improving public

roads for the organization of special road districts and to raise revenue therefor," in sections 16 and 17 appropriates for the repair and construction of roads certain portions of taxes raised by virtue of other statutes. *Held*, that the statute is not violative of the Constitution on the theory that it does not indicate in the title that it appropriates or uses revenues raised by other laws.

2. Const. art. 4, § 46, prohibits the Legislature from granting or authorizing the making of any grant of public money or thing of value to any individual, association, or corporation. Act approved March 9, 1895, providing for the organization of special road districts, and providing that a certain portion of certain taxes raised under other statutes in cities and counties within such district shall be appropriated to road district purposes, is not violative of the constitutional provision.

3. The statute is not violative of Const. art. 4, § 47, declaring that the Legislature shall have no power to authorize any county, city, town, or township, or subdivision of the state to lend its credit or grant public money in aid of any individual, association, or corporation.

4. Const. art. 9, § 7, declares that the Legislature shall provide for the classification of cities and towns, and that each city of the same class shall possess the same powers, etc., and that it shall make provisions whereby any municipality existing under special law may become subject to the general law. Rev. St. 1890, §§ 5252-5255, divide cities into four classes. Section 5254 provides that cities of a certain population may elect to become cities of the third class, and those of a certain population may elect to become cities of the fourth class, the procedure to such election being pointed out by section 5257. Act approved March 9, 1895, providing for the organization of special road districts, etc., provides that they may consist of territory wherein there is a city of the third or fourth class, except cities of the third class under special charter. *Held* that, inasmuch as cities under special charters do not belong to any of the classes provided for by the Constitution unless they have elected so to do, the statute is not violative of Const. art. 9, § 7, on the theory that it divides cities of the third class into two classes, and is hence special legislation.

5. Act approved March 9, 1895, providing for the organization of special road districts, etc., and appropriating revenue for the use of roads within the same, is not violative of Const. art. 10, § 3, providing that taxes shall be levied for public purposes only.

6. Const. art. 10, § 3, declares that taxes shall be uniform. Act approved March 9, 1895, providing for the establishment of special road districts, in section 17 provides for levying taxes for road purposes of not less than 10 cents on \$100, and section 18 provides for a special poll tax of \$2.50 on inhabitants of the road district between 21 and 60 years of age. In that part of a county not embraced in such a road district the age is between 21 and 50, and the assessment not less than \$2 nor more than \$4. *Held*, that the statute does not violate the Constitution, inasmuch as it is uniform upon the same class within the same territorial limits of the authority levying the tax.

7. Const. art. 10, § 10, declares that the General Assembly shall not impose taxes on cities or other municipal corporations for municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes. Act March 9, 1895, providing for the establishment of special road districts, which may embrace cities within their territorial limits, authorizes appropriation of certain funds raised by taxation in the cities for the maintenance and repair of the roads of the districts (Rev. St. 1889, §§ 4575, 7663, par. 2); and section 7922, Rev. St. 1889, authorizes taxation derived from

cities for the keeping up of roads entering the cities. *Held*, that the act of March 9th was not violative of Const. art. 10, in that it attempted to appropriate money collected by city authorities for purposes outside of the city.

Appeal from Circuit Court, Jasper County; Jos. D. Perkins, Judge.

Suit by Alonzo Elting and others against J. M. Hickman and others, as judges of the county court of Jasper county, to restrain them from drawing certain warrants. From a decree for defendants, complainants appeal. Affirmed.

This is an action by plaintiffs, taxpaying citizens of the county of Jasper, against the defendants, judges of the county court of said county, to restrain and enjoin them as such court from drawing warrants on the county treasurer of said county in favor of certain specified road districts organized in said county under the provision of an act of the General Assembly of the state of Missouri entitled "An act to provide for working and improving the public roads, by the organization of special road districts of territory not more than six miles square, in which is located a city of the third or fourth class, except cities of the third class organized under special charter, and to raise revenue therefor, and to further provide that when this act shall become a law it shall take effect and be in force only in such prescribed territory wherein the county courts shall by order of record, declare the same to be the law in such prescribed territory where adopted by the legal voters thereof, with an emergency clause," approved March 9, 1895 (Sess. Acts 1895, p. 253).

The petition, leaving off the formal parts, is as follows:

"Plaintiffs state that the plaintiff Alonzo Elting is a resident taxpaying citizen of Madison township, Jasper county, Mo.; that plaintiff Charles D. James is a resident taxpaying citizen of Marion township, Jasper county, Mo.; and that plaintiff H. D. Hoover is a resident taxpaying citizen of Preston township, Jasper county, Mo.; and that plaintiff I. S. Thompson is a resident taxpaying citizen of Sheridan township, Jasper county, Mo.; and that plaintiff Daniel Bickell is a resident taxpaying citizen of Lincoln township, Jasper county, Mo.; and that plaintiff George W. Duncan is a resident taxpaying citizen of McDonald township, Jasper county, Mo.; and that plaintiff W. E. Bridges is a resident taxpaying citizen of Sarcxie township, Jasper county, Mo.; and that plaintiff W. H. Rogers is a resident taxpaying citizen of Union township, Jasper county, Mo.; and that plaintiff Hiram Smith is a resident taxpaying citizen of Jackson township, Jasper county, Mo.; and that plaintiff J. C. Harvey is a resident taxpaying citizen of Galena township, Jasper county, Mo.; and that plaintiff J. H. McBee is a resident taxpaying citizen of Twin Grove township, Jasper county, Mo.; and that plaintiff Edward S. Billingslea is a resident tax-

paying citizen of Jasper county, Mo.; and that plaintiff George Sawyer is a resident taxpaying citizen of Duval township, Jasper county, Mo. Plaintiffs further say that the defendant J. M. Hickman is the duly elected, qualified, and acting presiding judge of the county court of Jasper county, Mo.; that the defendant W. R. Schooler is the duly elected, qualified, and acting associate judge of the county court of Jasper county, Mo., for the Eastern District of said county; that the defendant M. C. Terry is the duly elected, qualified, and acting associate judge of the county court of Jasper county, Mo., for the Western District of said county; that the said three defendants compose and are the county court of Jasper county, Mo. Plaintiffs further state that the city of Cartersville is a city of the fourth class, situated in Joplin township, Jasper county, Mo.; that the city of Webb City is a city of the third class, situated in Joplin township, Jasper county, Mo.; that the city of Joplin is a city of the third class, situated in Galena township, Jasper county, Mo.

"Plaintiffs further say: That by virtue of an act of the General Assembly of the state of Missouri approved March 9, 1895, entitled 'An act to provide for working and improving public roads, by the organization of special road districts of territory of not more than six miles square, in which is located a city of the third or fourth class, except cities of the third class organized under a special charter, and to raise revenue therefor, and to further provide that when this act shall become a law it shall take effect and be in force only in such prescribed territory wherein the county court shall, by order of record, declare the same to be the law in such prescribed territory where adopted by the legal voters thereof, with an emergency clause.' That the city of Cartersville, by proceedings duly had under said act on April 10, 1896, duly organized a special road district not more than six miles square, which included the said city of Cartersville, under the name and style of 'Cartersville Special Road District'; that a board of commissioners for said road district were duly and legally appointed in accordance with the provisions of law, and said road district is still in existence, and its board of commissioners in active operation; that one W. B. Kane is the treasurer of the board of commissioners of said Cartersville special road district. That the city of Joplin, by proceeding duly had under said act on May 14, 1896, duly organized a special road district not more than six miles square, which included the said city of Joplin, under the name and style of the 'Joplin Special Road District'; that a board of commissioners for said road district were duly and legally appointed in accordance with the provisions of law, and said road district is still in existence, and its board of commissioners in active operation; that one T. W. Cunningham is the treasurer of the board of commis-

sioners of said Joplin special road district. That the city of Webb City, by proceedings duly had under said act on September 10, 1896, duly organized a special road district, not more than six miles square, which included the said city of Webb City, under the name and style of the 'Webb City Special Road District'; that a board of commissioners for said road district were duly and legally appointed in accordance with the provisions of law, and said road district is still in existence, and its board of commissioners in active operation; that one J. P. Stewart is the treasurer of the board of commissioners of said Webb City special road district.

"Your petitioners further say that the county court of Jasper county, Mo., by order duly entered of record, has heretofore declared said act of 1895 to be the law in the territory prescribed and set out for each of said special road districts by their respective proceedings to organize the same.

"Your petitioners further state and charge that by virtue of their organizations as special road districts as aforesaid, the Carterville special road district, the Joplin special road district, and the said Webb City special road district have demanded and received from the county court of Jasper county, Mo., a large amount of the public money, they professing to act under and by virtue of section 17 of said act; that the county court of Jasper county, Mo., on the demand of said special road districts, have issued their warrants in favor of said special road districts on the county treasurer of Jasper county, Mo., for large sums of money payable to the treasurer of the board of commissioners of said special road districts, or to other persons designated by the board of commissioners of said special road districts.

"Your petitioners further say that in pursuance of the laws of the state of Missouri the county court has heretofore, by order of record, fixed a fee for license of dramshops doing business in Jasper county, Mo., at the sum of four hundred dollars for each six months, for county purposes, and has fixed the fee for license for billiard and pool tables operating and doing business in Jasper county at the sum of ten dollars for every six months for county purposes; that there are now in existence in the said city of Carterville four dramshops which are paying to Jasper county a fee of \$400 each for such license for every six months, for county purposes; that there are now in the city of Webb City six dramshops that are paying to the county of Jasper a fee of \$400 each for such license, for county purposes; that there are in the city of Joplin twenty-two dramshops that are paying to the county of Jasper a fee of \$400 each every six months for such license, for county purposes; that said licenses are granted to said dramshops by the county court of Jasper county, Mo., upon the payment of \$400 each every six months to the county of Jasper, as a license

and authority to do business as such dramshops in said county of Jasper, and said license fees so collected by said county of Jasper from such dramshops are all paid to the county treasurer of said county, and become a part of the revenue funds and public moneys of said county of Jasper; that in the cities of Carterville, Webb City, and Joplin there are a large number of billiard and pool tables in operation under licenses from said county of Jasper that have paid and are paying to said county of Jasper the sum of ten dollars each every six months by the owners thereof, for the privilege of operating and running the same in said Jasper county; that said license fees so collected by said Jasper county from said pool and billiard tables are paid in to the county treasurer, and become a part of the revenue, funds, and public moneys of said Jasper county; that the amount so paid for pool and billiard licenses in said cities to said county of Jasper is unknown to these plaintiffs; that section 17 of said act providing for the organization of said special road districts provides as follows: 'Sec. 17. In all counties wherein special road districts may be organized under this act, where money shall be collected as county taxes upon property within such special road district, or as dram shop, pool and billiard table licenses on business within such special road districts, the county court shall, as such taxes or licenses are collected, and as the board of commissioners of such special road district shall make application to such county court, draw warrants upon the county treasurer, payable to the treasurer of such board of commissioners, or to such other persons as the board may from time to time designate, for an amount bearing such proportion to the entire amounts of the year's taxes so collected upon said property as the amounts annually appropriated or expended for road and bridge purposes shall bear to the total county revenue for such year, and also to an amount equal to one-half of all the dram shop, pool or billiard table licenses collected by the county as county licenses from such business carried on within the limits of such special road districts; and all such sums so paid out shall be expended upon the roads, under the charge and control of such board of commissioners, as in this act provided: provided, that the amount of taxes collected by the county on the property within such special road district, and thus applied to the improvement of the roads, shall not be less than ten cents nor more than twenty cents on a hundred dollars of assessed valuation of the property within such special road district.'

"Plaintiffs further allege and charge that, acting under the pretended authority of said act of the Legislature aforesaid, and especially said section 17 of said act, that the county court of Jasper county has caused, since the organization of said special road districts, to be issued warrants on the treasurer of

Jasper county in favor of the treasurers of the board of commissioners of said special road districts, or to other persons that the board of commissioners has heretofore designated, warrants in a very large sum of money, to wit, for the Cartersville special road district, \$2,500, to the Webb City special road district, \$4,500, to the Joplin special road district, \$18,000; which said warrants were ordered to be issued by said county court of Jasper county, Mo., upon the demand of the boards of commissioners of said road districts, and were drawn upon the treasurer of Jasper county against the public money belonging to said Jasper county, and were by said treasurer paid out of the public moneys belonging to said county of Jasper.

"Your petitioners further allege and charge that the defendants herein, as judges of the county court and as the county court of Jasper county, are threatening to issue further warrants on the treasurer of Jasper county, drawn against the public funds and public moneys of said Jasper county, in favor of the treasurers of said special road districts, or such other persons as the boards of commissioners of said special road districts may direct, for large amounts of money, to be paid out of the public moneys and funds of said Jasper county; and said defendants, unless restrained and enjoined by this court, will in the future continue issuing warrants as aforesaid in favor of the treasurers of said special road districts, or other persons to whom the boards of commissioners of said special road districts may direct, drawn on the treasurer of Jasper county, payable out of the funds and public moneys of said Jasper county, for large sums of money.

"Your petitioners further allege and charge that all of the warrants heretofore issued by the county court of Jasper county in favor of the respective treasurers of said special road districts, or in favor of other persons to whom the board of commissioners of said special road districts may have directed, drawn on the treasurer of Jasper county, and against the public moneys and funds of Jasper county in the hands of said treasurer, were without authority of law, and was a misapplication and misappropriation of the public money and funds of said Jasper county, and any future warrants ordered by the defendants, as such county court, to be drawn in favor of the treasurers of said respective special road districts, or other persons to whom the boards of commissioners of such special road districts may direct, on the treasurer of Jasper county, to be paid out of the public moneys and funds aforesaid, are and will be illegal and void, and will be a misappropriation and misapplication of the public moneys and funds of Jasper county, Mo., and without authority of law.

"Your petitioners allege and charge that said act of 1895 is unconstitutional and void, and that sections 14, 16, and 17 of said act

are specially in violation of the provisions of the Constitution of the state. Said act of 1895 and sections 14, 16, and 17 of said act are specially in violation of section 28 of article 4, sections 46 and 47 of article 4, and section 53 of article 4, and section 6 of article 9, and sections 3 and 10 of article 10, of the Constitution.

"Your petitioners say that they have no legal remedy whatever to prevent the issuance of warrants as aforesaid in favor of said special road districts, their treasurers, or to persons to whom their boards of commissioners may direct, drawn on the treasurer of Jasper county against its public funds and moneys, and that they have no legal remedy by which said moneys can be recovered after once being paid out on such warrants by the county treasurer of Jasper county, Mo.

"Your petitioners further state that they bring this suit not only in their own behalf, but in behalf of other resident taxpaying citizens of Jasper county similarly situated.

"Your petitioners further charge and allege that the said illegal misapplication and misappropriation of the public money and funds of Jasper county, Mo., as aforesaid, works a great hardship and injustice upon the taxpaying citizens of Jasper county outside of such special road districts, in this: that it takes away from them, and from their use, public money and funds of Jasper county, and reduces the amount of the public funds of Jasper county to be appropriated and used for general public purposes in said county, and the misapplication and misappropriation of the same for special use and benefit of said special road districts.

"Wherefore, your petitioners pray the court to perpetually enjoin and restrain the defendants herein, as judges of the county court and as the county court of Jasper county, Mo., from issuing or ordering to be issued any further warrants under and by virtue of said section 17 of said act of 1895, drawn on the treasurer of Jasper county, Mo., payable out of the public funds and moneys of said county, in favor of the treasurers of either or any of said special road districts, or in favor of any other persons whom the boards of commissioners of said special road districts may direct; and for such other and further orders, judgments, and decrees as may be proper in the premises."

Defendant M. C. Terry demurred to the petition for the following grounds of objection: "(1) That said petition does not state facts sufficient to constitute a cause of action. (2) That several causes of actions have been improperly united. (3) That there is a defect of parties defendant." The defendants J. M. Hickman and W. R. Schooler demurred to the petition for the following grounds of objection: "(1) That said petition does not state facts sufficient to constitute a cause of action. (2) That several inconsistent causes of action have been improperly united in said petition. (3) That several causes of ac-

tion have been improperly united in the same count of said petition. (4) That there is a defect of parties, both plaintiff and defendant, in said petition."

The demurrers were sustained, the petition dismissed, and final judgment rendered for defendants, from which plaintiffs, after unsuccessful motions in arrest, appeal.

McReynolds & Halliburton, T. C. Tadlock, and Howard Gray, for appellants. O. H. Montgomery, for respondents.

BURGESS, J. (after stating the facts). The title of the act, it is claimed, is not in accordance with the mandates of section 28 of article 4 of the State Constitution, which declares that "no bill * * * shall contain more than one subject, which shall be clearly expressed in its title" in that the title says, "And to raise revenue therefor," but in no way indicates that the act is to appropriate or use revenue raised by other laws, as is done in sections 16 and 17 of said act, where it appropriates an amount equal to one-fourth of the city and one-half of the county dramshop, pool, and billiard table license money collected respectively by the city and county under and by virtue of other acts of the Legislature, but conceals that fact. This is not, we think, a correct interpretation of the act. It provides for the raising of revenue for the purposes specified in the act, and is clearly prospective in its operation, as it provides for raising revenues after its passage, and does not appropriate revenues which have been collected or set apart for any other purpose. The manner in which the revenues are to be raised, and their purpose, is not only germane to the title of the act, but the title is a fair index of the subject-matter of the act. The test is that: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incident or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid." Sedgwick on Statutory and Constitutional Law, 521; State ex rel. v. Miller, 100 Mo. 439, 13 S. W. 677; The City of St. Louis v. Tiefel, 42 Mo. 578; State v. Matthews, 44 Mo. 523; State v. Miller, 45 Mo. 495; The City of Hannibal v. The County of Marlon, 69 Mo. 571; State ex rel. v. Mead, 71 Mo. 268; Ewing v. Hoblitzelle, 85 Mo. 64. It is clear that all of the provisions of the act fairly relate to the same subject, have a natural connection with it, are the incidents or means of carrying it into effect, and it is not vulnerable to the objections urged against it.

It is said that the act violates sections 46 and 47 of article 4 of the Constitution, in that it appropriates and grants to special road districts the public money of the counties and cities, which are raised under other general laws of the state, and appropriated by such laws. The first of these sections prohibits

the Legislature from granting or authorizing the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation, while the other section provides that the Legislature shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the state now existing or that may be hereafter established, to lend its credit, or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatever. As the law does not grant or authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation, it is clearly not in conflict with the provisions of section 46, supra. State ex rel. v. County Court, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. Nor does the act authorize any county, city, town, or township, or other political corporation or subdivision of the state now existing or that may be hereafter established, to lend its credit, or grant public money or thing of value, in aid of or to any individual, association, or corporation, and is not, therefore, in conflict with section 47 supra.

It will be observed that no part of the revenues raised outside the limits of the road districts organized under the act is appropriated to the maintaining of roads in the district, but that all money to be used for that purpose is collected in the districts.

The case of the State ex rel. v. Walker, 85 Mo. 41, is relied upon by plaintiffs as sustaining their contention, but it does not, we think, do so. That case is bottomed upon the case of Webb v. Lafayette Co., 67 Mo. 353, in which it was ruled that the act of 1868 (Acts 1868, pp. 92, 93) was unconstitutional and void upon the ground that it permitted a subscription to be made by a municipal township to the stock of a railroad company upon the vote of two-thirds of the qualified voters voting on the question at an election held for that purpose, where the Constitution of 1865, under which the election was held, required the assent of two-thirds of all the qualified voters of the township to authorize such subscription. It was also held that the act was unconstitutional for the further reason that the fifth section of the act appropriated all the state and county taxes to be collected within the county from any railroad company to which the township had subscribed to the reimbursement of the township for its subscription, the effect of which was to indirectly make the state extend its aid to railroads, which was expressly prohibited by the Constitution; and it was also making the county extend its aid to railroads without the assent of two-thirds of the voters, as required by the Constitution.

The case of the State ex rel. v. County Court, 142 Mo. 575, 44 S. W. 734, is another authority relied upon by plaintiffs, but all that was decided in that case was that when

county taxes are collected, and the money is paid into the county treasury, it becomes public money, and the act of the Legislature which authorized the appropriation of any part of it by the county court to be expended upon the streets of incorporated cities, in which the county has no concern or control, is a gift or grant within the meaning of the Constitution. Article 4, § 46. In the case last cited it is said: "By section 7663, Rev. St. 1889, it is made the duty of the county court of each county at the May term every year to appropriate and subdivide all the revenues collected and to be collected for the purposes named in that section, among which is the duty to appropriate a sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county." The law of 1895 does substantially the same thing: that is, section 9618, Rev. St. 1899, applies three-sixths of the four-sixths of the county dramshop road money and the property tax road money to the building of permanent roads in the district where paid outside of the cities and villages, leaving the other one-sixth of the county dramshop road money to be applied under section 2996, Rev. St. 1899, under the direction of the county court.

In *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23, it was held that moneys acquired by a county from the taxation of the properties of her taxpayers is not the private property of the county, and an act of the General Assembly authorizing the county court to appropriate part of the county dramshop license collected in a certain township to the liquidation of such township's indebtedness was constitutional and valid.

Our conclusion is that the law is not unconstitutional upon either of these grounds.

It is further contended that the act violates section 53, art. 4, of the Constitution, in that it divides cities of the third class into two classes, making two classes out of one, and is, therefore, special legislation. Section 7, art. 9, of the Constitution, provides: The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations. By sections 5252-5255, Rev. St. 1899, cities are divided in four classes. By section 5254, supra, it is provided that all cities and towns in this state containing 3,000 and less than 30,000 inhabitants, which shall elect to be a city of the third class, shall be cities of the

third class; and by section 5255, supra, it is provided that all cities and towns in this state containing 500 and less than 3,000 inhabitants, and all towns existing under any special law, and having less than 500 inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class. It thus seems that, although a city organized under a special charter may have the requisite number of inhabitants to become a city of the third class, it does not ipso facto become such, but that, in order to do so, it must proceed in accordance with section 5257, Rev. St. 1899. Because general laws are passed relating to cities operating under special charters does not make such laws operating upon all of such cities special laws. By the Constitution the Legislature was required to provide for four classes of cities, and to give to each city of a given class the same powers, and to subject each class to the same restrictions; but cities of the third class having special charters are not included in this classification, unless they elect to become so, as before indicated. It is therefore plain that cities which retain their special charters do not belong to either of the classes provided for by the Constitution, although they may have the requisite number of inhabitants to become such, unless they first elect to do so.

It is also claimed that the act is special legislation for the further reason that it gives special rights and privileges to these road districts that are not given to other road districts in the same county, by taking money already appropriated to the general road district by Act 1898, p. 150. The act applies alike to all road districts in the state which may be organized under and in accordance with its provisions, and, because of the fact that much of the territory of the county may not be included in the road district thus organized, and that one-fourth of all the dramshop, pool or billiard table licenses collected by any city within any special road district, and a certain portion of the county taxes upon property within such special road district, and that a certain portion of the taxes derived from dramshop, pool or billiard table licenses are business within such special road district are applied to the construction and repairment of roads within such district instead of the entire county, do not bring the act within the meaning of the inhibition of the Constitution in regard to special legislation. In *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, it was said: "It is also insisted by counsel for plaintiffs that said acts are in conflict with section 53 of article 4 of the Constitution; that it is a special law; that it regulates the affairs of townships, creates new offices, refunds moneys legally paid into the treasury, and grants special privileges. In support of this contention he relies upon *State ex rel. v. Herrmann*, 75 Mo. 346; but in that case it was expressly said that a statute which relates to persons or things as a class

is a general law, while a statute which relates to particular persons or things of a class is special. The statute now under consideration refers to all of the road districts in all the counties in the state where there are dramshops, and to all townships that are indebted and have compromised, or that may hereafter compromise, their indebtedness. It does not refer or have reference to any particular county, road district, or township, and is not local or special in its application." To the same effect is the case of *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. It is well settled that a law which includes all persons who are in, or who may come into, like situations and circumstances, is not special legislation. *State ex rel. v. Wofford*, 121 Mo. 61, 25 S. W. 851; *State ex rel. v. Yancy*, 123 Mo. 391, 27 S. W. 380; *Spaulding v. Brady*, 128 Mo. 653, 31 S. W. 103; *State ex rel. v. Higgins*, 125 Mo. 364, 28 S. W. 638.

A further contention is that the act is violative of section 3, art. 10, of the Constitution, in that it appropriates public revenue to a private purpose. We are unable to see the force of this contention, for certainly the appropriation of moneys to the construction, repairment, and maintenance of public roads, which are for the use and benefit of the public, can in no sense be considered as an appropriation of moneys for a private purpose.

It is also said that sections 17 and 18 of the act provide for the levying an extra tax in these road districts; that section 17 provides for levying taxes on property for road purposes of not less than 10 nor more than 20 cents on \$100 of assessed valuation; that section 18 provides for a special poll tax on all inhabitants of the special road district between 21 and 60 years of age of \$2.50, while in all that part of the county not embraced in special road district the age is between 21 and 50, the assessment is not less than \$2 nor more than \$4, while section 3 of the Constitution, *supra*, provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied by general laws." The act in question does not discriminate in the levy of a poll tax in the districts organized under it, but is uniform upon the same class within the territorial limits of the authority levying the tax, to wit, upon every male inhabitant in said district not within the limits of an incorporated town or city of the third or fourth class having a special charter. "The only prohibition in the section being discussed is that which forbids inequality—favoritism—to be exercised in imposing taxes upon the 'same class of subjects.' So long as this is not done, the Constitution is not infringed, nor the rules of uniformity and equality violated." *City of St. Louis v. Bowler*, 94 Mo. 630, 7 S. W. 434; *Cooley on Tax*. (2d Ed.) 170, 171, and notes. The mode of levying and collecting taxes rests solely with the Legis-

lature, and, where laws with respect thereto operate alike on all persons within a certain district or municipality organized under and in pursuance of such laws, and they are for the benefit of the inhabitants of such district or municipality as well as to the general public, as in the case at bar, they are not open to the objection urged against the act in this case.

A final contention upon this theory of the case is that the act violates section 10, art. 10, of the Constitution, in that it attempts to appropriate money levied and collected by city authorities to uses and purposes outside of such cities. Cities are practically as much interested in public roads beyond their corporate limits which lead into and enter them as they are in their own streets, and have heretofore been taxed to keep up such roads. Sections 4575, 7663, par. 2, Rev. St. 1889. And they had the power to appropriate a sum of money, not to exceed 10 per cent. of the annual general revenue, for that purpose. Section 7922, Rev. St. 1889. It must follow that, if the Legislature had the power to permit cities and towns to improve roads beyond their limits, it possesses the power to direct it to be done. In *State ex rel. v. Owsley*, 122 Mo. 68, 26 S. W. 659, it was said: "The purposes for which such local taxes have always been imposed are not alone the support of the local government, but the support of many other public burdens, among which may be mentioned maintaining public schools, making and keeping in repair public roads and bridges," etc. This contention must also be ruled against the plaintiffs.

As the conclusion reached necessarily results in an affirmance of the judgment, it is deemed unnecessary to pass upon other questions presented by counsel for defendant in his brief.

The judgment is affirmed. All of this Division concur.

ACKERSON v. FLY.

(Court of Appeals at St. Louis, Mo. Feb. 17, 1903.)

CONTRACT TO WILL—CONSIDERATION—FAILURE—SPECIFIC PERFORMANCE.

1. Plaintiff's grandfather, a few weeks prior to his death, left the home of his children, with whom he had been living, with the intention of setting up housekeeping, after agreeing with plaintiff, who was 14 years of age, to leave her all his property in consideration of her keeping house for him during his life. Plaintiff did some work in preparing the house, and received from deceased a cow and a buggy, which she retained, but the grandfather died before the day set for moving into the house. *Held*, that the consideration of the contract was that plaintiff should become a member of decedent's family, and keep house for him, which never having been performed, specific performance of the contract to will would not be decreed.

Appeal from circuit court, Lawrence county; Henry C. Pepper, Judge.

Action by Emma Ackerson against J. N. Fly, as administrator of the estate of Peter

Ackerson, deceased, to compel specific performance of the contract to will to plaintiff the property owned by deceased at his death. From a judgment for defendant, plaintiff appeals. Affirmed.

Emma Ackerson, the plaintiff, is a girl 14 years of age, and sued by her next friend. Peter Ackerson was her grandfather. He died intestate in the year 1900. Defendant Fly is the administrator of the estate. The substantive averments of the petition are as follows: "Plaintiff further states that on the — day of —, 1900, said Peter Ackerson, deceased, was old and infirm, and had been for a long time prior thereto; that he was a single man, and had no one to care for him and to assist him in looking after his business affairs, and had no one to keep house for him, his wife having been dead for years, and all of his children having married and moved to themselves; that on the last date above mentioned plaintiff and deceased entered into a contract or agreement wherein it was contracted and agreed by and between deceased and plaintiff that if plaintiff would assist deceased in looking after and managing his business affairs, and keep house for him, and render him all of the assistance she could as long as he should live, that he would at the time of his death, for and in consideration of said services to be rendered as aforesaid, give to plaintiff all of his property of whatsoever kind, character, or description of which he should die seised and possessed. Plaintiff further states that, for and in consideration of said contract or agreement, she immediately entered upon the discharge of her duties under said contract or agreement, and was carrying out the provisions of said contract on her part when said Peter Ackerson died, on the — of —, 1900. Plaintiff further states that the said Peter Ackerson died intestate, and seised and possessed of a large amount of personal property, amounting to about two thousand dollars," etc. A description of the personal estate of deceased follows, and a prayer that the administrator be required to turn it over to plaintiff. The answer put in issue these allegations. The issues were submitted to the court, who, after hearing the evidence, rendered a judgment for defendant, from which plaintiff duly appealed to this court.

The evidence is that Peter Ackerson was old and infirm, and had for several years lived with and at the home of some of his married children; that a few weeks prior to his death he took a notion to set up housekeeping for himself, and promised plaintiff that if she would stay with him and keep house for him while he lived she should have all the property he should die possessed of; that plaintiff accepted this offer, and both parties proceeded to make preparations to set up housekeeping in a house presumably belonging to Peter Ackerson. Mr. Ackerson took the window blinds off the windows, and

sowed some grass seed in the yard, bought and set up a cooking stove, and moved some of his furniture into the house. Plaintiff washed the windows, scrubbed some of the floors in the house, and put up fruit, at the home where she was living, for the use of herself and grandfather, in cans furnished by him. The old man bought a cow, a buggy, and a horse, and made plaintiff a present of them. The administrator got possession of the horse, but not of the cow and buggy. Two days prior to the day he had set for moving into the house and taking up his abode with plaintiff, Peter Ackerson suddenly and unexpectedly died. Plaintiff at no time changed her residence to the house of Peter Ackerson, nor did she move any of her personal effects thereto.

Cloud & Davis, for appellant. E. J. White, for respondent.

BLAND, P. J. (after stating the facts). Plaintiff asked for the specific performance of a contract, which she on her part has never performed, and which it is impossible for her to perform. The consideration moving Peter Ackerson to enter into the contract with plaintiff was that plaintiff should become a member of his family, that he could have the pleasure and comfort of her society as such, and that she should keep house for him. She never became a member of his family; he did not have the enjoyment of her society; she never kept house for him a day or an hour. To authorize a court of equity to specifically enforce an oral promise to make a devise to a particular person, the promise must be founded on a valuable consideration, and it should appear that a fraud would be perpetrated on the promisee unless the contract was specifically enforced. *Kluney v. Murray* (Mo.) 7 S. W. 197. The plaintiff performed a few hours' or at most a few days' labor for her grandfather. She received from him a cow and a buggy, property greatly exceeding in value the value of the services she rendered him.

There is no inherent equity in the case, and the judgment is affirmed.

REYBURN and GOODE, JJ., concur.

COE v. COE.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

DIVORCE—EVIDENCE—SUFFICIENCY—APPEAL—CONFLICTING EVIDENCE.

1. Where, in divorce for cruelty, the testimony of plaintiff is corroborated by his witnesses in several particulars, but defendant contradicts all such testimony, a decree for defendant will not be disturbed.

2. The statute requires that before granting a divorce the court shall require proof of good conduct of plaintiff. In divorce for cruelty the evidence showed that about 11 months after

¶ 1. See *Divorce*, vol. 17, Cent. Dig. § 672.

marriage, and after the birth of a child, plaintiff deserted his family, and remained in concealment until his whereabouts were disclosed by the commencement of suit. *Held*, that though defendant had used toward plaintiff the abusive language to which his witnesses testified, a decree in his favor would not be granted.

3. Where, on appeal, the notice and formal parts of a deposition taken in the cause are not preserved in the abstract, it must be presumed that the ruling of the trial court that the deposition was properly taken and certified was correct.

Appeal from circuit court, Lafayette county; Samuel Davis, Judge.

Suit by Marion Coe against Daisy Coe. From a decree for defendant, plaintiff appeals. Affirmed.

H. A. Wright, J. D. Dale, and William Aull, for appellant. V. L. Drain, for respondent.

SMITH, P. J. This is an action for divorce based upon the ground that defendant had offered plaintiff such indignities as to render his condition intolerable. The specified indignities charged in the petition consisted for the most part of abusive language used by defendant to plaintiff. The answer was a general denial.

At the trial the plaintiff testified in his own behalf to the truth of the charges alleged in his petition, while the defendant testified to the untruth of such charges. The plaintiff and defendant, since nothing appears to the contrary, must be presumed to be persons of equally fair veracity, and therefore the testimony of the defendant is entitled to be given quite as much credence as that of the plaintiff. And this being so, the testimony of the plaintiff and defendant as to the indignities may with propriety be eliminated from the consideration of that branch of the case, leaving it stand, in so far as the testimony tended to prove or disprove this issue, as if no testimony had been adduced in respect to it. Of course, if there be found any unimpeachable testimony tending to corroborate that of the plaintiff touching this issue, it must be considered in determining whether or not he has made out a prima facie case. The testimony given by some of his witnesses is corroborative of his in several material particulars, but the defendant in her testimony flatly contradicts that of these witnesses. The result is that the testimony of the plaintiff and that of his witnesses is contradicted by that of the defendant. In a case of this kind, we feel it to be our duty to defer to the finding of the trial court.

But, even if the preponderance of the evidence was in favor of the affirmative of the issue as to the indignities, we should still not be inclined to find fault with the decree. It appears from the plaintiff's own testimony that when he married the defendant he owned a 180-acre unincumbered farm, besides

horses, cattle, hogs, sheep, and farm machinery. It is not disputed that he told his wife before their marriage that he was out of debt. It appears that 11 months after the marriage a child was born, and shortly after this event the plaintiff disposed of his farm to his father, and his personal property to other relatives; and, when this was done, he took his wife and child to her father, and then deserted them. He does not pretend that he made any complaint to defendant or her father of her demeanor, or that he gave her the slightest intimation of his purpose to desert her and her helpless child. Nor did he make the slightest provision for the support of either of these helpless dependents. He excuses himself from this by saying that he was indebted to such an extent that it required the whole proceeds received from the sale of his property to discharge such debts, after which he was penniless. In view of all the facts and circumstances detailed in the evidence, we are not satisfied with this excuse, which we think was a mere subterfuge and entitled to no consideration. After the plaintiff had so deserted his wife and child he disappeared, and remained in his place of concealment until he disclosed his whereabouts a year and a half later by bringing this suit.

Suppose the defendant did use towards plaintiff the abusive language to which he—plaintiff—and some of his witnesses testify, would any court be authorized to grant him a divorce on that account, when it appears, as it does, that he had so heartlessly and cruelly deserted his wife and infant child without making any provision whatever for either food, raiment, or shelter for them, though presumably amply able to do so? But even had he been without means, as he insists, he had youth, vigor, and capacity to labor; and, besides this, he had remunerative employment, and could easily have contributed something to their support. No sort of excuse has been shown for this most flagrant dereliction of his duty as husband and father. Since deserting his child he confesses that he made no sort of effort to see it, nor did he inquire as to its whereabouts or condition. Nor does he in his petition ask for its custody, and thereby evince a disposition to assume the natural burden of the care and expense of its nurture and education. He prays the court to impliedly relieve him of this burden, and to cast it wholly on the weak shoulders of a mother who "has not a cent to bless her soul." Would any court grant him a divorce in the face of these undisputed facts, and in the face of the statute requiring it, before granting a divorce, to require proof of his good conduct, and to be satisfied that he is the innocent and injured party? We think not.

As to whether the deposition of the witness Drain was properly taken and certified according to the requirements of the statute, we are unable to determine, since the notice and formal parts of it are not preserved by the abstract. In such case we must presume

the ruling of the trial court that it was not, and excluding it, was correct.

We think the decree should be affirmed, and it is so ordered. All concur.

ELLISON, J., concurs in result.

HOWARD v. SCOTT.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

CONTRACTS—WRITING—SERIES OF WRITINGS—INTENT—PAROL EVIDENCE—SUBSTITUTION.

1. A written contract of sale, which is complete and perfect in itself, and not ambiguous, supersedes any prior writing in relation to the same subject-matter, and parol evidence is not admissible to show that it was not intended that the latter writing should supersede the former.

2. A valid contract, made in substitution for a former one, annuls the obligations of the former.

Appeal from circuit court, Jasper county; Hugh Dabbs, Judge.

Action by F. P. Howard against Adam Scott. From a judgment for plaintiff, defendant appeals. Affirmed.

On October 25, 1897, the plaintiff and defendant entered into the following agreement, viz.: "Joplin, Mo., October 25th, 1897. This agreement is hereby entered into by and between Adam Scott and F. P. Howard, that any amount or amounts of money, with interest, that may be advanced from time to time by F. P. Howard in excess of the amount or amounts by Adam Scott in any kind of business in which they may be engaged, shall be repaid to F. P. Howard from the first net receipts of profits from any of the kinds of business in which they may be engaged together; then profits shall belong to each in proportion to his share in the business." The evidence disclosed that the parties entered into the mining business, and that while so engaged plaintiff paid into the business \$2,816.88 more than the defendant, and that the same was not satisfied out of any profits realized from their joint enterprise.

On October 14, 1898, the plaintiff, with one Maris, who had an interest with him in the business, and the defendant entered into the following contract, viz.: "Joplin, Missouri, October 14th, 1898. This memorandum of agreement witnesseth: That for and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and the further stipulations and agreements hereinafter contained and agreed to by F. P. Howard and J. M. Maris, parties of the first part, and Adam Scott, or his assigns, party of the second part, said parties of the first part hereby agree to sell and transfer a five-eighths interest in mining lots Nos. 20, 21, 22 and 23, at Oronogo, Missouri, as shown by plat and record of said lots in the office of

the Granby Mining Company, together with plant and all fixtures and improvements situated thereon, being known as the 'Nugget Mine,' for and in consideration of the further payment to them by said Scott or assigns, the sum of ten thousand dollars (\$10,000), which amount being the amount of money advanced and put into all the various enterprises and mining interests, in which the said parties hereto have been interested in, in the mining business in Jasper county, Missouri, under the firm name of F. P. Howard & Company, and this conveyance is construed to cover all fixtures, properties, credits &c. of the said firm of parties hereto, and said Scott, or assigns, are to assume all liabilities of said firm, a schedule of which is hereto attached, and it is agreed by said parties hereto, that whatever receipts above expenditures during the pendency of this agreement are to be applied in payment of said liabilities. The above consideration to be paid as follows, viz.: All cash upon receipt of assignment papers, and it is agreed by parties of the first part that said Scott, or associates, shall have thirty (30) days to make and accept under the terms of this agreement, and a failure to do so will render this contract null and void. In witness whereof we have hereunto subscribed our names on the date first above mentioned. Adam Scott. F. P. Howard 3-8. J. M. Harris 2-8. Pr. F. P. Howard."

On November 11, 1898, plaintiff and said Maris executed the following writing, viz.: "Joplin, Missouri, Nov. 11th, 1898. We hereby grant an extension of time on a certain contract made and entered into by us with Adam Scott, bearing date of October 14th, 1898, for a farther period of 20 days, upon the same terms, conditions, etc., as set out in said contract. F. P. Howard. John M. Maris."

On the 23d day of November, 1898, the parties entered into the following contract, viz.: "This agreement made this 23d day of November, A. D. 1898, between F. P. Howard and J. M. Maris, of Decatur, Illinois, parties of the first part, and Adam Scott and —, of Joplin, Missouri, parties of the second part, witnesseth: That the said F. P. Howard and J. M. Maris, in consideration of the agreement hereinafter contained, to be performed by Adam Scott and —, agree to sell and deliver to the said Adam Scott and — a five-eighths interest in mining lots numbers twenty, twenty-one, twenty-two and twenty-three at Oronogo, Missouri, as shown by the plat and record of said lots in the office of the Granby Mining Company, together with plant and all fixtures and improvements situated thereon, said plant being known as the 'Nugget Mine.' And the said Adam Scott and — in consideration thereof, agree to pay to the said F. P. Howard and J. M. Maris the sum of \$10,000 in the manner following: Two thousand dollars cash upon the delivery of the

¶ 2. See Contracts, vol. 11, Cent. Dig. § 1120.

property and the balance, eight thousand dollars, to be made payable in eight equal installments of one thousand dollars each, the first installment to be paid January 1st, 1899, and the following installments to be paid on the first day of each succeeding month thereafter until all the installments are paid; the said sum of eight thousand dollars to be secured by judgment notes and a chattel mortgage on the property sold and transferred by the parties of the first part; said notes to draw seven per cent. interest from date until paid; and in case of failure of the said parties of the second part to make either of the payments or perform any of the covenants on their part, the parties of the first part shall have the option to declare the whole amount due, and shall have the right to take possession of said goods and chattels under their mortgage and sell the same according to law. And the said parties of the second part for a further consideration agree to pay \$767.09 for bills outstanding against the said parties of the first part prior to October 1st, 1898, and to pay all bills contracted by the said parties of the first part in the carrying on of their business since October 1st, 1898, to the date of this instrument, said amount being agreed upon on this date. Said parties of the second part further agree to keep said mill and machinery insured to its fullest extent and made payable to the parties of the first part as their interest may appear. The said parties of the first part agree to give to the parties of the second part fifteen days of grace in case of failure to pay any of said notes above referred to. In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written. F. P. Howard. [Seal] John M. Maris. [Seal.] Adam Scott. [Seal.]

The cause was submitted to a referee, who found for the plaintiff the amount sued for. The finding of the referee was sustained by the court, and judgment rendered thereon, from which defendant appealed.

Spencer & Spencer and Frank L. Forlow, for appellant. Thomas & Hackney, for respondent.

BROADBUSH, J. (after stating the facts). The defendant contends that the writing introduced in evidence show that the indebtedness was discharged. The writing dated October 14, 1898, provides for a sale of the five-eighths interest of plaintiff and said Maris in certain mining lots to the defendant for the sum of \$10,000, which is stated to be "the amount of money advanced and put into all the various enterprises and mining interests in which the said parties have hereto been interested in in Jasper county." It is further provided that defendant, Scott, should have 30 days to accept and comply with the terms of said writing. On November 11th, as we have seen, an extension of time for 20

days was given to defendant by plaintiff and Maris on said contract "upon the same terms and conditions." On the 23d day of November next thereafter, the sale of plaintiff's interest with that of Maris to defendant was consummated, as shown by said last-named writing. It will be noted that this latter writing does not include the statement quoted from the former or preliminary writing that the consideration was the "amount of money advanced and put into all the various enterprises and mining interests" of the parties. The conclusion of law by the referee, which was approved by the court, was that the writings dated October 14, 1898, and November 23, 1898, "do not contain provisions releasing claim sued for," because the latter superseded the former, and does away with its provisions. It is the law that a contract in writing, complete and perfect in itself, not ambiguous in its terms, will be held to supersede a prior written contract in relation to the same subject-matter, and parol evidence will not be admitted to show that such was not the intention of the parties (*McClurg v. Whitney*, 82 Mo. App. 625); and that a valid contract made in substitution for a former one annuls the obligations of the first (*Pressed Brick Co. v. Barr*, 76 Mo. App. 380). There can be no doubt but what the first writing was a mere agreement for a sale, and that the latter contains the terms and conditions of a complete sale, and, as such, there being no ambiguity in its provisions, it supersedes the first in toto. An inspection will show that the two vary greatly in their provisions. And as it was competent for the parties, when they came to conclude the transaction, to vary the terms of the preliminary agreement for sale, and having done so by writing, we do not see how we can hold otherwise than that the last was a complete substitution of the former. We are forced, by this conclusion, to hold that the judgment of the trial court was proper on the issue as presented.

Cause affirmed. All concur.

BECKMAN v. ANHEUSER-BUSCH BREW- ING ASS'N.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

INJURY TO EMPLOYE—APPLIANCES—NEGLIGENCE OF MASTER—ASSUMPTION OF RISK.

1. Any defect in a skid for rolling barrels into a door, because of its not being firmly attached to the door sill or ground so as to render it immovable, being only in regard to the employe's safety and apparent to him, and one which he can readily remedy, he assumed the risk thereof.

2. A skid for rolling barrels into a door being secured in the usual manner, the master is not liable to an employe injured thereby, though it might have been safer if firmly attached so as to be immovable.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Charles H. Beckman, a minor, by Frederick Beckman, next friend, against the Anheuser-Busch Brewing Association. Judgment for plaintiff. Defendant appeals. Reversed.

The plaintiff in this case, Charles H. Beckman, is a young man 19 years of age, and for more than 5 years prior to the injuries complained of had worked for the defendant at its place of business at the northeast corner of Twentieth and Walnut streets, in Kansas City, Mo. The defendant during said time carried on the business of bottling and distributing its beer in said city, and maintained, among others, a bottling department. This department was located in one building, and to the east of it, about 25 feet across a driveway, was the cooler, another building used in the company's business. The floor of the bottling department was 10 or 11 inches above the level of the driveway. Beginning about 4 years before the injury, the plaintiff had been called upon, from time to time, with other men in the bottling department, to go across the driveway to the cooler and bring over small hogsheads of beer, and at the time of the accident had had long and continuous experience in this work. These hogsheads were about 3 feet in height, and about 2 feet in diameter at the ends, bulging in the center to about 30 inches. The door in the cooler was opposite the doorway in the bottling department. The cooler door was 3 feet above the ground, and leading from it was a skid, of about 10 feet in length, down which the barrels of beer were rolled, thence over and across the driveway, and up a small, short skid about 4 feet long, resting on a stone sill in the doorway into the bottling department, which, as stated, was about 10 or 11 inches above the ground. This small skid was a simple appliance, and was made of 2x6 oak lumber, fastened together with two, or, as some of the witnesses say, three pieces or cleats underneath, the lower piece being 2x6, and the upper piece 2x3. The lower end of the skid rested in a small excavation in the ground, made there for the purpose of holding the lower end firm. At the time of plaintiff's injury the skid had been in use about two months, before which time two unfastened boards had been utilized for the purpose. These latter having proved unsatisfactory, they were replaced by the one in controversy here. The method pursued was to allow the barrels to roll down the long skid from the cooling room by their own momentum, each man stepping in behind his own barrel as it reached the ground, and continuing across the driveway behind the barrel, and guiding it up the short skid in through the door of the bottling room. At the time in question, while plaintiff was guiding a barrel up the short skid, from some cause or other, when it got near the top of the skid, it rolled back, and plaintiff, in endeavoring to get out of the way, caught his

foot under some part of the skid, which caused him to fall; and, while he was down, the barrel passed over him and injured his leg. It is not very clear just what caused the barrel to fall backward. It must have occurred, however, in one of two ways: Either because the plaintiff was not guiding it up the center of the skid, which would have caused the skid to tilt and throw the barrel off; or that the skid had been misplaced in some way, which might have also caused both skid and barrel to fall to the ground. The preponderance of the evidence, however, goes to show that the accident occurred as last mentioned. There had been, according to the evidence of plaintiff and two other workmen, who did this work almost, if not entirely, to the exclusion of other workmen, no occurrence of a similar kind with this skid. However, some other witnesses say they saw the skid act similarly on one or two other occasions. But if such was the fact, it was unknown to either plaintiff or defendant. The finding and judgment were for the plaintiff.

Warner, Dean, McLeod & Holden, for appellant. William J. Morse, for respondent.

BROADDUS, J. (after stating the facts). Defendant insists that under the evidence plaintiff was not entitled to recover; and that is the only question presented for our determination.

It will be perceived that there can be no complaint as to the sufficiency of the skid itself, but the ground upon which plaintiff seeks to recover is that it was not properly secured, in which respect defendant failed in its duty to its employés.

A skid is a simple contrivance used for handling heavy articles under many conditions, and was especially adapted for the work plaintiff was performing when he was injured. Every person of ordinary intelligence and observation is familiar with the variety of circumstances under which it is utilized, but it is probably used more often in connection with the loading and unloading of wagons and freight cars than for any other purpose. When thus used, it is seldom permanently attached to any object, but only placed for the time being, and removed when the particular work in progress is completed. The evidence in this case, however, showed that the skid in question was removed at no time, remaining at all times in the same position. Would this difference and its constant employment impose upon defendant to have had it firmly attached to the door sill or the ground, so as to render it immovable? is the question to be settled.

It is a well-established principle that the master is not bound to use the latest and best appliance for the use of his servant, but that he has performed his duty when he adopts that which is in general use. *Minnier v. Railway*, 187 Mo. 99, 86 S. W. 1072; *Blan-*

ton v. Dodd, 109 Mo. 64, 18 S. W. 1149; Steinhauser v. Spraul, 127 Mo. 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441. Nor is he bound to adopt any particular method in doing his work, but that he may conduct his business in his own way, and that the servant, knowing the hazard of his employment, impliedly waives the right to compensation for injuries incidentally resulting therefrom, although a different method of conducting the work would have been less dangerous. Bradley v. Railway, 188 Mo. 293, 39 S. W. 763.

With a skid such as was ordinarily used for such purposes, the defendant, in law, had the right to transfer its barrels of beer from one department of its place of business to the other in the manner detailed, by rolling them down one skid and up another; and the hazard, if any, attending this method adopted by the defendant in conducting its business, was one which the plaintiff impliedly assumed in his contract of employment. But it is proper to go further, if possible, and distinguish between what may be regarded as a proper appliance, the right of defendant to conduct his business in his own manner, and that of the method in which the appliance (the skid) was secured for the safety of the employé. And we believe such a distinction may be properly drawn from the circumstances of the case. And if it was a condition over which the defendant alone had control, and the power to correct, perhaps defendant would be liable for a failure to provide against a danger which might be obviated by making secure the appliance. But the skid was a simple appliance used to aid the servant in the performance of the ordinary labor of moving barrels from one place to another, which, if not safely placed and secured, was a matter as open to the observation of the plaintiff as the defendant; and it was a defect which required no skill to remedy, and which could have been effected as readily by the servant as by the master. The facts in this case stand upon a parity to one wherein the master provides for the use of his servant a hoe insecure upon its handle, a condition equally apparent to both, and one which the servant can correct as easily and safely as the master. There would be much reason for holding the master liable in one instance as in the other. The defect was obvious; the hazard was such as usually attended the use of the skid as then placed; and it is an undeniable rule that the servant assumes the risks of such hazard.

But there is another test to be applied, viz.: Was the skid secured in the usual manner? Common observation teaches us that it was. If it was secured and used in the ordinary manner, defendant, under the rule, was not required to do more, although it may have been safer to have secured it in some other way. Mason v. Mining Co., 82 Mo. App., loc. cit. 370; O'Mellia v. Railway,

115 Mo. 205, 21 S. W. 503; Huhn v. Railway, 92 Mo. 440, 4 S. W. 937; Kane v. The Falk Co., 93 Mo. App. 209.

For the reasons given, the cause is reversed. All concur.

ASHFORD v. METROPOLITAN LIFE INS. CO.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

INSURANCE—APPLICATION—WILLFUL MISREPRESENTATIONS—DEFENSES—STATUTES—CONSTRUCTION.

1. Under Rev. St. 1890, § 7890, providing that no misrepresentation made in obtaining a policy shall avail as a defense unless the matter misrepresented actually contributed to insured's death, that insured willfully misrepresented that plaintiff, to whom the policy sued on was made payable, was his wife, and that he was not afflicted with syphilis, was no defense to an action on the policy, where it was found that the matter misrepresented did not actually contribute to insured's death.

Appeal from circuit court, Gentry county; Gallatin Craig, Judge.

Action by Amanda Ashford against the Metropolitan Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. H. Frisby and O. H. S. Goodman, for appellant. J. C. Wilson, Peery & Lyons, and J. L. McCullough, for respondent.

ELLISON, J. This action is based on a life insurance policy. The judgment in the trial court was for plaintiff. The case was before this court on a former appeal, wherein the judgment was reversed, and a new trial ordered. By reference to the report of the case (80 Mo. App. 638), it will be seen that the deceased, in obtaining the policy, represented that plaintiff was his wife; that the defense was mainly based on the allegation that she was not his wife, and that he willfully, falsely, and fraudulently represented her to be for the purpose of inducing defendant to issue the policy payable to her upon his death. He also represented that he did not have syphilis.

Whether plaintiff was the wife of deceased was a disputed question at both trials, and the disease aforesaid was a prominent issue at the last one. Plaintiff claimed to be the wife through a common-law marriage, and there was put forward in her behalf at the first trial the claim that, even though she was not deceased's wife, and that he willfully and falsely represented her to be for the fraudulent purpose and design of inducing the defendant to issue the policy, yet, since that matter did not contribute to his death, then, under section 5849, Rev. St. 1889, now section 7890 in the revision of 1890, providing that "no misrepresentation made in obtaining a policy" would avail as a defense unless the matter misrepresented

¶ 1. See Insurance, vol. 28, Cent. Dig. § 599.

"actually contributed" to his death, it was of no importance whether she was his wife or concubine. We reversed the former judgment for error in the trial of the question whether plaintiff was the wife of deceased, and we also decided that the statute aforesaid, properly construed, did not include within its terms a willfully false misrepresentation, made to induce the issuance of the policy, and which did induce it. The last trial was in substantial accord with the opinion referred to. The question of whether there was a common-law marriage was duly and properly submitted by instructions. But whether it was or not can make no difference, for the following reason: The deceased represented that plaintiff was his wife, and that he did not have syphilis, or other disease of the blood. It was submitted to the jury whether these representations were true, and whether, if false, they, or either of them, actually contributed to the death of deceased. The jury necessarily believed the representations were true, or, if untrue, that they did not contribute to his death. Under the rulings of the Supreme Court, those representations may have been willfully false, and made with the fraudulent purpose of securing the policy from defendant, and but for which the defendant would not have issued the policy, yet, if they were made of a matter which did not actually contribute to his death, the policy was validated by the terms of section 7890, Rev. St. 1899. *Schuermann v. Ins. Co.*, 165 Mo. 641, 65 S. W. 723; *Kern v. Ins. Co.*, 167 Mo. 471, 67 S. W. 252. Those cases overrule the views expressed by us on that head in this case on the former appeal, as well as in the case of *Van Cleave v. Ins. Co.*, 82 Mo. App. 681.

The judgment will be affirmed. All concur.

CALLIES v. MODERN WOODMEN OF AMERICA.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

FRATERNAL INSURANCE—MISREPRESENTATIONS IN APPLICATION—DECLARATIONS OF INSURED AFTER ISSUANCE OF POLICY—WAIVER OF FORFEITURE—WARRANTIES.

1. Declarations by the holder of a benefit certificate, made after its issuance, and tending to prove misstatements by him in his application, are admissible as evidence against the beneficiaries.

2. The holder of a benefit certificate was cited for trial before the local lodge on the charge of violating the terms of the certificate by frequently becoming intoxicated. While the charge was shown to be true, no sentence of expulsion was passed, but all action was deferred until he should be released from an asylum in which he then was. *Held* to constitute a waiver of a forfeiture on account of the use by insured of intoxicants after the certificate was issued, but not a waiver as to his use of them before his application, there be-

ing no evidence that defendant had knowledge thereof before that time.

3. The holder of a benefit certificate stated in his application that he had never been intoxicated, and had never had a hemorrhage. There was no evidence that defendant knew, at the time it furnished blank proofs of death, that there had been a misrepresentation as to either of these things having occurred prior to the date of the application. *Held*, that the furnishing of the proofs of death did not constitute a waiver as to such misrepresentations.

4. A blank application for a benefit certificate contained a request that the applicant give full answers to questions as to family history; also warranties that the answers were full, complete, and literally true. Deceased made no direct answer as to whether any brother was dead, but did answer that he had two brothers, giving their ages and condition of health. *Held*, that the question whether any brother was dead not being asked in terms, and defendant having accepted the answers in the form as given, there was no warranty on this head, as the law would endeavor to avoid a forfeiture.

5. Where an applicant for a benefit certificate fraudulently conceals certain facts in order to induce the company to issue a certificate to him, which it would not have issued had the truth been told, it will avoid liability.

Appeal from circuit court, Pettis county; Geo. F. Longan, Judge.

Action by Catherine Callies against the Modern Woodmen of America. Judgment for plaintiff, and defendant appeals. Reversed.

James T. Montgomery and J. G. Johnson, for appellant. Barnett & Barnett, for respondent.

ELLISON, J. The defendant is a fraternal benefit society, and Albert L. Callies became a member thereof and took out a benefit certificate insuring his life in the sum of \$2,000, of which sum \$1,000 was to be paid to his mother, and \$500 to each of two sisters. Callies died about the 27th of May, 1901, at the asylum in Nevada, Mo. Each of the beneficiaries brought suit for the sums named payable to them. These suits were consolidated and tried as one. At the close of the trial the court gave a peremptory instruction for plaintiff.

The deceased at time of his application did not use intoxicating liquors, and he stated in his application that he had never been intoxicated. He also stated that he had never had a hemorrhage. The certificate provided that he should not become intemperate by the use of intoxicating drink, and that if he did it became void. There was evidence offered by defendant, and excluded by the court, that deceased had stated, after the certificate had been issued, that he had been intoxicated and that he had had hemorrhages before its issuance. The evidence tended to show that deceased died of consumption while in a protracted state of intoxication. The evidence further tended to show that a short time before his death deceased was complained of before the local lodge for violating the rules and laws of the order and the terms of his certificate by habitually us-

¶ 1. See Evidence, vol. 20, Cent. Dig. § 392.

ing strong drink and frequently becoming intoxicated; that he was cited for trial of the charge, and, while it was shown to be true, no sentence of suspension or expulsion was passed. On the contrary, all action thereon was laid over and deferred until he should be released from the asylum.

The theory upon which the trial court sustained plaintiff's objections to the deceased's declarations as to his having been intoxicated and having had hemorrhages was that such declarations could not bind these plaintiffs as beneficiaries. We think the theory unsound, and that error was committed. The weight of authority, as regards ordinary life insurance, is that the declarations of the party insured are not evidence against the person for whom the insurance is taken, and the rule is so stated in a remark in the course of a decision by the Supreme Court of this state. *Reid v. Ins. Co.*, 58 Mo. 425. But as to fraternal benefit insurance, where the beneficiary is named by the insured, and whom he may change at any time before death, a well-founded distinction exists, for there is no vested interest in the beneficiary in the certificate until it becomes fixed by death. *Masonic Ben. Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25; *Wells v. Mut. Ben. Ass'n*, 126 Mo. 630, 29 S. W. 607; *Hofman v. Grand Lodge*, 73 Mo. App. 47; *Niblack on Ben. Soc.* § 212. It is true that neither has the insured member himself an interest in the fund (*Masonic Ben. Ass'n v. Bunch*, supra; *Keener v. Grand Lodge*, 38 Mo. App. 543), still he is the opposite party in the contract. He has made it from the motive of duty or affection, and he is interested in its being upheld. His declarations of things tending against the contract would likely not have been made if not true. They should be received in evidence. They should be regarded as in instances of contract, where the representative of the declarant is a party to the action. And so it has been decided. *Thomas v. Grand Lodge*, 12 Wash. 500, 41 S. W. 882; *Steinhausen v. Mutual Ass'n (Sup.)* 13 N. Y. Supp. 86; *Niblack on Ben. Soc.* §§ 212, 325.

Plaintiff seeks to avoid the effect of the deceased's misrepresentation and his subsequent conduct by a plea of waiver. This consists in the trial aforesaid by the local lodge, wherein deceased was charged with using intoxicants and becoming drunk just previous to his death, and wherein all action was deferred, as has been stated. We are satisfied that such action on the part of the company was a waiver of a forfeiture on account of the matter of use of intoxicants after he took out the policy. But it was no waiver of the fact (if it be a fact) that he had been drunk before his application. A waiver presupposes knowledge of the thing to be waived, and there is no evidence that defendant had any knowledge of his being drunk before the application. And so the trial aforesaid discloses that no consideration was given to anything except a violation of

his duties after becoming a member and shortly prior to his death. We cannot discover any good reason for connecting the two violations in such way as to make a waiver of one affect the other. We discover nothing bearing on the question in the authorities cited by plaintiff.

But plaintiff further insists that, if what we have just stated was not a waiver, the subsequent furnishing blank proofs of loss to plaintiffs, and the fact that they went to trouble and expense in making them, constituted a waiver, not only on the question of intoxication, but also that of hemorrhage. We think not. There is nothing to show that defendant knew at the time the blank proofs were furnished that there had been a misrepresentation as to either of these things having occurred prior to the date of the application.

Deceased, at time of application, had two brothers alive and one dead. Defendant offered to prove this, and that the dead brother died of diabetes. The court rejected this offer. The following questions, in the following form, and answers thereto, are found in the application made by deceased:

	Age, if Living	Condition of Health	Age at Death	Cause of Death	How long Ill & Date of Death	Previous Condition of Health	Was Tuberculosis a Factor
Father	54	Good	.....	.....	.....	.....	.....
Mother	44	"	.....	.....	.....	.....	.....
Brothers 2	21 33	Good "	.....	.....	.....	.....	.....
Sisters 2	19 17	Good "	.....	.....	.....	.....	.....
Father's Father	Don't know	anything	.....	.....	.....	.....	.....
Father's Mother	"	"	"	"	.....	.....	.....
Mother's Father	"	"	"	"	.....	.....	.....
Mother's Mother	"	"	"	"	.....	.....	.....
.....

This form was preceded by the request to "give full answers to following questions as to family history," and, following the form, there were warranties that the answers were "full, complete, and literally true." It will

be noticed that there was no direct answer as to whether any brother was dead. But he did answer that he had two brothers, giving their ages and their condition of health. But as the question whether any brother was dead was not asked, in terms, and as the defendant accepted the answers in that form, and as the law will endeavor to avoid a forfeiture, we conclude that there was no warranty on this head. *Phoenix Ins. Co. v. Rad-din*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Jersey Ins. Co. v. Carson*, 44 N. J. Law, 210. From what was said by counsel at the trial we do not take it that a warranty is claimed, but it is insisted that a fraudulent concealment was made by deceased. A full and complete answer to the questions was required by the application. If the offer of proof turns out to be a matter of fact, it is evident that a fair and candid answer was not given. There was concealment, and the parties (as they rightfully may) have made it material. *Jeffries v. Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833; *Price v. Ins. Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *Campbell v. Ins. Co.*, 98 Mass. 381, 403. If, therefore, it can be shown (under a proper answer) to have been a fraudulent concealment for the purpose of inducing the defendant to issue the certificate, and which it would not have issued had the truth been told, it ought to avoid liability. In so stating, we deem a fraudulent concealment of the matters here considered as tantamount to a fraudulent misrepresentation. As the answer stood at the trial, it bore more upon a question of warranty than a fraudulent misrepresentation or concealment, and therefore the ruling of the court was right. What we have said could only be available to defendant by an amendment to that part of the answer wherein information was sought as to the family history, setting up what we have just indicated it was necessary to prove.

The judgment is reversed, and cause remanded. All concur.

PAUL v. LEEPER.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

NOTES — INTERLINEATION — ALTERATION —
SPOILIATION—EVIDENCE—SUFFICIENCY—
APPEAL—THEORY ON TRIAL.

1. Where notes appear with the words "from due" interlined above the interest clause, in what is apparently the same ink and handwriting as the balance of the notes, it will be presumed that such interlineation was contemporaneous with their execution.

2. In an action against the maker of promissory notes, where evidence was introduced to show that plaintiff induced the payee to alter the notes by writing the words "from due" over the interest clause, before indorsing the same, and plaintiff admitted that he had had payee alter certain other notes in the same manner, a verdict for defendant could not be set aside as unsupported.

3. In an action on promissory notes, defended on the ground that they had been altered without the maker's consent, where plaintiff proceeded on the theory that the notes had not been altered, and in no way urged that the alleged alteration was a mere spoliation, he could not object, on appeal, to an instruction to find for defendant, if an alteration had been made, even though it was without plaintiff's consent.

Appeal from circuit court, Jasper county; J. D. Perkins, Judge.

Action by W. S. Paul against Clark Leeper. From a judgment for defendant, plaintiff appeals. Affirmed.

C. H. Montgomery, for appellant. Grayston & Taylor, for respondent.

ELLISON, J. This action was brought before a justice of the peace to recover on a number of promissory notes of \$10 each. The defendant had judgment in the trial court. It appears that the notes were executed by defendant to Austin Heaton, and that they were afterwards, before due and for value, indorsed to this plaintiff. The defense is that they were altered without defendant's consent after being delivered to Heaton. The alteration charged is that the words "from due" were interlined above the interest clause. The notes were drawn on printed blanks, and the interest clause was printed, "with interest at — per cent. per annum." The figure "8" was put in the blank space when the notes were executed. The words "from due" appear written above the printed words "per cent. per annum"; the bottom of the letter "r" in "from" coming down into the blank space after the figure "8." Plaintiff's contention at the trial was that the notes were never altered. They were written—that is, filled out—by Heaton, the payee; and plaintiff's theory is that Heaton wrote the words in question when he filled out the notes, before they were signed by defendant. Defendant's theories at the trial were that Heaton never wrote the words in question, and that he did write them in the notes at plaintiff's request just before he purchased them. These theories, inconsistent as they are, were advanced without being objected to on that account.

The fact that the notes appear with the words "from due" interlined, as they are, in what is apparently the same ink and in what is apparently the same handwriting as the balance of the notes, does not cast the least suspicion upon them. It will be presumed that such interlineation of them was contemporaneous with their execution. *Stillwell v. Patton*, 108 Mo. 360, 18 S. W. 1075; *Paramore v. Lindsey*, 63 Mo. 63. This rule can be applied with especial ease to these notes, since the interlineation is in favor of the maker and against the interest of the holder, as without the interlineation the notes would have read, "with interest at 8 per cent. per annum," and thus have drawn interest from date. It therefore devolved upon defendant

¶ 1. See *Alteration of Instruments*, vol. 2, Cent. Dig. § 238.

to show that the interlineation was made after he signed the notes and without his authority. Heaton being dead, defendant was not a witness himself, and the effort to show that there was an alteration was centered around the question whether Heaton made the interlineation before defendant signed. To show that he did not, defendant introduced Heaton's widow and son, who testified that those words were not in his handwriting and were not written by him. Then, as before stated, defendant introduced two witnesses, who gave evidence tending to prove that Heaton did write these words at plaintiff's request after defendant had signed. No objection was made on the score of inconsistency. If the jury believed the second of these two theories, then their verdict for defendant was the proper finding.

But plaintiff says the evidence was not of sufficient force and certainty to sustain such defense. We have gone over it carefully, and find that, while it is quite strange that plaintiff would have made such admission at the very time he was seeking to recover judgment, yet that was all a matter for the consideration of the jury. In this connection it is proper to say that plaintiff admitted he did have Heaton alter some other notes he purchased of him against another person, by interlining the same words interlined in the notes in controversy, and that he did it so as to make them conform to what Heaton said was the contract as to interest with the payors.

As to the first theory of defense, plaintiff urges that, though the jury should have believed that the words interlined were not written by Heaton, yet it did not follow but that some stranger might have written them, for whose acts plaintiff would not be responsible, in which case there would be a mere spoliation, not avoiding the notes. In this connection plaintiff objects to defendant's instructions, which directed a finding for defendant if an alteration was made without his consent, even though by a stranger without plaintiff's consent, thereby becoming a mere spoliation. The difficulty with this theory and objection lies in the manner in which it appears in the record. Plaintiff has sued on the notes as they now appear, and his theory has been that they have not been altered. If there was a mere spoliation, then plaintiff should have presented that theory in his case. It has been ruled that, when one sues on a "contract in its altered state," he adopts the alteration and makes it his own. *Kelly v. Thuey*, 143 Mo. 435, 45 S. W. 300; *Bremen Bank v. Umrath*, 42 Mo. App. 528. Notwithstanding such rule, we can very well see that, where one sues on a note without knowledge of its having been altered, he should not be bound by the alteration if made by a stranger. But in such instance, where the alteration is developed, he should in a proper way have that saving feature of his

case presented to the court. There were no pleadings in this case, yet plaintiff did not ask the court, by instruction or otherwise, to submit the question of alteration by a stranger without plaintiff's consent. The whole record shows that the contest on plaintiff's part was on the theory that there had been no alteration, either by a party in interest or a stranger, and that the note in his hands was as it was signed by defendant. On the respective theories of the parties, the court's instructions were undoubtedly right.

After having fully considered the record and briefs, as well as the printed arguments, including the oral argument by appellant's counsel at the hearing, we feel that we cannot interfere with the judgment, and it is accordingly affirmed. All concur.

WHITE v. MISSOURI PAC. RY. CO.

(Court of Appeals at Kansas City, Mo. March 2, 1906.)

JUSTICES—TRIAL—STATEMENT OF ACCOUNT—SUFFICIENCY—APPEAL—ABSTRACT.

1. Under the express provisions of Rev. St. 1899, § 3363, a suit before a justice cannot be dismissed for insufficiency of the account filed by plaintiff, where a sufficient account is filed before the commencement of trial.

2. In a suit before a justice, a statement setting forth two claims for work and labor performed between certain dates for the defendant by two different parties, and showing what was due thereon, with copies of written assignments of such claims to the plaintiff, is a sufficient statement of the cause of action.

3. Where, on appeal, the original abstract was not such as required, the defect was cured by the filing of a sufficient supplemental one.

Appeal from circuit court, Pettis county; Geo. F. Longan, Judge.

Suit by E. C. White against the Missouri Pacific Railway Company. From a judgment dismissing the cause on appeal from a justice, plaintiff appeals. Reversed.

E. C. White, for appellant. W. S. Shirk, for respondent.

ELLISON, J. This is an action on an account, begun before a justice of the peace. Judgment was there rendered for plaintiff, but on appeal to the circuit court the case was dismissed on defendant's motion, and plaintiff thereupon appealed.

It appears that plaintiff filed what he termed a statement of his account before the justice of the peace, and sued out a summons for defendant. This statement is said by defendant to have been so defective and incomplete as not to require defendant to answer thereto. On the return day of the summons (June 28th) both parties appeared, and the cause was continued to August 5th, when both parties again appeared, and plaintiff filed an amended statement, in words and figures following:

"Sedalia, Mo., May 15, 1901.

"Missouri Pacific R. R. Co., to Allen Scott,
Dr.

"For labor during the month of April, on section at Jefferson City, Mo., under L. Lipple, foreman,

Six days at \$1.25 per day..... \$7 50
Less hospital fees..... 25

Balance due \$7 25

"For and in consideration of fifty cents cash paid to me and receipt on account due to Mrs. Chas. Conrad, against me, of two and $\frac{25}{100}$ dollars, the above account is hereby sold, assigned and transferred unto E. C. White, his heirs or assigns. [Seal.] Allen Scott.

"Subscribed and sworn to before me, this 15th day of May, 1901. R. A. Higdon, Notary Public, Pettis County, Missouri."

"Sedalia, Mo., May 15, 1901.

"Missouri Pacific R. R. Co., Dr., to Carl Morrow.

"For working thirteen days checking baggage at Jefferson City, Mo., during the month of April, for H. A. J. Sexton, Agent Mo. P. R. R. Co., at \$1.00 per day..... \$13 00
Less hospital fees..... 25

Net balance due..... \$12 75

"For and in consideration of four and $\frac{25}{100}$ dollars, paid to me, and receipt in full for board bill due to Mrs. Chas. Conrad from me, the above account is hereby sold, assigned and transferred unto E. C. White, his heirs or assigns. [Seal.] Carl Morrow.

"Subscribed and sworn to before me this 15th day of May, 1901. R. A. Higdon, Notary Public, Pettis County, Missouri."

Defendant then took a change of venue to another justice, where, after several continuances, both parties appeared, and defendant moved to dismiss the case, "because no bill of items had been filed before issuing the original summons." The justice overruled the motion. Afterwards judgment was rendered for plaintiff, and defendant appealed to the circuit court. In the latter court the defendant filed the following motion to dismiss the case: "First. That this court has no jurisdiction to render any judgment in this cause whatever. Second. Because no statement of a cause of action in favor of the plaintiff and against the defendant was originally filed before the justice of the peace before whom this action was instituted. Third. Because the justice before whom this cause was instituted had no power or authority to allow the plaintiff to file such statement eleven days after the beginning of said suit. Fourth. Because the statement which the plaintiff attempted to file before the justice of the peace at the beginning of this action was a nullity, and the justice of the peace had no power or authority to al-

low the filing of the so-called amended statement after the beginning of said suit. Fifth. Because the so-called amended statement stated no cause of action whatever, and does not in fact constitute any cause of action within the meaning of the law." The trial court sustained the motion, and the plaintiff appealed.

The motion should not have been sustained. It is true, the account originally filed was wholly insufficient. But it is provided by section 3853, Rev. St. 1899, that no suit shall be dismissed by the justice for want of any statement, or for any defect or insufficiency thereof, if the plaintiff shall file the instrument or account, or a sufficient statement, before the jury is sworn or the trial commenced, or where required by the justice. That statute was followed in this case, and gave plaintiff the right to a hearing (*Carter v. Wamack*, 64 Mo. App. 338), unless the amended statement itself was insufficient. We, however, deem it clear that the amendment was all that could be reasonably required in actions before justices.

Defendant has not filed a brief on the merits, but has asked that the judgment be affirmed for plaintiff's failure to present an abstract sufficient under the statute and rules of court. The original abstract was not such as is required. But plaintiff filed a supplemental one, which cures all objection, and we have held at this term that he may do that. *Turney v. Ewins* (not yet officially reported) 71 S. W. 543.

The judgment will be reversed, and cause remanded. All concur.

SAXTON v. MISSOURI PAC. RY. CO.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

RAILROADS—NEGLIGENCE—STARTING TRAIN—ORDINARY JERKS—INSTRUCTIONS.

1. Where plaintiff was injured in getting off a car which had started while he was assisting his daughter to a seat, a refusal to instruct the jury that there was nothing in the conversation testified to between himself and his daughter to give notice to defendant's brakeman that he intended to get off after seating his daughter is proper where such instruction did not include the remarks of the brakeman tending to show that he understood that plaintiff was not to go on the train.

2. Plaintiff alleged that while he was assisting his daughter to a seat in defendant's car, intending to then get off, as the brakeman knew, defendant negligently started the train, and when plaintiff reached the platform the train was moving so slowly that he could, without negligence, leave it safely, when, as he was on the lower step, the train was negligently jerked with such violence that he was thrown off and injured. *Held*, that the refusal to instruct that the starting of the train before plaintiff had alighted was not the proximate cause of the injury was error.

3. There was no evidence that the jerk of the train was other than usual in starting a train under like circumstances, or attributable to anything other than the taking up of the slack.

Held, that defendant was entitled to an instruction withdrawing the question of negligence as to such jerk of the train from the jury.

Appeal from and error to circuit court, Cass county; W. L. Jarrott, Judge.

Action by E. M. Saxton against the Missouri Pacific Railway Company. From an order sustaining defendant's motion for a new trial after verdict for the plaintiff on one ground, plaintiff appeals, and from the action in overruling the other grounds of the motion defendant brings error. Affirmed.

J. T. Burney and A. A. Whitsitt, for appellant. R. T. Railey, for respondent.

SMITH, P. J. The plaintiff, a man far advanced in years, his age being three score and twelve, who was presumably under some physical disability, for he was a pensioner of the United States, on July 14, 1896, accompanied by his daughter-in-law and her infant child, came from Louisburg, in the state of Kansas, to Harrisonville, in this state, where the latter intended to take passage on defendant's Joplin train for Webb City. Plaintiff purchased a ticket entitling his daughter-in-law to a passage on said train to the last-named station. On the arrival of the train at Harrisonville he accompanied her into the chair car, and there remained until the train started, and while it was yet moving very slowly he undertook to step off, and in doing so fell upon the platform in such a way that one of the wheels of a car passed over his foot, and crushed it so that amputation became necessary. A few days before the expiration of the three-years period of limitation he brought this action.

There was a trial to a jury, which resulted in a verdict for plaintiff. The defendant filed a motion to set aside the verdict, urging a number of grounds therefor, amongst which was one to the effect that the court erred in refusing defendant's instruction C, which was as follows: "Although Mrs. Saxton, at the time she got upon the platform of defendant's rear coach, may have said, 'Father, are you going home this evening?' and although he may have said, 'Yes,' yet you are instructed that there was nothing in said conversation to impart notice to defendant's brakeman that plaintiff was not going to take passage upon said train, or that he intended to seat his daughter-in-law, and return after so doing." The court sustained the motion on that ground, and ordered the verdict to be set aside. From this order the plaintiff appealed. The other grounds of the motion were by the court denied, and to obtain a review of this action of the court the defendant sued out a writ of error.

The plaintiff, as appellant, and the defendant, as plaintiff in error, have, by consent, brought before us the entire record, so that the errors complained of on both sides of the case may be considered as if it

were here on cross-appeals. In recurring to the plaintiff's complaint that the court erred in setting aside the verdict on the ground that it had improperly refused the defendant's instruction "C" it may be stated that it is not negligence for a railway passenger carrier to start its train before a person who has entered such train with the intention, merely, "to speed a departing guest," or to assist one who is sick or infirm in getting a seat, has had time to alight therefrom, unless he had communicated this fact to its servant in charge thereof. In such cases the duty is dependent upon the knowledge of the carrier, and the negligence upon the nonperformance of the ascertained duty. Without the presence of these constituent ingredients, there can be no liability. *Yarnell v. Ry. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599, and authorities there cited; *Deming v. Ry. Co.*, 80 Mo. App. 152, and cases there cited. In order to make out a case of this kind it devolves upon the plaintiff to show that the brakeman was informed by the plaintiff, when he entered the car, that he intended to return. *Yarnell v. Ry. Co.*, ante; *Hurt v. Ry. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; *Straus v. Ry. Co.*, 75 Mo. 185. It is obviously proper for a court by an instruction to declare to the jury the legal effect of the evidence. But the difficulty with the defendant's said instruction is that it does not go far enough. The evidence discloses that at the conclusion of the query and the answer set forth in said instruction, that the brakeman, who was present, and standing at the entrance of the chair car, helped the plaintiff's daughter-in-law reach the platform of the car, and then motioned the plaintiff to follow, with the remark "to hurry up." The plaintiff was clearly entitled to have all these utterances, with the circumstances under which they were made, placed before the jury. Such evidence was doubtless sufficient to justify the inference that the brakeman heard and understood the utterances of the plaintiff and his daughter-in-law, and was thereby apprised that the plaintiff did not intend to take passage on the train, but intended to return. This would have constituted notice. To single out a part of what was said and done at the time the plaintiff and his daughter-in-law entered the train was subject to the objection as singling out specific facts in such way as to give them undue prominence. All of the facts involved in the issues should have been mentioned, so as to make the instruction cover the entire case. *Meyer v. Railway*, 45 Mo. 137; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *State v. Hibler*, 149 Mo. 478, 51 S. W. 85; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417. The conclusion, therefore, is that the court erred in ordering the verdict to be set aside on account of its action in refusing defendant's instruction "c."

Turning now to the defendant's complaint

in respect to the adverse rulings of the court on the other grounds of its motion for a new trial, and it will be seen that by one of these the question is raised as to whether or not the defendant's negligence in failing to hold its train, as alleged in the petition, was the direct and proximate cause of the injury. The petition, after alleging the plaintiff's entrance into the car, and his return to the platform of the same, contains these further allegations, to wit:

"But upon arriving at the platform aforesaid he discovered that the train had started, and was in slow motion, and was moving slowly and steadily away from said depot, along the platform thereof. Plaintiff thereupon stepped down from the said platform to the lower step of said coach, exercising due care and caution, and was expecting and intending to alight therefrom on the platform of said depot, where there was a convenient place for him to alight from said car, when the same was in slow motion, as it then was, which he could have done without any negligence or carelessness on his part, and without danger of being injured thereby.

"But when plaintiff stepped upon the lower step of said coach, as aforesaid, and before he had time to alight upon said platform, the agents and servants of defendant in charge of said train negligently and carelessly caused the said train to jerk suddenly and quickly, and with great force, so that plaintiff was thrown violently from said steps, and down onto the platform of said depot, by reason of which he fell to the platform aforesaid, and his left foot and ankle were thrown under the wheels of said train on the railroad track, and the wheels of said train run over and upon plaintiff's left foot and ankle, crushing the same, whereby and by reason whereof he was compelled to and did have his left foot and ankle amputated."

The statute (section 629, Rev. St. 1899) requiring pleadings to be liberally construed extends only to the form of the pleadings, and does not apply to the fundamental requirements of good pleading, and a pleader is no more allowed now than before the adoption of the present Code to insert doubtful or uncertain allegations, and thereby throw upon his adversary the hazard of correctly interpreting the meaning of such allegations. *Sidway v. Mo. Land Co.*, 163 Mo., loc. cit. 373, 63 S. W. 705.

But it has been authoritatively ruled that after verdict the petition should not be most strictly construed against the pleader, but should be construed liberally with a view to substantial justice. *Oglesby v. Ry. Co.*, 150 Mo. 137, 37 S. W. 829, 51 S. W. 758. Now, giving the plaintiff's petition a liberal construction, can we conclude from the allegations thereof just quoted that the failure of the defendant to hold its train at the station until the plaintiff, by the exercise of reasonable diligence, could leave it, was the direct

and proximate cause of the injury? Negligence is not the proximate cause of an accident, unless, under the circumstances, the accident was the probable, as well as the natural, consequence thereof—one which might reasonably have been foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. *Block v. Railway*, 89 Wis. 378, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Huber v. Ry. Co.*, 92 Wis., loc. cit. 646, 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940; *Railway v. Columbia* (Kan.) 69 Pac. 338; *Henry v. Ry. Co.*, 76 Mo. 293, 43 Am. Rep. 762; *Mathiason v. Mayer*, 90 Mo. 585, 2 S. W. 834. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unbroken by an intervening cause, produces the injury, and without which the result would not have happened. *Blell v. Ry. Co.*, 98 Mich. 228, 57 N. W. 117; *Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395. Applying these principles to the case in hand, and what conclusion should be deduced therefrom? It is alleged the train was moving so slow that the plaintiff could, without negligence, have left it with safety. Now, can it be maintained that the failure to hold the train until he alighted therefrom was the direct and proximate cause of the injury? The accident was neither the natural nor probable consequence of the alleged negligence. Certainly, under the circumstances, the accident cannot be said to have been the probable and natural consequence of the defendant's negligence, or that it was one which might reasonably have been foreseen by a man of ordinary intelligence and prudence. It is conceded that, though the train was started before the plaintiff had time to leave it, yet, since it moved so slowly, he could, by the exercise of ordinary care, have left it while so in motion with perfect safety. If nothing else except the slowly moving of the train before he had time to leave it had occurred, the conclusion is irresistible that the accident would not have happened. The failure to hold the train at most did no more than to furnish the condition or give rise to the occasion by which the injury was made possible. And it is well settled by authority that, where it is admitted or found that two distinct successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate cause and the other the remote cause, and in passing upon the facts as admitted or found the court must regard the proximate as the efficient and consequent cause, and disregard the remote cause. *Railway v. Columbia*, ante. It cannot be said that, but for the starting of the train, the accident would not have happened, any more than it can be said that, if he had not left home, or entered the defendant's car, it—the accident—would not have happened. The for-

mer is as much the proximate cause of the accident as the latter. *Henry v. Railway*, 76 Mo., loc. cit. 294, 43 Am. Rep. 702. We cannot see that it can be claimed with any show of reason that the injury was the result of the initial act of negligence alleged. We are unable to reach any other conclusion than that the first of the quoted paragraphs of the petition fails to allege any actionable ground of negligence for which there is liability. It therefore follows from the foregoing consideration that the court erred in refusing the defendant's instruction "x," which withdrew from the consideration of the jury the charge of negligence pleaded in the first of the before-quoted paragraphs.

It has been seen from the second paragraph of the petition already quoted that the negligence charged is that the defendant caused its train to jerk suddenly and quickly, and with great force, so that plaintiff was thrown with great force, etc. The sufficiency of this allegation may be well questioned. It seems to us that it should have been alleged that the jerk was extraordinary, or more than a usual and inevitable incident to the acceleration of the speed of the train under the circumstances. *Stewart v. Railway*, 146 Mass. 605, 16 N. E. 466; *Railway v. Morris* (Ky.) 62 S. W. 1012. But, if the specification under the allegation of negligence be sufficient, there was no evidence adduced which tended to prove that the jerk was unusual, extraordinary, or unnecessary, and not usually incident to the ordinary, careful, and efficient operation of the train. It was not enough to prove that there was a jerk in the movement of the train. One of plaintiff's witnesses testified that it seemed to him that the jerk occurred when the train took up the slack; but it does not affirmatively appear, as it should, in order to show liability, that the jerk was an extraordinary or unusual one, attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to the unskillful handling of the engine by the engineer, or to something of that kind. *Stewart v. Ry. Co.*, ante; *Bartley v. Ry. Co.*, 148 Mo. 139, 49 S. W. 840; *Hite v. Ry. Co.*, 130 Mo. 136, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 553; *Holt v. Ry. Co.*, 84 Mo. App. 443; *Pryor v. Ry. Co.*, 85 Mo. App. 378. In *Guffey v. Railway*, 53 Mo. App., loc. cit. 462, it was said that: "In this day and age it may be fairly assumed as a fact within common knowledge that there is more or less of violent jolting and jerking incident to the movement of long and heavy freight trains. Even on regular passenger trains, with every appliance for comfort and safety that can be devised by human skill and ingenuity, this occurs to some extent." It is well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless the course is improper. There must be some special circumstance calling for more particular care and caution to make liability.

There is nothing in the record to indicate that there was any act or any omission not incident to the constant usage of the road or indicating fault. It has been said, when something unusual occurs, which injures plaintiff, but such unusual occurrence is not even inferentially the result of an unusual act, and the defendant has, so far as he is concerned, been pursuing his usual course, which heretofore had been done in safety, then the usual occurrence is what is called an accident. In the absence of any evidence tending to show that the jerk complained of was unusual, extraordinary, unnecessary, and not usually incident to the movement of such trains under like circumstances, the alleged negligence cannot be said to be proved. There is no evidence tending to show that the course pursued by defendant in the movement of its train was unusual, nor that the jerk, if it occurred, as plaintiff proved, in the taking up of the slack, was unusual, and therefore there was nothing shown to indicate any act or omission not incident to the movement of the train at the time, or indicating any fault for which there was liability. It seems to us that the defendant was clearly entitled to instruction "y," withdrawing, from the consideration of the jury, the allegation of negligence contained in the said second paragraph of the petition.

It follows from the foregoing considerations that the court should have directed a verdict for defendant, and its failure to do so was error.

In the view of the case which we have expressed, it becomes unnecessary to notice the other points discussed in the briefs of counsel. The order of the court, setting aside the verdict, though based on a wrong ground, will be affirmed, since it was authorized on the grounds which we have sufficiently indicated in the foregoing opinion. All concur.

FOLKENS v. NORTHWESTERN NAT. LIFE INS. CO.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

INSURANCE — EMERGENCY — ASSESSMENT ON POLICY — NONPAYMENT OF PREMIUM — EXTENDED INSURANCE.

1. Rev. St. 1889, § 5690, provides that an assessment contract of insurance is one wherein the payment of the benefits "is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts." A policy "on the accumulative reserve plan" with a stated annual premium provided that, should any emergency arise which would exhaust the reserve fund, the policies could be assessed to meet the same. It further provided that all payments were at the option of the insured, and that no liability whatever should rest on assured after the termination of the contract, except for his notes and evidences of indebtedness. *Held*, that the policy was not an assessment contract, but a contract of old-line insurance, as the emergency assessment was on the policy, and not on the assured; and hence under sections 5856-5859, providing for extend-

ed or paid-up insurance on old-line policies, it was not forfeited for nonpayment of the last premium.

Appeal from circuit court, Chariton county; Jno. P. Butler, Judge.

Action by Zulica Folkens against the Northwestern National Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lavelock & Kirkpatrick, for appellant. Fred Lamb, for respondent.

ELLISON, J. This is an action on a policy of life insurance, in which the plaintiff prevailed in the trial court. The insured paid his premium annually on the 8th day of September, 1897, 1898, and 1899. He failed on the fourth, which fell due on September 8, 1900, and he died in the following November. Defendant claims to be what is known as an "assessment company," and that, in consequence the nonpayment of the last premium due forfeited the policy; and it is conceded by plaintiff that, if the policy is based on the assessment plan, as contemplated by the statute, it became void by reason of the nonpayment of the premium last due. But the contention of counsel for plaintiff is that defendant is an old-line company, or at least that the policy is a contract of old-line insurance, and that it had a net value at the death of the insured sufficient to keep it in force beyond the date of his death. This extended or paid-up insurance, so invoked by counsel, is based on the provisions of sections 5856-5859, Rev. St. 1889, providing for such insurance on the contingency of a failure of payment of a premium on old-line policies when due. The reason for the contest over the kind of company defendant is arises from the unfortunate and unjust distinction which the Legislature has made between the two kinds of companies, wherein it is provided that certain provisions of the law as to old-line companies (among which are the sections aforesaid as to extended insurance) shall not be applicable to assessment companies. Article 3, c. 89, Rev. St. 1889. So, therefore, it is only necessary to consider to which class of companies the defendant belongs. This will be determined, so far as this case is concerned, by the contract in the policy. If it is an assessment contract, as known to the law, then the sections of the statute aforesaid providing for extended or paid-up insurance, known as the "nonforfeiture statute," are not applicable. Section 5869, Rev. St. 1889.

An assessment contract, the statute says, is one wherein the payment of the benefit "is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts." Section 5860, Rev. St. 1889. If provision is made by the policy in any manner or degree for an assessment, then it is an assessment contract. *Elliott v. Ins. Co.*, 163 Mo. 133, 63 S. W. 400;

Aloe v. Ins. Co., 164 Mo. 675, 55 S. W. 993. In the former, Judge Gantt, and in the latter, Judge Marshall, review all the principal cases in this state on the subject. There must not only be provision made for such an assessment, but a liability of members created for its payment, as well as a right given to a beneficiary to have the assessment made (*Jacobs v. Ins. Co.*, 146 Mo. 523, 538, 48 S. W. 462); for a provision for an assessment in certain contingencies would be valueless if there was no liability on the members to pay it, nor no right in the beneficiary to have it enforced.

The application made by the insured was for a policy "on the accumulative reserve plan," and the policy was issued in consideration of a stated annual premium of \$13.65. There is no other premium or other consideration called for by the policy, unless it be in the following "safety clause" provision, which defendant insists makes the policy an assessment contract, viz.: "This association legally qualifies in the various states where it does business under the laws which do not require it to assume the liability of maintaining the legal reserve or level premium of old-line companies. The rate upon which this policy is issued is based upon the American Life Tables, and according to American experience will be sufficient to fully carry out the terms of this contract. Should, however, an emergency (hitherto unknown to American experience) arise, which would exhaust the mortuary reserve, or emergency fund, in excess of the amount of one mortuary rate upon all policies in force, then it is agreed that the policies in force may be assessed their pro rata, according to the American Experience Table of Mortality, of the amount necessary to meet such emergency and maintain the solvency of the association." That provision does provide for an assessment in a certain contingency (so remote as never yet to have occurred in America, and as to which we will again refer), but it does not provide for any obligation on the insured's fellow members to pay it. It provides for a non personam assessment upon other policies. The statute aforesaid makes necessary that the assessment shall be upon the "persons" holding the policies. An assessment upon the policy may cause its forfeiture if not paid, but it does not create a personal liability on the policy holder any more than a charge on real estate creates a personal liability upon the owner of such realty. One of the essential elements of an assessment contract, and upon which each member of an assessment company has a right to rely, is that every other member is personally obligated to pay in, for his benefit, such an assessment as will make good the amount of his insurance. That there was no provision for an assessment against the member intended to be provided for by this safety clause is made apparent by other provisions of the policy

wherein it is provided (*italics ours*) that "*all payments on this policy are at the option of the insured, and no liability whatever shall rest upon the association or the insured after the termination of this contract, excepting the insured shall still be bound by any notes or evidences of indebtedness given by him.*" This provision is one which is consistent with old-line insurance, where the annual premiums are paid by the voluntary act of the insured, and where the only consequence of nonpayment is a forfeiture of further insurance, there being no contractual obligation to pay future premiums. *Richards on Insurance*, § 37; *May on Insurance*, § 341a; *Ellerbe v. Barney*, 119 Mo. 649, 25 S. W. 384, 23 L. R. A. 435; *Worthington v. Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495; *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. But it is inconsistent with the idea of assessment insurance; as in the latter, from the very name and nature of an assessment company, the insured has a right to rely upon the liability of his fellow members whenever payment from other sources fails.

Our attention has been called to the recent opinion of Judge Bland, of the St. Louis Court of Appeals, in *Williams v. Ins. Co.*, 71 S. W. 376, which treats of the present subject. In the policy in that case there is a provision reading that "this policy shall be liable for its share of any deficiency caused" in the emergency fund. But that provision is immediately followed by another, making the assessment a charge on the policy holder. The case is therefore in no way opposed to what we have written.

2. It will be noticed that the courts have, from the beginning, marveled at the distinction which the Legislature has made between assessment insurance companies and old-line companies. If the question were a new one, I would say (speaking for myself only) that the distinction has been given most of its injurious effect by the construction which the courts have placed upon the statute defining assessment insurance. The statute is that, "if the payment of the benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, it shall be deemed a contract of insurance on the assessment plan." The courts have assumed that that language meant that if, upon any contingency, an assessment could be had within the terms of the contract, it made of it an assessment contract. The truth is, the language should never have received that construction. The statute does not refer to a contingency at all. The statute means as if it read that an assessment contract is one wherein the payment of the benefit depends upon the collection of an assessment on the other members of the company holding similar contracts. Manifestly, if the payment does not depend upon the collection of an assessment from other members, it is not an assessment contract. The statute does not read that the

payment may depend upon an assessment. It reads that where the payment does depend upon such assessment. The words of the statute are, "the payment of which said benefit is in any manner or degree dependent upon the collection of an assessment." The words "in any manner or degree" do not alter the fact that the payment in each case must depend in some part upon an assessment. They only refer to the mode and extent of the dependence. Each contract must, by some means, and to some extent, absolutely depend for payment upon an assessment. This dependence may be provided for in any manner, and in any degree, which is not a mere subterfuge designed for evasion; but it must exist. To say that an assessment may depend upon and be provided for in some remote contingency, so remote that it (according to the present contract) has never yet happened, and is beyond human experience in America, is to say that insurance may be perpetually effected at fixed premiums along the lines of regular insurance, and yet avoid the statute enacted for the protection of policy holders. For it is only necessary that the company put in a provision for assessment upon a contingency which is too remote to in any way affect its business—a contingency so remote as to be a mere possibility not worthy of consideration—then proceed to do old-line insurance wholly unaffected by the statute. By such construction a bare possibility that the contingency provided for may happen is enough to convert the old-line insurance into assessment insurance. So while, even in criminal law, we refuse to allow a possibility of innocence to save a man his life or liberty, we permit it to deprive him of the benefit of a contract which was designed to be protected by the statute. In *Jacobs v. Ins. Co.*, 146 Mo. 538, 48 S. W. 462, Judge Brace, in delivering the court's opinion, said that (*italics mine*): "The primary and controlling principle of the statute is that the benefit *is to be paid out of a fund raised by assessment upon other persons holding similar contracts, by which they are made liable for the payment of such assessments.* No scheme of life insurance can come within this principle and become insurance upon the assessment plan, unless somewhere along the line of its operations provision is made for such an assessment, and liability for its payment created. The right to have the assessment made must be given to the insured; the duty to make it must be imposed upon the corporation, and liability for its payment upon its members."

What we have said is not out of harmony with section 5864 of the statute, which simply provides for an emergency fund, which is to be invested in securities, and which, with the interest thereon, is to be a trust fund held by the superintendent of the insurance department for the payment of death claims whenever the death rate in any six

months shall exceed the annual rate of mortality shown by the American Life Tables. The section is founded on the assumption that death claims will ordinarily be satisfied by other modes of payment so long as the deaths do not exceed the rate in the American Life Tables. But it does not by any means assume that those other modes are made up altogether from fixed premiums. Under section 5860, and from the very nature of assessment insurance, those other modes must, in part, at least, be made up of assessments, as we have pointed out. It was never contemplated by the Legislature that assessment insurance could be written for the payment of losses without the aid of assessments. To permit a contract in every way old-line insurance to be converted into assessment insurance by the subterfuge of an assessment only on a remote contingency, is to bring the statute to the support of a sham.

The judgment is affirmed. All concur.

MISHAWAKA WOOLEN MFG. CO. v. POWELL.

(Court of Appeals at Kansas City, Mo. March 2, 1908.)

BANKRUPTCY—CUSTODY OF PROPERTY—PROCEEDING IN STATE COURTS—JURISDICTION OF BANKRUPTCY COURT—REPLEVIN—PROPERTY IN CUSTODIA LEGIS.

1. Under the sections of the bankruptcy act providing (section 2 [U. S. Comp. St. 1901, p. 8420]) that the district court shall have jurisdiction in bankruptcy proceedings, to appoint receivers to take charge of the property until the qualification of trustees, to cause the estate to be collected, reduced to money, and distributed, and (section 47 [page 8438]) enjoining such duty on the trustees, under direction of the court, and (section 70 [page 8451]) vesting title to the property of the bankrupt in the trustee, who is an officer of the court under section 1, subsec. 18 [page 8419] as of the date of adjudication, property of the bankrupt in the possession of the receiver or trustee is constructively in the possession of the court, and cannot be taken under a writ of replevin issuing out of a state court.

2. The jurisdiction of the United States District Court in bankruptcy, under the bankruptcy act of 1898, is exclusive, and, a trustee being appointed to take possession of the bankrupt's estate, all questions relative to the title of property so taken must be determined in that court.

3. Rev. St. 1899, § 4463 et seq., providing for a writ of replevin, when plaintiff claims to be the owner or entitled to the possession of specific personal property wrongfully detained, do not authorize a sheriff, acting under the writ, to invade the jurisdiction of the federal court over property in the custody of that court, under bankruptcy proceedings.

Appeal from Circuit Court, Pettis county; George F. Longan, Judge.

Action by the Mishawaka Woolen Manufacturing Company against W. H. Powell, trustee in bankruptcy. From a judgment for plaintiff, defendant appeals. Reversed.

Sangree & Lamm, for appellant. G. W. Barnett and C. E. White, for respondent.

SMITH, P. J. This is an action of replevin to recover certain personal property, consisting of men's knit, felt, and rubber boots. The plaintiff is a manufacturing company, incorporated under the laws of the state of Indiana. The cause was submitted to the circuit court upon an agreed statement of facts, which was to the effect: (1) That Huyssen & Holm were partners engaged in the boot and shoe business in this state; that they procured the goods described in the plaintiff's petition on a written order, in which, amongst other things, it was recited that "the title and property in all the goods herein mentioned shall remain in the vendor until fully paid for or sold in due course of business by the buyer, and if payment for the same shall not be promptly made when due, or, if at any time before the same shall be fully paid for or sold in the due course of business by the purchaser, the purchaser shall become insolvent or shall, in the opinion of the vendor, be in danger of insolvency, or the vendor, in its judgment, shall for any reason whatever deem itself in danger of losing the price of said goods, then the vendor may at its option reclaim and take possession of so much of said goods as shall then remain in the hands of the purchaser unsold." The order, with the foregoing condition incorporated therein, was not acknowledged and recorded as required by section 8412, Rev. St. 1899. (2) That the goods described in said order were delivered to Huyssen & Holm, and part of them sold and delivered to customers, prior to the time when they made application to become voluntary bankrupts. (3) That Huyssen & Holm filed their petition in the District Court of the United States for the Western District of Missouri to be adjudged bankrupts, and were so adjudged December 1, 1901. (4) That prior to the adjudication in bankruptcy the defendant was appointed by said United States District Court as receiver of the stock of goods, and of the assets of Huyssen & Holm, to preserve the same under the federal bankrupt act, and said goods in dispute, with the other goods, wares, and merchandise in their possession, were turned over to him as such receiver by Huyssen & Holm. That afterwards, by its proper order, this defendant was appointed trustee of the estate of said bankrupts by said court. That, as such receiver, he took possession of all the stock of goods, wares, and merchandise in the possession of Huyssen & Holm, including what remained of the goods delivered by plaintiff to said Huyssen & Holm, claiming them as a part of the bankrupt estate; and that upon being appointed trustee, under the bankrupt act, of said estate, he turned over to himself all of said goods, wares, and merchandise, and ceased to hold them as receiver, and from thence forward held them as trustee, and claiming them as belonging to the bankrupt's estate, and as subject to disposition under the bankrupt act under the orders of said United States District Court. That after-

wards he had all said goods inventoried and appraised as part of the estate, and that afterwards the said United States District Court ordered all said goods, including the goods claimed in this proceeding, sold as part of the bankrupt's estate, to pay claims allowed against the estate, and, in pursuance of said order of sale, bids were advertised for, and afterwards, on the 6th day of January, 1902, when said bids had been opened and said sale about to be consummated, the defendant was served with a writ of summons and order of delivery in this cause, summoning him to appear and answer the plaintiff's petition that day filed in the circuit court of Pettis county, Mo. Thereupon it was by the parties hereto agreed that the defendant might sell the goods replevied, and the proceeds thereof should remain in lieu of said goods in the hands of the trustee, to await the determination of this suit. Upon the facts agreed the finding and judgment were for the plaintiff, and after an unsuccessful motion for a new trial the defendant appealed.

The defense pleaded and relied on by the defendant in his answer was that at the time of the commencement of the action the property, the possession of which it was thereby sought to recover, was in the custody of the law, and under the control of the United States District Court, and that therefore the state court, in which the action was brought, was without jurisdiction. And so the question thus presented is whether or not the replevied property was in custodia legis, or whether or not such property may be taken from the custody of the trustee under the writ of replevin issuing out of a state court.

Whether or not the property at the time was in custodia legis must be determined with reference to the bankruptcy act of 1898. By section 2 [U. S. Comp. St. 1901, p. 3420] of that act, the District Courts of the United States are made courts of bankruptcy, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings; to adjudge persons bankrupt; to allow and disallow claims against bankrupt estates; to appoint receivers to take charge of the property of bankrupts after the filing of the petition and until the trustee is qualified; to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine the controversies in relation thereto; and to appoint and remove trustees, etc. By subdivision "b" of section 50 [page 3440] trustees, after their appointment, are required to give bond conditioned the same as that required of referees. Such trustees are officers, within the meaning of the bankrupt act. Section 1, subd. 18 [page 3419]. By section 47 [page 3438] amongst other duties enjoined on trustees is that to collect and to reduce to money the property of the estate of which they are trustees, under the direction of the court, and to report to the court in writing the condition of estates and the amounts of money on

hand, and such details as may be required by the court, etc. By section 70 [U. S. Comp. St. 1901, p. 3451] the trustee of an estate, upon his appointment and qualification, is vested by operation of law with the title to the property of the bankrupt as of the date he was adjudged a bankrupt, and with that to property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon or sold under judicial process against him, etc.

It will be seen from an examination of the various sections of the bankrupt act that a scheme is therein provided whereby the estate of a bankrupt is by the United States District Courts, through the various officers named in the act, to be taken into custody and fully administered by it for the benefit of all the creditors proving their claims, in accordance with their respective rights and privileges. The several officers therein named who, under the orders and directions of the court, are to conduct the administration of such estates, are but the arms of the court, to be used by it in effectuating and carrying out the scheme so provided by the act.

The manifest purpose of the act was to provide for the discharge of honest debtors, who have become insolvent, from their obligations, and for the distribution among their creditors of the money arising from the sale of their property. To accomplish this double purpose, the District Courts are by the act invested with a very broad and comprehensive jurisdiction. Under the act, none of the officers therein named can, during the administration of the bankrupt's estate, take a step in respect to it without the direction or approval of the bankruptcy court. Whether the officer in custody of the property of the bankrupt be a marshal, receiver, trustee, or what not, such custody is that of the court whose representative and substitute he is, so that it will not do to say that the property of the bankrupt in process of administration is not in the custody of the court.

Here, it appears from the facts agreed that the defendant, as receiver of the bankrupt's estate, under an order of the District Court, took possession of the property of the bankrupts, including that in issue, and later on, when appointed trustee of the estate of the bankrupts, the title to such property, by operation of law, passed to him as such trustee, to be administered under the direction of the court for the benefit of creditors; so that it was in custodia legis.

When property is in custodia legis, the officer holding it is the mere hand of the court. His possession is the possession of the court, and to interfere with his possession is to invade the jurisdiction of the court. Many cases might be cited illustrating the application of this doctrine.

Keegan v. King (D. C.) 96 Fed. 758, was where a trustee had possession of certain fixtures scheduled by the bankrupt, and had

advertised the personal property of the bankrupt, including the fixtures, for sale, and a stranger brought a suit in the state court to restrain the trustee from selling the fixtures, and to establish the title to the property against the trustee. In the course of the opinion of the court disposing of the case it was said: "After this court has taken possession of property through its receiver and trustee as the property of the bankrupt, and has retained the actual and continuous possession of the same from a time long anterior to the commencement of the suit in the state court, is it competent for parties who claim to be the owners of the property so in the actual custody and possession of this court to maintain a suit in a state court for the purpose of settling the title and enjoining the officer of this court from proceeding to the disposition of such property? The statement of the question would seem to carry its own answer. This court, being in possession of the property in controversy, has the exclusive right to determine all conflicting claims as to the title and right of possession of the property so in its custody [citing *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, and *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257]. * * * The moment that an adjudication in bankruptcy has been made, the title to all the property of the bankrupt as of that date passes to the person who is subsequently chosen trustee. From the time of the adjudication the property of the bankrupt is in the custody and control of the bankruptcy court. From the time such property, by the adjudication in bankruptcy, comes into the custody of the bankrupt court, it is in custodia legis, and that court will not permit any person, even though he be an officer of a state court, acting under its process, to interfere with the custody or possession by the bankrupt court or its officers of the property then in custody. And it does this upon the same principle which the bankrupt court refuses to interfere with a levy lawfully made by a sheriff under process of a state court prior to the adjudication in bankruptcy, or refuses to interfere with the possession of a receiver previously appointed by a state court, or any other officer acting under authority conferred prior to the adjudication."

White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, was where, after the referee had taken possession of the stock of goods in the store of the bankrupts, and had caused the entrance to it to be locked up, a writ of replevin of some of the goods was sued out of a state court and was executed by a sheriff forcibly entering the store and taking possession of the goods. The plaintiffs in the replevin claimed that the bankrupts had purchased and obtained the goods from them by false and fraudulent representations, on which they relied, and that before suing out the writ they had elected to rescind, and had demanded the return of the goods of the bankrupts. In the opin-

ion of the court it is, inter alia, said: "The goods were in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in custody of a court of the United States, they could not be taken out of that custody upon any process from a state court. * * * After an adjudication in bankruptcy, an action of replevin in a state court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication and in possession of the referee in bankruptcy at the time when the action of replevin is begun."

And so it has been adjudged that property taken and held by a marshal on a writ of attachment from a court of the United States directing him to attach the property of one person could not be taken from his possession on a writ of replevin on behalf of another person who claimed the attached property as his own. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Nugent's Case*, 184 U. S. 16, 22 Sup. Ct. 209, 46 L. Ed. 405. And similar rulings have been made in the following cases: *Kirk v. Kane*, 87 Mo. App. 274; *State ex rel. v. Netherton*, 26 Mo. App. 414; *Smith v. Railway*, 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; *Marx v. Hart*, 166 Mo. 503, 66 S. W. 260; *Green v. Tittman*, 124 Mo. 372, 27 S. W. 391; *State ex rel. v. Six*, 80 Mo. 61; *Bank v. Owen*, 79 Mo. 429.

And this comity between the federal and state courts is necessary to prevent scandals from unseemly conflicts of jurisdiction, and to promote the decent and orderly administration of justice. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Porter et al. v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660.

The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority, and all matters embraced in that act must be controlled and governed by it. The jurisdiction given by the second section of it to the district courts in bankruptcy proceedings is necessarily exclusive. And this seems to be the result of the authorities to which we have been referred by appellant. In *re Cunningham*, 9 Cent. Law J., 208, and cases cited; In *re Anderson* (D. C.) 23 Fed. 482, 489, 490, 496, et seq.; In *re Smith et al.*, 92 Fed. 135; In *re Francis-Valentine Co.* (D. C.) 93 Fed. 953; In *re Richard* (D. C.) 94 Fed. 633; *Keegan v. King* (D. C.) 96 Fed. 758; In *re Cobb* (D. C.) 96 Fed. 821; In *re Endl* (D. C.) 99 Fed. 915; In *re Chambers*,

Calder & Co. (D. C.) 98 Fed. 865; In re Wells (D. C.) 114 Fed. 222; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; In re Tune (D. C.) 115 Fed. 906.

The sale under which the bankrupts acquired the possession of the property in controversy was conditional. If the plaintiffs did not pay for the property the title was not to pass except to so much thereof as was sold by the bankrupts in the due course of business. The bankrupts had the power to transfer the same, and it may be that such property while in their possession was subject to be levied upon and sold under judicial process against them, and it may, too, be that under the provisions of section 70 of the bankruptcy act the title to such property passed to the trustee. Carter v. Hobbs (D. C.) 92 Fed. 594; and it may also be that such conditional sale was, as to creditors, void under our statute. Rev. St. § 3412; Collins v. Wilhoit, 108 Mo. 451, 18 S. W. 839; Landis v. McDonald, 88 Mo. App. 335.

But the determination of these questions in a case like this falls within the exclusive jurisdiction of the bankruptcy court. That court has the exclusive jurisdiction to determine the title to the goods as between the trustee and the plaintiffs, and that jurisdiction cannot be invaded and overthrown by the action of replevin begun in the state court.

Whether or not we apply the doctrine of in custodia legis, or adopt the theory that the jurisdiction of the matter is exclusively within the bankruptcy court, the result would be the same; for under either view the judgment was for the wrong party.

But it is contended that under section 4463, Rev. St. 1899, the property was not in custodia legis; but if this contention be conceded, still, the plaintiff was not entitled to recover, because of the exclusive jurisdiction of the bankruptcy court of the question of title, which it was sought to have determined by the state court in the action of replevin. We do not understand that the statute just referred to has overthrown the rule of comity prevailing between two courts exercising even concurrent jurisdiction where one of them has acquired jurisdiction of the res by a proceeding in rem before it, or where the property is in its custody through one of its officers. It is true that since the ruling of the Supreme Court of this state in Mohr v. Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503, it has been authoritatively settled that as to parties to a replevin suit, or their grantees or privies, the property is in custodia legis pending the determination of that suit, and cannot be sold by the party in possession, or levied upon by either party or their privies, but that as to third persons the pendency of the replevin suit does not place the property in custodia legis, and does not bar their right to proceed against it by proper judicial pro-

cess to establish their rights. But the application of this rule cannot be appropriately invoked in a case like this. The property here was not placed in the possession of the trustee of the bankrupt's estate by an officer acting under a writ of replevin. His possession was acquired under the bankruptcy act, and is a proceeding authorized by it.

Property of the bankrupt, when in the custody of the bankruptcy court through its trustee, is in custodia legis, and remains so until it is disposed of under the orders of that court, and cannot be interfered with or taken out of its custody on process issued by a state court in an action brought by third persons claiming title to it. The statute relating to replevin confers no authority upon any state court to issue its process of replevin and thereby authorize its sheriff to invade the jurisdiction of a bankruptcy court, and there capture property and withdraw it from the custody of that court. To allow this would lead to consequences incompatible with the direct and orderly administration of justice. The general rule is that where one claims property in custodia legis he must intervene in the court having the custody of it. State v. Netherton, 26 Mo. App. 414; Metzner v. Graham, 57 Mo. 404; Carter v. Hobbs, ante. And no reason is seen for a departure from this rule of practice in the present case.

It follows that the general finding of the court upon the facts agreed was erroneous, and accordingly the judgment will be reversed. All concur.

EDWARDS v. KELSO et al.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

APPEAL—RECORD—SUFFICIENCY.

1. The abstract of the record proper must show that a motion for a new trial was filed; and where the abstract shows that the bill of exceptions was filed in vacation it must also show that the time for filing the bill was extended, and it is not sufficient that these facts appear from the bill of exceptions.

Appeal from circuit court, Jasper county, J. D. Perkins, Judge.

Action by J. W. Edwards against N. H. Kelso and another. Judgment for plaintiff, and defendants appeals. Affirmed.

Thomas Dolan and Clark Craycroft, for appellants. Cole & Burnett and Gardner & Cameron, for respondent.

PER CURIAM. This is an action for personal injuries, in which the plaintiff had judgment in the trial court, and defendants appealed.

The abstract of the record proper contains the petition, answer, and reply, and the filing of the bill of exceptions in vacation. The abstract further contains the bill of ex-

ceptions. But the abstract of the record proper does not show a motion for new trial was filed, or that the time for filing bill of exceptions was extended. The bill of exceptions shows these things, but the Supreme Court and each of the Courts of Appeals have time and again ruled that not to be sufficient. We therefore have the cause without any exceptions at the trial, and, finding no error in the record proper, the judgment will be affirmed.

BANK OF ODESSA v. BARNETT et al.
(LITTLEJOHN et al., Garnishees).

(Court of Appeals at Kansas City, Mo. March 2, 1908.)

GARNISHMENT—TRUST FUND—PROCEEDS OF LIFE INTEREST AND REMAINDER.

1. Where a widow gave up her life estate in lands set apart to her as dower, and accepted in lieu thereof the keeping of the sale money in trust for the heirs, she to have the interest during her life, a part of such fund loaned by her to a bank could not be reached by her judgment creditor by statutory garnishment.

Appeal from circuit court, Lafayette county; Samuel Davis, Judge.

Action by the Bank of Odessa against Mary M. Barnett and others. L. B. Littlejohn and another were garnishees. From a judgment for defendants, plaintiff appeals. Affirmed.

N. M. Houx and Wm. H. Chiles, for appellant. John S. Blackwell & Son, for respondents.

ELLISON, J. The plaintiff held a note against defendants Mary M. and George A. Barnett, her son, on which it obtained judgment. Execution was issued, and the garnishees herein were garnished. Issues were made up on their answer, and the trial court gave judgment against the plaintiff bank.

It appears that defendant Mary is a widow, and was about 74 years old at the time of the trial. There was an 80-acre tract of land left by her deceased husband, which, and 60 acres in other tracts, were set off to her as dower. Opportunity offering for a sale of the 80 acres, it was agreed (in writing) between her and the heirs that they would sell the land, including her life dower therein, for the net sum of \$3,300. The agreement was, in short, that she should hold this purchase money in trust during her life, and have for her own use the interest thereof,

she to account to the heirs for the principal; the effect of which may be said to be that she gave up her life estate in the land, and accepted the keeping of the sale money thereof for the heirs, she to have the interest until her death, when the principal sum was to be divided among the heirs, the defendant George being entitled to one-seventh. Eight hundred dollars of this money was loaned to the garnishees herein for 5 years at 7 per cent. interest, the note being made payable to J. W. Prince, who indorsed it, without recourse, to "Mary M. Barnett, agent and trustee."

The garnishees filed separate answers, denying any indebtedness to defendants. The plaintiff then denied such answers, and set up that defendant Mary M. had placed the money received for the land in bank, deposited to her credit as agent and trustee, and that she bought the note aforesaid, and had it indorsed to her as agent and trustee, for the purpose of cheating, hindering, and defrauding this plaintiff. There was no evidence to support the charge of fraud on the part of defendant Mary, and the case is therefore left to be considered unembarrassed by that consideration.

An ordinary garnishment under an execution (as in this case) is a statutory proceeding at law. It is evident that what plaintiff seeks to have done requires a proceeding much more comprehensive and elastic than a mere legal proceeding by garnishment on execution. Plaintiff is endeavoring to substitute the purely legal process of statutory garnishment for a proceeding in equity. We are satisfied that the debt cannot be collected in that way. *Lackland v. Garesche*, 56 Mo. 267; *Sheedy v. Bank*, 62 Mo. 17, 21 Am. Rep. 407; *Atwood v. Hale*, 17 Mo. App. 88; *State ex rel. v. Netherton*, 28 Mo. App. 428.

The garnishees owe the defendant Mary, as trustee, \$800. That sum belongs to the heirs of her husband, with a right in her to draw the interest thereon from year to year as long as it may be loaned and she lives. In such situation, how are the garnishees to protect themselves, or absolve themselves from further concern, by paying what they owe the defendants in the execution, as the statute provides they may do? The nature of the case suggests that it cannot be adjusted in this proceeding; and so the instructions asked by plaintiff seem to demonstrate that it cannot.

We think the ruling of the trial court was proper, and therefore affirm the judgment. All concur.

¶ 1. See Garnishment, vol. 24, Cent. Dig. § 53.

**ROCK ISLAND IMPLEMENT CO. v.
SLOAN et al.**

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

APPEAL—QUESTIONS REVIEWABLE.

1. Where a motion for judgment is not set out in the bill of exceptions, nor the court's attention called to it in the motion for a new trial, it is not properly before the court on appeal.

2. Where a motion to quash a deposition is not set out in the bill of exceptions, nor the court's attention called to it in the motion for a new trial, it is not properly before the court on appeal.

3. In order to make the point on appeal that the trial court should only have admitted that part of the testimony of a witness which did not contradict his testimony given at a former trial, such former testimony must be brought into court, and incorporated into the record of the trial.

Appeal from circuit court, Cass county; W. L. Jarrott, Judge.

Action by the Rock Island Implement Company against J. H. Sloan and W. D. Corbin, defendants, and Thomas Corbin, administrator, interpleader. Judgment for interpleader, and plaintiff appeals. Affirmed.

James C. Williams and W. D. Summers, for appellant. George Bird and Barnett & Burney, for respondent.

ELLISON, J. This action is on an account for goods sold by plaintiff to defendants as partners. There was an attachment of property in aid. The property is claimed by interpleader, as administrator of Richard Corbin, deceased. The case was here prior to this, and will be found reported in 83 Mo. App. 438, to which reference is made for a further statement. It was ruled by us at that time that plaintiff's peremptory instruction declaring that the interpleader could not recover should have been given, and the judgment was reversed, and the cause remanded. When the cause afterwards came up for hearing in the trial court, plaintiff filed a motion for judgment, which the court overruled, and plaintiff excepted. This motion is not set out in the bill of exceptions, nor is the court's attention called to it in the motion for new trial. It therefore is not properly before us.

It is, however, insisted by plaintiff that the point made was saved by an instruction, which was refused. Passing by any question whether a point made on the overruling of such a motion could be saved by an instruction, we will say that when the case was reversed and remanded by us on the former occasion without any direction to the trial court, it did not indicate that we considered that judgment should be rendered without another trial. It indicated more to the contrary; for, ordinarily, remanding a cause is

evidence that it should be tried again, and then, if the same condition of case presents itself, the trial court will take such action as may have been ruled to be proper by the appellate court. See authorities in respondent's brief. *State v. Newkirk*, 49 Mo. 472; *Hayden v. Grillo's Adm.*, 42 Mo. App. 1; *Senate v. Railway Co.*, 57 Mo. App. 223; *State ex rel. v. Chaney*, 49 Mo. App. 511; *State v. St. Louis*, 41 Mo. 574; *Hurck v. Erskine*, 50 Mo. 116; *Treadway v. Johnson*, 39 Mo. App. 176. It is not infrequent that we consider a demurrer ought to have been sustained, and yet, from other considerations—such as feeling that the whole case has not been presented, or some matter suggests itself leading us to believe that justice would be better subserved by further investigation—we remand for another trial, without directing any certain action by the trial court.

Plaintiff complains that the court erred in overruling its motion to quash the deposition of W. D. Corbin. The motion is not set out in the bill of exceptions, and no attention was called to it in the motion for new trial. The action of the court, therefore, is not before us.

The only other point made in plaintiff's brief was stated along with the one last disposed of. It is that the court should only have admitted that part of the testimony of J. H. Sloan which did not contradict his testimony given in the former trial. The bill of exceptions does not show what his testimony at the former trial was, and no attempt seems to have been made to show to the trial court what it was, except the mere statement of counsel. In order to have made such point, the record of his former testimony should have been brought into court, and incorporated into the record of this trial. As it is, we are not informed whether there was any substance in the objection. If there was, it should have been made to appear, for ordinarily, of course, the fact a witness subsequently testifies to things inconsistent with prior testimony is no ground for excluding it. It may discredit the witness, but it does not disqualify him.

It seems that there were several extensions of time for filing the bill of exceptions. Two of these were in vacation, and are evidenced by vacation entries in the record. These do not show that the judge made the order. There is no written order of the judge, and the entry does not purport to be made by him, or by his direction. Respondents claim that it could have been done by the clerk, who had no authority; that it is a statutory power vested in the judge and should appear to have been exercised by him. The question is worthy of consideration, but, as what we have said disposes of the case, we make no decision of the point.

The judgment is affirmed. All concur.

COOK'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. March 12, 1903.)

RAILROADS—DUTY TO LICENSEES—INJURIES—BOARDING MOVING CAR.

1. Plaintiff's decedent, 19 years of age, left his home without permission, and boarded defendant's freight train when it left his home station, and on its arrival at a succeeding station deceased and some other boys on the train assisted the crew in loading tobacco. On the arrival of the train at C., where there was a very steep downgrade, deceased was seen on the station platform, and, after the train had started, and reached a velocity of 30 miles per hour, deceased attempted to board it, and was thrown under the wheels and killed. It did not appear that the train crew knew he was standing on the platform, or that they saw him attempting to board the train. *Held*, that defendant's employes owed no duty to deceased to see whether or not he boarded the train in safety, and defendant was, therefore, not liable for his death.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by Virgil Cook's administrator against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

S. M. Payton and J. P. O'Meara, for appellant. W. H. Marriott and E. W. Hines, for appellee.

PAYNTER, J. Virgil Cook was a boy 19 years of age. On the morning he was killed he left his home, about 10 miles from Upton a station on the appellee's road. So far as this record shows, without permission or consent of any one, he boarded a freight train at that station. When the train arrived at Sonora or Nolin, it took on some hogsheads of tobacco. The deceased and some other boys who were on the train assisted the crew in putting them on the train. One of the boys testified that the conductor, in referring to the hogsheads of tobacco, told them to roll them in. There is some proof that upon arrival at Elizabethtown he helped some there in loading or unloading a car. The train proceeded on its way north, and arrived at Colesburg. There is no evidence that he did anything there towards loading or unloading a car. He was seen on the platform of the station, and the downgrade seems to be considerable at that place. After the train had reached the velocity of 30 miles an hour, the appellant left the platform, and attempted to board the train, and in making the effort he was thrown under the wheels of the cars and killed. There is no evidence tending to show that any of the train crew knew that he was standing on the platform, or that they saw him make the effort to board the train.

It is sought to hold the appellee liable upon the grounds: (1) That appellant was a minor, and had become, by the acts which we have detailed, a servant of the appellee. (2) That those in charge of the train had failed to instruct him in his duties—that is, that

it was dangerous to act in the capacity in which he was acting; and that they failed to give him any information as to the grade of the road going north from Colesburg.

Counsel for appellant discusses the question as to the liability of masters to servants, and especially the obligation they are under to minors whom they engage in their service, etc. All of the services which the appellant performed have been detailed above. Assuming that he assisted at Sonora or Nolin and at Elizabethtown in placing articles upon the cars, still he was not injured while performing that service. He was not injured while assisting in loading or unloading a car, nor was he injured while doing anything for appellee. Hence he could not have been doing anything for appellee with the consent or permission of those in charge of the train. It was not shown that he did anything, or that he was expected to do anything, in the way of operating the brakes or looking after the train. There is not the slightest evidence that the train crew knew that it was his intention to go beyond Colesburg, or that they knew that he was on the platform, or that he would again attempt to board the train before or after it started on its journey to Louisville. He was injured, not in the discharge of any duty for appellee, but in a reckless and almost insane effort to board a train going at the rate of 30 miles an hour. The employes of the appellee were under no duty to look after the appellant to see whether or not he boarded the train. Had he succeeded in boarding the train at that station, he would have been, if not a trespasser, a mere licensee.

We will not enter into a discussion of the question as to what would have been the liability of the appellee had the deceased, a minor, been killed in the discharge of a duty assigned to him by the master, because, in our opinion, no relations existed between appellee and the deceased which imposed any duty upon its servants to see that appellant boarded the train in safety, or that he got on it at all. If a boy 19 years of age should get upon a passenger train, to be carried between stations, the conductor would be under no obligation to advise him that it was dangerous to get off and on a train while it was moving. He would have the right to presume that he had sense enough not to do so reckless a thing. If a boy of that age should board a freight train, with the knowledge of the conductor, to ride between stations, the conductor would be under no obligation to advise him that it was dangerous to get on and off the train while moving. He would have the right to presume that such a boy would not be guilty of such reckless conduct as attempting to get on the train after it had attained the speed of 30 miles an hour. The appellee was no more liable or responsible for the act of the deceased than it would have been had he purposely cast himself under the wheels of the car, and thus been

killed. We think the court properly gave the jury a peremptory instruction to find for the appellee.

Judgment is affirmed.

HUDGINS v. CARTER COUNTY.

(Court of Appeals of Kentucky. March 18, 1903.)

COUNTY HEALTH OFFICER—COMPENSATION—CLAIM AGAINST COUNTY—DISALLOWANCE—REMEDY—AMOUNT OF RECOVERY.

1. After presentation of a claim to, and its partial disallowance by, the county fiscal court, the claimant may bring his action, and is not confined to an appeal from the court's judgment.

2. A claimant, suing on a claim presented to and disallowed by the county fiscal court, cannot recover a greater amount than that claimed before that court.

3. A county health officer cannot recover from the county for medicines and services furnished during an epidemic to persons able to pay therefor, but only for those given indigent persons, and for general supervision occasioned by a quarantine, and attention to those quarantined.

Appeal from circuit court, Carter county.

"To be officially reported."

Action by E. L. Hudgins against Carter county. Judgment dismissing plaintiff's petition on demurrer thereto, and he appeals. Reversed.

Theobald & Theobald, for appellant. Armstrong & Woods, for appellee.

NUNN, J. The appellant filed his petition in the Carter circuit court against the appellee, alleging that he was a regular practicing physician, residing in Carter county, and was duly authorized to practice medicine under the laws of this state. That about the 5th day of June, 1900, the State Board of Health of Kentucky appointed three persons, naming them, as the local board of health for the county of Carter, and that the last-named board, at a meeting held on or about the 5th day of June, 1900, selected and appointed the appellant as health officer for Carter county, and that he at once accepted and entered upon the discharge of his duties as such, and continued to act as such health officer from that date until the filing of his action. That between October, 1900, and the 15th day of October, 1901, there prevailed in Carter county an epidemic of smallpox, which kept him constantly employed in looking after the same for at least 275 days of that time, and required him to make about 675 visits, vaccinate over 600 people, make 963 prescriptions, and furnish medicine involving 472 people, 425 of whom were quarantined, and to furnish a quantity of disinfectants used in the necessary fumigation of infected premises, and that such services rendered by him as health officer for Carter county were reasonably worth \$4,550; and that he had not received anything as compensation. That he

made out and presented his claim for \$4,060 to the fiscal court, and asked that same be allowed him, and the court refused to allow him anything thereon. He then asked judgment for the \$4,550. Appellee answered, controverting appellant's claim, and alleging that the fiscal court allowed appellant \$700 on his claim, which was all he was entitled to for his services, and refused the balance. It afterwards offered to file an amended answer, to which there was an objection made; and while the court had this motion under consideration, the appellee, on motion, withdrew its answer and amended answer and filed the following demurrer to appellant's petition:

"The defendant, Carter county, comes and demurs specially to the plaintiff's petition: 1st. Because the amount sued on is not the same as the amount presented to and passed on by the Carter fiscal court. 2nd. Because the Carter fiscal court has had no opportunity to pass on and allow or disallow the claim as set out in plaintiff's petition. 3rd. Because at the regular January term, 1902, of the Carter fiscal court the plaintiff presented his claim of \$4,550 for allowance and the said court then and there allowed plaintiff the sum of \$700 for his services between October, 1900, and October 15th, 1901. 4th. Because the \$700 allowed by the Carter fiscal court at its January term, 1902, is in effect a judgment against Carter county on the claim filed by plaintiff in the Carter fiscal court of \$4,550, and is now binding on said county, and was allowed to plaintiff as a reasonable compensation for his services as health officer of Carter county from October, 1900, until the 15th day of October, 1901. 5th. Because plaintiff's petition against Carter county is not an appeal from any judgment or order of the Carter fiscal court. 6th. Because the Carter circuit court has no jurisdiction to vacate or modify an order or judgment of the Carter fiscal court except on appeal taken to said court."

The court sustained the demurrer on the fifth and sixth grounds named, and dismissed the petition, and the case is here on appeal.

By section 2080, Ky. St., physicians appointed as health officers for cities, towns, and counties shall receive reasonable compensation for their services, to be allowed by the councils, trustees, or county courts of the cities, towns, and counties, and to be paid as other town or county officers are paid. The appellant alleges in his petition that, as health officer, he performed the services named and presented his claim to the fiscal court, and the court failed to allow him anything thereon. The law as heretofore construed by this court required him to first present his claim to that court for an allowance, and, if not allowed, or if the allowance was unsatisfactory, then the claimant had either of two remedies—first, to appeal from the action of the fiscal court; second, to bring his action.

In the case of Washington County Court v.

¶ 1. See Counties, vol. 12, Cent. Dig. § 323.

Thompson, 18 Bush, 239, which was a case where a claim was presented to the court of claims for allowance, and the court refused to allow it, and the claimant appealed from the order disallowing the claim, the county sought to dismiss his appeal, claiming he had no right to appeal, but should have brought his action, and referred to the case of Garrard County v. McKee, 11 Bush, 234. The court, in the first case referred to, said: "In that case McKee had rendered professional services for the county of Garrard in resisting the enforcement of an alleged subscription for stock in the Kentucky River Navigation Company. He applied to the levy court for an allowance, which was refused. He then sued the county court in an action at law, and the judgment or order of the levy court was pleaded in bar of his action, and the only question for decision was whether he was bound to proceed by appeal. The court said, *arguendo*, that the act of 1867 did not apply to claims or demands against a county growing out of transactions founded upon a grant of power to the county in the character of a private corporation, and then decided the question in point by saying that McKee 'was not bound to appeal from the order refusing him the allowance asked.' The clear inference from the decision actually made is that he had his election either to appeal or to resort to his action at law, and hence the order of the levy court did not amount to a bar. The Kentucky Statutes provide (chapter 27, § 11) that 'any person presenting a claim before a county court of levy and claims for \$20,' etc., shall have the right to appeal from an order rejecting it; and we feel that it would be carrying the doctrine of *stare decisis* to a most unreasonable length to refuse to carry out the evident will of the legislature, because of an expression of opinion which was at most but a dictum. This conclusion will not operate to give claimants of the character under consideration an advantage over other county creditors. The remedy by appeal being merely cumulative, all county creditors may elect either to appeal or resort to their action."

In the case of *Wels v. Lawrence County*, 13 Ky. Law Rep. 975, was where the claimant, after the county court refused to allow his claim, resorted to his action. The case of *Turner v. Harrison County* (Ky.) 32 S. W. 467, was a like case, and in the opinion the court used this language: "We are, also of the opinion that the rejection of appellant's claim by the fiscal court of Harrison county is no bar to this action." To the same effect are the cases of *Stephens, County Judge, v. Allen* (Ky.) 44 S. W. 386, and *Henderson County v. Dixon* (Ky.) 63 S. W. 756.

The appellant cannot claim in this action for anything more than \$4,550, the amount of the claim alleged to have been presented to the fiscal court for allowance, as in the opinion of this court the presentation of the claim to the fiscal court for its allowance is a pre-

requisite to any action; also he cannot recover against the county for services and medicine rendered and furnished to persons who were able to pay for same. He can only recover for his services and medicines rendered and furnished to indigent persons (see *Thomas v. Edmonson County*, 8 Ky. Law Rep. 265), and for services and general supervision rendered by him which was necessary or reasonably necessary to quarantine and keep the smallpox under control and prevent the spread of the disease, and for attention to those quarantined.

For these reasons the case is reversed, and the cause remanded for further proceedings consistent herewith.

LANCASTER et al. v. CITY OF OWENSBORO.

(Court of Appeals of Kentucky. March 13, 1903.)

CITIES—LIMIT OF INDEBTEDNESS—CENSUS.

1. For the purpose of determining the population, and so the limit of indebtedness, a city may take a census pursuant to an ordinance, though a federal census has been taken two months before; especially where territory has been added in the meantime.

2. The ordinance under which a census was taken having provided for the appointment by the mayor of four enumerators, without confining any of them to any particular territory, a recanvass by one of them, at the direction of the mayor and council, of territory canvassed by the others, is not void.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Suit by J. R. Lancaster and others against the city of Owensboro. Judgment for defendant. Plaintiffs appeal. Affirmed.

Wilfred Carico and W. S. Morrison, for appellants. Geo. W. Jolly, for appellee.

O'REAR, J. This suit was brought by appellants, taxpayers of the city of Owensboro, against that city and its mayor and clerk, to enjoin the issuance of \$200,000 of the city's bonds, voted to be issued at the November election, 1900. It is the same bond issue involved in the case of *O'Bryan v. City of Owensboro* (Ky.) 68 S. W. 858. It was held in the opinion delivered by this court in that case (*O'Bryan v. City of Owensboro*) that the act of enumerating the inhabitants of a community by way of a census was a legislative act; and that, unless there was fraud or mistake in making the enumeration that changed its practical result, the action of the local legislative body in fixing upon and declaring such result was conclusive upon all persons. In this case the taxpayers (appellants here) alleged that the city authorities, the mayor and common council, with the fraudulent purpose of making the total population of that city appear to be greater than it was in fact, and to make it appear that it was in excess of 15,000 souls on the 1st day of August, 1900, instead of some 13,189, its alleged actual population, caused the census

to be taken by the city enumerators to be so changed in two wards as to include the same persons twice in a great number of instances, and to include a great number as citizens who were not such in fact. The two wards included in that charge were the First and Fourth. By reference to the former opinion it will be seen that, unless the city's population was 15,000 or more when the vote was taken for the bond issue in question, the incurring of that liability was void, as being prohibited by section 158 of the Constitution. The last federal census, taken as of June 1, 1900, showed the total population of the city to be then 13,189. But additional territory had been added between the dates of June 1 and August 1, 1900. Besides, the municipality was not bound to rely upon the accuracy of the federal census.

In making the enumeration, the city council provided by ordinance that the mayor should appoint four enumerators, who should be citizens; that they should make accurate lists of all persons residing in the city as of August 1, 1900, and make a true and complete record of all persons included in the enumeration. This record was to be and was bound in the form of a permanent volume, and is presumably yet among the public records of the city. It was required to show, and, so far as this record discloses, did in fact show, the name, age, color, sex, employment, place of abode, and social condition (whether married or single) of each person enumerated. The enumerators were made public officers by the ordinance providing for the census. They were appointed by the mayor, confirmed by the common council, and took the oaths of office required by law. Until their complete and certified work is impeached by proper and sufficient evidence, it must be given the credit and presumption accorded by law to all other official acts.

Appellants' principal complaint is that the enumerators were assigned to their respective wards, each taking the list of his ward; and that the act of the mayor and council in having three of the wards subsequently canvassed by one of the enumerators was unauthorized by the ordinance, and was in fact void. Four enumerators were appointed. The ordinance did not confine any of them to any particular part of the work. Any of them, therefore, was authorized to do any part of it that the council or mayor may designate; and if one committed errors, or otherwise failed in his work, another might go over it and correct it. The object being to attain accuracy as near as possible, all the usual aids and checks commonly employed to that end were proper. The enumeration was not complete until the result was declared by the ordinance of the council adopting the completed work of their enumerators. One of the enumerators—P. J. Murphy, the one selected to retake the enumeration in three of the wards—was an ex-

perienced assessor, had for 20 years or longer been engaged as county or city assessor in taking somewhat similar lists in Daviess county and the city of Owensboro, had lived for many years in that city, and was both well acquainted with its inhabitants and peculiarly qualified for the duties of his office. His previous selection for such work by the people of those communities attests alike his qualifications and character. He says he did the work carefully, and as accurately as was possible; that true records were made and returned to the city clerk, which were shown to be in his custody while the proof was being taken in this case. There is no evidence of fraud, not a scintilla. The mistakes shown in the work of Murphy were not as many as 20 all told. There was an entire failure of proof to sustain appellants' charges. The record, as completed, was a public one; was open to appellants' inspection. Certain evidence of errors called out by their cross-examination of Murphy indicates that they did inspect it. We must presume that they called attention to every error discoverable by such inspection; for, while it would be exceedingly difficult to prove that a census did not contain all the inhabitants, it is comparatively a simple matter to show from such record that it contained duplications, and names of persons not in fact resident in the city, if such were the facts. Appellants' failure to show these facts persuades us that they did not exist.

In view of the conclusion at which we have arrived on the material issues in the case, we deem it unnecessary to notice certain matters of practice alluded to in argument.

The judgment of the circuit court refusing the injunction and dismissing the petition is affirmed.

MARKS & STIX v. GAUSE et al.

(Court of Appeals of Kentucky. March 12, 1903.)

ATTACHMENT—GROUNDS—PROPRIETY—SUFFICIENCY OF ALLEGATIONS.

1. Civ. Code, § 237, provides that an equitable action for indemnity may be brought by a creditor before the debt matures if there exists against defendant any of the grounds for an attachment mentioned in section 194, subsecs. 3-8. Section 194, subsec. 6, authorizes an attachment where the defendant is about to remove or has removed his property out of the state, not leaving enough to satisfy creditors. Held, that in a suit under section 237 it was sufficient to allege the grounds mentioned in section 194, subsec. 6, without also alleging that neither of the defendants had sufficient property in the state subject to execution to satisfy the demand sued on; though the latter allegation would be necessary in a suit under section 194, subsec. 8, authorizing an attachment in an action for the recovery of money if the defendant have no property in the state subject to execution, the collection of which will be endangered by delay in obtaining judgment or a return of no property found.

Appeal from circuit court, Rowan county.
"Not to be officially reported."

Action by Marks & Stix against A. J. Gause and others. From a judgment dismissing plaintiffs' petition, entered on sustaining a demurrer thereto, plaintiffs appeal. Reversed.

J. G. Whitt and J. E. Clark, for appellants.
W. A. Young, G. B. Caywood, and E. W. Senff, for appellees.

BURNAM, C. J. On the 12th day of July, 1901, appellants, Marks & Stix, brought this suit in equity in the Rowan circuit court against the appellees upon a note for \$479.25, dated the 2d of February, 1901, and due on the 2d day of August, 1901, with interest from date, which had been executed and delivered to them by the appellees. The suit was brought under section 237 of the Civil Code for indemnity. The petition is in the usual form, and then goes on to allege that the defendants, A. J. Gause and Martha Gause, are about to depart from the state, and are about to move out of the state their property, or a material part thereof, not leaving enough therein to satisfy the claim sued on, or claims of other creditors; that A. J. and Martha Gause are principals in the note, and Wilson security. The necessary affidavit, bond, et cetera, having been executed, a general attachment issued against the property of the defendants, A. J. and Martha Gause, which was levied upon a stock of goods in the house of the defendants, and which was discharged, upon motion of the defendants, by the circuit judge of that judicial district on the 20th day of July, 1901, and which was reinstated by a judge of this court on the 1st day of August thereafter. The defendants, Gause and wife, filed a general demurrer to plaintiffs' petition, which was sustained, and plaintiffs declining to plead further, their petition was dismissed, and from that judgment they appeal.

It is insisted that the petition is fatally defective in that it fails to allege that neither of the defendants had sufficient property in this state subject to execution sufficient to satisfy the demand sued on, and that the collection thereof would be endangered by delay in obtaining a judgment or return of no property found. In support of this contention they refer to *Francis v. Burnett*, 84 Ky. 30, and *Dunn's Trustee v. McAlpin & Co.*, 90 Ky. 83, 18 S. W. 363. The attachments in both of the cases relied on were sued out under subsection 8 of section 194 of the Civil Code. This ground of attachment is not based upon the idea that the defendant is a wrongdoer, or contemplated any wrongdoing with reference to his creditors. He may be subjected to this remedy though his honesty is unquestioned. And it was very properly held that to authorize an attachment upon this ground, where two or more obligors were sued on the same debt, it was not sufficient to allege that one of them did not have sufficient property in the

state subject to execution to satisfy the demand, and that it would be endangered by delay, etc.; but that this allegation must be made as to each of the joint obligors to authorize an attachment.

This proceeding was not instituted under the section on which those suits were predicated, but under section 237 of the Civil Code, which reads: "Before a debt or liability upon a contract becomes due or matures, an equitable action for indemnity may be brought by a creditor against his debtor, by a surety against his principal; or by one who is jointly liable with another for such debt of liability against the latter. * * * Subsec. 2. If there exists against the defendant any of the grounds for an attachment, which are mentioned in sub-sections 3, 4, 5, 6, 7, and 8 of section 194."

A wholly different state of fact is presented where one of several co-obligors is about to dispose of his property with a fraudulent intent to cheat his creditors. In this state of case, notwithstanding there may be other co-obligors amply good for the debt, and it is not endangered by delay, etc., the creditor is entitled to avail himself of the remedy of attachment, and all that he has to allege with reference to the particular debtor, to entitle him to the remedy, is that he has done or is about to do some of the acts denounced in subsections 3, 4, 5, 6, 7, and 8 of section 194.

In our opinion the petition contains every averment necessary to support a cause of action, and the trial court erred in sustaining a demurrer.

For reasons indicated, the judgment is reversed, and cause remanded with instructions to overrule the demurrer.

HAYS et al. v. ISON et al.

(Court of Appeals of Kentucky. March 12, 1903.)

TRESPASS—CUTTING TIMBER—PROOF OF TITLE—EVIDENCE—MAPS—APPEAL.

1. Where in trespass a map was attached to the record on appeal, but it did not appear that the map was introduced in evidence, or that the map attached was the one used at the trial, it could not be considered.

2. Where a witness testified that he made a map of the premises in question from his brother's notes, but there was no evidence of the correctness of the notes, the map was inadmissible.

3. Where, in trespass for cutting timber, plaintiff's title was put in issue by the answer, and at the trial plaintiff failed to introduce his deed of the land in evidence, or make any proof of title, a verdict was properly directed for defendant.

Appeal from circuit court, Letcher county.
"Not to be officially reported."

Action by David Hays and another against D. D. Ison and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Hall & Baker, David Hays, W. F. Hall, and Ira Fields, for appellants. J. G. Forester, for appellees.

BARKER, J. The appellants, David Hays and Jonathan L. Holcomb, instituted this action in the Letcher circuit court against the appellees, D. D. Ison and Jesse Holcomb, to recover damages for a trespass alleged to have been committed by them on the property of appellants. The petition states: That David Hays and Jonathan L. Holcomb "at all times on and after the 6th day of October, 1899, were and are the owners of about two hundred poplar, ash, and cucumber trees standing on the land of John Holcomb. These lands are situated in Letcher county, Kentucky." Then follows a description by metes and bounds. "That the defendants, D. D. Ison and Jesse Holcomb, by themselves, agents, and employes, on the 9th day of October, 1899, and since plaintiffs' purchase of said timber, unlawfully, forcibly, and without right entered upon said land, and cut down 117 of said trees, to plaintiffs' damage in the sum of \$500." The answer of appellees, who were defendants below, puts in issue the ownership of appellants to the trees in dispute, and also denies the trespass in manner and form as stated in the petition. By affirmative allegations it sets up title in appellee Jesse Holcomb to the land on which the trees are said to have been cut, and further pleads that the contract of purchase of the trees in question was champertous, because the land on which they stood was in the actual, adverse possession of Jesse Holcomb at the time it was made. The reply of appellants placed in issue all of the affirmative allegations of the answer. On trial of the case in the Letcher circuit court, after appellants had introduced all of their evidence, appellees moved the court for a peremptory instruction to the jury to find a verdict in their favor, which was sustained. Appellants' motion for a new trial having been overruled, they have brought the case to this court on appeal.

The only question involved here is the correctness of the judgment of the court in sustaining the motion of appellees for a peremptory instruction. The bill of exceptions recites that all of the evidence introduced on the trial of the case is contained in the transcript of the notes of the official stenographer, which is filed in the record, and properly certified. We find attached to the transcript in this case a large map, and several of the witnesses speak as if they had before them a map of the land in dispute, but it nowhere appears that any map was introduced in the evidence, or that the particular map attached to the record was the one used on the trial in the circuit court. On the subject of some map, which appears to have been used at the trial, plaintiffs introduced Steven Fairchild, who testifies as follows: "Q. Tell the jury whether or not you surveyed the land and made that map. A. Yes, sir. Q. Tell the jury what you know about the correctness of that map.

A. I made the map from my brother's notes, and I presume it is correct." No evidence was introduced to show that the notes from which the map was made were correct or true. It thus appears that the map used by the witnesses was neither put in evidence, nor was its correctness established by testimony.

The appellants claim title to the trees cut down by deed from John Holcomb, who, they allege, is the owner of the land on which the trees stood. Although their title to the trees was put in issue by the answer, the deed from John Holcomb to them was not introduced as evidence upon the trial. The appellant David Hayes, in testifying, speaks of this deed as if he had it in his hands at the time his testimony was given; but the deed itself was not introduced in evidence, nor is it copied in the transcript.

There seems to have been a survey made by one James Caudill, the official surveyor of Letcher county, of the property in question, for the purpose of the trial to be had between appellants and appellees; and this officer was introduced for the purpose of testifying with reference to this survey and his report, but the report was not introduced as evidence, or read to the jury, so far as the bill of exceptions shows.

The ownership of the timber described in the petition having been placed in issue by the answer, it was necessary for the appellants to establish their disputed title by an exhibition of the deed from John Holcomb, under which they claim. As the bill of exceptions shows that they failed to do this, the circuit judge was, of necessity, compelled to sustain the motion for a peremptory instruction to the jury to find for the defendant; wherefore the judgment is affirmed.

MYERS et al. v. PEDIGO et al.

(Court of Appeals of Kentucky. March 10, 1903.)

JUDGMENT—COLLATERAL ATTACK—JURISDICTION—SUBJECT-MATTER OF SUIT—PERSONS OF DEFENDANTS.

1. The judgment of a circuit court, in a suit by a purchaser of an incumbered homestead from a widow (who with the proceeds of the sale discharges the incumbrance, and then with her infant children removes from the state) against the widow and children to declare his deed valid, or else to subrogate him to the mortgagee's rights and resell the property in satisfaction of the lien, is not open to collateral attack as void for want of jurisdiction of the subject-matter.

2. A judgment of a circuit court against non-resident infant defendants, who have been served by warning order, and represented by an attorney appointed for them by the court, is not open to collateral attack as void for want of jurisdiction of the persons of such defendants, though no guardian ad litem was appointed.

Appeal from circuit court Barren county. "Not to be officially reported."

Suit by Charles Pedigo and others against Robert Myers and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Geo. T. Duff, for appellants. Baird & Richardson and W. L. Porter, for appellees.

BARKER, J. S. P. Pedigo died intestate October 6, 1883, a resident of the city of Glasgow, Barren county, Ky. He left a widow, Mary E. Pedigo, and four infant children, Charles Pedigo, Carrie Pedigo, Amos Pedigo, and Ellen Pedigo (now Matillo). Decedent was the owner of several lots in Glasgow, upon which he resided at the time of his death, and in which he had a homestead right. This property was worth considerably less than \$1,000, and upon it there was a mortgage to George E. Pedigo to secure an indebtedness of \$425. After the death of S. P. Pedigo, his widow, presumably being unable to pay off the mortgage, sold the homestead, by a deed of general warranty, to appellant Robert Myers for the sum of \$525, out of which she paid off and discharged the mortgage debt to George E. Pedigo, and then, with her children, moved to Indianapolis, Ind., where they have since resided. In 1891, Robert Myers, evidently becoming doubtful as to his title to the property under the deed from the widow, instituted an action in the Barren circuit court against her and her children. In his petition he set up substantially the facts above stated in reference to the property, and the sale to him, and the payment of the mortgage, praying that his title be quieted; that the defendants be adjudged to have no interest in the land, and that a commissioner's deed be ordered, conveying the property to him free from any claim of theirs; or, if that could not be done, that he be adjudged to have a lien by subrogation on the property in question to the extent of the mortgage paid off with the purchase money paid by him to the widow, and that the property be sold for the purpose of reimbursing him for his debt, interest, and costs. Affidavit having been made as to their nonresidency, the appellees and their mother were proceeded against by warning order, and W. L. Porter, an attorney of the Barren circuit court bar, was appointed attorney for them, and afterwards made report of his acts, as such officer, to the court. After the expiration of 60 days, the defendants being properly before the court by warning order, the case was submitted, and a judgment rendered divesting the defendants of all title to the property described in the petition, and ordering its conveyance by the commissioner to plaintiff Robert Myers. This judgment was entered on the 16th day of April, 1891. After receiving the commissioner's deed, Robert Myers conveyed a part of the property in question to J. W. Brooks. On the 31st day of July, 1901, the appellees, who were the defendants in the case of Myers against Pedigo before mentioned, having all arrived at full age, instituted this action in the Barren circuit court to recover the property in question from the appellants, Robert Myers and J. W. Brooks.

It is not necessary to take further note of the pleadings in this case, or the issues made thereby, further than to say that the appellees' right to recover the land in question from the appellants depends upon the question as to whether or not the former judgment of the Barren circuit court, entered in the case of Myers against Pedigo, was void, or merely erroneous; if it is void, then it may be attacked collaterally, and affords no protection to the appellants, Robert Myers and J. W. Brooks, who claim by virtue of its validity. If it is merely erroneous, then the appellees must fail, for the reason that an erroneous judgment cannot be vacated by collateral attack, such as is made herein. This proposition of law has been decided by this court so often that it is not necessary to cite the cases. Did, then, the Barren circuit court, in 1891, have jurisdiction of the subject-matter brought before it by the petition of Robert Myers against Mary E. Pedigo, the widow of S. P. Pedigo, and her infant children? Myers presented to the court his claim to the property, which was the deed from Mary E. Pedigo to him, and he also presented the facts of the payment of money by him to relieve the homestead mortgage, and submitted to the court two propositions: First. That the deed was valid, and vested him with a fee-simple title to the property as against appellees and their mother. Second. If that was found unsound, that he was entitled by subrogation to a lien on the property in question, and an enforcement thereof for the purpose of reimbursing him for his outlay. The proceeding was entirely in rem. If the Barren circuit court had no right to pass upon this claim of Robert Myers, then no court had such jurisdiction. There was no tribunal in which he could have his rights adjudicated except the Barren circuit court. In *Freeman on Judgments*, § 118, it is said: "The power to hear and determine the cause is jurisdiction." It seems to us clear that the Barren circuit court had the right to hear and determine the matter in dispute between Robert Myers and the appellees; and, they having been constructively summoned, it had jurisdiction both of the subject-matter and the persons of the parties. The infant defendants being properly before the court by warning order, and having an attorney appointed for them as nonresidents, the judgment was not void as against them, for the reason that no guardian ad litem was appointed for them, or defense made by him for them. *Oliver v. Park*, etc. (Ky.) 39 S. W. 423; *Norfleet's Adm'r v. Logan* (Ky.) 54 S. W. 713; and *Simmons v. McKay*, 5 Bush, 25.

It may be conceded that the judgment divesting appellees of their interest in the land in question was erroneous, but, not being void, they cannot vacate it by the collateral attack instituted in this action. As nonresidents, they had five years after the rendition of the judgment to vacate it upon proper showing under section 414 of the Civil Code

of Practice, which is as follows: "A defendant against whom a judgment may have been rendered upon constructive service of a summons, and who did not appear, may, at any time within five years after the rendition of the judgment, move to have the action retried; and, security for the costs being given, shall be admitted to make defense; and thereupon the action shall be retried, as if there had been no judgment; and, upon the new trial, the court may confirm the judgment or modify or set it aside; and may order the plaintiff to restore any money of such defendant paid to him under it, or any property of the defendant obtained by the plaintiff under it and yet remaining in his possession, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored." Or, as infants, they might, at any time up to one year after reaching their majority, have opened the judgment, under section 391 of the Code, which is as follows: "An infant—other than a married woman—may, within twelve months after attaining the age of twenty-one years, show cause against a judgment, unless it be for a tort done by, or for necessities furnished to, the infant; or unless it be rendered upon a set-off or counterclaim stated in an answer; but the vacation of such judgment shall not affect the title of a bona fide purchaser under it." Appellees did not proceed under either section of the Code mentioned, and, as the time has long since expired in which they may do so, those remedies are denied them.

The judgment is reversed, with directions to dismiss the petition.

NEW YORK LIFE INS. CO. v. N. L. CURRY & BRO.

(Court of Appeals of Kentucky. March 11, 1903.)

LOAN FROM INSURANCE COMPANY—POLICY AS COLLATERAL—DEFAULT—FORFEITURE.

1. A provision in a contract of loan from an insurance company for which its paid up policy is pledged as collateral, that on default in payment of interest for 30 days the policy shall, at the company's option, be surrendered to it at the customary cash surrender value then allowed by the company for the surrender of policies of that class, is void.

Appeal from circuit court, Mercer county.

"To be officially reported."

Suit for redemption of collateral security by N. L. Curry & Bro. against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis & Willis and Humphrey, Burnett & Humphrey, for appellant. Gaither & Vandersdall, for appellee.

O'REAR, J. George J. Anderson was the holder of a paid-up policy of insurance upon his life for \$630, issued by the appellant, and

payable upon the death of the insured to his estate. Anderson borrowed \$130 from appellant, and executed to it a writing, called a "Loan Agreement," by which he pledged to appellant the policy to secure the repayment of the loan. Interest on the loan was payable on August 1st of each year (that being the anniversary of the insurance), so long as the principal was owing. The loan agreement contained the following: "It is agreed that interest at the rate of five (5) per cent. per annum shall be paid upon said loan at the anniversary of the insurance next succeeding, and annually thereafter, at the office of said party of the first part. It is agreed that although it is not intended that said party of the first part shall demand payment of said loan until the first day of August, 1900, on which date said loan shall become and be due and payable, or until the death of the party whose life is insured under said policy, said party of the first part reserves the right to demand repayment provided said interest is not duly paid." It is further provided as follows: "It is agreed that in the event of the default of any payment of said interest or of said loan or of any premium on said policy for thirty days after they shall respectively become due said policy shall be deemed to be and shall be in effect at the option of said party of the first part, surrendered to said party of the first part at the customary cash surrender value then allowed by said party of the first part for the surrender of policies of this class, said party of the first part in that case being liable to said party of the second part for the return of the balance only of said cash surrender value after deducting said loan and interest and any expenses incurred thereon." And further: "It is agreed that said party of the second part has deposited said policy and its accumulations with said party of the first part as collateral security for said loan, on the terms and conditions of this agreement, and covenants and agrees to and with said party of the first part to abide by and perform all and singular the stipulations and agreement contained in this agreement." And further: "It is agreed that all the conditions, limitations and requirements of said policy except as herein expressly modified, remain in full force."

On the 1st of August, 1899, when the interest on the \$130 loan became due and payable according to the terms of the contract, it was not paid; nor was it paid for more than 30 days thereafter; nor was it offered to be paid until nearly 8 months after its maturity. Appellant then refused to receive it and reinstate the insurance (which it had canceled as forfeited because of the nonpayment of interest as provided in the agreement above copied), unless the insured would furnish a certificate of his then good health. That he did not do so, and, possibly, could not have done. As a matter of fact appellant admits that the "accumulations" hy-

pothecatcd with this policy as collateral to its loan of \$130 were, when included in the "cash surrender value then allowed" by appellant on this class of policies, some \$12.47 more than the principal and interest owing appellant when the default occurred. Before the interest above named became due, Anderson had assigned the policy for value to appellees, his creditors, of which appellant had notice at the time. Being apprised of the appellant's claim of the forfeiture of the policy, appellees tendered the interest and principal of Anderson's loan, and offered to redeem the policy for their benefit as assignees and creditors. Being refused, this suit was brought to compel appellant to reinstate the policy, or to pay its value above the amount of appellant's debt and interest, to appellees. That excess of value was alleged to be \$300. Appellant, by answer, relied on the surrender and cancellation of the policy under the contract and conditions above stated. The circuit court sustained a demurrer to the answer, and adjudged that upon the payment to appellant of the \$130 and interest that it reinstate the policy.

This appeal involves the validity of the clause of the above agreement providing for the surrender, or practically for the forfeiture, of the policy, if the interest on the loan was not promptly paid when due. By the terms of this writing, if the loan, or its interest, was not repaid when due under the loan agreement, the policy was to be "surrendered" to the insurer "at the customary cash surrender value then allowed by said party for the surrender of policies of this class." That is, pure and simple, a provision for the forfeiture of the policy upon such terms as the payee of the note may require, and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to, or consent of, the borrower, of his collateral, if he fails to promptly pay the interest upon his debt.

The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid—\$630—at his death. The \$130 was borrowed from appellant since that completion of the contract.

The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement is upheld. This is said to be because "on the prompt payment of the premiums depends the mutuality of the contract and the ability of the insurance company to meet its obligations." But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are mere penalties for the nonpayment of borrowed money, they

are not allowed. They lead to, and themselves are, unconscionable oppressions of the unfortunate.

The question in this case, in collateral form, has been before this court several times.

In *St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Bush, 310, a policy provided that if the interest upon premium notes given by the insured was not promptly paid when due it should work a forfeiture of the policy, including all that had been paid on it. Said the court (per Lindsay, J.): "We are satisfied from the nature of the contract that the forfeiture was intended as a penalty, to secure, not the ultimate, but the prompt, payment of the interest to become due; and as the default is only in time, and as the company can be given all that it stipulated to receive, a case is presented in which relief can and ought to be afforded."

In *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush, 51, the question was whether a failure to surrender the old policy and to demand a paid-up policy for the lesser sum, in case of default after paying a certain number of premiums, forfeited the insurer's rights. This court (per Cofer, J.) held that time was not of the essence of the undertaking; that the clause for a forfeiture was repugnant to the policy of the law, and was contradistinguished from conditions precedent. The court quoted approvingly the following section from *Story's Equity*, § 1314: "Wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not."

In *North Western Mutual Life Ins. Co. v. Fort's Adm'r*, 82 Ky. 269, the question was whether the failure of the insured to pay promptly the interest on certain premium notes voided the policy under a provision which declared, "which interest shall be paid annually or the policy be forfeited." The court (per Lewis, J.) held: "Here the default, if any has occurred, is not of the substance of the contract, but in the time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is secured in the full payment of, if not already paid, would impose upon the assured the entire loss of the premiums actually paid. A forfeiture under such circumstances would be extremely oppressive, and if provided for between individuals concerning any ordinary

business transaction be held as in the nature of a penalty."

The later case of *Mutual Life Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343, was quite similar to *Montgomery v. Phoenix Mut. Life Ins. Co.*, supra. It was there reasserted (per Guffy, J.): "Time is not generally of the essence of contracts. Story's Equity, § 776. It may be so when the contract is executory on both sides, or when the nature of the transaction or the stipulation of the parties shows it was so intended by them. But when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity."

Also, see *Manhattan Life Ins. Co. v. Paterson* (Ky.) 60 S. W. 383, 53 L. R. A. 378; *Washington Life Ins. Co. v. Miles* (Ky.) 66 S. W. 740.

In all of these cases the failure relied on as a forfeiture was connected with the existence of the original contract of insurance. It was not always easy to distinguish between the legal principles governing the right to provide for forfeiture because of nonpayment of premium notes and the nonpayment of interest on premium notes. The evident aim of the insurers was to bring the interest upon the notes within the principles governing the notes themselves. The court, however, noted a distinction, and applied it.

In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of the money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business, or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies, and other corporations and individuals.

We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void.

The judgment of the circuit court is therefore affirmed.

DYER v. BALLINGER.

(Court of Appeals of Kentucky. March 10, 1903.)

PARTNERSHIP—ACCOUNTING—COSTS.

1. Where defendant made no effort to have a partnership account with plaintiff settled for

more than four years after the close of the partnership, and until he was sued on another account, and then set up a counterclaim based on the partnership account, a judgment that the cost of settling such account be borne equally by the parties was not error.

Appeal from circuit court, Clinton county.
"Not to be officially reported."

Action by F. M. Ballinger against J. B. Dyer. From a judgment in favor of defendant for only a portion of his counterclaim, based on a partnership account, and that the costs of settling such account be borne equally by the parties, he appeals. Affirmed.

L. G. Campbell, for appellant. Bertram & Bertram, for appellee.

PAYNTER, J. The appellee, Ballinger, sued the appellant on a merchandise account, and asked for judgment in the sum of \$55.66. The appellant filed an answer and counterclaim. By the counterclaim he sought to recover from appellee more than \$200, which he claimed was due him on the settlement of a partnership venture in buying some cattle and hogs in January, 1896. Upon the trial of the case the court gave judgment for the appellant for \$9.49, and that the cost of the settlement of the partnership be borne equally by the plaintiff and defendant. This action was filed in 1899, more than four years after the close of the partnership transaction. It does not appear that the appellant made any effort to have the partnership accounts settled. He purchased the cattle and hogs himself, although the larger part of the money used for that purpose was furnished by the appellee. The appellee does not seem to have kept an accurate account of the amounts paid for the hogs and cattle; neither did he keep one of the sales.

They both agree that something was made upon the cattle and a small amount lost on the purchase and sale of the hogs. The appellant practically concedes that the appellee advanced on the partnership account the sums claimed by him, although there is a little question of bookkeeping as to an item of \$50, but the appellant concedes that he received it.

When the amount paid by the appellee is conceded, and it is admitted that there was a profit upon the cattle transaction and a small loss upon the hogs, we cannot believe that the appellant contributed to the partnership as much as claimed by him. Under all the circumstances of this case, we are unable to reach the conclusion that the appellant received less than he was entitled to receive by the judgment of the court.

It being a question of fact, and there being some doubt on the question, we are disposed to give some weight to the finding of the lower court. The court was certainly right in making each party pay one-half of the cost incurred in this action in settlement of the partnership.

Judgment is affirmed.

HARTFORD FIRE INS. CO. v. BOURBON COUNTY COURT.

(Court of Appeals of Kentucky. March 11, 1908.)

INSURANCE POLICY — VALUED POLICY — PROVISIONS — STATUTES — ARBITRATION — TOTAL LOSS — EVIDENCE — LETTERS — PHOTOGRAPHS.

1. Ky. St. § 700, provides that in case of total loss by fire the insurer shall be liable for the full estimated value of the property as fixed in the policy. A policy provided that the company should not be liable beyond the actual cash value of the property at the time of the loss. *Held*, that such provision was of no validity, as the statute fixes the loss at the face of the policy where it is total.

2. Ky. St. § 700, provides that in case of a loss by fire the estimated value of the property may be diminished to the extent of any depreciation in value of the property occurring between the dates of the policy and the loss. *Held* that, a provision of a policy providing that the amount of loss shall be the cash value at time of loss, the proper deduction for depreciation, "however caused," is invalid.

3. Ky. St. § 700, provides that in case of a loss by fire the insurer shall be liable for the value of the property as fixed by the policy. *Held* that, in so far as total loss is concerned, a provision of the policy providing that the loss "shall in no event exceed what it would cost the insured to replace the building" is invalid.

4. A policy provided that in case of difference between insured and insurer as to the amount of the loss the sum should be fixed by appraisers. *Held* that, if the policy meant that the question whether there has been a total loss was to be submitted to arbitrators, the provision was void, as submitting a question of law as to what was a total loss within Ky. St. § 700.

5. In an action on a fire policy the court rejected a letter written by the adjuster to one whom it had selected as its representative in an effort to adjust the loss. It appeared that such representative had a conversation with one of the policy holders and handed him the letter, and some parts of the conversation that then ensued were admitted in evidence. *Held* that, it not appearing that anything was said about the letter, and the letter not appearing to be relevant to the issue, there was no error in rejecting it.

6. Where the issue is whether there has been a total loss, testimony as to the cost of replacing the building is properly rejected.

7. Where the question was whether there had been a total loss by fire, it was proper to admit testimony in detail as to what would be necessary to restore the building.

8. On an issue whether a building had been totally destroyed by fire, photographs of the building, though they seemed to bear out the theory that the building was not totally destroyed, were inconclusive, where some of the witnesses testified that the condition of the walls were such that they must be torn down, yet an examination of the photographs gave no intimation of that fact.

Appeal from circuit court, Bourbon county.
"To be officially reported."

Action by the Bourbon county court against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Breckinridge & Shelby, R. W. Barger, and John S. Smith, for appellant. McMillan & Talbott, E. M. Dickson, Denis Dundon, T.

Earl Ashbrook, Claude M. Thomas, and J. H. Brent, for appellee.

O'REAR, J. The county courthouse of Bourbon county was insured against loss or damage by fire in the sum of \$50,000. Appellant was one of the insurers, to the extent of \$1,000. This suit was to recover of appellant \$1,000 because it was alleged that the building, during the continuance of appellant's policy, had been totally destroyed by fire. The answer denied that the loss was total. It further pleaded that the loss was partial only; that it did not exceed in value \$33,918.27, and that for \$34,000 it could, by using the part not destroyed by fire, be replaced in as good or better condition than it was just immediately before the fire. It was also pleaded that in the policy of insurance sued upon there was a provision that the sum insured should not be payable, nor should suit be brought to recover it, till 60 days after the loss or damage had been ascertained and awarded by appraisers if arbitration had been required; that appellant had required appraisers; that appellee had refused and failed to name an appraiser; and that no such appraisement or award had been made. The provision for arbitration pleaded and relied on is as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by the company in accordance with the terms of this policy." The prayer of the answer is: "Having answered, defendant prays to be hence dismissed with its costs." The failure and refusal of appellee to enter into the arbitration was not denied. The court overruled the demurrer to the paragraph of the answer pleading the matters in avoidance above set out. The issue made by these pleadings, and the only issue, is, was the loss total? The other matter pleaded by defendant, while admitting the fact of a partial loss, or damage, pleaded the other facts in the nature of a plea in abatement.

The court instructed the jury as follows:

"(1) The court instructs the jury that the law is for the defendant, and they should so find, unless they shall believe from the evidence either or both of the following propositions are true: First, that the fire of the

19th of October, 1901, destroyed the identity and specific character of plaintiff's building as a building; or, second, that the said fire, and the water used in the attempt to extinguish same, so injured and destroyed all parts of said building above ground as to render said building so unsafe and useless as a building as to require the walls or whatever was left standing of the building to be torn down and said building to be rebuilt throughout in order to be used as a building. (2) The court instructs the jury that, if they believe from the evidence that either or both of the above-mentioned propositions are true, then the law is for the plaintiff, and the jury should so find. (3) If the jury find for the plaintiff they should assess their recovery against the defendant in the sum of \$1,000, with interest thereon from February 18, 1902. (4) The court instructs the jury that if they believe from the evidence that so much of the material of which the building was made has been destroyed by fire, or by reason of fire, as to leave what remained of no material value as a building, although it may have value as debris or salvage, there has been a total loss of that building, within the contemplation of the statute, and the law is for the plaintiff. But if the remaining part of said building can be repaired it be restored to the former condition of the original just before the fire, then the loss in contemplation of the statute is a partial loss, and the law is for the defendant. But if, instead of repairing the damaged part substantially, a reconstruction of the whole would be necessary to restore the building, then the loss is total."

A peremptory instruction was asked by appellant, and refused. The jury's verdict was for the plaintiff (appellee).

The only rulings complained of as errors are the court's refusal to give the peremptory instruction, its definition to the jury of the term "total loss," and the rejection of certain evidence offered by appellant.

The peremptory instruction was asked upon the assumption that the policy provided for an arbitration to fix upon the fact and extent of the loss, in case of disagreement, and that such award was a condition precedent under the contract to a right of action on the policy. The argument is that the parties have by contract stipulated that the company shall not be liable to any payment until the amount of loss had been fixed, either by the agreement of parties or, if they disagreed, by an appraisal and award by arbitrators provided for in the contract; that a disagreement did arise as to both the amount and extent of the loss, the insured claiming it was total, the insurer that it was partial. Counsel for appellant say: "We submit that whether the loss was partial or total was the very question which, under the statute, as written into the body of the contract, had been agreed to be submitted to appraisal."

The statute in question is section 700, Ky. St., as follows:

"That insurance companies that take fire or storm risks on real property in this commonwealth shall, on all policies issued after this act takes effect (in case of total loss thereof by fire or storm), be liable for the full estimated value of the property insured, as the value thereof is fixed in the face of the policy; and in cases of partial loss of the property insured, the liability of the company shall not exceed the actual loss of the party insured: provided, that the estimated value of the property insured may be diminished to the extent of any depreciation in the value of the property occurring between the dates of the policy and the loss: and provided further, that the insured shall be liable for any fraud he may practice in fixing the value of the property, if the company be misled thereby."

The policy sued on was issued since the adoption of that statute. The provision of the policy for arbitration in event of disagreement is in direct conflict with the statute in several particulars. For example, the policy provides that "this company shall not be liable beyond the actual cash value of the property at the time of any loss." The statute fixes the liability of the company in event of total loss at the value of the property fixed in the face of the policy. The policy provides that the appraisal shall fix the cash value of loss or damage, "with proper deduction for depreciation however caused." The statute says that only that depreciation in the value of the property occurring between the dates of the policy and the loss shall be deducted. Again, the policy reads: "[The loss or damage] shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." So far as this clause refers to a total loss it requires the arbitrators to proceed on a basis of estimate entirely different from that fixed by the statute.

It cannot be claimed, of course, that there was any legal duty upon appellee to submit its claim to arbitrators before suit, other than may be found in the clause of the contract quoted.

Broadly speaking, one cannot by contract bargain away his right to try his case before the courts (*Whitney v. National, etc., Assoc.*, 52 Minn. 378, 54 N. W. 184; *Badenfeld v. Mass. Mut. Acc. Assoc.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; *Gray v. Wilson*, 4 Watts, 39), although it is generally held that an agreement in a contract of insurance that the amount of the loss or damage shall be first ascertained by arbitrators is enforceable as a condition precedent to the right to sue on the policy. *Hanover Fire Insurance Co. v. Lewis*, 28 Fla. 209, 10 South. 297; *Randall v. Am. Fire Ins. Co.*, 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. 478, 21 Am. Rep. 80.

But this is where there is a dispute as to the amount—where it is not fixed by the policy. If the amount is fixed, and the agreement is to submit the question of liability to arbitration, it is void. *Tunnel Co. v. Segregated B. M. Co.*, 19 Nev. 121, 7 Pac. 271; *Seward v. Rochester*, 39 Hun, 44, affirmed 109 N. Y. 164, 16 N. E. 348; *Corbin v. Adams*, 78 Va. 58; *Alexander v. Campbell*, 41 L. J. Ch. 478; *Whitney v. National Masonic Acc. Assoc.*, 52 Minn. 378, 54 N. W. 184.

While the law favors settlements, arbitrations as a means of peaceful and expeditious settlement are enforced only where they have been executed, or where the agreement to submit to arbitrators does not oust the courts of their jurisdiction. *Hill v. More*, 40 Me. 515; *Contee v. Dawson*, 2 Bland, 264; *White v. Middlesex R. Co.*, 135 Mass. 216; *Randall v. Am. Fire Ins. Co.*, 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.

Applying these principles to appellant's contention, it follows that if the contract provided, as seems to be contended, that the question of appellant's liability was to be submitted to arbitrators, the provision was void. The line of demarcation in the cases wherein such provisions have been either upheld or rejected is, if the thing to be submitted is the one of an undetermined and disputed fact, as a condition precedent to an action upon a recognized legal liability, the agreement will be enforced. But if the fact is already fixed, e. g., the value of the property, or the amount to be paid, the agreement to submit the question of liability—the question of law—is invalid. In the case at bar the value or sum to be paid in event of total loss is conclusively fixed. It was proposed to submit to arbitrators whether for that sum or value liability had attached, or existed—a question purely of law, or, at least, of law and fact. The arbitrators could not have determined it without deciding the question of law involved, i. e., when is a loss total within the meaning of the statute? Appellant's position is that by the contract that question must first be settled by arbitrators selected by the parties, instead of by the courts created by the law—a proposition which we think is against principle and precedent. Numerous cases hold that, under statutes similar to ours quoted herein, if the question is one of total loss, the arbitration clause of the policy cannot be applied; for there is nothing to arbitrate that is the subject of arbitration. *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Merchants' Ins. Co. v. Stephens* (Ky.) 59 S. W. 511, and cases therein cited.

Counsel insist that until the extent of the damage or loss was ascertained it could not be known whether the loss was total, or partial only; that if it was but partial, then the arbitration feature of the contract clearly, and under all the authorities, applied. That the parties might have submitted the question of extent of damage or loss to ar-

bitrators in this case, we do not doubt. Their award, though, in our opinion, could have been used as a basis of the settlement only in event the loss was partial. If it was total, no matter what may have been the value of the building (in the absence of fraud mentioned in the statute), the liability of the insurer was fixed at the sum named in the face of the policy; and the agreement to submit that question to arbitration, being without consideration, and being contrary to the policy of the law as embodied in section 700, Ky. St., was not binding on the insured. The only one who took any risk by refusing the arbitration was the insured, for if the loss turned out to be only partial, then, without a fulfillment of the condition precedent (and it not being waived) appellee could have recovered nothing. Appellee took the burden and the risk of maintaining that the loss was total.

Furthermore, a careful inspection of the clause of the policy providing for the arbitration shows that it required the arbitrators, not to determine the amount of loss or damage in fact, and under the terms of the statute, but to find the extent of the loss, to be estimated upon an entirely different basis, the one pointed out above in this opinion. This was the only arbitration asked for by appellant, or provided for in the contract of insurance. The policy of the state has been to close this very question of value of property totally destroyed. The reasons supporting this policy are well known, and are not of recent promulgation. Appellant's effort seems to be to have the law so construed that the parties by their contract may bind themselves in advance to defeat this policy of the law, and return to the very conditions sought to be corrected by the legislative action.

The circuit court properly decided that appellee's failure to submit its claim of total loss to arbitration was not available as a defense to that claim.

The instructions given are based upon former decisions of this court. *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. 279; *Palatine Ins. Co. v. Weiss*, 59 S. W. 509; *Ætna Ins. Co. v. Glasgow E. L. & P. Co.*, 107 Ky. 77, 52 S. W. 975; *Thuringia Ins. Co. v. Malcott*, 64 S. W. 991, 55 L. R. A. 277; *Germania Ins. Co. v. Ashby*, 65 S. W. 611. We adhere to the principles announced in those cases.

One of the complaints on account of the trial court's rejecting evidence offered for appellant is that a letter written by appellant's adjuster to one White, whom it had selected as its representative in an effort to settle the loss, was not admitted. Mr. White had a conversation with County Judge Smith, of Bourbon county, relative to the loss, and handed the letter to Judge Smith, who read it. Some parts of the conversation then ensuing between White and Smith were admitted. It is claimed that the letter formed a part of the colloquy. It does not appear that

anything was said about this particular letter in that conversation. The letter itself does not appear to be relevant as aid in any way in determining whether the loss was total or partial. At best it is a testimonial of appellant's fair intentions in the matter—a fact not in issue. We are of opinion that the letter was immaterial.

Appellant introduced several architects and builders as expert witnesses, who testified that in their opinion the building was not totally destroyed; that, on the contrary, by far the most of it could be utilized with perfect safety in rebuilding or repairing. They went into detail in describing the parts fit for that purpose. They had made out estimates of the work and material necessary, according to their opinion, to restore the building. The estimates noted the cost of the labor and material. Appellant offered these estimates in evidence, which were rejected—we think properly so. Then appellant asked the witness, and offered to prove, the cost. This was refused. Some courts have admitted this class of evidence as bearing on the question whether the loss was total or partial. Ordinarily it seems that that fact might be shown in part in that manner. But under the statute (section 700) above, we are of opinion that such evidence would more probably mislead than aid the jury. To illustrate: If, as a matter of fact, the building could have been built new for \$40,000, that fact was entirely irrelevant and immaterial under the statute. Therefore, if one wall alone stood, all other parts being without doubt destroyed, still the building could be restored for \$40,000. Now would that evidence tend to prove that the building was not totally destroyed? We think not. The trial court allowed the witness to describe in minute detail what was necessary to restore the building, and as to the percentage or proportion of it that was destroyed by the fire. The question of cost was alone excluded. In the rulings admitting and rejecting this evidence the trial court, in our opinion, was right.

The verdict was not flagrantly against the evidence. Indeed, there was much evidence to sustain it. There was also evidence, respectable in character, and considerable in extent, to the contrary. Photographs of the building taken during and after the fire are before us. They would seem to bear out appellant's theory that the building was not so injured as to be totally destroyed. However, this class of evidence must necessarily be inconclusive. To the eye it conveys an impression that the witnesses refute. Even some of appellant's witnesses admit that the condition of the walls was such that they must have been torn away down to the top of the first story, yet an examination of the photographs does not give the slightest intimation of that fact. The theory of appellee was, and that was the substance of its evidence, that the walls were sprung, cracked, and so

impaired by water and heat that they were unsafe for use in rebuilding. True, appellant's witnesses contradict this. But the photographs are without much value on that issue, manifestly.

We perceive no reversible error in the record, and the judgment is affirmed, with damages.

STEPHENSON v. STEPHENSON.

(Court of Appeals of Kentucky. March 5, 1903.)

DEED—CANCELLATION—PLEADINGS—SUFFICIENCY TO WARRANT—RELIEF TO VENUE.

1. A mother, having conveyed land to her son for a recited consideration of \$500, sued to recover the balance remaining unpaid. The son answered that the real consideration for the conveyance was the services rendered and yet to be rendered by him in caring for his mother. The proof showed that he had wholly failed to care for her. *Held* error to refuse to permit the mother to file an amended petition asking to have the conveyance canceled.

2. Civ. Code Prac. § 90, provides that the petition must demand the specific relief to which plaintiff considers himself entitled, and may contain a prayer for any other relief to which plaintiff may appear entitled. The original petition, after asking judgment for the balance of the purchase price, asked for "all proper, general, and equitable relief." *Held*, that the mother could ask to have the deed canceled under the broad prayer of the original petition.

3. Where the recited consideration for a deed from a mother to son is the payment of \$500 from him to her, of which \$20 is paid, but the real consideration is the son's agreement to care for the mother, and the deed is canceled for the failure thereof, the son is entitled to receive back the \$20.

4. The son is not entitled to receive back money expended by him in improving the land, where it appears that the amount thereof will not more than equal the rental value of the land during the time he has had possession.

Appeal from circuit court, Pulaski county. "Not to be officially reported."

Action by Polly Stephenson against W. M. Stephenson. Judgment dismissing the petition, and plaintiff appeals. Reversed.

O. H. Waddle, for appellant. J. W. Colyar and W. A. Morrow, for appellee.

SETTLE, J. The appellant, Polly Stephenson, widow of Jesse Stephenson, deceased, became, by the death of a son, Riley Stephenson, the owner, in fee simple, of an undivided one-half of several small and adjoining tracts of land in Pulaski county, the other half having descended to her husband. Jesse Stephenson, who was then living; but upon his death, which occurred at a later date, she became entitled to an estate for life in the whole of his undivided half of the lands mentioned, as a homestead, the same being worth less than \$1,000. On October 6, 1900, she, by deed, conveyed the undivided one-half interest in the lands which had descended to her by the death of her son Riley to the appellee, W. M. Stephenson, also a son, for the recited consideration of \$500,

the payment of which was acknowledged in the deed. Soon after the conveyance of the land to him, the appellee with his family, consisting of a wife and several children, moved on the land and into the house which had been occupied by his mother; he having built for her another small house near by, which she was expected to occupy. Unpleasantness soon arose between appellant and appellee, his wife, and children, which caused her to leave the place, and thereafter to institute this suit in the Pulaski circuit court.

It is alleged in the petition that, although the deed acknowledged the payment of the entire consideration of \$500, only \$20 of the same had in fact been paid, leaving due her \$480, which appellant promised to pay, but failed to do so. It is also averred in the petition that appellant is entitled to a lien on the lands conveyed to secure the payment of the \$480. The petition closes with a prayer for judgment in her favor against appellee for the \$480 and interest, for the enforcement of her lien, and, finally, for "all proper, general, and equitable relief." The answer admits the execution of the deed, and that only \$20 of the \$500 consideration named therein has been paid, but denies that \$500 is the true consideration, and avers that the real consideration is the service he has performed, and is yet to perform, in caring for and supporting the appellant, who is admitted to be very old and feeble. The reply denies the material allegations of the answer.

After some of appellee's depositions were taken, appellant offered to file an amended petition, in which she asks the cancellation of the deed made to appellee, and the restoration to her of the land, if the court should be of opinion that the averments of appellee's answer are true. The chancellor refused to permit the amendment to be filed, to which appellant excepted. The trial of the case resulted in a judgment dismissing the petition; hence this appeal.

While the evidence in the case is conflicting, it shows that, shortly after appellee and his family removed to his mother's house, disagreements arose between her and his wife and children, so serious and violent as to render it impossible for her to remain with or near them, or for either appellant or appellee to carry out the contract which he claims was the true consideration for the conveyance of the land to him. Appellant is shown to be 80 years old, and it is doubtless true that, in her dotage and feebleness, she was not altogether blameless in respect to the matters of disagreement that arose between her and the wife and children of the son. But it is shown by the evidence that much of the mistreatment accorded her by appellee's wife and children was cruel and wholly unjustifiable; and, besides, it is further disclosed by the proof that appellee has failed to comply with his undertaking to care for and support his mother. Upon the con-

trary, she has been neglected and abandoned by him and others of her own flesh and blood, whose duty it was and is, independent of compensation or reward, to see that she is maintained in comfort during the few remaining days of her life. It must, therefore, be taken for granted that, if the \$500 mentioned in the deed was the true consideration for the conveyance, \$480 of it has not been paid. Upon the other hand, if the true consideration was the appellee's undertaking to live with and support his mother during the remainder of her life, no part of this has been furnished or will be performed by him.

We are disposed to accept the theory that the true consideration for the conveyance to appellee was his agreement and undertaking to properly care for and support his mother, and we find from the evidence that he has not even in part complied with his undertaking; that there has been and is a failure of consideration, and the question to be determined is, what relief shall be allowed the appellant?

We think the chancellor erred not only in dismissing the petition, but that he also erred in refusing to let the amended petition be filed which was tendered by appellant, as the effect of such filing would be to make her petition as amended conform to the proof, and we think it was proper for her to ask of the chancellor the relief therein claimed, under the broad prayer of the original petition.

Section 90 of the Civil Code of Practice provides that "the petition must state facts which constitute a cause of action in favor of the plaintiff, and must demand the specific relief to which the plaintiff considers himself entitled, and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled. If no defense be made the plaintiff cannot have judgment for any relief not specifically demanded; but if defense be made, he may have judgment for other relief under a prayer therefor."

In *Lillard v. Brannin and Brand*, 91 Ky. 512, 16 S. W. 349, which was an action to enjoin Lillard from transferring certain stocks in his possession to others, the lower court, under plaintiff's prayer for general relief, rendered judgment in their behalf for the value of the stock in controversy, defendant declining to transfer it to them, and this court, in discussing that action of the circuit court, said: "The plaintiffs may pray for alternate relief if they desire; still we perceive no reason, where defense is made, why the prayers for general relief would not authorize a judgment for the value of the stock, if it belongs to the plaintiffs, and the defendant has disposed of it."

So, in view of the provision of the Code and the doctrine announced in the case supra, we feel authorized to say that the averments of the petition, as they will appear after the filing of the amendment upon return of the cause to the lower court, will en-

title the appellant, under the prayer for general and equitable relief, to a rescission of the contract made with appellee, and a cancellation of the deed conveying the land to him.

We are of opinion, however, that appellee should be repaid the \$20 which appellant admits receiving of him as a payment on the land, and upon her failing to return this sum he should be given a lien on the land in controversy for same. But no return should be made to him of the sum he expended in erecting the small house on appellant's land, as we are of the opinion that the cost of the house will not more than equal the rental value of the land during appellee's possession and use thereof, and the cost of the house may be regarded as set off by the rent or use of the land.

For the reasons indicated, the judgment of the lower court is reversed, and cause remanded, with directions to permit the amended petition to be filed, and for the entering of a judgment rescinding the land contract, and canceling the deed from appellant to appellee.

SMITH et al. v. CURD.

(Court of Appeals of Kentucky. March 12, 1903.)

FRAUDULENT CONVEYANCES—SUIT TO VACATE—CONDITIONS PRECEDENT—JUDGMENT AGAINST DEBTOR—NECESSITY—CONVEYANCE TO WIFE—CONSIDERATION—EVIDENCE.

1. Under Ky. St. § 1907a, providing that when any real property has been fraudulently conveyed a person aggrieved may file a petition in equity alleging the facts constituting the fraud, etc., and such suit shall be determined as though it had been brought on a return of nulla bona as previously required, a suit may be maintained to set aside a deed for fraud, before recovery of a personal judgment against the grantor.

2. In a suit to set aside a conveyance to a wife as in fraud of the husband's creditors, evidence held insufficient to establish that the consideration for the purchase of the property was derived from the wife's separate estate.

Appeal from circuit court, Calloway county.

"Not to be officially reported."

Action by L. A. Curd against R. H. Smith and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. P. Holt, for appellants. J. H. Coleman, for appellee.

PAYNTER, J. The appellee instituted this action to recover a judgment against R. H. Smith on a note and account, to which action he made R. H. Smith's wife a defendant, and also J. W. Gilbert. The purpose of the action was to recover personal judgment against R. H. Smith, and subject to the payment of it a house in Murray, Calloway county, upon the ground that it had been conveyed to Mrs. Smith fraudulently, to pre-

vent its being subjected to the payment of the husband's debts.

It is urged as a ground for reversal that the action could not be maintained to set aside the deed which had been made to Mrs. Smith, because a court of equity did not have jurisdiction for that purpose before a recovery of a personal judgment against the debtor. This question is answered by section 1907a, Ky. St., which reads as follows: "That hereafter in this commonwealth it shall be lawful for any party who may be aggrieved thereby, when any real property has been fraudulently conveyed, transferred or mortgaged, to file in a court having jurisdiction of the subject matter, a petition in equity against the parties to such fraudulent transfer or conveyance or mortgage, or their representatives or heirs, alleging therein the facts showing their right of action and alleging such fraud, or the facts constituting it, and describing such property, and when done a lis pendens shall be created upon the property so described, and said suit shall progress and be determined as other suits in equity, and as though it had been brought on a return of nulla bona as has heretofore been required. All laws or parts of laws in conflict herewith are hereby repealed." By this section the Legislature intended to change the old rule with reference to such actions.

Mrs. Smith endeavored to show that she obtained from her father's estate the money with which the purchase money was paid. Her testimony does not satisfactorily establish that as a fact. The contract for the purchase of the property was made with Gilbert by the husband, and the purchase money to be paid was \$100. Afterwards \$40 was borrowed from Gilbert to be used in the erection of improvements on the lot. The evidence tends to show that the property, after the improvements were made, was worth \$350, and Mrs. Smith does not seem to have paid any part of the cost of the improvements, unless it was the \$40 borrowed from Gilbert. We are of the opinion that the court below was justified in its conclusion that the property was purchased, and the improvements erected upon it, out of the means of the husband, and therefore it was subject to the payment of his estate.

We have considered all of the questions raised by counsel for the appellants, and have reached the conclusion that there are no grounds for reversing the judgment.

Judgment is affirmed.

COMMONWEALTH v. HAMILTON et al.

(Court of Appeals of Kentucky. March 11, 1903.)

TAXATION—OMITTED PROPERTY—SUBSEQUENT ASSESSMENT—DOWER INTEREST—LIABILITY OF HOLDER—ACTIONS—PARTIES—DESCRIPTION—LIMITATIONS.

1. Under Ky. St. § 4021, authorizing the assessment of omitted property for taxation at any time not later than five years after its omis-

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 697.

sion, a proceeding cannot be maintained to assess such property where it was not commenced within five years after the failure to assess the same.

2. Where defendant had a dower interest in land omitted from taxation, the fact that in a proceeding against her to compel the assessment of the lands she was summoned as "H., trustee of A. H.," did not affect her personal liability in such proceedings, the words "trustee of A. H." being words of description only.

3. Under Ky. St. § 4049, providing that real estate or any interest therein shall be listed for taxation against the owner of the first freehold estate therein, the owner of a dower interest in one-third of a decedent's land was bound for the payment of taxes thereon.

4. The act of the owner of a dower interest in land in rendering the entire land for taxes is not binding on the children or remaindermen.

Appeal from circuit court, Fayette county.
"Not to be officially reported."

Proceeding by the commonwealth against Mrs. Emma Hamilton and others for the assessment of omitted land. From a judgment for defendants, plaintiff appeals. Reversed.

H. T. Duncan, Jr., for the Commonwealth.
Morton, Darnall & Morton, for appellees.

NUNN, J. This was a proceeding begun in the Fayette county court by the auditor's agent to cause the assessment for taxation of 470 acres of land belonging to the appellees, valued at \$30,000, which had been omitted to be assessed for the year 1895. It had been regularly assessed before that year, and ever since, at that price. It seems that the omission for that year was caused by a change of trustees for the estate of Archie L. Hamilton. On the 14th day of August, 1897, the auditor's agent filed with the county court a statement alleging that the 470 acres of land had been omitted to be assessed for the year 1895, and caused summons to be issued thereon against "Mrs. Emma Hamilton, trustee of Archie Hamilton," which was executed by the sheriff upon her. The proceeding was continued from that time until January 24, 1901, when the auditor's agent filed an amended statement with the county court, and caused a summons to be issued thereon against Mrs. Emma Hamilton, the Security Trust & Safety Vault Company, Mrs. Emma Hamilton, guardian of Archie L. and Amelia Hamilton, and Archie and Amelia Hamilton, to appear and show cause why the land should not be assessed for the year 1895 at the price named. They all appeared, and on a hearing of the case the county court assessed the property in accordance with the statements of the auditor's agent, and from that order the defendants there, appellees here, appealed to the circuit court, and that court sustained their defense and dismissed the proceedings, from which judgment the commonwealth appealed to this court.

We are of the opinion that the lower court was correct in dismissing the proceedings against all the defendants except Mrs. Emma Hamilton, for the reason that more than five

years had elapsed after the failure to assess the property before the proceedings were commenced against them. Section 4021 of the Kentucky Statutes reads as follows: " * * * When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively in the manner provided by law for that year, at any time not later than five years thereafter." But the court erred in dismissing the proceedings as to Mrs. Emma Hamilton, it appearing from the record that she owns a dower interest of one-third in the land, and she should pay the taxes thereon. The proceedings were commenced against her in the year 1897, and she was summoned to answer the proceedings. It is true that she was summoned as "Mrs. Emma Hamilton, trustee of Archie Hamilton," but the words "trustee of Archie Hamilton" were only descriptive of the person, and she in her individual capacity was the only defendant in those proceedings. The record shows that the proceedings were continued at her request, and no further steps were taken until January, 1901, when the auditor's agent filed an amended statement giving a more perfect description of the property and the ownership therein, in no wise changing the cause of action as to her except to decrease her liability for the taxes from the whole to one-third. Section 4049 of the Kentucky Statutes is as follows: "Real estate or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein. * * *" The appellee Mrs. Emma Hamilton, owning the first freehold in one-third of the land, is bound for the payment of the taxes thereon. But even if she had given in the whole of the survey for taxes, having no interest therein except as to one-third, such action by her would not have been binding upon the children or remaindermen. See *Payne, etc., by Guardian v. Arthur, Trustee* (Ky.) 20 S. W. 860.

For these reasons, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

CARTER v. FARTHING.

(Court of Appeals of Kentucky. March 11, 1903.)

APPEAL—JURISDICTION—ACTION TO ENFORCE LIEN ON REALTY—USURY—CONNECTED NOTES—PAYMENT OF PART—BAR OF LIMITATIONS—EFFECT.

1. The court of appeals has jurisdiction to review a suit on a purchase money note in which is sought the enforcement of a vendor's lien, though the amount in controversy is less than \$200.

2. Where three purchase money notes were executed for land, all of them tainted with usury, and two have been fully paid more than a year before suit on the third, usury paid on the first two cannot be allowed as a credit to

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 121.

defendant, under the statute providing for recovery of usury within one year from payment made.

Appeal from circuit court, Graves county. "To be officially reported."

Action by Coleman Farthing against J. C. Carter. Judgment for plaintiff, and defendant appeals. Affirmed.

Robertson & Thomas, for appellant. R. E. Johnston and James Webb, for appellee.

SETTLE, J. On the 6th of October, 1887, appellee sold and by deed conveyed to appellant three parcels of land, aggregating 126 acres, situated in Graves county, Ky., at the agreed price of \$1,650. Three hundred and fifty dollars of this sum was immediately paid by appellant, and he executed three several notes for the remainder of the consideration as follows: Two of \$500 each, due January 1, 1889, and January 1, 1890, respectively, and one of \$300, due January 1, 1891; all to bear interest from January 1, 1888, until paid, at the rate of 8 per cent. per annum. Appellant made annual payments of interest at the rate of 8 per cent. on all three of the notes for several years, and finally paid the principal of the first and last notes, but on October 28, 1901, this action was instituted by appellee in the Graves circuit court on the second note of \$500 which became due January 1, 1890.

The answer filed by appellant sets forth his purchase of the land from appellee, the payment of the \$350 by him, his execution of the three notes for the remainder of the purchase money, and the further fact that he had paid the first and last of the notes after their maturity, respectively, with 8 per cent. on each from January 1, 1888, until paid, and also that he had paid from January 1, 1888, to June 1, 1901, 8 per cent. on the note sued on, and \$100 in addition on August 15, 1898, for which last payment appellee had failed to give him credit on the note.

The answer contains the further averment that the appellant should be credited on the note sued on by all interest in excess of 6 per cent. paid thereon, as well as by the excess over 6 per cent. paid on the notes that had been satisfied by him, on the ground that such excess was and is usurious, and that appellee had no legal right to exact usury of him.

Appellee filed demurrer to the answer, and at the same time entered motion to require appellant to make it more specific.

The lower court sustained the motion to make the answer more specific, and when an amended answer was tendered by appellee in compliance with the order of the court in that particular, permission to file the same was refused. The court thereupon sustained the demurrer to the original answer, and rendered judgment in appellee's favor for the amount due on the note sued on, less the usury that had been paid thereon, and

the \$100 with which appellant had not been credited; also decreed the enforcement of the lien retained in the deed, and a sale of enough of the land thereby conveyed to pay appellee's debt and costs, but refused to allow him credit for any of the sums of usury that had been paid by him on the other two notes. From this judgment of the lower court appellant has appealed.

There are but two questions presented by the record for our consideration, viz.: First, has this court jurisdiction of the appeal? Secondly, did the lower court err in refusing to credit the note sued on with the sums of usury that were paid by appellant upon the two notes discharged by him?

It is contended by counsel for appellee that the appeal cannot be entertained by this court, because the aggregate amount of the usury paid by appellant upon the two notes that have been satisfied, and for which he now asks credit, is less than \$200. We are unable to sustain his contention, for the reason that this court has more than once decided the point otherwise. Its most recent deliverance in regard thereto may be found in *Smith's Adm'r's v. Catlin, etc.* (Ky.) 63 S. W. 473, wherein it is said "this court has been uniformly holding for a number of years that, where a lien is asserted upon land, the title to it is brought in controversy, regardless of the amount of the claim asserted or adjudged; whether this court was in error in so holding it is too late now to consider." It therefore follows that the motion to dismiss the appeal must be overruled.

In considering the second and only remaining question involved in this appeal, we take it for granted that the lower court refused in its judgment to credit appellant by the sums of usury which he paid on the two notes discharged by him, because his demand for such credit was not made for more than a year after the payment of the notes—that is, beyond the statutory period in which usury may be recovered of the payee by the payor—and we are constrained to hold that this conclusion of the lower court is sustained by the law.

It is contended, however, by counsel for appellant, that the entire sum of \$1,300, for which the three notes were given, constituted but one debt contracted for the land, and the three notes only evidenced that one debt, though dividing the periods as to which each particular part of it would have to be paid by appellant, and that as long as any part of the debt remained unpaid all usury paid on any of the notes could be applied as payments thereon. We are unable to find that this view of the law is supported by any of the authorities cited in the brief of counsel for appellant.

It has, however, been repeatedly held in this state, that usury cannot be recovered after the expiration of a year from the time of the extinguishment of the debt upon which it was paid, and in *Sutherland v. Owensboro*

Savings Bank, 8 Ky. Law Rep. 431, it was held by the superior court that, "where separate obligations, or bonds, are executed by a debtor at the same time, to the same obligee, payable at different times, each constitutes a separate and distinct debt, and, one of them having been paid off, with usury, the fact that the others remain unpaid will not extend the time in which the debtor may sue to recover the usury paid on the first bond; therefore, in an action upon the bonds remaining unpaid, the debtor will not be entitled to a credit for usury paid on the first bond, more than one year having elapsed from the time of payment." In *Riddle v. Rosenfeld*, 103 Ill. 600, it was held that "the payment of usurious interest upon the first four notes of a series does not entitle the maker to plead it as a defense to an action on the fifth."

While the prime object of the usury laws is to protect the debtor from the oppressive exactions of the creditor, where, as in this state, the statute fixes the period after the extinguishment of the debt within which an action may be instituted to recover the usury paid, it must be brought within the time thus fixed, or the courts will be powerless to grant relief; and this we understand to be the rule though the usury be paid upon one or more of a series of notes, leaving others to be thereafter paid.

It has been held by this court that in the sale of land an agreement by the purchaser to pay a rate of interest in excess of 6 per cent. in notes given therefor may be enforced, provided such interest constitutes a part of the consideration to be paid for the land. It is not averred by appellee, nor claimed in argument, that the 8 per cent. interest expressed in the notes executed by appellant constituted any part of the consideration agreed to be paid by him for the land sold him by appellee; so that question does not arise in this case.

Finding no error in the judgment of the lower court, the same is affirmed.

OLLIGES v. KENTUCKY CITIZENS' BUILDING & LOAN ASS'N'S ASSIGNEE.

(Court of Appeals of Kentucky. March 12, 1903.)

**BUILDING AND LOAN ASSOCIATIONS—USURY—
INSOLVENT ASSOCIATIONS—LOSSES—BOR-
ROWING MEMBERS—CREDITS.**

1. Where, in an action by a borrowing stockholder of a building association, after settlement to recover usury paid, the only evidence of losses sustained by the association was that since its assignment for the benefit of creditors the assignee had charged off a large amount on account of uncollected usury, and that borrowing members had recovered judgment for usury collected, but there was no evidence that the association was insolvent when plaintiff's membership was terminated, or that any money was lost prior to that date, plaintiff was entitled to credit for everything paid in in excess of 6 per cent. interest on the loan.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by Mary A. Olliges against the assignee of the Kentucky Citizens' Building & Loan Association to reopen a settlement made with the association and recover usury paid, consolidated with a suit for a settlement of the assigned estate, brought by the assignee. From a judgment in favor of the assignee, plaintiff appeals. Reversed.

C. B. Blakey, for appellant. Phelps & Thum and S. E. Sloss, for appellee.

BURNAM, O. J. This is the second time this case has been brought to this court on appeal. The opinion in the former appeal is reported in 66 S. W. 617. The questions involved upon the appeal have been so frequently decided that it is only necessary that a summary of the facts leading up to the judgment appealed from should be stated to enable the court to correctly determine the legal questions involved.

On the 2d day of May, 1892, the appellant borrowed from the appellee \$900, and executed her note therefor, secured by a mortgage on certain real estate, and at the same time subscribed for 10 shares of stock of the association. At the beginning of her dealings with the company, there was deducted from the \$900 loaned her \$55, the amount of money actually received by her being \$845. She made 16 monthly payments of \$15 as interest and premiums, the last being made on the 30th day of November, 1893. On the 7th day of February, 1896, she had a final settlement with the company, at which time she surrendered to them for cancellation her certificate of stock, which was valued at \$134.80, and paid to them the additional sum of \$1,033.50, and the association then canceled the mortgage held by them upon her property. On the 4th day of February, 1897, she instituted this suit against the association to recover \$277.98 of usury collected from her by the association. On the 29th of June, 1897, the association made a general deed of assignment for the benefit of its creditors to the appellee, W. R. Logan, and on the 2d of July, 1897, he instituted a suit for the settlement of the assigned estate. On the 1st of February, 1898, the assignee filed an answer to the suit for usury, and subsequently this suit was consolidated with the suit for a settlement of the assigned estate brought by the assignee. The case was then submitted upon appellant's motion for judgment, which the chancellor overruled, upon the ground that she should be charged with her share of the losses and the expense of the business, and subsequently dismissed her petition. That judgment was reversed by this court, the court holding that whilst appellant was properly chargeable with her proportionate share of the expenses and losses of the association

up to the date of her withdrawal therefrom, she was entitled to have these expenses clearly ascertained and credited upon what was due her from the company. After the return of the case to the lower court, it was referred to the master commissioner to ascertain the amount due appellant. Under that order the commissioner reported that appellee owed appellant \$344.50, with interest from the 24th of June, 1902. Numerous exceptions were filed to this report, and the trial court decided that appellant was entitled to no credit for the money paid by her on her stock; that she should be charged with all dividends declared on her stock, whether paid to her or not; that she was not entitled to a credit for the \$10 paid by her to the association as an admission fee; and that she should be charged \$82.55, which the court found to be her proportionate share of the losses sustained by the association during her connection therewith; and remanded the case to the commissioner, with instructions to report in accordance with his rulings upon these exceptions. In pursuance to the second order of reference the commissioner reported appellee indebted to appellant in \$1.70, and judgment was entered in conformity therewith. And she appeals, and asks that the judgment be reversed, and the trial court instructed to enter a judgment for the amount found due by the first report of the commissioner.

It was held in *Safety B. & L. Ass'n v. Ecklar* (Ky.) 50 S. W. 50, that a borrowing member, in settling with a going concern, was entitled to credits for everything paid in in excess of 6 per cent. interest; but that if the association was insolvent, the borrower, as a stockholder, should bear his proportionate share of the losses and expense of winding up the association. And the rule laid down in this case has been uniformly followed in repeated decisions of this court.

The plaintiff ceased to be a stockholder in the association on the 30th day of November, 1893, when she ceased to pay premiums upon her stock, and her connection with the company as a borrower ceased on the 7th day of February, 1896. The only evidence in the case on the question of losses is to the effect that since the assignment the assignee, under orders of court, has charged off \$24,374.90 on account of uncollected usury, and that borrowing members of the association have recovered judgments for usury collected against the association since the assignment by suit of about \$5,000. There is no evidence at all in the record which conduces to show that the association was insolvent when appellant's connection with it terminated as a stockholder in 1893, or that it had lost any money prior to that date; and this court, in a number of cases, has held that losses based on the failure to collect usury are not such losses as can be properly charged to a borrower; that it was

simply a failure of the company to realize certain anticipated profits. See *People's S. & B. Association v. Denton* (Ky.) 50 S. W. 53; *National B. & L. Ass'n v. Bybee* (Ky.) 53 S. W. 670. Appellee was charged, during the time of her connection with the company, \$1 a share per month on all the stock held by her to meet expenses; and while there is some testimony to the effect that this did not cover the expenses during that period, it is not made to appear in such tangible and definite form as would justify the court in allowing any additional credit on this account. See *U. S. B. & L. Ass'n's Assignee v. U. S. B. & L. Ass'n's Assignee*, (Ky.) 56 S. W. 422. And as the proof fails to show that any expenses or losses were incurred whilst appellant was a member of the association, she was entitled to a judgment for the balance found due her by the commissioner's report filed on the 24th of May, 1902.

The judgment is therefore reversed, and cause remanded, with instruction to render a judgment in favor of appellant for \$344.50, with interest from the 24th day of May, 1902, the balance found due to her by the first report of the commissioner.

CHOWNING v. HOWSER et al.

(Court of Appeals of Kentucky. March 12, 1903.)

DEED—SETTING ASIDE—FRAUD AND UNDUE INFLUENCE.

1. Evidence in a suit by a relative of a deceased grantor to set aside his deed as obtained by fraud and undue influence held insufficient to overcome the presumption of fairness.

Appeal from circuit court, Spencer county. "Not to be officially reported."

Suit by B. H. Howser and others against C. R. Chowning. Judgment for plaintiffs. Defendant appeals. Reversed.

Gilbert, Peak & Gilbert, for appellant. J. O. Beckham & Son, J. W. Crume, and T. L. Edelen, for appellees.

HOBSON, J. Bradford Howser died intestate, a resident of Spencer county, in December, 1899, without issue. His wife had died some years before. This suit was filed on October 20, 1901, by B. H. Howser, who was his nephew and one of his heirs at law, to set aside a deed made by the intestate to C. R. Chowning, another nephew, for a tract of 112 acres of land, on the ground that the deed was obtained when the intestate was feeble in mind and body, by fraud and undue influence. The allegations of the petition were denied, and on final trial the court set the deed aside.

The deed was executed on February 23, 1895. The grantor, Bradford Howser, was at this time 73 years old. He owned about 200 acres of land, worth, say, \$25 an acre. He had something like \$1,400 in money. His wife had died some years before. They had

no children, and after his wife's death a man named Stewart lived with him for a year or two. Stewart moved away, and he then remained at home, keeping a negro man with him for some months. Chowning, who was his nephew and only a few years younger than he, lived in the neighborhood on a tract of his own. Chowning had no children with him, and the uncle, Bradford Howser, proposed to him that, if he would sell his place and move to the uncle's place and take care of him as long as he lived, he would deed him the 112 acres in controversy. It was suggested to the old gentleman, by a mutual friend who was present, that he sell his place, and come and live with Chowning at Chowning's home. He said "No," his land was better than Chowning's, and he wanted to be at his old home, and he wanted Chowning to have the place. Chowning hesitated to sell his place, but after the second visit of his uncle agreed to the arrangement, sold his farm, and moved to the uncle's place. The uncle got a surveyor to come and run off the 112 acres he was to convey to Chowning, and went himself to a neighboring town and had the deed written, Chowning not being present. The next day he and Chowning went in together, and the deed was read to Chowning. They then went before the clerk, the uncle acknowledged the deed, and it was put to record. From that time until his death he made his home with Chowning, and no question was made of the fairness of the transaction until some time after his death. The consideration of the deed, as originally drawn by the draftsman, was thus stated: "For and in consideration of the sum of one dollar cash in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of Bradford Howser making his home during his natural life with O. R. Chowning, his heirs or assigns, on the property this day conveyed from said Howser to said Chowning," etc. When it was read to the old man, Chowning not being present, he suggested to the draftsman that \$1,000 would sound better, and at his suggestion it was changed so as to read \$1,000 instead of \$1. When it was read to Chowning the next morning, he at once said that this had not been mentioned to him, and the uncle stated that he was not to pay anything. There is some proof in the record, on behalf of the appellees, showing that from his youth Bradford Howser was subject to spells, during which he was not competent to transact business; but even the evidence for appellees shows pretty conclusively that at other times he was a man of good sense, and capable of attending to his business. He had made what he had. He had always transacted his own affairs, and from the record it is apparent that those who knew him did not question his power to dispose of his property according to a settled purpose of his own. His family physician and a number of his neighbors, whose testimony was taken for appellant, testify that

he was a man of strong mind, or at least of average capacity. Other persons traded with him, and two of the witnesses, whose testimony was taken for appellees, seem to have contemplated making an arrangement with him about taking care of him without any idea of his incapacity to contract with them. The testimony of the friend who was present when the arrangement with Chowning was proposed, the surveyor of the land, the draftsman of the deed, the clerk who took the acknowledgment, all testify to his capacity at the time of the transaction, and there is in fact no contrary evidence worth considering, except such as relates to conduct at other times in many cases years before, when he was in one of the spells referred to. He was an ignorant man. He had many notions that a man of more intelligence would not have entertained, but that he had sufficient capacity to make a contract the great preponderance of the evidence establishes beyond doubt. The direct testimony of the witness on this subject is sustained by the circumstances disclosed by the proof.

There is an utter want of proof that any undue influence was exercised by Chowning, or that any fraud was practiced by him in the obtaining of the deed. The proposition for the arrangement came from the uncle, and was pressed by him. Chowning then lived at some distance from him. The old man was alone. He had but one brother surviving who lived in Missouri. He was apparently not very friendly with appellee B. H. Howser, the nephew who brought this suit, and declared that he should have none of his estate. He was attached to Chowning and wife, and it was important for him in his declining years to have somebody with him who would treat him kindly, and do for him the tender offices that affection only will perform for the old. He had a cancer on his nose. It was uncertain how long he would live, or what his condition would be during that time, and, if he had lived out his expectancy of life, Chowning would have well earned the value of the farm in taking care of him. Chowning and his wife and the old man constituted the family. We think the proof shows unquestionably that the old man was kindly treated and was satisfied with the arrangement. He so declared on numerous occasions, and also declared the nature of the contract made with Chowning. The people who lived in the house from time to time with them, or who worked on the farm, testify to a state of facts showing that the old man got at the hands of Chowning and his wife what he wanted. It is true he carried in his own wood; sometimes made up his own bed. He often bought sugar or coffee or other things; but all this he did of his own volition. It is also true that after his death but \$40 in money came to the hands of his administrator. But there is an utter want of evidence to show what had become of the

money, or that Chowning received it. The fact is shown that he was in the habit of hiding his money around, and it also appears that he lent a niece \$600, which she testifies she paid back to him in small sums from time to time, except what she paid to his administrator after his death.

Under all the evidence, it seems to us the arrangement made with Chowning was not an unreasonable one for the old man to make. They were both not far from the same age. The old man was of a disposition that everybody could not get along with him. He had no near relations, and he was in a condition in which he needed a home and provision against the infirmities of coming years. He had a right to secure himself in these by a disposition of his property, if he saw fit. Want of capacity or fraud or undue influence is not presumed without proof. The law presumes a man sane until the contrary is proved. It presumes a contract was fairly made unless undue influence is shown. It is not presumed that a grantee practiced a fraud in a transaction with the grantor; on the contrary, fraud must be established by positive proof, or by circumstances which cannot reasonably be reconciled with the presumption of fair dealing. The evidence before us utterly fails to overthrow the presumption in favor of the deed. On the contrary, taken as a whole, it preponderates on the side of appellee.

The judgment, therefore, canceling the deed is reversed, with directions to dismiss the petition.

MASTIN v. ZWEIGART et al.

(Court of Appeals of Kentucky. March 10, 1908.)

JUDICIAL SALES—APPRAISEMENT—INADEQUACY—PREJUDICE OF APPRAISER—SUFFICIENCY OF EVIDENCE—BID OF APPRAISER'S BROTHER—EFFECT.

1. After appraisers to appraise land for judicial sale had been sworn, the owner stated to the master commissioner that he feared one of them would not do him justice, and was assured that the commissioner would protect him. The commissioner testified that the land was appraised at a fair value. There was evidence that the land was worth \$25 per acre, the appraisal being \$20. *Held*, that the sale would not be set aside for prejudice of the appraiser.

2. The mere fact that a brother of an appraiser bid at a judicial sale will not invalidate it.

3. Land was appraised for judicial sale at \$20, and sold for \$18.25. On an application by the owner to set aside the sale for inadequacy in the appraisal, affidavits were filed that the land was worth \$25, and that it should have been appraised at that amount. It was not shown that any purchaser would have given more had the appraisal been larger, or that any one would increase the bid on a resale. The amount received being more than two-thirds of \$25, the owner, even on that appraisal, would have had no right to redeem. *Held*, that the sale would not be set aside.

Appeal from circuit court, Mason county.
"Not to be officially reported."

Suit by John G. Zweigart and others against Samuel E. Mastin. From a judgment refusing to set aside a judicial sale, defendant appeals. Affirmed.

M. C. Hutchins and Allen D. Cole, for appellant. Garret S. Wall, for appellees.

PAYNTER, J. The land in controversy was ordered sold to satisfy liens upon it. The appraisers valued the same at \$20 per acre. It brought \$18.25 at the sale. The appellant sought to have the sale set aside, principally upon the grounds: (1) That one of the appraisers was unfriendly to him; (2) that it was appraised at an inadequate price. This court has frequently held that mere inadequate price is not alone sufficient to set aside a judicial sale. After the appraisers had been selected and sworn and were proceeding to appraise the land, the appellant expressed to the master commissioner a fear that one of the appraisers would not do him justice, on account of some differences between them. The master commissioner assured him that, if he discovered any purpose upon the part of the appraisers not to treat him fairly in the appraisal, he would interfere to protect his rights. The master commissioner failed to discover any purpose to appraise the land at less than a fair value, and testified that he thinks it was so appraised. There is not the slightest evidence that either the master commissioner or the appraisers had any purpose in the discharge of their duty to do other than what they thought was exactly right. There is no evidence of any fraudulent conduct upon the part of the appraisers.

A mere mistaken opinion of the appraisers as to the value of the land does not affect sale. *Vallandigham v. Worthington & Co.*, 85 Ky. 87, 2 S. W. 772. The evidence that the land was worth \$25 per acre could not do more than to conduce to show that the appraisers erred in their judgment as to the value of the land. In the absence of other evidence tending to show fraud in the appraisal of the property, it was irrelevant. *Knight v. Whitman*, 6 Bush, 51, 99 Am. Dec. 652.

It is suggested that a brother of the appraiser to whom we have referred bid upon a small part of the land to be sold. It was held in *Isom, etc., v. Kinnaird, Treasurer, etc.* (Ky.) 17 S. W. 633, and *Barlow, etc., v. McClintock*, 11 S. W. 29, that the mere fact that one of the appraisers purchased the land at the sale would not render the appraisal irregular or void, in the absence of evidence showing that he contemplated purchasing it at the time of the appraisal. If the circumstances as detailed in those cases would not render the sale irregular or void, then certainly the fact that a brother of one of the appraisers bid upon a small piece of the land would not render the sale invalid.

The appellant filed a number of affidavits,

in part of which it was stated that the land should have been appraised at \$25 per acre. In others it was stated that it was worth \$25 per acre. If it had been appraised at \$25 per acre, as it brought more than two-thirds of that amount, the appellant would not have had the right to redeem it. The object of an appraisal is to give the debtor the right to redeem if it sells for less than two-thirds of the appraised value.

Certainly the appraisal did not affect the value of the land in the least. It was not shown that any one would have given more for the land had it been appraised higher, nor does any one come forward and say that he would give more than the amount bid should a resale be ordered. We do not want it understood that we hold that, if some one had done so, the sale would have been set aside.

The judgment is affirmed.

HARMAN et al. v. AVRITT.

(Court of Appeals of Kentucky. March 10, 1908.)

DECEDENT'S ESTATES—SALE OF LANDS—DIVISION OF PROCEEDS—SETTLEMENT.

1. Where, in proceedings to sell the land of a decedent, and settle his estate, it is adjudged that his widow is entitled to a certain fractional part of the "amount" of the sale, she is entitled to such fraction of the gross amount, and not merely of the net proceeds.

2. Heirs seeking to require a master commissioner to account for the proceeds of land belonging to the estate, sold by him by order of the court, cannot complain that the widow has not been paid her share in full, she herself making no complaint.

3. Where the heirs of a decedent and the master commissioner who sold the lands of the estate had a settlement as to the proceeds, at which they were represented by attorneys, and received the amounts found due them, such settlement should not be disturbed 11 years thereafter.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Proceedings by Charles K. Harman and others to compel an account by G. C. Avritt of moneys received by him, as master commissioner of the court, on the sale, by order of the court, of land belonging to the estate of S. H. Harman, deceased. From a judgment in favor of defendant, petitioners appeal. Affirmed.

C. S. Hill and W. C. McChord, for appellants. Samuel Avritt, for appellee.

PAYNTER, J. S. H. Harman died in 1885, leaving a widow and nine children. His administratrix and heirs brought a suit to sell the real estate left by him, and to settle the estate. In the proceedings had it was adjudged that the widow should have paid to her \$750 out of the proceeds of the sale. There was also adjudged to her, in lieu of dower, 19.42 per cent. of the amount of the sale of the real estate. At that time the appellee was master commissioner of the court,

and, as directed by the court, sold the land, and, as he claims, distributed the proceeds according to the order of the court. The evidence conduces to show that more than 11 years before the institution of this suit he had a settlement with the widow and heirs. At the instance of a part of the heirs the case was redocketed, and proceedings inaugurated with a view of having it determined whether or not he had disbursed the money which came into his hands. The appellants, being the parties who were making the question, reached the conclusion that appellee had in his hands nearly \$500 of the money which he collected. To arrive at that amount, they concluded that the widow was only entitled to 19.42 of the proceeds of the net amount of the sale, instead of the gross amount. Under the plain wording of the judgment, she was entitled to that per cent. of the amount which the real estate brought. The appellee insists that each of the nine heirs was entitled to \$161.61. John Harman, one of the appellants, testified that he had not received his part of the estate, yet a check for that exact amount was drawn in his favor by the appellee, indorsed by the payee, and the proceeds of it passed to his credit in a bank in the state of Kansas. This is referred to to show how hard it is, after the lapse of many years, to recall business transactions with accuracy and certainty. The appellee produced the receipt of the appellant J. H. Harman for \$91.61, "balance in full of my distributable share in the estate of S. H. Harman, deceased." He produced an order, signed by him, in favor of Mrs. Mary Harman on him for \$70, and upon which there is a memorandum, signed by Mary Harman, to the effect that she had received the \$70. These amounts make the sum of \$161.61. He produced the receipt of the appellant Martha Smock for \$141.61, "balance in full of my share in the estate of S. H. Harman, deceased." The fact that the amounts paid were \$161.61 is suggestive that they were paid on the settlement. Besides, some of these receipts recite that it is in full of the signer's distributable share of the estate.

The widow is not complaining that she did not receive her share of the estate. The fact that she did or did not does not diminish or add to the rights of the appellants in the least, as they were only entitled to the share of the estate going to them, respectively, regardless of the sum which should have been paid to the widow by the appellee.

The sum which the appellants claim the appellee owes consists of more than \$200 that should have been paid to the widow, and certain costs, of which no account seems to have been taken in making the calculations to impeach the accuracy of the appellee in the settlement of the matter.

When the matter was fresh in the minds of all of the interested parties, they settled with the appellee, and, considering that there

was such a small amount of money to be distributed to each, it was hardly possible that the appellee should have retained four or five hundred dollars which belonged to the widow and the heirs without complaint, and that he should have continued to hold it for the period of 11 years without question. Besides, they had attorneys to look after their interests in the settlement of the estate, and who, the appellee says, were present when the settlements were made.

Judgment is affirmed.

ADAMS EXPRESS CO. v. SMITH.

(Court of Appeals of Kentucky. March 10, 1903.)

SERVANT—INJURY—ROTTEN PLANK—LIABILITY OF MASTER—LEASED PREMISES—EVIDENCE—QUESTION FOR JURY.

1. A servant stepped on a rotten plank, and broke the bones of his leg and sprained his ankle. His injury was a very painful one, confining him to the house for some time, and requiring him to go on crutches much longer. *Held*, that a verdict of \$1,000 was not excessive.

2. A porter in the employ of an express company received injuries by stepping on a rotten plank in a platform in front of the company's room, over which he had passed many times a day for several years. He and the other employees testified they did not know the plank was rotten. Its condition was not apparent from the top. *Held*, that the question whether he knew, or by ordinary care could have known, of the defective plank, was for the jury.

3. Even if the porter had equal means of ascertaining the defect in the plank, the company would be liable, if he did not in fact know of it, for it was its duty to exercise reasonable care to furnish him a safe place to work, and he had a right to assume the place was safe.

4. The fact that the master does not own the premises, but leases them from a third party, does not absolve him from the duty of seeing that they are safe for his servant to work in.

5. A servant was injured by the giving way of a plank in a platform on his master's premises. It appeared that the plank had been in place at least two years longer than its ordinary life. *Held* to sufficiently show that the plank was in fact rotten and unsafe when the servant was injured.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Frank C. Smith against the Adams Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant. O'Neal & O'Neal, for appellee.

HOBSON, J. The Adams Express Company rents a room at the station of the Louisville & Nashville Railroad Company at Tenth and Broadway, Louisville, Ky., at which it handles all express matter passing through that station. It keeps there a clerk who has charge of the room, and several porters. The room is on the west side of the station building proper, and in front of the room is a platform 3 or 4 feet high, something over 11 feet wide, leading down on one side to Broadway and on the other to the station platform.

On this platform trucks are run, by which the freight is conveyed to and from the trains. Appellee, Smith, was a porter in the company's service at this room, and, as such, it was his duty to bring the express matter from the trains to the room. On January 5, 1900, while bringing a heavily loaded truck from a train along this platform, he was required in the discharge of his duty to walk near the outer edge of the platform. There was a cover over the platform which protected part of it, but the outer part of the platform was not protected by the cover. In consequence of this, the plank had become rotten, and when appellee, to keep a package from falling off, placed his foot on one of these planks, it broke, precipitating him on the railroad tracks below, breaking the bones of his leg, and spraining his ankle. At least, these are the facts as shown by the evidence on his behalf, which seems to have been followed by the jury. His injury was a very painful one, confining him to his house for some time, and requiring him to go on crutches much longer. At the trial, in November, 1901, his leg was still not strong, although it was supposed time would gradually improve his condition. The jury fixed his damages at \$1,000, which is not excessive under the evidence.

It is earnestly insisted that he cannot recover, because, as he passed over the platform so often in the discharge of his duty—something like 20 or 30 times a day for two or three years—he must have known the condition of the platform, and, therefore, took the risk. But he testifies that he did not know it; that he had simply gone over the platform in the discharge of his duties, and had not observed that the plank was rotten. In this statement, he is confirmed by all the servants of appellant who are introduced as witnesses on its behalf at the trial, and had the same means of observing the platform as he had. They all testify that they did not know the plank was rotten. The proof also shows that if you got down off the platform, and looked underneath, the rottenness of the plank was apparent, but it was not so apparent from the top; and as appellee was not required to inspect the platform, but only to discharge the duties which were assigned him in carrying the freight to and from the train, the question was properly submitted to the jury as to whether he knew, or by the exercise of ordinary care should have known, of the defectiveness of the plank. The court properly refused to instruct the jury in addition that if he had equal means of knowledge with the defendant it was not liable; for it was the duty of the defendant to exercise reasonable care to furnish him a safe place to work, and it was not his duty to get down off the platform, and inspect it underneath, to ascertain if it was safe before proceeding to run its truck over it as he was told to do. The inspection of the platform was no part of his duty. He had a

right to assume it was safe, unless he knew it was otherwise, or by the exercise of ordinary care he should have discovered it in the discharge of his duty. *Champion, etc., Co. v. Carter* (Ky.) 51 S. W. 16; *L. & N. Railroad v. Foley*, 94 Ky. 224, 21 S. W. 866.

It is also insisted that the express company is not responsible because it did not own the premises, but rented them from the railroad company, and it was the duty of the railroad company to keep them in repair. The platform was the only way of reaching the room in which the express company did business. The use of the platform was, therefore, a necessary appurtenance to the use of the room. Whether the express company was owner or lessor, it was incumbent on it to exercise reasonable care to furnish its employes a safe place to work, and this duty extended not only to the room in which the work was mainly done, but to the approach to that room. It required appellee to work in its service in that room and on that platform. It furnished him these as the place for the performance of his duties, and the master cannot avoid responsibility for the nonassignable duty of furnishing his servant a safe place to labor by leasing the premises, instead of owning them himself.

The proof shows that this platform was built about the year 1889, and that the life of such plank as composed it is about eight years. The platform, therefore, at the time that appellee was injured, had stood at least two years longer than the ordinary life of the plank. It is also shown that appellant had in its employ a watchman, whose duty it was to look out and report defects, and these when reported were remedied by the railroad company. It was also the duty of the agent who had charge of the room to do this. The proof leaves no doubt that the planks were in fact rotten and unsafe and had been for some time—at least, out at the end where appellee fell.

The first instruction, taken as a whole, only warranted the jury in finding for the plaintiff if the platform was not reasonably safe, and the defendant knew of its dangerous and unsafe condition, or could have known of it by the exercise of ordinary care. This is again repeated with emphasis in the fourth instruction. There is no room for criticism, therefore, of the instructions as requiring of the employer anything more than ordinary care as to the safety of the platform.

Judgment affirmed.

ARNOLD v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 10, 1903.)

HOMICIDE—DEGREE OF CRIME—INSTRUCTION.

1. Under Cr. Code Prac. § 239, providing that, if there be a reasonable doubt of the degree of

the offense which defendant has committed, he shall only be convicted of the lower degree, it is error, in a prosecution for homicide, to omit to so instruct.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Lucien Arnold was convicted of murder, and appeals. Reversed.

Sweeney, Ellis & Sweeney, Walker & Slack, and Wathen & Morrison, for appellant. C. J. Pratt and M. R. Todd, for the Commonwealth.

BARKER, J. The appellant, Lucien Arnold, and his brother, Hugh Arnold, were jointly indicted by the grand jury of Daviess county charged with the wilful murder of Luther Robinson. A joint trial of the brothers resulted in their conviction, and sentence to the penitentiary for the term of 21 years. Upon an appeal to this court the case was reversed. 55 S. W. 894. Upon the return of the case to the Daviess circuit court a separate trial was demanded and granted. Hugh Arnold, being tried first, was found guilty, and sentenced to the penitentiary for the term of his natural life. An appeal to this court resulted in an affirmance of the judgment. 62 S. W. 15. Upon trial of the appellant, he was also found guilty, as charged in the indictment, and sentenced to the penitentiary for life; from which judgment he is now complaining on appeal to this court.

It is not necessary to set forth the facts, as they are recited with sufficient amplification in the opinion in the case of *Arnold v. The Commonwealth*, 55 S. W. 894; and, furthermore, appellant, through his counsel, admits there was sufficient evidence to warrant his conviction by the jury, although he complains of the degree of which he was convicted. The instructions of the court in this case are largely the same as those given on the trial of Hugh Arnold, which were passed upon and approved in the case of *Arnold v. The Commonwealth*, 62 S. W. 15; but there was one instruction given in the case cited, which was omitted in this, the omission of which was prejudicial to the substantial rights of the appellant. Section 239 of the Criminal Code of Practice is as follows: "If there be a reasonable doubt of the degree of the offense which defendant has committed, he shall only be convicted of the lower degree." In the case of *Williams v. The Commonwealth*, 80 Ky. 313, this court said: "It was the duty of the court to state the law fully and correctly to the jury in the instructions. It was error, therefore, not to instruct them that, if they should believe the appellant guilty, but entertained a reasonable doubt of the degree of his offense, they should convict him of the lower degree. This is substantially the language of section 239 of the Criminal Code, and the failure to instruct the jury affected seriously his substantial rights. It is true that the jury must believe

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 639.

beyond a reasonable doubt that the accused is guilty, before they can convict at all; but it might be that, while they had no doubt of his guilt, they entertained a reasonable doubt of the degree of that guilt, and the policy of this humane provision of the law cannot be questioned, nor can it be rendered nugatory by a failure to execute it. Whenever there is evidence introduced which might be calculated to raise a reasonable doubt of the degree of the guilt of the accused, the jury should be instructed in pursuance of the provision of the Code quoted." In both of the opinions of this court heretofore alluded to the number and prolixity of the instructions were criticised, and these defects undoubtedly were confusing and perplexing to the minds of the jury. We recognize that this fault is often the result of the excitement and confusion incident to a jury trial, such as was doubtless had in this case. As there must be a reversal for the reasons given, we make the following suggestions for the guidance of the court in any future trial had herein: Instruction No. 6 should be omitted, as its provisions seem to be fully contained in instruction No. 9. If there be any doubt on this subject, it should be incorporated in No. 9. Instruction No. 9 should end with a substantial compliance with section 239 of the Criminal Code. Instructions Nos. 10, 11, 12, 13, and 14 should be omitted, as unnecessary to the rights of the defendant, and confusing to the minds of the jury. Instruction No. 8 should end with the qualification of the right of self-defense by the principle flowing from the fact that appellant may have commenced or provoked the difficulty in which the killing took place, in accordance with the rule laid down in the opinion in the case of *Arnold v. The Commonwealth*, 55 S. W. 894. We believe that, with the changes herein suggested, the instructions will fully protect the legal rights of the commonwealth and the defendant, and present the questions of law, to which the jury are to apply the facts, in a simpler and less confusing form.

The case is reversed for proceedings consistent with this opinion.

PROVIDENT SAV. LIFE ASSUR. SOC. v. JOHNSON.

(Court of Appeals of Kentucky. March 6, 1903.)

MALICIOUS PROSECUTION—CRIMINAL LIBEL—INDICTMENT—EVIDENCE—JUSTIFICATION—INSTRUCTIONS.

1. Where one was indicted for criminal libel under an indictment containing three paragraphs, but the prosecuting attorney elected to prosecute on the first paragraph alone, in a subsequent action by accused for malicious prosecution it was error not to permit defendant to show that the second and third paragraphs of the libelous matter charged in the indictment were false.

2. In an action for malicious prosecution,

plaintiff having been indicted for a criminal libel, libelous matter that was laid before the grand jury, and which was not included in the indictment, because constituting a separate offense, and properly a subject for another indictment, cannot be introduced in evidence by defendant to justify his action in obtaining the indictment.

3. The premiums payable on insurance policies issued by a certain company were according to a schedule of rates indorsed on the policies, less the dividends awarded, the rates increasing as the age of the insured advanced; and it was stated that the dividends would probably offset the increase, and give a level rate of premium. Plaintiff caused an article to be published charging an agent of such company with practicing fraud on its policy holders. He was indicted for criminal libel, and, after acquittal, sued the company for malicious prosecution. *Held*, that evidence that agents for the company deceived persons by assuring them absolutely that there would be a level rate of premium was not objectionable as impeaching the printed statements of the policy, inasmuch as the rule forbidding evidence contrary to the terms of an instrument only applies to the parties thereto.

4. The question as to what facts constitute probable cause for a prosecution is a question of law for the court.

5. On malicious prosecution the question whether certain facts exist, which, if they do exist, show probable cause, is for the jury.

6. A criminal libel is committed by any writing calculated to create disturbance of the peace, corrupt public morals, or lead to any act which, when done, is indictable.

7. In an action for malicious prosecution, plaintiff having been indicted for criminal libel, in defining "probable cause" the court should set out the matter charged as libelous, and instruct the jury that it is libelous if untrue, and that defendant had probable cause for the prosecution if its agents who procured the indictment believed, and had grounds such as would induce a man of ordinary prudence to believe, that the matter published, or any substantial part of it, was materially false.

Appeal from circuit court, Hickman county.

"To be officially reported."

Action by D. Johnson against the Provident Savings Life Assurance Society. From a judgment for plaintiff, defendant appeals. Reversed.

Humphrey, Burnett & Humphrey and R. B. Platt, for appellant. Robertson & Thomas and Greer & Reed, for appellee.

HOBSON, J. Appellee, Johnson, was for some time an agent of the appellant, the Provident Savings Life Assurance Society. He left its service, and entered the service of the Union Central Life Insurance Company, and after this published in the county paper the following:

"A few months of work for the Provident Savings convinced me that I was misled. Just as hundreds of policy holders of that company have been; that is, by false representation of general agents and managers of the company. An honest man, when he finds his error, tries to atone for it. I am doing that now by selling my friends insurance

¶ 4. See *Malicious Prosecution*, vol. 33, Cent. Dig. § 161.

in the Union Central Life Insurance Company, that is acknowledged by all insurance men to be absolutely reliable."

Also the following: "None of the policies sold by the Provident Savings' agents as straight life, whether old or not, are of any value as collateral or in cash. Such contracts have no reserve behind them, and on that account are worthless, unless the insured dies while they are in force."

Also the following: "Also I further state that the work of that company's agents during the last five years in Western Kentucky has been characterized by twisting policies of other companies, and selling their own policies under misrepresentations; also by rebating, and other unfair and rotten methods."

Appellant, after laying the facts before counsel, and being advised that a prosecution for criminal libel might be maintained, went, by its agents, before the grand jury, and had appellee indicted for libel. The indictment set out the matter above quoted. The defendant entered a demurrer to the indictment, and on the hearing of this demurrer the commonwealth's attorney elected to prosecute for the first paragraph of the libelous matter quoted. The case was then tried on this charge. The defendant was acquitted. He afterwards filed this suit to recover of appellant damages on account of the prosecution, charging that it was malicious, and without probable cause. The jury returned a verdict in his favor for \$1,250.

The proof shows that appellee, after he was indicted, had his father to go on his bond when arrested on the indictment, and was in custody but a short time while going with the sheriff to his father's for the purpose of signing the bond. No special damage is shown, except the cost of defending the prosecution. The defendant offered to show on the trial that the second and third paragraphs of the libelous matter charged in the indictment were false, and known by the defendant to be false, when published by him. The court refused to allow this proof, confining the evidence entirely to the first paragraph. This was error. Appellant had charged appellee with criminal libel in publishing the matter embraced in all three paragraphs. It was all set out in the indictment, which was procured by appellant, and is the basis of this action. If appellant had probable cause for the prosecution, the action before us can not be maintained; and, if either one of the paragraphs was false, and was intentionally published by the defendant without justifiable cause, this was sufficient to sustain the indictment. Appellant is not bound by the act of the commonwealth's attorney in electing to prosecute on the first paragraph alone. Its action was based on all three paragraphs, and if, on the whole case, it had probable cause for its action, it is not liable in this suit. The gist of the action consists in the malicious abuse of

the process of the court. The thing complained of is the obtaining of the indictment, and, if there was probable cause for it by reason of any of the matter set out therein, there was no abuse of the court's process. Appellant obtained the indictment, and for this it is sued. Libelous matter that was laid before the grand jury, which was not included in the indictment because constituting a separate offense, and properly the subject-matter for another indictment, cannot be introduced on this trial to justify the action of appellant in obtaining this indictment; for proof of such matter would simply show that appellant had probable cause to believe appellee guilty of another charge other than that on which he was indicted.

The policies issued by appellant are for one year, and may be renewed annually at a schedule of rates indorsed thereon, less the dividend awarded on the policies. The printed rates increase as the age of the insured advances, but it was stated that the dividend would probably offset this increase, and give a level rate of premium, or practically so. Proof was introduced on the trial tending to show that appellant's agent or agents who procured the indictment deceived persons into taking policies by assuring them absolutely there would be a level rate of premium. It was objected to this evidence that it impeached the writings themselves, which plainly showed in express terms that the rate of premiums increased year by year, and that, necessarily, the amount of dividends to be earned in the future was only matter of judgment or opinion. But the rule forbidding evidence contrary to the terms of a written instrument only applies between the parties to it. 1 Greenleaf on Evidence, § 279. Appellee had, in effect, charged appellant with practicing a fraud on its policy holders, and justified the publication. If it was true, he was not, for this, guilty of libel; and this question of fact was for the jury on the written contracts and all the other evidence introduced on the trial. Some of the policy holders said they did not see the policies, but relied on the assurances of the agent as to the character of policy that was to be issued. The writing is potent evidence for appellant, but in a case like this it is not conclusive. As to appellee himself, however, the policy issued to him is conclusive, in the absence of proof of fraud or mistake.

The court also erred in failing to define to the jury "probable cause." The rule is that what facts constitute probable cause is a question of law for the court, and whether the facts exist or not is to be determined by the jury. The court did not define to the jury the offense of criminal libel, or inform them what facts made out a case of probable cause for the prosecution. A criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable. 2 Bishop on Crim-

inal Law, 907. If the publication in question was false, the defendant was properly indicted. 2 Bishop on Criminal Law, §§ 922, 933. In defining "probable cause" the court should, in an instruction, have set out the matter charged as libelous in the indictment, and should have told the jury that it was libelous if untrue, and that the defendant had probable cause for the prosecution, and they should find for it in this action if its agent or agents who procured the indictment believed, and had such grounds as would induce a man of ordinary prudence to believe, that the matter so published, or any substantial part of it, was materially false.

Judgment reversed, and cause remanded for a new trial.

RICE et al. v. STRANGE et al.

(Court of Appeals of Kentucky. March 11, 1903.)

EXECUTORS—BORROWING MONEY.

1. An executor has no power to bind the estate by borrowing money for its use, unless he is authorized to do so by the will or an order of court.

Appeal from circuit court, Woodford county.

"Not to be officially reported."

Action by Rice & Turner against David Strange and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

D. T. Edwards, for appellants. Richard Godson, for appellees.

O'REAR, J. The will of Georgia Belle Strange devised to her children, who were infants, all of her property, consisting of a small tract of about 74 acres of land, farming implements, some live stock and household furniture. The will contained this clause: "I want my husband David Strange to have charge of all the above property, both real and personal, to keep and use to the best advantage for the benefit of my children during his lifetime, and at his death to be sold, and the money to be divided amongst the five children equally as aforesaid." It is averred that appellants loaned and advanced \$250 to David Strange, as executor of his deceased wife's estate, to enable him to care for and preserve the tobacco crop raised by him on the said premises, and to enable him to procure seed to sow wheat upon a portion of the land. It was stated in the petition that the estate had no money or means with which to care for the tobacco crop, and to seed the land; and that it was necessary that the means be procured to preserve the estate to its beneficiaries. This money was furnished within about 18 months after the date of the will. This suit was brought to subject the estate to the payment of the above-named sum, upon the theory that the

executor, as trustee, had the power, and was under the duty to operate the farm, and, if necessary, to incur this liability, and make it a charge upon the land and other estate. The court is of opinion that David Strange held the estate at the time he borrowed the money as executor, and not as testamentary trustee. *Johnson v. Fuquay*, 1 Dana, 514; *Warfield v. Brand's Adm'r*, 13 Bush, 77. An executor has no power to bind the estate represented by him by borrowing money for its use, unless he is authorized to do so by the will, or, in particular instances, by an order of a court of competent jurisdiction. An executory contract of an executor or administrator, if made on a new and independent consideration, moving between the promisee and the personal representative as promisor, is the latter's personal contract, and cannot, in the absence of authority given by the statute or the will of the decedent, bind the estate. The estate is not bound, not so much because of lack of consideration, as for the want of power in the personal representative to bind it in that character of transaction.

The judgment of the circuit court sustaining a demurrer of the guardian ad litem to the appellants' petition, and dismissing it, is affirmed.

LOUISVILLE, H. & ST. L. RY. CO. v. McCUNE.

(Court of Appeals of Kentucky. Feb. 13, 1903.)

DAMAGES—PERMANENT INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTION—HARMLESS ERROR.

1. Where no special damages were claimed in an action for injuries for medicine and medical treatment, and there was no proof that any sum had been expended therefor, an instruction authorizing the jury, in fixing the amount of damages, to consider the expense incurred for medical and surgical treatment, was harmless.

2. Where there was evidence that plaintiff's injury was permanent, and the court charged that the jury should award plaintiff only such damages as he sustained as the direct and proximate result of the injuries received, an objection, not pleaded, that the permanency of plaintiff's injuries was caused by his walking too soon after the accident, could not be sustained.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by James F. McCune against the Louisville, Henderson & St. Louis Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Helm, Bruce & Helm and Chapeze Wathen, for appellant. Sweeney, Ellis & Sweeney, for appellee.

NUNN, J. The appellant asks a reversal of this case for several reasons. The facts, as shown in the record, are, in substance, that appellant's railroad crosses the street railway at right angles on Frederica street, in the city of Owensboro, Ky., a street and

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 414.

at a point that is used extensively by the public, and where street cars cross appellant's tracks about every 10 minutes. The appellant's servants in charge of a freight train, composed of engine, tender, and from 8 to 12 cars, with caboose, without any warning, and without any one being on the caboose or cars, backed this train from the east at the rate of 8 to 12 miles per hour, and struck a street car, on which appellee was the motorman, and knocked the car off of its track, and threw appellee a considerable distance, and injured his hip, back, wrist, and ankle. The jury gave him a verdict for \$3,000. The appellant's witnesses fix the rate of speed at which the train was running at not more than four miles per hour, and that the bell was rung continuously; and two of the witnesses place one of the servants on the caboose, and say that he tried to attract appellee's attention to his danger.

The appellant excepted to all of the instructions given by the court, which, taken all together, were more favorable to it than it was entitled to. The main contention of appellant is that instruction No. 2 authorized the jury, in fixing the amount of damages, to consider the expense incurred for medical or surgical treatment. The appellee did not claim anything in his petition for special damages, nor did appellee prove any sum incurred for medicine, or such treatment. The language used in instruction No. 2, referred to, was evidently inadvertently used, and under the evidence in this case the error was harmless, and, if the jury believed the appellee's evidence, and the evidence of his witnesses, appellant's servants, in operating said train, did not use "the highest" or any degree of care for the protection of persons using or about to use the crossing at Frederica street. The evidence at the trial—which was about a year after the injury—showed that the injured wrist was still enlarged, and his injured ankle was in bad condition, and (by four physicians) that it was permanently injured; that one of the smaller bones was enlarged; the ligaments that held the foot in position on one side were torn loose from the bone, and caused his foot to turn, and he walked on the side of his foot; and that his power to earn money was lessened at least one-half, and would so continue. Appellant claims that the permanency and seriousness of his injury was caused by his getting out and walking too soon; i. e., about four or five weeks. There was no issue made on the pleadings on this matter, and, besides, the court confined the jury to the damages he sustained by reason of his being thrown from the car, as the direct and proximate result of the injuries he received as the result thereof. The jury, by the instructions given, were not allowed to give appellee anything for injuries caused or produced by his own improper or imprudent acts, if any, which enhanced his injuries.

Instruction No. 6 was harmless, and not

subject to the criticism made by the appellant; but it was not necessary for the court to give it, for the law on that point, as applicable to both appellant and appellee, was given in instruction No. 7.

Perceiving no error prejudicial to appellant, the judgment is affirmed.

KING'S ADM'R v. COVINGTON, F. & A. RY. CO.

(Court of Appeals of Kentucky. March 11, 1903.)

SERVANT—ACTION FOR INJURIES—SUFFICIENCY OF PETITION.

1. Where a petition alleged that plaintiff's intestate was in the employ of defendant railroad, and that, when requested by his superior, his duty required him to assist in clearing wrecks; that, in obedience to such a request, he started for a wreck on a hand car; that it jumped the track, by reason of defects therein, throwing him on the roadbed; and that before he could escape a heavy truck, following with men for the wreck, which did not have brakes of any kind, ran over and killed him—it stated a good cause of action against the company.

Appeal from circuit court, Fleming county.

"Not to be officially reported."

Action by Amella King, as administrator of the estate of P. H. King, deceased, against the Covington, Flemingsburg & Ashland Railway Company. From an order sustaining demurrer to the amended petition, plaintiff appeals. Reversed.

W. G. Dearing and G. A. Cassidy, for appellant. Jno. P. McCartney, for appellee.

BURNAM, C. J. The plaintiff, Amella King, as administrator of P. H. King, deceased, instituted this suit against the defendant, the Covington, Flemingsburg & Ashland Railway Company, to recover damages for the death of her husband, which resulted from injuries received on the railroad of appellee while he was in their employ. A general demurrer was interposed and sustained to her amended petition, and, plaintiff declining to plead further, her petition was dismissed, and she has appealed.

The petition alleges, in substance, that plaintiff's intestate, P. H. King, was in the employ of the defendant as night watchman, and that in addition thereto, when required, he assisted in putting engines and cars, which had been derailed, back on the track; that on the 13th of May, 1901, one of the defendant's trains ran off the track between Flemingsburg and Poplar Plains; and that, by direction of defendant's manager, he started on a downgrade on a hand car from their engine house towards the place of derailment of the train; that shortly afterwards the manager had a large truck, weighing about 4,000 pounds, which was not equipped with brakes or other appliances of any kind for stopping it, placed upon the track, loaded it with men, and started it in the same direction in which

the car on which he was riding was going; and that while the hand car on which he was was passing over a long and high trestle at a rapid rate, it came to a point on the road where the rails on the track were not properly joined or aligned, and in consequence thereof the hand car suddenly jumped the track, throwing him off on the roadbed; and that, before he could get off, the heavy truck, which was following, ran over him, inflicting injuries from which he shortly died.

The demurrer admits that plaintiff's intestate was in the employ of the company, and that his duty required him, when called upon by his superior, to go to the assistance of derailed trains; that in obedience to a request from the manager of the road he was on his way to the scene of the wreck on a hand car; and that it left the track by reason of its defective condition; and that he was thrown upon the track and seriously injured; and that before he could escape a heavy truck, loaded with men destined for the same place, and for the same purpose, which was not equipped with brakes of any kind, ran over him and killed him. In our opinion this petition states a good cause of action. If its averments are true, it was plaintiff's intestate's duty to obey the orders of defendant's manager on the occasion in question; and if in consequence thereof he was injured, either on account of the defective condition of the track, or because of the company choosing to send a heavy truck without brakes after him on a downgrade so close to the hand car on which he was traveling as to make it impossible for those in charge of the truck to arrest its progress in time to have avoided injuring him, the company was guilty of gross negligence.

For the reasons indicated, the judgment is reversed, and cause remanded, with instructions to overrule the demurrer.

COMMONWEALTH v. CHESAPEAKE & O. RY. CO.

(Court of Appeals of Kentucky. March 5, 1903.)

CARRIERS—DISCRIMINATION—INDICTMENT.

1. Under Cr. Code, § 124, requiring an indictment to be certain, not only as to the party and offense charged and the county where committed, but also as to the particular circumstances if they be necessary to constitute a complete offense, an indictment for violation of Const. § 215, prohibiting discrimination in freight rates by railroads, which fails to allege that the discriminative rates were charged for services to the different persons "upon the same conditions," is fatally defective.

Appeal from circuit court, Johnson county.

"Not to be officially reported."

An indictment against the Chesapeake & Ohio Railway Company was dismissed, and the commonwealth appeals. Affirmed.

Clifton J. Pratt and M. R. Todd, for the Commonwealth. Wadsworth & Cochran, for appellee.

O'REAR, J. Appellee, a common carrier operating a railroad between Catlettsburg, Ky., and White House, Ky., and other points, was indicted by the grand jury of Johnson county for unlawful discrimination between shippers of freight of the same class from and to the same points and on same conditions. The indictment was for a violation of section 215 of the State Constitution. While the indictment charges the offense, it fails to describe the circumstances constituting the offense. The descriptive part of the indictment is as follows: "The said defendant Chesapeake & Ohio Railway Company on the 1st day of October, 1898, in the county and circuit aforesaid, did unlawfully, wilfully and knowingly charge, collect, receive from John R. Mollett, \$1.40 per barrel of sorghum, for hauling sorghum for him from White House, Johnson County, Ky., to Cincinnati, Ohio, while at the same time said deft. charged, collected and received from John Ward \$1.00 per barrel of sorghum for hauling sorghum for him from said White House, Ky., to said Cincinnati, Ohio. The said freight hauled by defendant for said Mollett and Ward as aforesaid was of same class and hauled for them by defendant from and to same points and as a common carrier, as aforesaid. Against the peace," etc. The omission of the words from this part of the indictment, viz., "upon the same conditions," is a fatal one. See case this day decided, Com. v. O. & O. Ry. Co., 72 S. W. 360; also L. & N. R. R. Co. v. Com. (Ky.) 57 S. W. 508. It is argued for the commonwealth that as the words are in the accusative part of the indictment it is unnecessary to repeat them in the descriptive part. Section 124, Cr. Code, is: "The indictment must be direct and certain as regards: (1) The party charged. (2) The offense charged. (3) The county in which the offense was committed. (4) The particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The offense for which appellee was indicted in this case is known as a "statutory offense," and in the charging part of the indictment it is sufficient to follow the language of the statute near enough that the accused may certainly be put upon notice of the crime for which he is called upon to answer. When that is done, however perfectly done, it does not dispense with a good description also of the facts upon which the pleader relies as constituting the offense. The Code is equally imperative as to each of these requirements. The indictment must fully satisfy each. Touching this subject, this court, in *White v. Commonwealth*, 9 Bush, 180, said: "There is, perhaps, no principle in criminal pleading better established and supported by the common law authorities than that it is not only necessary that the nature and degree of the offense should be specified on the face of the indictment, but that the particular facts and cir-

cumstances which render the defendant guilty must also be alleged, it being a general rule that all indictments ought to charge a man with a particular offense by properly specifying the facts constituting it, to enable him to prepare for his defense, and for other important reasons." See, also, *Ward v. Commonwealth*, 14 Bush, 233, and *Brooks v. Com.*, 98 Ky. 143, 32 S. W. 403.

The court is of opinion that this indictment was fatally defective in omitting an averment, the existence of which in this case was essential to constitute any offense against appellee under the charge laid in the indictment.

The judgment is affirmed.

BURKAMP v. HEALEY et al.

(Court of Appeals of Kentucky. March 11, 1903.)

CORPORATIONS—CHATTEL MORTGAGES—EXECUTION—SEAL—NECESSITY—OFFICERS—AUTHORITY—PRESUMPTION.

1. Where a chattel mortgage is executed by the president and secretary of a corporation, purporting to be the obligation of the corporation, it will be presumed, in the absence of a showing to the contrary, that they had authority to execute it.

2. A chattel mortgage, otherwise properly executed, is not insufficient by reason of the absence of a scroll or seal.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by Ellen Healey and others against W. A. Burkamp, as trustee of the Newport Printing & Newspaper Company, an insolvent. From a judgment sustaining exceptions to a claim, the trustee appeals. Reversed.

W. A. Burkamp and J. C. Wright, for appellant. Aubrey Barbour and Thomas Healey, for appellees.

NUNN, J. This action was instituted by Ellen Healey, executrix, against the Newport Printing & Newspaper Company to settle the affairs of the defendant as an insolvent. Appellant was made a defendant, and he filed his answer and cross-petition, setting up a claim against the corporation for \$1,500, secured by a mortgage on personal property upon which payments had been made. No reply was filed to this pleading. Upon reference to the master commissioner the appellant also proved his claim. The master reported in favor of appellant's claim as a preferred one for \$1,300, with interest thereon from July 5, 1901. To this report appellees filed two exceptions: First, the mortgage was without the corporate seal of the company; second, the company never au-

thorized the execution or the delivery of the mortgage. The court sustained the exceptions, and ordered a pro rata distribution of the funds, from which judgment appellant appeals.

The appellees did not file any reply to appellant's answer, nor take any proof with reference to appellant's claim. There is nothing in the record showing when or how the Newport Printing & Newspaper Company obtained its charter, or what powers and privileges, under the charter, it had, or whether it was authorized to transact its business by a board of directors, president, or secretary. If this corporation had no power to create a liability except by the use of its seal, or if the president and secretary had no power to bind it except by direction of the board of directors, these facts should have been presented by appellees by proper pleadings. This mortgage, executed by the president and secretary, purporting to be the obligation of the corporation, it is to be presumed that they had the authority to execute it. In the case of *Kentucky Tobacco Association v. Ashby*, 9 Ky. Law Rep. 110, the court said: "If the alleged agreement was made by the president and secretary of appellant, we think that it is bound by the agreement unless it can show some valid restriction on their authority to bind the corporation. The president is the chief officer, and ought to be presumed to have authority to make contracts pertaining to the business of the corporation, unless the contrary be shown." See, also, the case of *L. & N. R. R. Co. v. The Literary Societies of St. Rose and St. Catherine*, 91 Ky. 399, 15 S. W. 1066. These literary societies were both corporations for educational purposes, and the corporation or society of St. Catherine made a subscription of \$500 for the building of a railroad to the town of Springfield, Ky., its place of business. In that case the court, by Holt, C. J., said: "The obligation given by the society of St. Catherine is merely signed by the prioress, who is the chief officer of the institution. But it purports to be the obligation of the society. The face of the instrument shows that it was so intended. Its execution by the corporation is not questioned by the pleading, and the officers of each institution knew of the execution by the chief officer of its respective obligation. They must be held, therefore, to have been in forma properly executed." In our opinion, no scroll or seal is necessary to the validity of a chattel mortgage executed in this state, if otherwise properly executed.

The lower court erred in refusing to allow appellant's claim as a preferred claim, and for these reasons the case is reversed, and the cause remanded to the lower court for further proceedings consistent herewith.

¶ 2. See *Chattel Mortgages*, vol. 9, Cent. Dig. § 114.

LOUISVILLE & N. R. CO. v. HOWERTON.

(Court of Appeals of Kentucky. March 6, 1903.)

RAILROADS — NEGLIGENCE — OPERATION OF HAND CAR—FRIGHTENING HORSE—INJURY.

1. A railroad company is not liable for injuries to one driving a horse, owing to the horse, when about to cross the railway, having become frightened at an approaching hand car operated without unusual noise.

2. It is not negligence on the part of a railway company for a hand car not to give a signal when approaching a crossing.

Appeal from circuit court, Shelby county.

"To be officially reported."

Action by Mary J. Howerton against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Willis & Willis and E. W. Hines, for appellant. R. F. Peak and P. J. Beard, for appellee.

PAYNTER, J. About four miles south of Shelbyville the appellant's track crosses at right angles the public road, forming what is known as the "Keene Crossing." To the right of the crossing, in going from Shelbyville, there is a deep cut. The appellee and her daughter were driving a horse, proven to be gentle, from Shelbyville to their home, over the highway in question. As they approached the crossing, and as the horse's fore feet were over the first rail, it became frightened, swerved to the left, and ran off, which resulted in the appellee being painfully injured. It is claimed that the horse became frightened because the servants and employes of the appellant operated the hand car with gross negligence and carelessness. The plaintiff did not see the hand car, but, as the horse lunged, her daughter discovered the hand car, which was about 50 or 60 feet away, approaching the crossing through the cut. There was not the slightest evidence introduced which tended to prove that the hand car was operated in an unusual way, or that it was making any unusual noise or sounds. The mere fact that the horse became frightened at the hand car, ran off, and injured the appellee, does not entitle her to maintain this action. She could only maintain it upon the ground that defendant's servants or employes were guilty of negligence resulting in the injury. Hand cars are necessary in the conduct of the business of railroads. They must be used for the purpose of carrying tools and the section forces from point to point in repairing and looking after the track. It is impossible to run them in a noiseless manner. The fact that they are run, and that a horse became frightened by reason of their approach, or the noise which they make, which results in injury to the driver, does not give a cause of action. When trains are run in the ordinary way, and whistles and bells are sounded as the necessities of the business require, and a horse becomes frightened by rea-

son thereof, and damages result therefrom, no action can be maintained therefor. Ohio Valley R. R. Co.'s Receiver v. Young (Ky.) 39 S. W. 415. Elliott on Railroads, volume 3, section 1264, says: "A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains, or noises incident to the running or operation of a railroad." It was held in McCerrin v. Alabama & Vicksburg R. Co., 72 Miss. 1013, 18 South. 420, that because a horse became frightened by the noise of a hand car running over street crossings, and the person driving the horse was injured, the railroad company was not liable. The court said: "The defendant had the right to operate its car in the usual and customary way, and at a safe rate of speed, but had no right to convert it needlessly into a terror-inspiring thing, and for such departure from propriety would undoubtedly be liable in damages for any injury caused by this negligence to one free from fault, but rapidity of movement, noises, and sudden appearances are common incidents of the operation of railroads, and one complaining of hurt from these causes must show clearly a departure by the defendant from custom and propriety, to warrant recovery. Railroads operating trains and hand cars have the right to make all reasonable and usual noises incident thereto, whether occasioned by escaping steam, gripping of cars, etc. Persons whose duties call them near railroads must know that such right exists. There is no law in this state requiring hand cars to give signals as they approach crossings, and we cannot say, as a matter of law, that a failure to do so is negligence.

For the reason that the plaintiff failed to show any negligence whatever which produced the injury of which she complains, we are of the opinion that the court should have given the jury a peremptory instruction to find for the defendant.

Judgment is reversed for proceedings consistent with this opinion.

GORMAN'S ADM'R v. LOUISVILLE RY. CO.

(Court of Appeals of Kentucky. March 11, 1903.)

STREET RAILROADS—INJURIES TO PEDESTRIAN—CHILDREN—ORDINARY CARE—INSTRUCTIONS.

1. An instruction that it is the duty of a motorman to use ordinary care to discover and prevent injury to persons using the street, and defining ordinary care as that degree of care usually exercised by ordinarily careful persons "under the same or similar circumstances," sufficiently states the degree of care required toward a young child.

2. A street railway company, while required to use the highest degree of care toward passengers, need only use ordinary care towards persons using the streets.

3. Where the instruction given by the court holds defendant to the same degree of care required in an instruction requested by plaintiff, plaintiff cannot complain.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by K. A. Gorman, as administrator of Catherine Gorman, deceased, against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. O. Harris, B. K. Marshall, and O'Neal & O'Neal, for appellant. Fairleigh, Straus & Eagles and Kohn, Baird & Spindle, for appellee.

O'REAR, J. Appellant's intestate, a child about six years old, was killed by being run over by one of appellee's cars. The neighborhood where the accident occurred was sparsely settled. There was not a crossing at the point where the child attempted to cross appellee's tracks when it was injured. Appellee's motorman testified that he did not see the child till it darted in front of his car; that a large four-horse brick wagon was just ahead and to the side of the car track, and as it passed the child she attempted to cross the track. The evidence was conflicting touching the motorman's negligence, but the jury returned a verdict for appellee.

The only question presented is the correctness of the instructions. The court told the jury that it was the duty of the motorman in charge of the cars to watch the street in front of his car, so that he might avoid injury to persons upon the street, if he could do so by the exercise of ordinary care; and that if they believed from the evidence that the death of Catherine Gorman (appellant's intestate) was caused by the failure of the motorman to exercise ordinary care to discover her peril or danger from his car, and to prevent injuring her, the law was for the plaintiff. The gravamen of the negligence charged in the pleadings and pointed out in the proof was that the motorman had negligently failed to keep a lookout, and because of that fact the injury occurred. The duty of the motorman is stated in the instruction to be (1) to keep such a lookout on the street in front of his car, so that by the exercise of ordinary care in operating his car he might avoid injury to others using the street at the same time; (2) to use ordinary care to discover the peril or danger of such others as might be attempting to use the street at that point when the car was passing; and (3) to use ordinary care to prevent injuring such one. Appellant complains because a higher degree of care was not required of the motorman. He argues that, as to young children, a different and higher degree of care is owing than is to adults under similar circumstances. We believe that is true. We are also of opinion that the instruction given by the court defining "ordinary care" fairly submitted that idea to the jury, viz.: "Ordinary care means the degree of care usually exercised by ordinarily careful and prudent

persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care." It might be impossible to lay down a general rule that would aptly and minutely define the care to be exercised under every conceivable state of case. Nor would it be wise to attempt it. What would amount to ordinary care in operating an electric car in a sparsely settled, unfrequented part of a city might be gross negligence in a much used downtown thoroughfare. And what would be ordinary care toward an adult, under similar circumstances, might be criminal negligence toward an infant of very tender years. Ordinarily careful and prudent persons regulate their conduct by the difference in circumstances surrounding the act. This is generally known and recognized of all people. That is what makes it ordinary care. So, when the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinarily careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the streets, his full legal duty was stated.

It has been held in this state, and we believe is generally held, that operators of street cars, while held to the highest degree of care toward their passengers, are required to use but ordinary care towards others using the streets. *Passamanek's Adm'r v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620; *L. & N. R. Co. v. Cummins' Adm'r* (Ky.) 63 S. W. 594; *Louisville, C. & L. R. Co. v. Goetz's Adm'r*, 79 Ky. 449, 42 Am. Rep. 227; *Shearman & Redfield on Negligence*, sec. 485a; *Wood on Railroads*, sec. 323. If they discover the peril of the pedestrian, it is then their duty to exercise the highest degree of care to prevent his injury. *Passamanek's Adm'r v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620; *Ry. Co. v. Blaydes* (Ky.) 51 S. W. 820. But whether the law defining the degree of care in this case was fully and accurately given or not, we are of the opinion that the error, if any, would not be available to appellant, because the only instruction he asked for (and which was embraced, substantially, by those given by the court of its own motion) embodied this same standard. That instruction was: "Although the jury may believe from the evidence that plaintiff's intestate, Catherine A. Gorman, was guilty of negligence which contributed to cause the injury complained of in this suit, yet if they further believe that the motorman in charge of the car did see her in time to have prevented the accident by ordinary care on his part, or if they believe from the evidence that he could, by the exercise of ordinary care, have seen her in time to so prevent said accident, then in either such a case the law is for the plaintiff, and the jury should so find." This court has frequently held that when the trial court is induced to give an erroneous instruction, the error can-

not avail the party in fault on appeal. Union, etc., Co. v. Hughes' Adm'r (Ky.) 60 S. W. 850; First National Bank v. Germania Safety Vault & Trust Co. (Ky.) 66 S. W. 716; L. & N. R. Co. v. Penrod's Adm'r (Ky.) 68 S. W. 1013, 1042.

The judgment is affirmed.

NEW YORK LIFE INS. CO. v. JOHNSON'S ADM'R.

(Court of Appeals of Kentucky. March 4, 1903.)

INSURANCE—DELIVERY OF POLICY—EVIDENCE—MEMORANDA—DECLARATIONS—WITNESSES—HUSBAND AND WIFE—INTERESTED PERSON.

1. On the issue whether a note for the first premium on a life policy was delivered and accepted, an entry in the pocket memorandum book of insured, since deceased, to the effect that notes for \$1,572 had been taken in payment, is inadmissible, if for no other reason, because it was conceded the premium was \$1,590, and there was no evidence that a \$1,572 note was seen or delivered to the insurer.

2. Under Civ. Code Prac. § 606, providing that neither husband nor wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage, the widow cannot, in an action on his life policy, testify to communications between them.

3. Declarations of insured before his death to his attorney, not in the presence of the insurer, are not admissible to show that the policy was delivered to him, and that he did not acquiesce in the rejection of the application and the cancellation of the policy.

4. A policy holder in a mutual insurance company is not disqualified by interest to testify for the insurer in an action on a policy, by Civ. Code Prac. § 605, providing that, subject to the exceptions and modifications in section 606, every person is competent to testify for himself or another, and section 606, subsec. 2, providing that no person shall testify for himself concerning any verbal statement of or any transaction with or act done or omitted by deceased. The disqualifying interest must be direct and certain, so that the judgment will charge witness with a liability or exempt him from one.

5. Testimony of witness in an action on a policy on the life of J., in which the question was as to the policy having gone into effect, that J. was in possession of the policy, and claiming it, is competent.

6. Testimony of witness in an action on a policy on J.'s life, as to what J. said the insurer's agent had said in reference to dividing the policy into smaller ones, the insurer's agent not being present when J. made the statement, is inadmissible, being no part of the res gestæ.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by M. W. Johnson's administrator against the New York Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Humphrey, Burnett & Humphrey, for appellant. Harris & Marshall, O'Neal & O'Neal, and W. McC. Johnson, for appellee.

PAYNTER, J. In June, 1896, M. W. Johnson became the local soliciting agent of the appellant in Garrard county, Ky. Soon there-

after he applied to the appellant for a policy on his life in the sum of \$50,000. Two policies were issued, one for \$10,000 and the other for \$40,000. He never paid the premium on either. Soon after they were issued, he applied to the appellant for a \$50,000 policy, to be issued in lieu of the two mentioned, which was accordingly done on the 14th day of July, 1896. The policy was payable to Johnson's estate. In due course of business it was sent to General Agent W. R. Noble at Louisville, Ky. It is claimed by the appellant that it was placed in the hands of Johnson (he being treated as the soliciting agent with reference thereto, as with other policies), to go into force when the premium was paid or an acceptable note given for it. The appellee claims that such a note was delivered and accepted, whilst the appellant claims it was tendered but returned. Thus the matter stood until about the 1st of September, 1896, when the policy was returned to the appellant. About the 1st of October the appellant rejected the application for the insurance, and canceled the policy.

It is claimed on behalf of the appellee that the policy was actually delivered and wrongfully canceled. It appears that nothing further was done with reference to it until about the middle of December, 1896, when Johnson died. This suit was instituted by Johnson's administrator on the policy to recover the \$50,000.

It is unnecessary to make a fuller statement of the facts for the purpose of this opinion. It is likewise unnecessary to comment upon the letters which were used in the evidence upon the trial of the case.

The questions to be determined on this appeal are upon the admission of certain testimony over the objection of the appellant and the refusal to admit certain testimony in its behalf.

On the trial of the case a pocket memorandum book of Johnson was offered in evidence. It contained a heading and entry as follows: "Insurance written by M. W. Johnson for the New York Life Insurance. June 23, '96, M. W. Johnson, \$50,000." On another page of the book it contains the following: "Notes taken in payment of insurance wrote in the New York Insurance Co. by M. W. Johnson of Paint Lick, Ky., June 23, M. W. Johnson, 4 months, \$1,572." It is conceded that the premium on the \$50,000 policy was \$1,595; so the amount of the note mentioned in the book does not correspond with the amount of the premium which Johnson should have paid. It seems to us for that reason, if for no other, it was error to admit the book as evidence, as no evidence was offered to show that any \$1,572 note was ever sent or delivered to the appellant.

The widow of Johnson was allowed, over appellant's objection, to testify as to communications between her and her husband. This was error. Section 606, Civ. Code Prac. Mr. R. H. Tomlinson, a lawyer of Lan-

caster, Ky., was introduced as a witness upon behalf of the appellee. He was asked: "Were you employed by Mr. Johnson at any time before his death to bring any suit against the New York Life Insurance Company in respect to a policy for \$50,000 in that company?" He answered that he had been, and then proceeded to detail a conversation with Johnson, wherein Johnson stated the transaction from his point of view which he had with the appellant in reference to the policy in question. This testimony was offered with a view of showing that the policy had been delivered to Johnson, and that Johnson had not acquiesced in the rejection of the application by the company and the cancellation of the policy. No one representing the New York Life Insurance Company was present when that conversation took place. It was hearsay evidence. If a cause of action could be made out by statements which the plaintiff had made to others as to the transaction (not in the presence of the party against whom it is asserted), then to follow such rule it would be quite an easy thing for any one to establish a cause of action against one who was under no liability whatever to the party making such a claim. In *Dixon v. Labry* (Ky.) 29 S. W. 21, it appeared that one party claimed the property by a gift from his grandfather and the other party claimed that he had acquired title to it by a subsequent purchase from the grandfather. The court held that it was incompetent to prove the statements of the grandfather, not in the presence of the plaintiff, to the effect that he had not given the property to the grandson. In *Lowery v. Erskine*, 113 N. Y. 52, 20 N. E. 588, it was held, where it was claimed that an uncle took notes in the name of his niece, that it was not admissible in the suit of his personal representative against the niece to prove that the uncle had said that he took the notes in the name of his niece to avoid the payment of taxes. It was held in *Penn v. Fightmaster* (Ky.) 17 S. W. 334, that statements made by an ancestor, not in the presence of the party to be affected thereby, were not admissible on behalf of the plaintiff. The court held in *Bryan v. Buford*, 7 J. J. Marsh. 335, that an indorsement on a note of a payment by the plaintiff was not evidence for him of the fact of the payment.

On the trial of this case the appellant introduced W. R. Noble, who was the agent of the company and conducted its business at Louisville, Ky. He was familiar with the facts in relation to the policy in question. He was asked the following questions, and made the following answers, to wit: "Q. Is the New York Life Insurance Company a mutual company? A. Yes, sir. Q. Are you a stockholder? A. To the extent of being a policy holder. Q. Do you participate in the profits of the company? A. Yes, sir." The court ruled that he was incompetent as a witness, because he was an interested party. This is upon the idea that he was a policy

holder in the New York Life Insurance Company, which is a mutual company. The court was of the opinion that by reason of being a policy holder he therefore had such interest as disqualified him as a witness. Section 605, Civ. Code Prac., reads as follows: "Subject to the exceptions and modifications contained in section 606, every person is competent to testify for himself or another * * *." Subsection 2, § 606, Civ. Code Prac., reads as follows: "No person shall testify for himself concerning any verbal statement of or any transaction with or any act done or omitted to be done by * * * one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who, when over fourteen years of age and of sound mind, heard such statement or was present when such transaction took place or when such act was done or omitted." The purpose of the enactment of the sections of the Code was not to disqualify witnesses who were qualified before its enactment, but to qualify witnesses who previous to the time had been disqualified. It is in the nature of an enabling and not a disabling statute. The Supreme Court of Florida had under consideration this question in the case of *Adams v. Board of Trustees*, 37 Fla. 266, 20 South. 266, wherein it said: "The purpose of the statute was to remove this common-law disability arising from interest in the event of the litigation, except in cases where one of the parties to any transaction or communication was, at the time of the examination, dead or insane. In the latter cases the disabilities arising from interest in the event that were imposed by common law are by this statute retained; but in such cases the statute disqualifies those only who were disqualified by the general rule of the common law. Any exception from the disqualification that is recognized by the rules of the common law forms a like exception to the cases intended to be excluded by the proviso to our statute. Where, then, a witness is objected to under the proviso of this statute as being disqualified because of interest in the event of the suit, the test of his competency is by a resort to the common law. If he was competent by the common law, he is competent under the proviso of this statute, and vice versa." If Noble, as a policy holder, can participate in any profits of the company, it is not only small, but extremely uncertain, contingent, and very remote. In discussing the interest of a witness, Mr. Greenleaf, vol. 1, § 390, says: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent; * * * and if the interest is of a doubtful nature,

the objection goes to the credit of the witness, and not to his competency, for, being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn." Previous to the enactment of the section of the Code in question, Noble would have been a competent witness to have testified in this case. As we understand the rule, the disqualifying interest must be direct and certain—one that would charge the witness with a liability or exempt him from one—but a mere uncertain, remote, or contingent interest would not disqualify one from being a witness. So far as this record shows, a recovery of the judgment would not have any perceptible effect upon the rights of the policy holder. It is not certain that it would remotely effect his rights to the extent of one cent. Some decisions of this court have been cited to show that a person may have an interest in the result of litigation which disqualifies him from being a witness, although he is not a party to the action. We recognize this to be true, but we have failed to find the disqualifying interest.

The testimony of Bernard to the effect that Johnson was in possession of the policy and claiming it during the time stated by him was competent, but his testimony with reference to what Johnson said that Noble or other agents of the company had said with reference to dividing the policy into smaller ones was incompetent. Noble was not present when Johnson made the statement to the witness. It was no part of the res gestæ. The transaction between Johnson and Bernard was entirely independent of and disconnected with the transaction which resulted in issuing the policy for \$50,000.

Judgment is reversed for proceedings consistent with this opinion.

COOK v. KENTUCKY GROWERS' INS. CO.

(Court of Appeals of Kentucky. March 12, 1903.)

FIRE INSURANCE—MUTUAL BENEFIT COMPANY—DEATH OF MEMBER.

1. Where a mutual benefit assessment insurance company was organized for the purpose of protecting its members in case of loss by fire, etc., the losses being paid from the proceeds of assessment of the members, and the protection to continue only so long as the insured continued to be a member and complied with the by-laws, on the death of a member and devise of his insured property to his son the protection then terminated, and the company was not liable for the subsequent destruction of the property by fire.

Appeal from Circuit Court, Garrard County. "Not to be officially reported."

Action by W. R. Cook against the Kentucky Growers' Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. I. Williams, for appellant. W. McC. Johnston, for appellee.

BARKER, J. On the 6th of November, 1897, the appellee, the Kentucky Growers' Insurance Company, issued to one J. V. Cook an insurance policy, whereby it insured him against all direct loss or damage by fire, lightning, or wind, to an amount not exceeding \$1,500, on a dwelling house owned by him, located in Lancaster Precinct, Garrard county, Ky., on the Lancaster and Danville pike, about 2½ miles from Lancaster, Ky. The consideration of this policy is stated by its terms to be the payment by J. V. Cook of \$10.50 policy contract, and the stipulations contained in the policy; the insurance being for such time as he shall "fully comply with our by-laws and regulations, or until this policy is canceled or withdrawn." J. V. Cook seems to have continued a member of appellee up to the time of his death, which took place in February, 1901. By his last will and testament he devised the property, upon which was situated the dwelling house insured under the policy in question, to his son, the appellant, W. R. Cook. Afterwards, on November 14, 1901, the house was destroyed by fire; upon the happening of which event, W. R. Cook gave appellee notice, in accordance with the terms of the policy, and, upon its refusal to pay, instituted this action in the Garrard county circuit court. His petition sets forth the facts substantially as herein set out, and with it he filed the policy of insurance under which he claimed. A general demurrer to the petition was sustained, and, appellant declining to amend his petition, it was dismissed by the court, and from that judgment he has appealed.

The question for adjudication is whether the insurance contract sued on was one of personal indemnity, which ceased upon the death of J. V. Cook, or whether it is a chose in action passing by the will of J. V. Cook to W. R. Cook under the devise of the house upon which it was based. Undoubtedly the general rule is that fire insurance is a contract for personal indemnity, and does not pass by assignment. The policy sued on contains the following stipulation: "Sec. 20. In case of change of ownership of property insured in this company, notice shall immediately be given the company, with payment of all claims due from the property, and the policy shall cease and determine, and in this event the executive board may determine all equities." Appellees contend that, by the death of J. V. Cook, he ceased to be a member of its company, and the devise to W. R. Cook was such a change in the ownership of the property as is contemplated by section 20 above quoted, and the policy by its terms ceased and determined, and, therefore, all liability under it at once ended.

Undoubtedly much authority can be cited

to sustain this view, but this court, in the case of *Richardson's Adm'r v. German Insurance Co. of Freeport, Illinois*, 13 S. W. 1, held that the death of the insured, and descent of the insured property, was not such a change in the title as would work a forfeiture under a clause on this subject substantially the same as that contained in section 20 of appellee's policy above quoted. The policy in the case cited contained a fixed and determinate term of indemnity, for which the insured had paid the required premium. It also contained, among other things, the following stipulation: "And the said company hereby agrees to make good unto the said insured, his executors, administrators and assigns, all such immediate loss or damage not exceeding in amount the sum insured, nor the interest of the assured in the property, nor the cash value of any building or other property at the time of loss, as shall happen by fire or lightning to the property above specified, from the 10th day of March, 1883, at 12 o'clock, noon, to the 10th day of March, 1888, at 12 o'clock, noon. * * * Or if the property, or any part thereof, shall be sold, conveyed, encumbered by mortgage or otherwise, or any change take place in the title, use, occupation or possession thereof whatever * * * the policy shall be void." Said the court in their opinion in the case cited: "According to the only meaning we think the language used fairly capable of, the property was insured for a specified period of time, which could, after the premium had been fully paid, be abridged by the company only upon notice and refunding the unearned part of the premium. For it agreed, in express terms, to make good, unto not merely the insured himself, but as well his executors, administrators, and assigns, the immediate loss or damage that might happen by fire or lightning to the property at any time during that period, whether before or after his death. And, therefore, to treat that event as *ipso facto* a termination of the policy and liability under it, would be contrary to the express terms of it, under the stipulation for payment to the personal representative of the insured, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement. It is true, as argued, the property might have been destroyed before, though the loss not made good until after his death; but the stipulation of the company to pay his personal representative was not necessary to meet such contingency, because the amount due could have, in that case, been collected without. On the other hand, it is both rational and provident for a person obtaining a policy of fire insurance to have provision in it against destruction of the property after his death, and in such case the stipulation mentioned becomes applicable and necessary. It seems to us the force and effect of language so comprehensive and clear should

not be neutralized, or to any extent impaired, by a subsequent forfeiting clause of a policy of insurance, unless the words used for that purpose be so definite, explicit, and free from ambiguity as to leave no other reasonable alternation. For while forfeitures are not favored by law, and provisions in a contract therefor are always to be strictly construed, the terms of a policy of insurance, as said in *Ætna Insurance Company v. Jackson & Co.*, 16 B. Mon. 242, should be liberally construed for the benefit of the insured, and so as to effectuate, as far as may reasonably be done, the indemnity he justly expected. It is evident the clause referred to was prepared with care, and a purpose to guard every supposed right and interest of the company. Yet, of the seven distinct clauses for forfeiting the policy therein enumerated, not one of them, in express terms, or by fair implication, relates to, or includes, the death of the insurer; nor is it anywhere mentioned as a condition or cause for forfeiting or terminating the policy. The only part of the clause which can be construed to have any relation at all is expressed as follows: 'Or any change takes place in the title, use or occupation or possession thereof, whatsoever.' And that, we think, does not necessarily or properly refer to a change unavoidably resulting from his death, but rather such as might be caused or suffered by the act of the insured while living, which is the case in each one of the other causes or conditions set forth in the forfeit claim, as well those which precede as those following the one quoted. But, be that as it may, each condition of forfeiture mentioned may, without destroying or lessening its proper meaning or effect, be reconciled with a continuation of the policy after such death to the end of the period; and it, therefore, should be done, rather than defeat what was elsewhere in the policy clearly provided for."

It will be noticed that the court in the case cited placed stress on the fact that the policy, in case of loss, was payable, not only to the insured, but, in the case of his death, to his executor, administrators, and assigns, and, further, that there is no similar clause in the policy sued on here; and this case might be distinguished from the case cited for that reason, but it seems to us that the policy of insurance in the case at bar is wholly different from the policy in the case cited.

Appellee is not an ordinary insurance company; it is a mutual benefit assessment insurance company. An examination of its policy shows that the insured must be a member of the company, and the indemnity against loss exists only during such time as he shall fully comply with the by-laws and regulations of the company, or until the policy is canceled or withdrawn under the terms of the policy. Its by-laws, applicable to the questions involved in this case, are as follows: "1st. This company is organized for the purpose of protecting its members in case of loss or

damage to their property by fire, lightning and wind, and shall be known as the 'Kentucky Growers' Insurance Company,' with general office in the city of Lexington, Kentucky, and doing business in the territory embraced in the charter. 2nd. Any person owning property in the territory embraced by our charter who shall sign an application and hold a policy in this company, shall thereby become a member of the same, and any person living within the territory, and who may be appointed or elected by the board of directors or executive board, to fill any office of the company, shall thereby become a member of same." "13th. All persons who desire insurance in this company must make written application through one of its officers on blanks furnished by the company. This company insures detached property only, and reserves the right to accept or reject any application. 14th. The property insured in this company shall be divided into seven classes, and each piece of property shall bear its pro rata of all losses and expenses, and assessments shall be made in proportion of 50 cents for the first class; 60 cents for the second class; 70 cents for the third class; 80 cents for the fourth class; \$1.00 for the fifth class; \$1.25 for the sixth class, and \$1.40 for the seventh class." "16th. Policies issued by this company shall be perpetual, unless withdrawn by the insured or canceled by the company, for which policy the applicant shall pay a policy contract, the amount of which to be determined by the executive board, both in time and manner of payment, but shall be equitable between the classes in a similar ratio as assessment. No policy shall be issued for a greater sum than one per cent. of the amount of property insured in the company at the time of its issue. All policies not bearing the signature of the President and Secretary and the seal of the company shall be null and void. 17th. No property shall be insured for more than three-fourths of its value; the valuation and classification is left to the judgment and discretion of the company." "23rd. Losses and damages shall be payable in sixty days after the same shall be ascertained and proven according to the terms and conditions of this policy of insurance and these by-laws, and any member suffering a loss or damage, and entitled to insurance, shall pay his pro rata of the loss or damage." "25th. Any member failing to pay his assessments for thirty days after the same has been issued shall pay a fine of 25 cents, and should the company be compelled to collect the same by law it may use the penalty therein." Losses under this policy are to be made good by an assessment of every member of the class in which the destroyed property is listed. It is absolutely essential to the existence of the company, and the carrying on of its business under its charter, that every insured should also be a member of the company, and be ready and willing to pay all proper assessments made against his respective class. The very

object of the company was to insure its members against loss, and no one else.

The appellant makes no pretense to having been a member of the company. It could not have called upon him for assessments to pay the losses of others in the class to which his property had belonged. He was under no obligation, either legal or moral, to pay such assessments, and the company had no claim on him for them, and could not have collected them from him, as a matter of legal right. To hold that the company was bound to appellant under the policy in question would be to bind it under an instrument to which he was not amenable. Such a construction would do violence both to the letter and spirit of the contract between the company and appellant's testator, J. V. Cook.

As there was no legal obligation on the part of appellant to comply with any of the conditions and stipulations which the policy required of its insured and members; as he was not a member of the appellee company, and did not comply with its rules and regulations—there cannot be any liability on the part of appellee to indemnify him against loss under the contract made with his ancestor. Wherefore, the case is affirmed.

SMITH v. SMITH et al.

(Court of Appeals of Kentucky. March 12, 1903.)

WILLS—CONSTRUCTION—AMBIGUITY—EVIDENCE.

1. Where an ambiguity in a will is not latent, but appears on the face of the instrument, parol evidence is not admissible to explain it.

2. Under a will reading, "I give to my wife all my estate which I now own or may acquire in fee simple. To hold and possess during her natural life after having paid all my just debts. Also desire and hereby empower my wife to act in her own way in settling up all my business of any kind and desire no administration," the wife took the estate in fee.

Appeal from circuit court, Trigg county. "Not to be officially reported."

Action by Martha Smith against J. W. Smith and others for the construction of a will. From a judgment in favor of defendants, plaintiff appeals. Reversed.

R. A. Burnett, for appellant. Jno. C. Dabney, for appellees.

HOBSON, J. The will of J. F. Smith is in these words: "I, Joe F. Smith, being of sound and disposing mind do make this my last will and behest, to wit: I give to my wife M. E. Smith all of my estate which I now own or may acquire in fee simple. To hold and possess during her natural life, after having paid all my just debts. Also desire and hereby empower my wife to act in her own way in settling up all my business of any kind, and desire no administration. In witness whereof my hand and seal this 23rd day of March, 1893. J. F. Smith. Witness: J. T. Mitchell, D. H. Armstrong, A. G. P. Pool." The widow, M. E. Smith,

took charge of the estate after his death, and, acting upon the idea that it was devised to her in fee, disposed of the personal property in order to pay the debts. After the personal property was exhausted, she made a mortgage on the real estate to get the money to pay the remainder of the debts. The adult children acquiesced in her construction of the will, but later some question was made as to the proper construction of the will; and as some of the grandchildren were infants, this suit was filed by the widow for a construction of the will and a determination of her rights under it. The real estate consists of 196 acres of land, worth about \$2,000. The amount of the mortgage executed on the land to finish paying the debts is not shown by the record. The infants by their guardian ad litem alone defended the action, and made the point that under the will the widow only took a life estate in the property. This construction of the will was adopted by the learned circuit judge, and the widow appeals.

The proof taken shows that the will was written on March 23, 1893, six years before testator's death. He was then living on the land in contest and continued to live there until his death. He had a number of children, who were all of age, and several grandchildren, who were infants, the issue of daughters who had died. From the condition of the family it is evident that he and his wife were advanced in years. The draftsman of the will, when sent for to write it, remarked it was something new to him, but if they would give him a start he could perhaps formulate it. The doctor, who was present, said to begin, "I, Joe Smith, being of sound and disposing mind." Mr. Smith then said he wanted his wife to have everything, and to dispose of it in her own way, and he did not desire any administration. The witness used his own phraseology to carry out the wishes of the testator. This testimony is confirmed by the other witness, who was present at the time, and makes substantially the same statement, but exceptions were filed to this testimony as incompetent, and were properly sustained by the court, for the reason that the ambiguity is patent on the face of the will, and while parol evidence is competent to place the court in the light of circumstances of the testator, or to explain a latent ambiguity, it is never received to explain an ambiguity appearing on the face of the instrument.

It remains, therefore, for the court to determine from the will itself what its meaning is, reading it in the light of the circumstances of the testator at the time it was made, and if possible we must give some force to all the words of the will, as it cannot be presumed that in so short an instrument it was intended that one part of it should contradict another. That construction is to be preferred which reasonably reconciles all the parts of the instrument, rather than that which makes one part destroy an-

other, other things being equal. As it is also apparent from the instrument that it is the work of one not acquainted with legal forms, the words should be read in their ordinary sense, rather than according to any technical meaning. The words, "I give to my wife M. E. Smith all of my estate which I now own or may acquire in fee simple," plainly carry a fee, and if the will had stopped here there would be no trouble about the testator's meaning, for there could have been no purpose in using the words "in fee simple," if an absolute estate in the devisee had not been contemplated. But these words are added, "To hold and possess during her natural life after having paid all my just debts." These words, standing alone, would clearly give the devisee only a life estate, but, if read in connection with the preceding words, which had already invested the devisee with the fee, they may, according to the ordinary and untechnical use of language, be read as simply explanatory of the preceding words, and as meaning that, after she had paid the debts, the devisee was to hold and enjoy the property. Then follows the concluding sentence of the will in these words: "Also desire and hereby empower my wife to act in her own way in settling up all of my business of any kind, and desire no administration." This provision carries out the same idea as that conveyed by the first clause, and is entirely inconsistent with the idea that the wife was to have only a life estate, for she is empowered to act in her own way in settling up all the business of any kind, and no administration is to be had. The provision that he desired no administration is only consistent with the idea that his wife was to have everything as her own, and this idea is borne out by the fact that there is no devise over, and nothing is said about the children of the testator, although he had a number of children and grandchildren. Construing the will as a whole, we think that there was no inconsistency intended between any of its provisions, and that a purpose to give everything to the wife absolutely is the natural meaning of the instrument as a whole. It is common to add a habendum clause to deeds. The draftsman seems to have had a vague idea of following such a form, and to have added the words, not for the purpose of restricting the fee previously granted, but simply to show that the wife during her natural life was to do as she pleased with the property; for in the last part of the will the same idea is set forth as in the first, and it cannot be presumed that the intermediate words were used for a different purpose. The law favors the vesting of estates. At the death of the testator all the parties in interest would seem to have given to the construction that the wife took a fee; and while the matter is not free from difficulty, we are of opinion that the cotemporary construction was in accord with the

real intention of the testator, and that this intention sufficiently appears from the will as a whole to be enforced by the court.

The rule that in case of a conflict the latter clause of a will prevails over a former clause has no application here, for the reason that the entire instrument is written in one short clause. The difficulty arises on the words of the same clause, and the later expressions of the will clearly indicate the same intention as the first part of it. The testator had but a small estate. The two objects he had in mind apparently were the payment of his debts and a provision for his wife. The entire surplus of his estate was little more, if any, than the property exempt by law. The sum of his will is that his debts are to be paid; that his wife is to have everything that is left in fee simple; that there is to be no administration; and that she is to do as she pleases with the property. The expression "to hold and possess during her natural life" was not used to restrict the estate which had been granted or to change its character, but to show that she was to enjoy the estate; for immediately following it is said that she is to act in her own way in settling up the business.

Judgment reversed, and cause remanded, with directions to enter a judgment as herein indicated.

DEPPEN et al. v. GERMAN AMERICAN TITLE CO. et al.

(Court of Appeals of Kentucky. March 6, 1903.)

"Not to be officially reported."

On petition for rehearing. Petition denied. For former opinion, see 70 S. W. 868.

S. J. Boldrick, and J. W. S. Clements, for appellants. H. M. Lane for appellee Hess. Ernest Macpherson, Arthur Peter, and Geo. A. Brent, for appellee Immohr. Shackelford Miller, Barnett & Barnett, and H. H. Herr, for appellee Louisville Banking Co. D. I. Heyman, for appellee Western Bank.

HOBSON, J. It is not necessary for a decision of this case to determine whether the stock subscription may be rescinded or not. The only real question here is how far the notes and mortgage to secure them may be enforced. The parties most interested in the question of the rescission of the stock subscription are not before the court, and we do not deem it proper to determine that question on this record; for if the subscription is rescinded, the only persons really affected will be the creditors of the title company proceeding against its stockholders under the double liability statute, and they are not before the court. So much of the opinion as intimates any opinion on this question is withdrawn, the court now not committing itself in any way thereon. In other respects the opinion heretofore delivered is adhered

to, as after a reconsideration of the questions discussed and the facts shown by the record we see no reason for departing from the conclusion then announced by the court.

Rehearing refused.

FRED v. TRAYLOR.

(Court of Appeals of Kentucky. March 10, 1903.)

SLANDER—WORDS ACTIONABLE PER SE—SEPARATE SLANDERS IN SAME PETITION.

1. Defendant, a miller, asked a customer what he wanted for his wheat, and, on the latter's replying that he would not price it until he had seen plaintiff, also a miller, to whom he had given the refusal of it, defendant said, "Well, you won't want to price it to him but once, if he beats you out of as much as he beat me out of. He just beat me out of \$1,100 in three months." *Held*, that the words were actionable per se.

2. Under Code, § 83, providing that "several causes of action may be united if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action; and if all of them be brought * * * for injuries to character," plaintiff may sue in one action and recover for slanderous statements made by defendant to two different parties at different times.

Appeal from circuit court, Lincoln county.

"To be officially reported."

Action by Morris Fred against W. H. Traylor. Judgment for defendant, and plaintiff appeals. Reversed.

J. B. Paxton and Robt. Harding, for appellant. W. G. Welch, for appellee.

HOBSON, J. Appellant and appellee are both millers in Lincoln county. Appellant filed this suit against appellee to recover damages for slander charging that the latter had said of him as a miller to one of his customers, falsely and maliciously, and for the purpose of injuring him in his business as such, the following: "Dudderar, what do you want for your wheat?" Dudderar answered, "I won't price it until I see Fred (appellant), as I have given him the refusal of it." Appellee replied, "Well, you won't want to price it to Fred but once, if he beats you out of as much as he beat me out of. He just beat me out of \$1,100 in three months." Appellee in one paragraph of the answer denied that the words were spoken of the plaintiff as miller, and in the other paragraph he alleged the truth of the words. On the trial, at the conclusion of the evidence for the plaintiff, the court instructed the jury peremptorily to find for the defendant. This instruction was given on the ground that, although it appeared from the evidence that appellant had been for many years a miller, in the year 1900 for three months he kept an exchange in the town of Stanford in the employ of appellee, at which he exchanged flour and meal for wheat and corn, and sold the products of the mill for cash, and the \$1,100 transaction referred to occurred while he was so en-

gaged. After this, however, he rented a mill, and was engaged in business as a miller when the words complained of were spoken. The petition did not sufficiently allege special damages, and so the only question in the case is were the words actionable per se.

It is urged in support of the judgment that the vital fact that the words were spoken of the plaintiff as a miller is denied, and that, his own testimony showing he was simply running the exchange for appellee at the time the transaction referred to took place, the instruction was proper. The following authorities are relied on: "It is not enough for the plaintiff to prove his special character and that the words refer to himself. He must further prove that the words refer to himself in that special character, if they be not otherwise actionable. It is a question for the jury whether the words were spoken of the plaintiff in the way of his office, profession, or trade. It is by no means necessary that the defendant should expressly name the plaintiff's office or trade at the time he spoke, if his words must necessarily affect the plaintiff's credit and reputation therein. But often words may be spoken of a professional man, which, though defamatory, in no way affect him in his profession, e. g., an imputation that an attorney has been whipped off the course at Doncaster, or that a physician had committed adultery." *Odgers on Libel and Slander*, star page 541. To same effect see *Townshend on Slander*, section 190; 18 Am. & Eng. Ency. of Law, 944. On the other hand, in the same works the law as to imputations upon traders or merchants is thus stated: "The law has special regard for the reputation of men which they have acquired as merchants or traders, and, as will be seen more particularly hereinafter, in considering the precise nature of actionable words concerning them, any words, whether oral or written, which impute to merchants, traders, or other business men insolvency, financial difficulty, embarrassment, dishonesty, or fraud, or which in any other manner are prejudicial to them in the way of their employment or trade, are actionable per se." 18 Am. & Eng. Ency. of Law, p. 954. "In those trades or professions in which, ordinarily, credit is essential to their successful prosecution, there language is actionable per se which imputes to any one in any such trade or profession a want of credit or responsibility, or insolvency, past, present, or future, as to say of a tradesman, 'He is not able to pay his debts,' or 'He owes more than he is worth; he will break shortly. He is a pitiful fellow and a rogue; he compounded his debts at 5s. in the pound.'" *Townshend on Slander and Libel*, section 191.

In support of the texts a great number of cases are collected. There seems to be no conflict of authority on the subject. The reason for the rule is that where a man is engaged in trade his credit is the life of his

business, and to destroy his credit is to ruin him. Taken as a whole, the words used by appellee, above quoted, were an imputation of present want of integrity on the part of appellant in his business as a miller. The words were spoken to a customer, who had promised his wheat to appellant. They were evidently spoken to create in his mind the belief that he might suffer by keeping his promise, and to induce him to break it. They were spoken by a rival in business. If Dudderar credited what appellee said, he would necessarily believe appellant was a miller not to be trusted. The words, "Well, you won't want to price it to him but once," imported a present condition rendering credit to him as a miller unsafe for one who extended it. It is true the condition was added, "If he beats you out of as much as he beat me out of;" but this only accentuated the imputation, for the following explanation was added, "He just beat me out of \$1,100 in three months." The fair meaning of the whole, taken together, was an imputation that Dudderar would not sell his wheat to Fred but once, as he would then find out that he could not afford to. A miller buying grain and selling his products cannot exist without the confidence of his customers. He must have credit, or his mill will be deserted of trade. The words charged were spoken of the plaintiff as a miller in relation to the business he was then carrying on, as a warning to a customer not to trade with him. They necessarily touched him as miller, and were actionable, under the rule above quoted, as an imputation upon his credit and honesty. *Lawson on Rights and Remedies*, sec. 1257; *Price v. Conway* (Pa.) 8 L. R. A. 194, and notes (s. c. 19 Atl. 687, 19 Am. St. Rep. 704); *Hayes v. Press Company* (Pa.) 5 L. R. A. 543, note (s. c. 18 Atl. 331, 14 Am. St. Rep. 874).

Two separate slanders may be sued for in the same petition against the same party in separate paragraphs. *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432. The plaintiff should not be required to elect which paragraph of his petition he will prosecute, but may sue in the one action, under section 83 of the Code, and recover for the different statements made to the two different parties at different times.

Judgment reversed; and cause remanded for a new trial and further proceedings not inconsistent herewith.

ILLINOIS CENT. R. CO. v. GLASSCOCK
et al.

(Court of Appeals of Kentucky. March 11, 1903.)

BILL OF EXCEPTIONS—STATEMENT OF EVIDENCE—DELAY IN FILING—PRACTICE IN COURT BELOW.

1. Where the bill of exceptions and statement of evidence are not in fact filed and signed during the term at which the judgment becomes final, and no order is made extending the time, they will be stricken from the files, and this notwithstanding a practice in the

lower court to make an order reciting their filing, when in fact they have not been filed, with the understanding that they will be prepared and filed later, and dated back as of the date of the order.

Appeal from circuit court, Hardin county.
"Not to be officially reported."

Action by S. D. Glasscock and others against the Illinois Central Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. H. Marriott, J. M. Dickinson, and Pirtle & Trabue, for appellant. Sprigg & Chelf, for appellees.

NUNN, J. The appellee S. D. Glasscock and about 30 others filed their petition in the Hardin circuit court against the appellant, alleging, in substance, that they were the joint owners by purchase of a certain tract of land lying in Stephensburg, in Hardin county, Ky., consisting of about 27 acres, on which there was located a valuable lake of water covering about 12 or 15 acres of land, and that their interest and ownership therein was known as the "Stephensburg Lake and Improvement Company"; that they had incurred great cost and expense to purchase said lake, to remove the stumps, trees, and obstructions from said lake, to stock the same with all kinds of choice fish, and to fit up the same as a desirable fishing, bathing, and boating resort; that the appellant, by and through its gross negligence and carelessness, caused and permitted large tanks filled with oil and molasses, containing many thousand gallons thereof, to be thrown from the same near and into said lake, and negligently and carelessly caused and permitted the oil and molasses contained in the tank to leak, run, and flow therefrom into the lake, to poison and pollute the waters thereof, and to render the same putrid, offensive, and unwholesome, and by reason thereof all the fish therein—about 20,000 pounds—were killed, smothered, and destroyed, and rendered the lake unfit for boating, bathing, and fishing purposes; that the lake has been thereby rendered totally unfit for any purpose whatever, to their damage in the sum of \$2,000. Appellant filed answer traversing each and every allegation contained in the petition. A trial was had, and the jury returned a verdict in favor of appellees for the sum of \$750, on which the court rendered judgment for appellees. Appellant filed reasons, and moved the court to grant it a new trial. The court overruled the motion, the appellant taking all proper exceptions, and the case is now here on appeal.

At the same term of the court at which this judgment was rendered, there appears from the record this order: "Came defendant, by attorney, and filed herein its bill of

exceptions and statements of evidence, which, having been examined and approved by the court, was signed, and made part of the record." The record shows, and it is admitted, that the bill of exceptions and statement of evidence were not filed nor signed and approved by the judge at that time, nor was there an order made extending the time for filing same to any day in the succeeding term; but it is agreed that the bill of exceptions and statement of evidence were in fact signed on the first day of the succeeding March term of the court, over the objection of appellees. The record shows that appellant's counsel and the court claim that it was the custom of that court to make an order filing such bill of exceptions and statement of evidence when in fact they were not filed, with the understanding that they were to be prepared and approved after the adjournment of the court, and dated back as of the date of the order filing same, and that they heard no objection on the part of appellees' counsel to such a proceeding in this case. Appellees' counsel contend that they did object. In the case of *Newport News, etc., Co. v. Stavig*, 98 Ky. 584, 33 S. W. 620—which is a case in all particulars like the one before us—the court said: "The case was tried at the January term, 1893, and an order was then entered stating that the bill of exceptions and statement of evidence were filed, signed by the judge, and made a part of the record. But at the succeeding April term an order was made to the effect that at the January term no such bill or statement had in fact been filed, and a bill and statement, over the objection of the appellee, were then filed, and signed by the judge as of the date of the former order. While this is said to have been the practice in that circuit, we cannot approve it. The law provides that time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court; and, unless such time be given, the party excepting shall prepare and file his bill, properly signed, during the term at which the judgment becomes final. These are the plain provisions of sections 334 and 337 of the Civil Code of Practice, and cannot be changed by any rule of practice." To the same effect are *Adkins v. Commonwealth*, 42 S. W. 834, 44 S. W. 132, and *Beattyville & C. G. R. Co. v. Plummer*, 52 S. W. 948.

For these reasons the motion of appellees to strike from the record the bill of exceptions and the statement of evidence must be sustained. The petition states a cause of action in the plaintiffs, and, without a bill of exceptions and statement of evidence in the record, it must be presumed that there was no error committed on the trial; wherefore the judgment is affirmed.

KING et al. v. BALLOU.

(Court of Appeals of Kentucky. March 11, 1903.)

TITLE BOND — MISTAKE — REFORMATION—
RIGHT OF MARRIED WOMEN TO
BUY REAL ESTATE.

1. Where an agent of the owner sold a lot to a member of a firm, and the vendor, by mistake, made the title bond call for two lots, and forwarded it to the firm's manager, who executed a note for the purchase money, relying, as he claims, on the recitals in the bond, though the member of the firm had previously reported her purchase to him, and then only claimed the one lot, the fact that the purchase was made subject to the manager's approval, which was given in reliance on the recitals in the bond, will not prevent the vendor from having the mistake corrected and the purchase price paid.

2. Under Ky. St. § 2128, which grants to a married woman the right to buy and sell property, a married woman who is in business for herself can buy land and bind her estate therefor, even though her husband disapproves of the purchase.

Appeal from circuit court, Pulaski county.
"Not to be officially reported."

Action by Joseph Ballou against King & King for unpaid purchase money and the correction of a mistake in a title bond. Judgment for plaintiff, and defendants appeal. Affirmed.

O. H. Waddle, for appellants. W. A. Morrow, for appellee.

O'REAR, J. Appellee sold to appellants two lots of land in the town of Burnside, and executed a bond for title. The purchase money was not then paid. This suit was by appellee to collect the balance of the purchase money owing, and to correct what he alleges was a mistake in the bond for title. The transaction took place between a brother of appellee, representing him as his agent, and a member of the firm of appellants. The agent wrote appellee that he had sold to appellants two lots in Burnside for \$185. Appellee drew up and signed the bond for title, in which he described the lots as being in the town of Burnside, one on the north of the depot and the other on the south. The evidence is conclusive that the agent did not sell, nor did appellants buy, the last-named lot. Nor did either of the parties to the trade understand that that lot was included. This mistake seems to have grown out of the traders calling the first-named lot, "lying on both sides of the railroad," two lots, while appellee regarded it as one lot only.

Appellee's agent testifies to the particulars of the sale, and says that the bond mistakenly includes a lot not intended to be sold. The member of the firm with whom the trade was made did not testify. Instead, another, the general manager of appellant firm, testified that he executed the note, and that the purchase was made subject to his ratification; that appellant firm is composed of the wife and the sister-in-law of the manager; that when his wife reported that she

had bought the lot she did not claim to have bought the one south of the depot; that when he saw the bond he approved the purchase, relying on its recitals. He says that his wife wanted to buy the lot, but that he did not.

While an agent may buy subject to his principal's ratification, when the principal buys it is immaterial whether the agent ratifies or approves it or does not. Where a married woman is in business on her own account under the statute now in force (section 2128, Ky. St.), she can buy land and bind herself and her estate for it, even though her husband disapproves the transaction. It therefore appears that the understanding appellants' agent had about the trade was not material, as he was not making it. But, appellee's agent and the purchaser, Mrs. King, having agreed about the lot, and the bond containing an unquestioned mistake as to one of the lots named, the circuit court properly corrected the error and rendered judgment for the balance of the unpaid purchase money.

Judgment affirmed, with damages.

HOWARD v. LONDON MFG. CO.

(Court of Appeals of Kentucky. March 11, 1903.)

JUDGMENT—PAYMENT—EVIDENCE—SUFFICIENCY—TRUSTEE—APPLICATION
OF PAYMENTS.

1. Evidence considered, and held to show that a certain judgment had been satisfied.

2. Where a trustee of land for the benefit of infants sold timber therefrom, it would be presumed that he applied the price to the extinguishment of a lien against the land itself, rather than to the extinguishment of other indebtedness due from him as trustee.

3. A debtor has the right to designate the particular indebtedness to which payments made by him are to be credited.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Suit by the London Manufacturing Company against B. F. Howard. From a judgment for plaintiff, defendant appeals. Reversed.

W. R. Ramsey, B. B. Golden, E. H. Johnson, and H. C. Hazlewood, for appellant. Jas. Sparks, for appellee.

BURNAM, C. J. In February, 1895, C. L. Troutman recovered a judgment against B. F. Howard for \$153.48, with interest and cost, and for the enforcement of a mortgage lien upon the tract of land belonging to the defendant in Laurel county, Ky., to secure the payment of his judgment. A short time after the entry of this judgment B. F. Howard sold and conveyed this tract of land, subject to the judgment of Troutman, to his father, W. M. Howard, as trustee for his seven brothers and sisters, most of whom were infants. After this transfer, in March, 1895, W. M. Howard, for the purpose of paying off this judg-

† 3. See Payment, vol. 39, Cent. Dig. § 90.

ment, contracted with the London Manufacturing Company to sell and deliver to them 60,000 feet of logs, which were to be cut from the land, and by agreement with McKee, the manager of the manufacturing company, and Sparks, the attorney and father-in-law of Troutman, it was agreed that the manufacturing company should pay the Troutman judgment in dressed lumber furnished to Troutman, and charge its value to Howard's account for the logs, and on the 18th day of November, 1895, James Sparks, as attorney for Troutman, indorsed on the margin of the record of the judgment, "Satisfied in full." After the delivery of the 60,000 feet of logs originally contracted for, Howard continued to furnish logs to the company until he claims they were indebted to him in \$1,765.18, on which they paid him, including the Troutman judgment, \$1,590.34, leaving a balance due to him of \$178.63. On the other hand, the company claimed that it had overpaid W. M. Howard for the logs purchased from him as trustee, excluding the Troutman judgment, and in September, 1899, they procured, for the first time, a written assignment to them of this judgment, and instituted this suit, in which they ask that the indorsement on the margin of the judgment be set aside, and that the deed from B. F. Howard to W. M. Howard, trustee, be canceled, and the land be subjected to the payment of the Troutman judgment. The defendant, by way of answer, relied upon the facts recited above; the question at issue being altogether one of fact. W. M. Howard testified that in November, 1895, after the delivery of a good many logs, and after Troutman had received the dressed lumber contracted for, he asked that the mortgage be released, and was told by McKee to have Sparks release it; that he immediately went to see Sparks, and Sparks said that he would see McKee before doing so, and went immediately for that purpose, and returned in a few moments, and then went with him to the courthouse, and indorsed the satisfaction of the judgment. Sparks, in his deposition, admits the transaction with him testified to by W. M. Howard, and further says that when he went to see McKee that he understood him to say that the judgment had been settled by Howard, and to release the lien, and that he did so; but that the next morning McKee told him that he did not mean that the judgment had been paid, but only that arrangements had been entered into by which it would be paid by Howard. McKee corroborates Sparks. But the fact remains that no steps to correct the alleged error on the part of Sparks entering the release were made before the institution of this suit, some four years later. W. M. Howard's statements are fully corroborated by W. R. Grant, who says that he was acting as sawyer for the London Manufacturing Company at the time the Howard logs were manufactured, and that McKee told him that he had agreed to take logs from Howard and furnish dressed lum-

ber to pay off the Troutman judgment, and that the judgment had been fully satisfied.

Under this proof, the trial court entered a judgment subjecting the land to the payment of the judgment, and the manufacturing company became the purchaser at the price of their debt, interest, and cost, and from that judgment defendant appeals.

We are of the opinion that the decided weight of the evidence in the case is on the side of the appellant. All the parties agree that Sparks, as attorney for Troutman, objected to Howard's cutting the timber from the land mortgaged to secure his client's debt until satisfactory arrangements had been made to secure its payment by the manufacturing company, and this was the main inducement which brought about the arrangement made with appellee. Nor is it controverted that shortly after this arrangement was entered into Troutman got the dressed lumber to satisfy his judgment. As the logs were cut from the land of the infant, it was the duty of their father and trustee to see that their price was applied first to the extinguishment of the lien against the land itself, and it is more reasonable to believe that this course would have been adopted by both appellant and appellee than that they should have applied the price of these logs in other directions. A debtor has always the right to designate the particular indebtedness to which the payments made by him are to be credited. We are therefore of the opinion that the trial court erred in allowing the price of these logs to be applied to other indebtedness due by Howard as trustee to the appellant, if such in fact existed, and leave the lien against the land to be enforced years after it had been stripped of what constituted its chief value.

For reasons indicated, the judgment subjecting the land to the Troutman judgment is reversed, and cause remanded, with instruction to set aside the sale made to appellees thereunder, and to cancel their deed, and for other steps not inconsistent with this opinion.

BLACK v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 13, 1903.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—ACTS OF DEFENDANT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—REVIEW—HARMLESS ERROR.

1. A new trial will not be granted for newly discovered evidence, which was only cumulative, and which would not have strengthened that adduced by accused to any appreciable extent.

2. Under Cr. Code Prac. § 281, providing that decisions of the trial court on motions for a new trial shall not be subject to exceptions, the denial of a motion for a new trial for newly discovered evidence cannot be reviewed.

3. Where, in a prosecution for murder by stabbing, defendant did not testify, it was error for the state's attorney to ask defendant's sister if she did not know that the reason she was so afraid of defendant was that he had

¶ 2 See Criminal Law, vol. 15, Cent. Dig. §§ 2537, 2693.

cut two other men, and had been sent to the pen for it.

4. Where, in a prosecution for murder by stabbing, the defense was insanity, and his counsel, in cross-examination of a state's witnesses and in the examination of his own witnesses, showed defendant's attempts to cut men and boys frequently as an evidence of his insanity, the fact that the commonwealth's attorney was erroneously permitted to ask a witness whether the reason why she was afraid of defendant was that he had cut other men, and been sent to the pen for it, was not prejudicial.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

John Black was convicted of murder, and he appeals. Affirmed.

Jos. E. Conkling and H. W. Saunders, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

NUNN, J. The indictment charging the appellant with willful murder of Archie James was returned at the June term of the Jefferson circuit court, 1902. On the 10th day of the same month the appellant was brought into court, and, with his attorney, Henry Tilford, consented to dispense with the formalities of an arraignment, and entered a plea of not guilty of the offense charged. On that day an order was made by the court appointing Joseph L. Reed and Dudley C. Jones attorneys to defend the case. The trial of the prosecution was assigned for June 17, 1902, and, when the prosecution was called for trial, Joseph E. Conklin and H. W. Saunders appeared as counsel for appellant, and on their motion the case was continued until September 28, 1902. On the calling of the prosecution on the last date, the same counsel appeared, and on their motion the trial was postponed until September 30th, and on the last-named day no further motion for a continuance was made, and the trial was entered into. The jury returned a verdict of guilty, and fixed appellant's punishment at death. The appellant, by counsel, filed reasons, and moved the court to grant him a new trial, which motion was overruled, and he has appealed to this court to reverse that judgment.

The facts in the case, as shown by the record, are, in substance, these: In the month of May, 1902, the appellant, at Second Street Market, in the city of Louisville, stabbed and killed Archie James. It occurred under the following circumstances, as related by the witness Edgar Johnson, who was a butcher in that market house: "Archie James was sitting in a wagon. The wagon was backed right up against the curbstone in front of the market, and he had his head down this way, and this man was in the rear end of the market, about 40 feet from James. John Black came walking from the rear end of the market, and said to me, 'I want to borrow your knife,' and took the knife, about a 12-inch blade, and walked

out to where the old man James was, and I happened to look just at that time. The old man raised his head, and Black stuck the knife in his neck. Neither said anything to the other. Black turned immediately, and walked back through the meat market, and out the back door. Archie James jumped up, and stepped a few feet forward, and fell with his head in the door, and died in a few moments. Black was sober." Several other witnesses corroborated this witness Johnson. There was no attempt to contradict this testimony. There was some intimation that they had had some words the night before at James' house. When arrested, appellant said "he was trying to run his bluff on me." All the testimony shows that the old man was unarmed, and was sitting in his cart, about half asleep. Deceased was about 65 years old, and appellant a young man, and a nephew of the deceased.

The only attempt made to excuse appellant from this foul crime was insanity. All the witnesses for the commonwealth, seven or eight in number, said that he was of sound mind at all times when sober. The appellant's witnesses, except one or two, agreed with those of the commonwealth as to this. Appellant's counsel contend for a reversal on three grounds: (1) That the lower court failed to grant appellant a new trial on account of newly discovered evidence; (2) that the second instruction given by the court to the jury was prejudicial to him; (3) that the court permitted incompetent evidence to be introduced over his objection.

As to the first ground, the newly discovered evidence, if introduced, would have been only cumulative, and would not have strengthened that adduced to any appreciable extent; and under section 281 of the Criminal Code of Practice, which says that the decisions of the lower court upon motions for a new trial shall not be subject to exceptions, and in the case of Gambill v. Commonwealth (Ky.) 23 S. W. 960, this court said: "One of the grounds for a new trial is the discovery of new evidence tending to contradict the evidence of the witness for the commonwealth. It is only necessary to state that, the lower court having passed upon that matter, its judgment thereon cannot be reversed here, for this court is confined in its review of criminal appeals to errors of law occurring on the trial." In the case of Hatton v. Commonwealth, 7 Ky. Law Rep. 46, this court said: "An error in overruling a motion for a new trial on the ground of newly discovered evidence is not a ground for reversal." In the same book, page 377 (Edrington v. Commonwealth), the court said: "This court cannot review the action of the lower court in overruling a motion for a new trial made upon the grounds of newly discovered evidence."

As to the second ground, there was no error in the giving of instruction No. 2, complained of, and, taking all the instructions

together, they were more favorable to appellant than he was entitled to.

As to the third ground, the only evidence complained of was brought out on the cross-examination of Jane Black, a sister of the appellant. She was asked this question by the commonwealth's attorney, "Now, don't you know that the reason that you were afraid of him, he out two other men, and was sent to the pen for it?" which question was not answered by the witness. Then the commonwealth's attorney asked this question, "Now, don't you know that that was the reason you were afraid of him?" to which witness answered, "No, sir; I was not scared of him about that." This was improper, as appellant did not testify, and the court should not have permitted it; but in view of the defense made by appellant of insanity alone, and the effort on the part of his counsel in the cross-examination of appellee's witnesses and in the examination of his own to show his attempts to cut men and boys frequently as an evidence of his insanity, this evidence was not prejudicial to him, but was rather in aid of his attempted defense.

This record discloses the fact that the appellant committed a most foul, brutal, and unprovoked murder, and the jury saw proper to fix the death penalty, which this court does not feel justified in interfering with; wherefore the judgment of the lower court is affirmed.

WEBSTER et al. v. BROWN.

(Court of Appeals of Kentucky. March 17, 1903.)

WILL—DEVISE OF REALTY—CONSTRUCTION—LIFE ESTATES.

1. A will devised realty to trustees for the use of a beneficiary, the land to descend to his lawful children. The beneficiary's parents were given the privilege of a home for themselves and minor children, or as long as any female child of the mother was unmarried. One-fourth of the crop was to be appropriated to the education of the beneficiary, the rest to be used by his mother for herself and family, and her husband so long as he remained a widower. Should the beneficiary die without children, then the land was to belong to the child of the mother, "who shall have the use of it during her life as directed in this will." Held, that the parents took a life estate, subject to the appropriation of one-fourth of the crops to the beneficiary's education, after which the mother, who was the surviving parent, took the whole income; and on the death of the mother, the beneficiary would have a life estate, with remainder to his legitimate children.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Suit by Lucy J. Brown against Myrtle R. Webster and others. Judgment for plaintiff, and defendants appeal. Affirmed.

M. Merritt and F. M. Hutcheson, for appellants. Lockett & Lockett, for appellee.

BURNAM, C. J. The appellee, Lucy J. Brown, brought this suit against the appellants, Myrtle Webster, then Myrtle Robards, and J. W. Porter, on the 8th day of November, 1900, for the possession of 220 acres of land, and the rents thereon, in which she claimed to have a life estate under the will of Almira E. Suggett. Myrtle Webster claimed 100 acres of land as allimony allowed her by a judgment of Henderson circuit court out of the estate of her divorced husband, J. D. B. Robards; and the appellant Porter claimed the residue of the tract as vendee of Robards. We are asked to determine what interest J. D. B. Robards and his mother, Mrs. Lucy J. Brown, took under the will of Almira E. Suggett. The clauses of the will we are asked to construe read as follows:

"I give all the balance of my estate, real and personal, to James White and Henry H. Farmer, and their legal successors, * * * in trust for the use and benefit of J. D. B. Robards, son of B. F. and Lucy Robards, the land not to be divided, but to descend to the children that may be born in lawful marriage to said J. D. B. Robards. But the property is given with restrictions to be mentioned below. B. F. and Lucy J. Robards have the privilege of a home on the land for themselves and any children they now have or she may have, during their minority, or as long as any girl child of hers is unmarried. But one fourth of the proceeds of the crop raised is to be appropriated by my trustees to the education of said J. D. B. Robards, with the view to his entering the Christian ministry as a Baptist or Presbyterian. The farm, land and proceeds are to be controlled by said trustees and nothing raised on the farm is to be subject to any one's debts except as to my own as before mentioned, and all raised on the farm except the one fourth appropriated as before mentioned is to be used by Lucy J. Robards for the benefit of herself and family, and B. F. Robards, should he be left a widower, so long as he may continue unmarried. But no child except Lucy J. Robards shall be raised on the place out of its proceeds. Should J. D. B. Robards die without children, then the land shall belong to the child of Lucy J. Robards, who shall have the use of it during her life as directed in this will."

This will was probated in May, 1877, and the appellee, Lucy J. Robards, and her husband, B. F. Robards, and their son, J. D. B. Robards, lived on this tract of land until he married the appellant Myrtle Webster, in December, 1894, he being at that time only 17 years old. Both families continued to occupy the premises until J. D. B. Robards and his wife separated in May, 1899. B. F. Robards having died, Lucy J. Robards married A. A. Brown. The appellant Myrtle Webster appears not to have agreed with her mother-in-law after her marriage to Brown, and only consented to return to her husband on the condition that her mother-

in-law and her husband should leave the premises, and, apparently with a view of promoting harmony in the family, she did leave the premises in May, 1899. But the reconciliation between J. D. B. Robards and his wife was short lived. She again separated from him in the following August, and instituted a suit against him for a divorce and alimony, in which she was allowed 100 acres of land as alimony for the support of herself and infant child. She shortly afterwards married her present husband, Webster. In the meantime, J. D. B. Robards and wife mortgaged his life interest in the land to the appellant Porter, and this land was subsequently sold, and Porter became the purchaser. In addition to the facts recited above, both of the appellants relied upon the abandonment of the premises by Mrs. Brown in 1899 as an estoppel. No facts, however, are alleged to support this plea.

We are of the opinion that B. F. and Lucy J. Robards took a life estate in the tract of 220 acres of land under the will of Mrs. Suggett, subjected to a charge of one-fourth of the proceeds of the crop raised thereon for the education of their son, J. D. B. Robards. It appears from the testimony that appellee, Mrs. Lucy J. Robards, has no minor children, and her son, J. D. B. Robards, has finished his education, and has now no valid claim to one-fourth the proceeds of the farm. It therefore follows that appellee is entitled to the use and occupancy of the farm during her life. At her death, J. D. B. Robards has a life estate therein, and, at his death, it descends to his children born in lawful wedlock. As appellee was not a party to the proceedings in which the appellant Myrtle Webster was adjudged 100 acres of the land as alimony, and J. W. Porter a lien upon the residue to secure the payment of his debt, her interest is not in any wise affected by this judgment. Nor is there any proof in the record to support the plea of estoppel. We think the trial court properly adjudged appellee entitled to the possession of the property, etc.

Judgment affirmed.

RENO et al. v. BLACKBURN.

(Court of Appeals of Kentucky. March 13, 1903.)

DESTROYED WILLS—PROOF—ADVERSE POSSESSION—OCCUPATION BY WIDOW—HOMESTEAD—BURDEN OF PROOF.

1. Where it was proved that a will under which defendant claimed title to land had been destroyed by fire with the records of the county clerk's office, but the proof did not show that the will was duly attested or that it was admitted to probate, proof that by the will testator devised the land in controversy to defendant's widow was insufficient to sustain her title under the will.

2. Where a widow occupied land of her deceased husband under a destroyed will and held actual, notorious, adverse possession thereof for more than 15 years, claiming the land in fee, and not as a homestead merely, she thereby acquired title by adverse possession as against her husband's heirs.

3. Where a husband's heirs, in an action to recover land held by the widow for more than 15 years, claimed that the widow occupied the property as her homestead and not adversely, the burden of proof of such fact was on such heirs.

Appeal from circuit court, Carlisle county.
"Not to be officially reported."

Action by Margaret Reno and others against Cal Blackburn. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

J. M. Nichols & Son, for appellants. Gus Thomas, for appellee.

SETTLE, J. Appellants, Margaret Reno and others, claiming to be of kin to and the only heirs at law of Lloyd Pickett, deceased, brought this action in the Carlisle circuit court to recover of the appellee, Cal Blackburn, 50 acres of land lying in Carlisle, formerly Ballard, county. It appears from the record that the land was formerly owned by Lloyd Pickett, who was residing thereon at the time of his death, which occurred in 1872. It further appears from the record that Lloyd Pickett left no children, but that his wife survived him. In 1874 she married the appellee, Cal Blackburn, with whom she lived until her death in March, 1900. It is averred in the petition that Lloyd Pickett died intestate, and that appellee is wrongfully in the possession of the land left by Lloyd Pickett, upon whose death, it is claimed, it descended under the statute to appellants, and that they are now the owners and entitled to the possession thereof. The answer of appellee, as finally amended, denies that appellants are the owners or entitled to the possession of the land, and avers that Lloyd Pickett left a will, which was admitted to probate in the Ballard county court, and duly recorded in the Ballard county court clerk's office, but that the courthouse and clerk's office in that county were destroyed by fire in 1880, for which reason the will cannot be produced. That by its terms the land was devised absolutely to the testator's wife, who from his death, in 1872, to her own, in 1900, a period of more than 29 years, continuously had and held the actual possession thereof, claiming it adverse to all the world, and that appellants, who resided near her, had notice of the nature of her title and the character of her possession. And appellee also pleads and relies on the statute of limitation to defeat appellants' action. The reply filed by appellants traverses the averments of the answer, and charges that the wife of Lloyd Pickett occupied the land in controversy only as a homestead, and this averment is denied by the rejoinder. The lower court, upon these issues and the proof taken by the parties, rendered judgment dismissing the petition, and allowing appellee his costs.

The evidence furnished by the depositions tends to show that a will was executed by Lloyd Pickett. Three witnesses testified that

they were present when it was written. These witnesses also agreed that Lloyd Pickett's wife was the sole devisee under the will, though none of them could give the precise terms of the will, or tell what character of estate was given her in the land. It is not clear, either, who the attesting witnesses were.

There is also some evidence in the record tending to show that the will was carried, after the death of Lloyd Pickett, to Blandville, the county seat of Ballard county, and delivered to Corbett, the county clerk, for record. The witness, Sam, who testified to this fact, seemed to have the impression that he paid for the recording of the paper when it was handed by him to the clerk, and that the money for the purpose was furnished him by one Wiley Dicus. A small book containing many entries of various kinds was filed with the deposition of one of the witnesses, and by him identified as the former property of Wiley Dicus, who is dead, and the following entry in this book was identified as in the handwriting of Wiley Dicus, viz.: "Oct. 4th, 1872, \$1.40 paid cash for recording Lloyd Pickett's will to his wife." An inspection of the book and entry will show that the entry is not of recent date. The book and entry cannot, in our opinion, be treated as competent evidence, as the entry was not made by the direction of any one authorized to act for the estate of the testator, nor by one who is shown to have had any control of the will, or who had been intrusted with the duty of having it probated.

It is shown beyond question that the clerk's office and courthouse of Ballard county were burned in 1880, and all the public records of the county then in existence were destroyed, which would account for the loss of the will of Lloyd Pickett, if he left one that was admitted to probate, but while the evidence introduced in support of the contention that such a will was made by Pickett for the benefit of his wife is persuasive in the extreme, and, indeed, sufficient to satisfy us that the will was at one time in existence, it is by no means sufficient to convince us that the will was duly attested by two witnesses as required by law, and, if it were proved that it was legally executed, we would still be without information as to whether or not it was admitted to probate in conformity to the provisions of the statute.

While the evidence is insufficient to authorize this court to hold that the wife of Lloyd Pickett took the land in controversy as devisee under the will of her husband, we are of opinion, from all the facts and circumstances connected with her holding of it, that some sort of a paper was executed by the husband, whether valid as a will or not, under and by virtue of which she claimed to own the land. The evidence shows that her claim of ownership as well as her possession of the land was derived from and based on what she believed to be a valid will

of her husband, and that her possession was actual, continuous, notorious, and adverse to appellant and all others for more than 15 years. It also appears that her claim of ownership was generally known throughout the neighborhood, and that many of the appellants were close neighbors, and must certainly have known of it, yet not one of them ever denied or controverted her claim while she lived, nor have any of them testified in this case in contravention thereof.

It is alleged in reply that the widow of Lloyd Pickett occupied the land as a homestead, which is denied in the rejoinder. No proof has been made to show that she occupied the land as a homestead, though, under the pleadings, the burden was upon the appellants to show that such was her true interest.

In *Yeatman v. McDonald*, 4 Ky. Law Rep. 348, 349, only the syllabus of which is reported, this court announced that 15 years' adverse possession by the wife under claim of title perfected her title to the lands of her husband as against other claimants, and in *Hogan v. Kurtz*, 94 U. S. 773, 24 L. Ed. 317, it was said by the Supreme Court: "By the record it appears that the testatrix of the defendant was twice married, that her first husband emigrated here in the year 1794, married here, purchased the lot in question, and built a house on it as a family residence, that they never had any children, and that he died in 1828, leaving her surviving him, that she married a second husband, whom she survived, and died testate in 1869, devising the property to her sister, the defendant in error. Throughout her life, subsequent to the decease of her first husband, the testatrix held actual, exclusive, continuous, visible, and notorious possession of the property, and the evidence is full to the point that the defendant, as her devisee, continued to so hold the same from the death of the testatrix to the present time. Forty-two years elapsed after the death of the first husband of the testatrix before the present suit was commenced, the plaintiffs claiming to be collateral heirs, or the representatives of collateral heirs." Under these facts the court held that the possession of the widow was adverse to the heirs, and her title was perfected by lapse of time.

We see no reason why the principle announced in the case supra should not be applied in this case. The failure of appellants to assert title to the land in controversy until since the death of Pickett's wife, the knowledge that they must have had of the adverse claim of title set up by the widow of Lloyd Pickett so long ago, coupled with her actual possession of 29 years, convinces us of the insincerity and staleness of appellants' claim, and of the propriety of applying to it the bar that may be interposed in such cases by the statute of limitation.

The judgment of the lower court is affirmed.

GARTH'S GUARDIAN v. TAYLOR.

(Court of Appeals of Kentucky. March 12, 1903.)

GUARDIAN—NOMINATION BY MINOR—COMPLIANCE WITH STATUTE.

1. Under Ky. St. § 2022, permitting a minor 14 years of age to nominate his own guardian, either in the presence of the court or by a writing signed in the presence of the judge, after a privy examination, an order appointing a guardian on nomination by writing is void, where the minor did not attach the signature in the presence of the judge, and was not privately examined by him.

Appeal from Circuit Court, Bourbon County.

"To be officially reported."

The appointment of the Central Trust Company as guardian of Joanna Garth was vacated, and Catesby Woodford was appointed instead. From a judgment of the circuit court sustaining the second appointment and holding the first one void, the Central Trust Company appeals. Affirmed.

McMillan & Talbott, for appellant. Brent & Thomas, for appellee.

BARKER, J. On the 23d day of May, 1900, the judge of the county court of Bourbon county, Ky., upon what purported to be a written nomination of Joanna Garth, an infant over the age of 14 years, appointed the Central Trust Company as her statutory guardian. Under this appointment it continued to act until the 9th day of November, 1901, when the order of May 23, 1900, was vacated and set aside upon the motion of Joanna Garth, by her next friend, Gurley Taylor. Afterwards, on the 23d day of November, 1901, the court entered the following order: "At the further hearing of this matter, adjourned to this 22d day of November, 1901, the court, the applicant, Joanna Garth, having in its presence, and also by writing signed by her in the presence of the judge thereof after privy examination by him, nominated Catesby Woodford, Esq., to be her guardian, doth hereby order and adjudge that said nomination be, and the same is hereby, approved, and said Woodford is appointed to succeed the said Central Trust Company heretofore acting as her guardian. Said Woodford having qualified and given the security required by law, the aforesaid trust company, which is hereby superseded as guardian, is ordered to settle its accounts as such, and turn over the control of said Joanna Garth and her property in their hands to its successor above named. To all of which the said Central Trust Company, as guardian of Joanna Garth, objects and excepts, and prays an appeal to the Bourbon circuit court." Afterwards, on the 29th day of March, 1902,

the case, on appeal to the Bourbon circuit court, came on for trial, and the court, by its judgment, held that the order of the county court of Bourbon county of May 23, 1900, appointing the Central Trust Company guardian of Joanna Garth, was void, and also adjudging that Catesby Woodford, appointed by order of the county court on November 22, 1901, is, and has been since that date, the guardian of Joanna Garth, and as such is entitled to control her person and estate. From this judgment the Central Trust Company is appealing to this court.

The only question for adjudication in this case is whether or not the order of May 23, 1900, is void. Section 2022 of the Kentucky Statutes is as follows: "If a minor is fourteen years of age, he may, in the presence of the court, or by writing signed in the presence of the judge, after a privy examination, nominate his own guardian; but if the person so nominated is not approved by the court, or if the minor, after summons, fails to nominate a suitable person, or resides out of the state, or if the testamentary guardian fails for three months to qualify, the court may appoint a guardian of its own selection." It will be seen that the above statute points out the precise manner in which a minor of 14 years of age may nominate his own guardian: First, he may do it in the presence of the court; or, second, he may do it by a writing signed in the presence of the judge, after a privy examination. The Statutes only authorize the nomination of a guardian by a minor in the manner set out. These statutory barriers are for the protection of the infant by enabling the judge of the county court to know himself that the infant is not under the domination or control of designing persons in his selection, and it enables the judge to protect the infant from the machinations of interested persons, who might influence him to his injury in the selection of a guardian. It is of the utmost importance to the infant that all of the provisions of the Statutes protecting him from youthful indiscretion should be enforced, and this can only be done by firmly establishing the principle that the conditions upon which a minor may nominate his own guardian are jurisdictional, and, if they are not complied with, the nomination is void. It is conceded in this case that the writing purporting to be the nomination of the Central Trust Company by Joanna Garth was not signed in the presence of a judge of the county court, and that she was not privily examined by him.

We are therefore constrained to hold that the order of May 23, 1900, was void, and, as this was the view entertained by the judge of the circuit court of Bourbon county, the judgment is affirmed.

NEWPORT & DAYTON LUMBER CO. v. LICHTENFELDT et al.

(Court of Appeals of Kentucky. March 13, 1908.)

MECHANICS' LIENS—PETITION TO ENFORCE—SUFFICIENCY—CURE OF DEFECTS.

1. A petition to enforce a lien for materials, not stating, as required by Ky. St. § 2468, that the statement filed in the county court clerk's office, to secure the lien, was subscribed and sworn to by petitioner, or some one on its behalf, is fatally defective.

2. The petition is not cured by filing a copy of the statement therewith.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by the Newport & Dayton Lumber Company against C. H. Lichtenfeldt and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Tisdale & Gray, for appellant. M. Herold, for appellees.

NUNN, J. The appellant sold and delivered to one Nagel, a contractor, \$45.90 worth of lumber, which was used in the repair or erection of a house for the appellees; and it filed, or attempted to file, in the county court clerk's office, under section 2468 of the Kentucky Statutes, a statement of its claim for the purpose of perfecting a lien upon appellees' property to secure its claim, and it filed its petition in the Campbell Circuit Court to enforce its lien on the property. The appellees demurred to the petition, because it did not state facts sufficient to constitute a cause of action. Afterwards appellant moved the court to submit the cause for judgment and order of sale, which was done, over the objection of appellee. The court took the case under advisement, and made an order dismissing appellant's petition, and rendered judgment against him for costs; from which judgment appellant appealed.

We are of opinion that the appellant's petition did not state a cause of action. It was fatally defective in not stating, as required by section 2468, Ky. St., that the statement which it filed in the county court clerk's office, to secure its lien, was subscribed and sworn to by it, or some one in its behalf. In volume 18, p. 969, Am. & Eng. Enc. Pl. & Pr. (2d Ed.), it is said: "A party seeking to enforce a mechanic's lien must, by his pleadings, bring himself strictly within the terms of the statutes creating the lien. * * * It must be shown that the claimant has taken the requisite steps to create the lien. The sufficiency of the complaint is to be determined by the statute." And again, on page 988: "If the statute requires the notice to be verified before filing, the complaint will be demurrable unless it alleges that this was done." In volume 15, p. 161, Am. & Eng. Enc. of Law (1st Ed.), it is said: "Where the lien law requires that a notice to create a lien shall be verified before filing, a complaint, in an action to foreclose a lien, which

contains no averment that the notice was verified, does not state facts sufficient to constitute a cause of action." The filing of a copy of the statement with the petition did not cure this defect. In the case of Green v. Page, 80 Ky. 370, the court said: "Counsel insists, however, that the exhibit controls the allegation in the petition. This is not the rule under our Code. An exhibit neither aids nor destroys the material averments in a pleading, and is not to be considered by the court in determining the sufficiency of a pleading, but may be properly considered as evidence on the trial of an issue tendered." In the case of Saur, etc., v. Sayres, 2 Ky. Law Rep. 229, the court, by Chief Justice Cofer, said, "A material fact cannot be supplied by means of an exhibit."

Perceiving no error in this case, the judgment of the lower court is affirmed.

BURGHARD et al. v. FITCH et al.

(Court of Appeals of Kentucky. March 17, 1908.)

STREET IMPROVEMENT—SIDEWALK—CARRIAGE WAY—ORDINANCE—VALIDITY.

1. An ordinance which provided for the grading of a street "full width to the curb grade," was not void in that it did not designate what part was sidewalk, the cost of which, under Ky. St. § 2835, should be borne by the owners of fronting lots, and which part was carriage way, the cost of which, under section 2833 should be borne by the owners of lots in the contiguous quarters of squares, the construction of sidewalks not having been contemplated.

Appeal from circuit court, Jefferson county, Common Pleas Division.

"Not to be officially reported."

Action by C. F. Fitch and others against J. T. Burghard and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Lane & Harrison, for appellants. Wm. Furlong, for appellees.

NUNN, J. On the 19th day of April, 1898, the following ordinance was passed by the general council of the city of Louisville, and approved by the mayor, to wit: "An ordinance for improving a part of Grand avenue from the west line of 28th street to the east line of 30th street. Be it ordained by the general council of the city of Louisville that Grand Ave. from the west line of 28th street to the east line of 30th street shall be improved by grading full width to the curb grade, in accordance with the plans and specifications on file in the office of the board of public works. Said work shall be done at the cost of owners of ground as provided by law, and that all ordinances in conflict herewith be and same are hereby repealed."

It is agreed by the parties that Fitch, the contractor, graded the street in accordance with said ordinance, and that his work was approved by the board of public works, and

accepted by the city, and an apportionment made of the cost thereof as against the property owners, as required by statute. The appellant, being one of the property owners, contends that his property is not bound for any part of the cost of said improvement, for the reason that the ordinance quoted was and is void. He says: "The act for the government of cities of the first class, approved July 1, 1893, provides that the cost of the improvement of the sidewalks, either by original construction or reconstruction, shall be apportioned against and paid for by the owners of lots fronting the improvement, in proportion to the number of feet owned by each; that the cost of the improvement by original construction of the street proper, or carriage way, shall be apportioned against and paid for by the owners of lots in the quarters of squares contiguous thereto, according to the number of square feet owned by each of such persons in said quarter squares; but whenever the general council, by ordinance, provide for the improvement of any public ways of such cities, such ordinance must determine what part of such public way, if any, is for the sidewalk, and what part, if any, is for the carriage ways, or street proper; and where an ordinance provides for the grading of a public way, throughout its entire width, and between the terminals, as fixed by the ordinance, without designating what part is sidewalk or what part is carriage way, such ordinance is void, and the property owner cannot be held liable for the cost of such improvement."

If the ordinance in question had required the construction of a street or carriage way and also a sidewalk, then the contention of appellant would be proper, because the cost of constructing a street or carriage way should have been apportioned to each fourth of a square, as required by section 2833, Ky. St., but in the construction of sidewalks it would have been apportioned by the front foot as owned by the abutting property owners, respectively, as required by section 2835, Ky. St. But we do not understand that this was the character of construction contemplated by the ordinance. As we understand the ordinance, it only required the grading of the street, full width, to the curb grade. It did not require the construction of sidewalks, and the city may never require such construction.

We are of the opinion that the ordinance was valid, and the cost of the improvement was properly apportioned.

Judgment affirmed.

COOK v. TODD et al.

(Court of Appeals of Kentucky. March 10, 1903.)

MASTER AND SERVANT—CONTRACT FOR SERVICES—PLACE OF PERFORMANCE—PRESUMPTION—BURDEN OF PROOF—ORAL EVIDENCE.

1. Defendants, conducting a manufacturing business in Kentucky, contracted to employ

plaintiff as superintendent for two years at a stated monthly salary, no place being mentioned. During such period defendants moved their factory to another state, and, plaintiff refusing to superintend the business there, they refused to pay his salary, and he sued to recover it. The court left the question whether the parties intended, in making the contract, that the services should be performed in Kentucky, to the jury, and cast the burden of proving that fact on the plaintiff. *Held* error, since, in the absence of proof to the contrary, it is presumed that a contract is to be performed in the state where it is executed.

2. Where a contract for services is silent as to where the services are to be performed, oral evidence is admissible to show the intent of the parties as to the locality where the services were to be rendered.

3. Where plaintiff contracted to superintend a manufacturing plant in the state, he was not required to object to the removal of the plant to another state, to preserve his rights under the contract to the salary after such removal, on his refusal to move with it.

Appeal from Circuit Court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by C. Lee Cook against George D. Todd and others. From a judgment for defendants, plaintiff appeals. Reversed.

Mat O'Doherty, for appellant. Harris & Marshall, for appellees.

PAYNTER, J. The appellant invented a "metallic piston rod packing," and for which he obtained a patent, and on the 19th of January, 1898, was engaged in manufacturing it in the city of Louisville, where he and appellee Todd both lived, and where Todd was carrying on a manufacturing business. On that day appellant assigned to Todd for a period of two years from February 1, 1898, all of his rights under his patent, together with some implements and tools used in the manufacture of the packing. Todd was to manufacture the packing and pay Cook one-half of the net profits derived from the business. There are some provisions of the contract which are not necessary here to be stated. A clause in the contract reads as follows: "Second party agrees to employ first party as superintendent during said term of two years at a monthly salary of seventy (70) dollars, payable monthly, and his salary shall begin from and after the first day of February, 1898, and first party agrees to serve second party during said two years and to perform such services as the second party may require of him, except manual labor, concerning said business." After the contract went into force Todd attempted to manufacture the packing at his factory in Louisville, but for some reason it was abandoned, whereupon he resumed the manufacture of the packing in the house where Cook had previously been engaged in the business. Todd afterwards removed his manufacturing plant from Louisville to New Albany, Ind. In January, 1899, while Cook was in Cincinnati, Todd had certain molds, etc., used in the manufacture of the packing, removed to his

manufacturing establishment in New Albany. Cook being so badly crippled that he could not walk, it was necessary for him to be carried in a wagon, and, not being allowed to carry his wagon on the street cars, he declined to superintend the business for Todd in New Albany. The appellees failing to pay the salary after the appellant refused to superintend the business in New Albany, this action was instituted to recover it.

The question here to review is as to the correctness of the instructions of the court, which are as follows:

"Gentlemen of the Jury: It appears from the written contract which is sued upon by the plaintiff in this case that the contract was entered into in this state, but it fails to state where it should be executed, or, in other words, where Mr. Cook, the plaintiff, shall superintend the work that he is required to superintend by the terms of the contract. Now you will consider all the evidence and circumstances that have been admitted, and determine from the evidence where the contract was to be executed—where Mr. Cook was to superintend the work that he was required by the terms of the contract to superintend—and if you shall believe from the evidence that it was the purpose or intention of the parties at the time the contract was entered into that the contract to be executed—that is, that Cook was to superintend the work that he is required by the contract to superintend—in the city of Louisville, then the law is for the plaintiff, provided you shall further believe from the evidence that thereafter Mr. Cook made a bona fide effort to obtain employment of a similar nature to that which he was required to superintend under the contract sued upon, and was unable to find it. If such be the fact, then you should find for Mr. Cook in the amount he would have earned under his contract if he had been permitted to execute it, not exceeding the sum of \$800.40, the amount claimed in the petition.

"(2) But unless you shall believe from the evidence it was the intention and purpose of the parties at the time this contract was entered into that it should be executed in the city of Louisville, the law is for the defendant, and you should so find.

"(3) Or if you shall believe from the evidence that the manufacturing that Mr. Cook was to superintend was not moved to New Albany by Mr. Todd against the will or consent of the plaintiff, then the law is for the defendant, and you should so find."

It will be observed that the contract is silent upon the question as to where Cook was to perform the services. As the contract was made in Kentucky, the presumption of law is that the services were to be performed somewhere in the state. In *Bishop on Contracts* it is, in substance, stated that, in the absence of anything indicating to the contrary, the place of the making of a contract is presumably that of its performance,

by the law whereof it is to be interpreted and its effect defined. It is further stated by that author that "whether mere oral evidence, where the writing is silent, is admissible to rebut the presumption, and show an intent to perform in another state or country, is a question perhaps not absolutely settled. In reason, and within a principle disclosed in another chapter, as such evidence does not contradict the terms of such contract, and is a help to the real meaning, it would seem to be admissible, and this is believed to be the better doctrine in authority." Sections 1391, 1392.

This court, in *Trabue v. Kay*, 4 Bibb, 226, states the rule substantially as stated by Bishop, except it does not determine whether it is admissible to introduce oral evidence upon the silent feature of the written contract to show what the agreement was.

We are of the opinion that Bishop states correctly the rule as to the admission of oral testimony to show any agreement which the parties made with reference to the place of performance; as such testimony would not contradict the terms of the agreement, the contract being silent on the question. Under this rule of law, it was certainly incumbent upon the appellees to show that it was agreed between the parties that the business was to be transferred to New Albany, and that Cook was to superintend it there. The court did not observe this rule in instructing the jury.

The court, in the first instruction, told the jury that if it believed from "the evidence that it was the purpose and intention of the parties at the time the contract was entered into that the contract to be executed—that is, that Cook was to superintend the work that he is required by the contract to superintend—in the city of Louisville, then the law is for the plaintiff," etc.

Again, in instruction No. 2, the court told the jury: "But unless you shall believe from the evidence it was the intention and purpose of the parties at the time this contract was entered into that it should be executed in the city of Louisville, the law is for the defendant, and you should so find."

These instructions clearly place the burden upon Cook to show that it was the purpose and intention of the parties at the time the contract was entered into that it should be executed in the city of Louisville. The court should have embraced in its instructions which it gave the following language: The written contract being silent as to the place where Cook was to superintend the business, the law is for him, unless the jury believe from the evidence that the parties agreed at the time the contract was executed that the business of manufacturing the packing was to be removed to New Albany, and that Cook was to superintend it there. The instructions were misleading in using the words "intention and purpose of the parties." Instead of that, the court should have used

language as follows: That it was agreed between the parties.

If there was no agreement that the work which Cook was to perform was to be done at New Albany, then, if the factory was removed there, he was not required under the contract to go there to perform it. He did not have to object in order to place himself in a position to demand his rights under the contract. Therefore the third instruction was misleading, inasmuch as the court told the jury that the law was for the defendants if the plant was not removed against plaintiff's "will or consent."

If Cook, after the execution of the written contract, and before the removal of the plant to New Albany, agreed to perform his duties as superintendent there, then he would be bound by such an agreement.

Judgment is reversed for proceedings consistent with this opinion.

CATLETT v. CATLETT'S ADM'R.

(Court of Appeals of Kentucky. March 17, 1903.)

ADMINISTRATION—SALE OF DECEDENT'S LAND.

1. Where, in a proceeding by an administrator to sell real estate, a guardian ad litem was appointed for an infant defendant, though the petition was not verified, and no affidavit was filed showing that such infant had no statutory guardian residing in the state, as required by Civ. Code Prac. § 38, it was error to overrule exceptions to the confirmation of the sale.

Appeal from circuit court, Anderson county.

"Not to be officially reported."

Proceedings by R. B. Carlton, as administrator of Frank Catlett, deceased, to settle his accounts. From a judgment directing the sale of certain real estate, John W. Catlett appeals. Reversed.

Gilbert, Peak & Gilbert, for appellant. F. R. Feland, for appellee.

BURNAM, C. J. This suit was brought on November 6, 1900, by R. B. Carlton, as administrator of Frank Catlett, to settle his accounts as administrator, and for a sale of enough of the real estate to pay the debts of the decedent. Charles Catlett, one of the defendants, is alleged in the petition to be an infant. He was duly served with process, and the same day the clerk appointed James Posey his guardian ad litem, notwithstanding the fact that the petition of the plaintiff was not verified, and that no affidavit, either of the plaintiff or his attorney, was filed in court, with the clerk, or presented to the judge during vacation, showing that the infant defendant had no statutory guardian, residing in this state, known to the affiant, as required by section 38 of the Civil Code of Practice. The cause was at once referred to the master commissioner to report debts, and at the April term his report was filed, showing debts aggregating \$529.87. Thereupon, a judgment

was entered directing the master commissioner to sell as a whole three separate tracts of land, aggregating 129 acres, belonging to the estate of decedent, subject to the occupancy of Charles Catlett until he became 21 years of age. At the sale made pursuant to this judgment, the statutory guardian of the infant became the purchaser at the price of \$680, and executed bond therefor with the administrator as security. John W. Catlett, one of the heirs at law, excepted to the confirmation of the sale, both because plaintiff failed to conform to section 38 of the Civil Code of Practice and because the land sold for a grossly inadequate price, and tendered with his exception a written agreement with good security to bid \$900 for the land, if the sale should be set aside and a resale ordered. Upon the trial he testified that the tract was reasonably worth \$1,200; and that he expected to have been present at the sale and bid on the land, but had been prevented from doing so by unavoidable casualty.

It was held in *McMakin v. Stratton*, 82 Ky. 226, and *Gardner v. Letcher* (Ky.) 29 S. W. 868, that the appointment of a guardian ad litem was not a reversible error, although no affidavit had been filed as required by section 38. But in both cases the statutory guardian was a party to the proceeding. In this case the statutory guardian was not made a party at all, and only appears in the record as a purchaser. Under this state of fact, we think the chancellor erred in overruling the exceptions filed to the confirmation of the sale, as it is reasonable to believe that an irregularity of this sort would have affected materially the salable value of the property.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

HENDERSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 17, 1903.)

HOMICIDE—INSTRUCTIONS—DYING DECLARATIONS.

1. Where there was evidence that defendant had been drinking heavily, and was drunk at the time of the killing, and no motive was shown, it was not error to charge as to manslaughter, over defendant's objection.

2. Where defendant was convicted of manslaughter, the giving of an instruction as to involuntary manslaughter was not prejudicial; there having been evidence tending to show that he may have fired the fatal shot recklessly, and without intention of harming any one.

3. A dying declaration by deceased that he knew that one of two men, of whom accused was one, fired the fatal shot, was not inadmissible as a mere expression of opinion.

Appeal from circuit court, Fleming county.

"Not to be officially reported."

Allen Henderson was convicted of manslaughter, and appeals. Affirmed.

G. A. Cassidy and J. D. Pumphrey, for appellant. C. J. Pratt and M. R. Todd, for the State.

O'REAR, J. Appellant was indicted, charged with the murder of Best (Lander) Barber. He was convicted of manslaughter, and sentenced to 15 years' confinement in the penitentiary. There was evidence to the effect that appellant had been drinking heavily, and was drunk at the time of the killing. The fatal shot was fired in the dark; whether by appellant or another there is conflicting evidence. There was no testimony tending to show the state of feeling of appellant toward the deceased, or that there was any motive for the act.

The court in instructing the jury defined the crimes of murder, manslaughter, and involuntary manslaughter (the last named being punishable by fine and imprisonment only). Appellant objects to the two last-named instructions, because he says that there was no evidence to authorize them, nor did he ask for them, but, on the contrary, objected to them. His theory is that the question of his guilt of the crime of murder only should have been submitted.

Intoxication is no justification or excuse for the commission of a homicide, but upon a trial for murder it is competent to prove drunkenness, as bearing merely upon the existence or nonexistence of malice. Not that it excuses or mitigates the offense, because one offense cannot justify or palliate another, but because under the circumstances of the case it may tend to show that the lesser and not the greater offense was committed. In *Wilkerson v. Commonwealth*, 88 Ky. 33, 9 S. W. 838, the court, commenting upon the effect of evidence of drunkenness of the accused, said: "It was competent to prove his condition, not because intoxication per se excuses crime, but because it, with other circumstances, may show an absence of malice. It is admissible in evidence merely as one fact bearing upon the existence or nonexistence of that deliberate intent essential to the crime of murder." *Buckhannon v. Commonwealth*, 86 Ky. 110, 5 S. W. 358. The court is of opinion that the evidence justified the giving of the manslaughter instruction.

The submission of an instruction on the subject of involuntary manslaughter does not appear to the court to have been prejudicial to the accused, because the jury did not find under it. Besides, there was some evidence tending to show that the accused may have fired the shot recklessly, and without intention of inflicting death or harm upon any person.

Another objection is that the court permitted the following dying declaration of the deceased: "I, Lander Barber, realizing the fact that I am shot and seriously wounded, and being in my right mind, state that on the 6th day of December, 1901, in Fleming county, Kentucky, I was shot by some unknown person to me at the time when Robert Hawkins put both hands on me and pushed me back. I also know that two men nam-

ingly Allen Henderson and Jacob Adams were standing just behind Hawkins, and I know that one of the two shot me." That the statement was made under a due sense of impending dissolution was abundantly proved. The criticism of this statement is that the declarant does not state who fired the fatal shot, but that it amounts only to an expression of an opinion. Evidence had been admitted showing that the deceased, shortly before his death, had stated that Jacob Adams had fired the fatal shot; but it was in the dark, the parties were some distance apart, and it was clearly shown that it was almost impossible for the deceased to have known definitely and exactly which of the two men fired the shot. They were standing together. In view of the circumstances attending the occurrence, the court is of opinion that the statement was admissible, to be given such weight as the jury should deem it entitled to. It appears to be as much in favor of appellant as against him, and could not alone have materially influenced the finding of the jury.

In the motion and grounds for a new trial, although 14 different grounds are presented, the ruling of the court in admitting the dying declaration above named was not included as one of them. The other grounds mentioned in the motion for a new trial are not relied upon in argument on this appeal, nor do they appear from the record to have merit.

Upon the whole case we find no error, and the judgment must be affirmed.

GARTH'S GUARDIAN v. THOMPSON et al.

(Court of Appeals of Kentucky. March 12, 1903.)

PARTITION—COMMISSIONERS—COMPETENCY —REVIEW.

1. The fact that a person has examined land jointly owned by two minors for the purpose of testifying for one of them in the trial of a partition proceeding, does not make him incompetent to act as a commissioner on a subsequent trial.

2. Where, in proceedings to partition land held jointly by two minors, there have been three divisions of the land, none differing more than as to an acre of land and a tobacco barn standing thereon, and no substantial inequality appears in the last allotment, though the evidence as to the value of the tracts is conflicting, the judgment of the trial court will not be disturbed on appeal.

Appeal from circuit court, Bourbon county.
"Not to be officially reported."

Petition by Frank P. Bedford for the partition of lands owned jointly by his wards, Joanna Garth and Frank A. Thompson. From a judgment on the commissioners' report, H. C. Howard, guardian ad litem for Joanna Garth, appeals. Affirmed.

H. C. Howard, for appellant. T. Earl Ashbrook, for appellees.

BARKER, J. Joanna Garth and Frank Allison Thompson, who are half-sisters, and

infants, by their statutory guardian, Frank P. Bedford, filed their joint petition in the circuit court of Bourbon county, praying for the appointment of commissioners, and the division of a tract of land, which they jointly owned, under section 499 of the Civil Code of Practice. In accordance with the prayer of the petition, the court appointed commissioners, who made a division of the tract of land in question, and reported their action to the court. Upon exceptions filed, the court set aside the division as made by the commissioners, and entered a judgment dividing the land between the sisters. Upon appeal to this court the case was reversed (*Garth's Guardian v. Thompson*, by, etc., 83 S. W. 40), for the reason that the court had no power, by judgment, to make the division, but it was required, if it sustained the exceptions, either to appoint other commissioners, or refer the matter to the old commissioners for a new division. Upon the return of the case the court appointed Frank P. Clay, Sr., James Barlow, and Miller Lall as commissioners to divide the land equally between the sisters. It seems that only two of these commissioners acted in making the division for which they were appointed. For some reason, Miller Lall did not meet, or act, with his fellow commissioners. The report of the commissioners having been filed, it was excepted to by H. O. Howard, guardian ad litem for the infant Joanna Garth. These exceptions having been overruled by the court, the case has been appealed to this court for review.

Appellants filed exceptions both to the report of the commissioners and to the commissioners themselves, who, it is said, were incompetent to act, because James Barlow is distantly related to Frank Allison Thompson, and F. P. Clay, Sr., examined the land for the purpose of testifying in her favor upon a former trial. James Barlow, when on the stand as a witness, testified that he was not related by blood or marriage to the infant appellee; and it seems to us that the fact that F. P. Clay, Sr., had examined the land for the purpose of testifying as a witness, did not render him incompetent. The division to be had, was one of judgment, and was to be made under his oath of office, and we cannot see how any prior examination that he may have made of the land would render him less competent to judge of its value.

There have been three divisions of the land made in this case, and except the change of a certain tobacco barn, and about an acre of land on which it stands, there is no difference in any of these divisions. By the first division, Joanna Garth received lot No. 1, containing 51.40 acres; Frank Allison Thompson received lot No. 2, containing 44.15 acres. This report having been set aside, the court divided the land as follows: Joanna Garth, lot No. 1, containing 51.55 acres; Frank Allison Thompson, lot No. 2, containing 44 acres, with the barn. By the present report,

Joanna Garth received 50.55 acres; Frank Allison Thompson received 45 acres, with the barn. In none of these divisions has either of the infants received more than one acre more or less than she received in the other divisions; so that it may be said that one acre of land and the barn constitute the difference between the three divisions.

There is much contrariety in the evidence concerning the value of the respective tracts of land. Of the weight of the testimony this court is not in a position to judge so well as the judge of the circuit court; but we are not inclined to accept the statements of appellant's witnesses of the immense difference in value in the two tracts, as against the judgment of the commissioners appointed by the court for their competency, and sworn to do their duty with reference to the two infant sisters. In the cases of *Chamberlain v. Ballinger*, 13 S. W. 429, and *McClanahan v. McClanahan*, 14 S. W. 493, it is said that this court is exceedingly loth to set aside the division of land made by commissioners, unless it appears that substantial injustice has been done. We do not believe there is any substantial inequality between the two tracts of land allotted to the two infant parties hereto, and we think it best for the interest of both that this litigation should end.

Wherefore, the case is affirmed.

BRINEGER v. LOUISVILLE & N. R. CO.
(Court of Appeals of Kentucky. March 13, 1908.)

CARRIERS—INJURIES—NEGLECT—CONTRIBUTORY NEGLIGENCE—APPEAL—SIGNING BILL OF EXCEPTIONS.

1. Where a bill of exceptions which refers to the bill of evidence is not signed by the trial judge, as required by Civ. Code, § 337, neither the evidence nor the exceptions can be considered on appeal.

2. Plaintiff in an action for negligent injuries left his compartment in the front end of defendant's railroad coach on approaching a station, passed through the baggage compartment to the one in the rear, and stood in the door opening thereto, with his hand against the door facing. While he was in this position, a brakeman, who had his back toward him, and was stooping over to light a lantern, called out, "Shut the door!" which some one near the door did, thereby injuring plaintiff's hand. *Held*, that defendant was not guilty of negligence.

3. Plaintiff was guilty of such contributory negligence as to preclude his recovery.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by J. F. Brineger against the Louisville & Nashville Railroad Company to recover damages for injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

N. B. Hays, for appellant. J. W. Alcorn, C. W. Metcalfe, and E. W. Hines, for appellee.

BURNAM, C. J. The appellant, Brineger, with his fourteen year old son, were riding in a passenger coach on appellee's road, which runs from Middlesboro to Mingo-

Mines. The coach was divided into three compartments. The front one was exclusively for the use of white passengers, the rear one for the use of negroes, and the middle one for the storage of baggage. When the whistle blew for South Boston, appellant left his seat in the front portion of the car, passed through the baggage compartment, and stood in the door opening into the end of the car for negroes, with his hand against the door facing. The thumb of his right hand was on that part of the facing to which the door would be shut. Whilst in this position, a brakeman, who had his back to appellant, and who was stooped down attempting to light a lantern, called out, "Shut the door!" presumably to avoid a draft which was blowing through the car. Some one near the door gave it a sudden push, and the door caught the thumb of appellant, and crushed it; and he instituted this suit to recover damages therefor, which he alleges was due to the negligence of appellee's brakeman in directing the door to be shut. The answer traversed all the allegations of negligence and pleaded contributory negligence. The trial resulted in a verdict for the defendant under a peremptory instruction, and plaintiff has appealed.

The transcript of the testimony introduced upon the trial is shown in the bill of evidence transcribed by the official stenographer of the Bell circuit court, and is attested by the judge thereof; and there is a paper copied in the record, which purports to be a "bill of exceptions," which refers to the bill of evidence, but which is not signed by the judge. Section 337 of the Civil Code required the judge to sign the bill of exception, if he approves it, and it shall be then filed as a part of the record. Under this state of fact, neither the bill of evidence nor exceptions can be considered by the court. See *Stanford v. Parker* (Ky.) 15 S. W. 784, 16 S. W. 268; *L. & N. v. Finley*, 86 Ky. 294, 5 S. W. 753; *New York Life Ins. Co. v. Brown's Adm'r* (Ky.) 66 S. W. 613. Consequently there is no proof that we can legitimately consider upon the trial of the appeal.

But we are satisfied from a careful reading of the bill of evidence that we would not be justified in reversing the case on its merits, even if the testimony were properly before us, as there is no evidence of negligence on the part of the defendant, and plaintiff was himself guilty of such contributory negligence as would have precluded recovery.

Judgment affirmed.

EZELL v. OUTLAND.

(Court of Appeals of Kentucky. March 13, 1903.)

INJURIES RESULTING FROM ASSAULT ON THIRD PARTY—ASSAULT—SELF-DEFENSE—UNPREJUDICIAL ERROR—INSTRUCTIONS—PASSION AND PREJUDICE—COMPENSATORY DAMAGES.

1. An instruction authorizing the jury to find for plaintiff both compensatory and punitive

damages if defendant assaulted a third party, with whom he and plaintiff were driving in a wagon, and thereby frightened the team, and caused it to run away, throwing plaintiff out and injuring him, without regard to whether the assault was unlawful or justifiable, was erroneous.

2. Defendant engaged in a fight with a third party, with whom he and plaintiff were driving in a wagon, and the team ran away, and plaintiff was thrown out and injured. *Held*, that if defendant, acting in self-defense, used only such force as was necessary, he would not be liable for the injuries to plaintiff.

3. Where there is no evidence to show that defendant acted in self-defense in assaulting a third party, in an action against defendant for injuries to plaintiff, resulting from such assault, it is not error to refuse instructions predicated upon the theory of self-defense.

4. If defendant's misconduct caused the team to run away, resulting in injury to plaintiff, it was immaterial whether or not in the course of the difficulty, he struck plaintiff, and knocked the reins from his hands, causing him to lose control of the team.

5. Defendant engaged in a fight with a third party, with whom he and plaintiff were riding in a wagon, and the team, becoming frightened, ran away, and plaintiff was thrown out and injured in the head and other parts of the body. In an action for such injuries he recovered a verdict for \$200. *Held*, that the jury evidently allowed only compensatory damages.

Appeal from circuit court, Graves county.

"Not to be officially reported."

Action by J. S. Outland against O. V. Ezell. Judgment for plaintiff, and defendant appeals. Affirmed.

W. J. Webb and S. H. Crossland, for appellant. Webb, Johnston, & Seay, for appellee.

SETTLE, J. Appellant and one Joseph J. Jones engaged in an altercation in the latter's wagon on the streets of Mayfield, June 1, 1901. Appellee, J. S. Outland, was at the time occupying a seat in the front end of the wagon, and holding the lines by which the horses attached to the wagon were controlled. During the difficulty the lines were knocked or fell out of appellee's hands, the horses became frightened at the noise of the combat, and ran away, throwing appellee from the wagon to the ground, and thereby injuring him, as alleged, in the head and other parts of the body, for which alleged injuries, loss of time, doctors' bills, and other expenses resulting therefrom he brought suit against appellant in the Graves circuit court, laying his damages at \$1,500. The petition sets forth the facts mentioned, and, in addition, that appellee was assaulted and struck by appellant with his fist and a stick during the latter's fight with Jones. Appellant filed answer, denying the assault and battery complained of, or that appellee was damaged thereby, and for further defense averred that while he (appellant) was engaged in an altercation with Jones, and acting in his necessary self-defense, the team ran away, and appellee, in attempting to get out of the wagon, received some slight injuries, which were purely accidental, and for which appellant was not responsible. The allegations of the answer were

controverted by the reply filed, and upon the issues thus formed the trial followed, and the jury returned a verdict awarding appellee \$200 in damages, and, the lower court having refused appellant a new trial, the case has been brought to this court by appeal.

The motion for a new trial was based on the grounds usually presented in such cases, and we deem it necessary to consider but one of them, as it raises the question chiefly relied on for a reversal, viz., that the lower court erred in the matter of giving and refusing instructions.

We are unable to find any valid reason for condemning instruction No. 1 given by the court, as it is predicated upon the state of facts set forth in the petition, and properly defines both compensatory and punitive damages.

Instruction No. 2 is as follows: "The court further says to the jury that if they should believe from the evidence that defendant assaulted one John J. Jones, and said assault or difficulty caused the team which plaintiff was driving to run away with the wagon, and by reason of said runaway plaintiff was thrown out of the wagon, and hurt or injured, they will find for plaintiff such actual and punitive damages, if any he sustained, as they may believe from the evidence he is entitled to, not exceeding in all, however, the sum of \$1,500, unless the jury should believe from the evidence that at the time defendant assaulted said Jones, if he did assault him, defendant believed in good faith that he was in danger of receiving at the hands of said Jones great bodily harm; then the jury will find for plaintiff only such actual or compensatory damages as they may believe, from the evidence, he sustained." This instruction is clearly erroneous, as it, in the first place, authorized the jury to find for appellee both compensatory and punitive damages if they believed from the evidence that the appellant assaulted Jones, and thereby caused the team to run away and injure appellee, without regard to whether the assault was unlawful or justifiable; and in the latter part of the instruction the jury were further told that, although they might believe from the evidence that appellant, in the assault upon Jones, was acting in his necessary self-defense, they should nevertheless find for appellee actual or compensatory damages. If there had been any evidence tending to show that Jones commenced the difficulty with the appellant by first assaulting him, the jury should have been told that if they believed from the evidence that such was the case, and that appellant used only such force as was necessary, or appeared to him to be necessary, to protect himself from injury at the hands of Jones, and that while so engaged the team became frightened by reason of the difficulty, and ran away, thereby injuring appellee, the jury should find for appellant. In other words, if Jones, on the occasion in question, had commenced the difficulty by attacking appellant, and the latter,

acting in his necessary self-defense, was merely resisting the attack, thereby repelling force by force, and the team that appellee was driving, becoming frightened because of the difficulty, had run away, and thereby injured him, appellant would not have been liable in damages therefor. But a careful examination of the record forces us to the conclusion that in the difficulty between appellant and Jones the former was the aggressor, for he testified that he and Jones, while in the latter's wagon, had a conversation in reference to an overpayment of money made by him to Jones on his tobacco; that angry words ensued, and he struck Jones with his fist because of the insulting language used by him; that Jones thereupon put his hand in his pocket, and appellant, believing that it was his purpose to draw a knife or other weapon with which to attack him, got off the wagon, went to the rear end thereof, secured a tobacco stick, again got into the wagon, and, returning to where Jones was standing in the front of the wagon, repeatedly struck him with the stick, either knocking him down or causing him to fall out of the wagon, thereby so frightening the team as to cause it to run away. It is patent, therefore, that appellant was not acting in his self-defense at the time of the difficulty with Jones, and, if a wrongdoer in respect to the difficulty, he was also in the wrong in the matter of causing the team to run away. Therefore the error committed by the court in giving instruction No. 2 could not have been prejudicial.

We are of the opinion that the court did not err in refusing to give instructions asked by counsel for appellant, as they are all predicated upon the theory that he was acting in self-defense in the difficulty with Jones, when in fact there was no evidence whatever to support that theory. It is not clear from the evidence that appellant actually struck appellee with his fist or otherwise. Much of the evidence tends to show that he did not do so; and, if he did, we are satisfied that it was not intentional, for he had no quarrel with appellee, and the latter gave him no cause to strike him, as he did not offer to interpose in Jones' behalf. But appellee testified that appellant, in assaulting or beating Jones with the tobacco stick, did strike him on his hands with his elbows and the stick, and the lines were thereby knocked from his hands, and when the horses ran from the fright occasioned by the combat between appellant and Jones the loss of the lines prevented him from controlling or stopping them. Appellant testified that he did not strike appellee, or knock the lines from his hands, and no other witness in the case seemed to know how he lost the lines, but the jury doubtless accepted appellee's version of the affair, and they were the sole judges of the credibility of the witnesses and of the weight to be given to the statements of each or any of them. But whether appellant actually struck appellee or not would seem immaterial if his misconduct

brought on the difficulty with Jones, and the fight between them caused the horses attached to the wagon to run away, and, as these facts are alleged in the petition, as well as the fact that appellant struck appellee with his fist or stick, and there was some evidence introduced to prove them, we cannot afford to disturb the finding of the jury.

We find nothing in the record to support the contention of appellant's counsel that the jury were influenced by passion or prejudice, and it is evident that only compensatory damages were allowed by them.

For the reasons indicated, the judgment of the lower court is affirmed.

BURNSIDE & C. R. RY. CO. v. TUPMAN.

(Court of Appeals of Kentucky. March 19, 1903.)

CARRIERS—INJURY TO STOCK—LIABILITY—CONNECTING LINES—EVIDENCE—LIMITATIONS.

1. A carrier who guaranties that a car is suitable for carrying live stock is liable for injury to the stock caused by the defective condition of the car, whether the injury occurs on its own line or on the line of a connecting carrier.

2. Where the injury is due to the defective condition of the car, testimony that it occurred after the car was delivered to a connecting carrier is properly excluded.

3. Ky. St. § 2516, providing that "an action * * * for injuries to cattle or stock by a railroad * * * shall be commenced within one year next after the cause occurred and not thereafter," has no application to a suit against a railroad for injuries to stock due to the defective condition of the car which it has expressly guarantied to be sufficient.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Benj. F. Tupman against the Burnside & Cumberland River Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O. H. Waddle, for appellant. Denton & Robinson, for appellee.

BURNAM, C. J. On the 7th day of December, 1898, the appellant, the Burnside & Cumberland River Railway Company, contracted with the appellee, B. F. Tupman, to transport a car load of mules and horses from Burnside Landing to Burnside Junction, both points being on its own line of road, and, as the agent of the shipper, to forward it to him at Shelman, Ga., in consideration of \$107.50.

On the 18th of May, 1901, Tupman instituted this suit against the railway company, in which he alleges that, at the time of the shipment, the mules and horses were put into a defective car, to which he objected, but that the agent of the defendant assured him that it was sufficient, and guarantied it to be all right, and that, relying upon these representations and guaranty, he consented that his stock might be shipped there-

in; that, by reason of the defective condition of this car, one of his mules had his hip broken, and was rendered worthless, and that a number of others were so crippled, cut, gashed, maimed, and disfigured as to greatly depreciate their salable value; that all of the injury was caused by the defective car and the negligence of the defendant; and asked a judgment for \$300 in damages. The answer of the defendant traversed all the affirmative averments of the petition, and denied the alleged representation, and guaranty as to the sufficiency of the car, and pleaded that, under the terms of the contract of shipment, their liability for injuries to stock was confined to such injuries as might be received on their line of road.

The testimony shows that the defendant's road runs from Burnside Landing to Burnside Junction, a point on the Cincinnati Southern Railway, a distance of a little more than a mile. The substance of the testimony for the plaintiff was to the effect that he objected to the car in which the railway company proposed to ship his stock, on the ground that the slats were too far apart, and that it was otherwise defective; that he pointed out these defects to the agent of the company, who assured him that the car was all right, and said that they would guaranty that his stock could be safely transported therein to their destination in Georgia; that, only a few minutes after the stock had been loaded, he saw the leg of one of his mules sticking out between the slats, some four or five feet from the bottom of the car; that the slat was sawed in two, and the mule released, but that, when they arrived at their destination in Georgia, this mule had a broken hip, and in consequence thereof had become worthless; and that several slats on the car had been broken and nailed up, and that other mules were considerably injured. The agent of the company denied the alleged guaranty of the sufficiency of the car, but testified that it was in good condition, and that plaintiff made no objection to it when it was pointed out. The trial resulted in a verdict and judgment for the plaintiff for \$200, and a reversal is asked: First, because the court erred in giving to the jury the following instruction: "If the jury believe from the evidence that any of plaintiff's stock mentioned in evidence were injured or damaged by reason of a defective or unsuitable car furnished by defendant for shipment, and that the defendant guarantied that the car was safe, and that plaintiff, relying on the guaranty, loaded the stock, and any of the stock were injured by reason of the defective or unsuitable condition of the car, you will find for the plaintiff such a sum, not exceeding \$300.00, as you may believe from the evidence will fully compensate him for the injury, if any, to the stock. The defendant is not responsible for any injury occurring to the stock beyond its line, unless caused solely by reason of the car in which

they were shipped being defective or unsuitable." If defendant guarantied the sufficiency of the car for the purpose for which it was to be used, they were liable for the damages resulting from such breach, whether it occurred on their own line of road or after the delivery of the car to the connecting lines of railway. And the instruction is based wholly upon this theory, and in our opinion aptly states the law applicable to the facts in issue in this case. It concedes defendant's contention that they were not responsible for any injury occurring to the stock beyond their line, unless caused by reason of the defective and unsuitable condition of the car exclusively.

Upon the trial the defendant offered to introduce records of connecting railway lines for the purpose of showing that the stock were in good condition when they arrived at Chattanooga, Tenn., and that the injuries were received after the car was delivered to the Southern Railway beyond that point. In our opinion this testimony was properly excluded.

They also complain that the trial court did not sustain their plea of limitation to the suit under section 2516 of the Kentucky Statutes, which provides that: "An action * * * for injuries to cattle or stock by a railroad * * * shall be commenced within one year next after the cause accrued, and not thereafter." This is not an action for tort, but for a breach of contract, and the statute relied on has no application. The limitation to actions of this character is regulated by the provisions of section 2515, and must be brought within five years after the accrual of the right. We are therefore of the opinion that the trial court did not err in sustaining a demurrer to the plea of limitation, or in either of the other grounds relied on for a reversal.

Judgment affirmed.

FISHER v. MUSICK'S EX'R.

(Court of Appeals of Kentucky. March 10, 1903.)

EJECTMENT—RENT—ACTION—DEATH OF PARTY—REVIVOR—ATTORNEY—JUDGMENT.

1. Where, while a cause was under submission in the court of appeals, plaintiff died, the action was properly revived in circuit court after remand thereto.

2. Where, on the revival of an action after the death of the plaintiff, the subsequent proceedings were taken in the name of the executor by the same attorney who had acted for the plaintiff, and acquiesced in by the executor, the defendant could not object to the attorney's authority.

3. Where a claim for rent for a certain year is first made in an amended petition filed after the time within which an action could be brought therefor, the claim is barred.

4. Where, in an action to set aside a deed and recover the premises, and for the use thereof for a stated period, defendant recovered judgment, which was reversed on appeal, and

judgment entered for plaintiff for all he claimed, he could not, by an amended petition, recover for rent which accrued prior to such judgment, and not included therein.

5. Where a judgment awards restitution of premises to plaintiff, with reasonable rent during the time defendant was shown to have been in possession, plaintiff may file an amended petition setting up the value of such rent, and the court may proceed in such action to determine such value.

6. Rent should not be awarded for a period for which rent was disclaimed in the amended petition.

7. Evidence, in a proceeding in an action after judgment of restitution to ascertain the rent due from defendant, examined, and held to show that he was not in possession during a certain year for which rent was awarded.

8. Where a party had possession of lands under a judgment which was reversed and judgment entered against him, he should be required to pay reasonable rent, less the taxes paid and reasonable and necessary repairs made by him.

Appeal from circuit court, Greenup county.
"Not to be officially reported."

Action by Joseph Musick's executor against George Fisher, Jr. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. A. Violet, R. C. Myers, and E. E. Fullerton, for appellant. Wm. T. Cole and B. F. Bennett, for appellee.

HOBSON, J. The facts of this case are stated in the opinion rendered on the former appeal (see *Musick v. Fisher* [Ky.] 27 S. W. 812). While the case was pending in this court under submission the appellant, Musick, died. The mandate was filed in the circuit court at its next term, in November, 1894. The death of the plaintiff was suggested and the case continued for revivor. At the April term, 1895, an order of revivor was made, reviving the case in the name of the executor, and a warning order was made by the clerk against the defendant Fisher. At the next term of the court, the report of the attorney for the nonresident defendant being filed, the case was submitted for judgment, and in obedience to the mandate a judgment was entered setting aside the deed in contest as fraudulent, awarding the plaintiff a writ of possession for the land which had been taken from him under the judgment, reversed on the appeal and adjudging Fisher liable for the reasonable rent of the property from the time he took possession thereunder. We do not see any irregularity in these proceedings. The case could not be revived while under submission in this court, and it was revived in the circuit court within the time it could be done. The proceedings were taken in the name of the executor by B. F. Bennett, who had been the attorney for the testator; and as the executor acquiesced in the action of the attorney, appellant cannot raise the question now of his authority to act for the executor.

At the next term of the court Bennett, on his own motion, was made party to the ac-

¶ 3. See *Limitation of Actions*, vol. 32, Cent. Dig. § 545.

tion, and set up a claim to the property in contest by reason of his services as attorney, and process was issued against the executor, who appeared in April, 1896, and filed a demurrer and some other motions, and in January, 1897, filed answer to the cross-petition of Bennett. Finally, in July, 1897, the controversy between Bennett and the executor was settled by a compromise, in which Bennett paid the executor \$500, and the executor conveyed him the land. The executor then filed an amended petition against Fisher, by which he sought to recover the reasonable rent of the land from the time that Fisher obtained possession of it under the reversed judgment. Fisher moved to strike this petition from the files, on the ground that it set up an independent cause of action, which must be prosecuted in a separate suit. This motion was overruled, also a motion by Fisher to set aside so much of the judgment of July, 1895, as adjudged him liable for the rent. Issue was then joined on the amended petition, and after this the plaintiff filed an amended petition, in which he admitted that Fisher did not obtain possession of the land during the year 1892, and withdrew all claim for the rent of the place for that year, but in this amended petition, which was filed on January 8, 1900, recovery was sought for the rents of the land for the years 1889-1890, and to this claim limitation was pleaded. On final hearing the court gave judgment against Fisher for the rent of the farm for \$150 for the years 1889-1890; also at the same rate for the years 1892, 1893, 1894, and 1895, and from this judgment he appeals.

The rent for the years 1889-1890 was not set up in any pleading until the amendment was filed in the year 1900. It was then barred by limitation. This rent, too, accrued before the judgment which had been reversed had been rendered; and if it was sought to be recovered in that action, should have been set up before its final submission. After the action was finally submitted and a judgment entered for all that was prayed, it was too late to go back and set up, by way of amended petition, a claim for rent accruing theretofore, which had not been set up in the action. This claim, after a final judgment in the action, could only properly be asserted by a separate suit. But the rents accruing under the judgment which was reversed stand on a different plane. When the judgment was reversed the court had jurisdiction to order restitution, not only of the land, but, in its discretion, of the reasonable rent which the party in error had received by virtue of the reversed judgment. There was no abuse of discretion therefore in allowing an amended petition to be filed setting up these rents, and thus proceeding in an orderly way to their ascertainment, as the parties were all before the court. But as the rent for the year 1892 was disclaimed by the amended petition, no judgment should

have been entered for it. Fisher was properly held responsible for the reasonable rent of the place for the years 1893 and 1894; but we do not think, under the evidence, anything should have been adjudged against him for the subsequent year.

The judgment of this court was entered on September 27, 1894. Fisher had rented the place to George D. Winn for the year 1893 for a rent of \$150. There was no new contract made for the year 1894, but Winn continued in possession. When the mandate of this court issued in October, 1894, Fisher, realizing that the land was finally adjudged to Musick, made no further claim to it, and had nothing more to do with it. Winn remained in possession, and no writ of possession issued until about the time that Bennett and the executor compromised their litigation. Winn was the son-in-law of Bennett, who was the attorney for the executor, and managed the litigation for Musick and the executor against Fisher. After the reversal of the judgment Fisher did not claim the land, and as the landlord, Fisher, had been evicted, the tenant might attorn to the person who by the judgment was determined to be the true owner. We think the evidence sufficient to show that after the year 1894 Winn held the land under Bennett, who was the attorney and only representative in this state of the executor, who lived in Ohio, and not under Fisher. This is shown by circumstances that seem to us conclusive. There is no other reasonable explanation to be given for the long delay in issuing a writ of possession. Winn did not hold under Fisher during this time, but professed to hold under Bennett. Bennett knew he had possession of the land. Winn had no contract with Fisher for the land, and the entire conduct of the parties is explainable only on the idea that he was holding under Bennett, the representative in this state of the executor, who afterwards conveyed the land itself to Bennett. Fisher should be charged with the rent for the years 1893 and 1894 at \$150 a year, with interest from the close of each year, and he should be credited thereon with the taxes paid for those years and such reasonable and necessary repairs as he made on the property during the years 1893 and 1894. No other part of his counterclaim should be allowed.

Judgment reversed, and cause remanded for a judgment as herein indicated.

PAYNTER, J., not sitting.

PERKIN'S ADM'X v. EMBRY.

(Court of Appeals of Kentucky. March 17, 1903.)

FRAUDULENT REPRESENTATIONS—SALE OF STOCK—EVIDENCE—QUESTION FOR JURY.

1. Plaintiff's decedent sold defendant certain lands, and accepted as part consideration certain bank stock, which, after the contract was

made, defendant represented to be of the value of \$100 per share. The contract was made September 24, 1898, and decedent lived until the following April, during which he made no complaint that the value of the stock had been misrepresented, though he could readily have ascertained its value. The stock had previously paid 4 per cent., and paid that dividend for two years after its transfer to the deceased; and the president of the bank testified that at the time of the transfer the stock was worth \$75 per share. *Held*, that such facts were insufficient to justify a submission of defendant's fraud in the sale of the stock to the jury.

2. In an action for deceit in the sale of stock, the rejection of evidence of a conversation between witness and defendant, occurring before the sale, and relating to a different proposition from that accepted, was not prejudicial.

3. In an action for deceit in a transfer of land for corporate stock, evidence of a witness that the landowner sent witness to the defendant to ask him to buy the land was admissible.

Appeal from circuit court, Lincoln county.
"Not to be officially reported."

Action by Columbia Perkins, as administratrix of the estate of William Perkins, deceased, against Samuel J. Embry. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. W. Alcorn and Robt. Harding, for appellant. W. G. Welch, for appellee.

SETTLE, J. This action was instituted by appellant, Columbia Perkins, as administratrix of the estate of her deceased husband, Wm. Perkins, in the Lincoln circuit court, to recover of the appellee, S. J. Embry, damages for alleged fraud and deceit in the sale to her intestate of $7\frac{1}{2}$ shares of the capital stock of the First National Bank of Ft. Scott, in the state of Kansas. The facts upon which the recovery is sought are substantially set forth in the petition as follows: Appellant's intestate, on September 24, 1898, sold, and, together with his wife, conveyed by deed, to appellee, 67 acres of land in Lincoln county at the price of \$2,489. Of this sum \$1,312.50 was paid in $12\frac{1}{2}$ shares of the capital stock of the Lincoln County National Bank at \$105 per share, \$750 in $7\frac{1}{2}$ shares of the capital stock of the First National Bank of Ft. Scott, Kan., at \$100 per share, and the remaining \$426.50 of the consideration was paid in cash. It is averred in the petition that at the time of this transaction Perkins was sick of a disease of which he in a few months thereafter died, and that appellee fraudulently, and with the intent to deceive the intestate, and induce him to take the stock of the Ft. Scott Bank as of the value of \$100 per share, represented to him that it was then worth that sum, and was a good dividend-paying stock; that appellee then knew that the stock was not worth exceeding \$50 per share, but that Perkins had no knowledge as to its value, and accepted the stock relying upon appellee's statements. The answer specifically denies the fraud and deceit complained of, and avers that appellee knew no more of the value of the bank stock than

the general public, and that appellant's intestate had the means and opportunity of knowing as much about the value of the stock as he did. The trial resulted in a verdict for appellee, the jury having been directed to so find upon a peremptory instruction given by the court at the conclusion of appellant's evidence, and a new trial was refused the appellant, of which she complains.

Ordinarily, representations of the value of an article sold, though exaggerated, or even untrue, do not constitute a warranty; nor will they support an action for fraud or deceit, unless the representor sustains a relation of trust or confidence to the buyer, as in the case of attorney and client, trustee and cestui que trust, etc. Another exception to the rule stated is where the truth of the thing represented is unknown to the buyer, but is peculiarly within the knowledge of the representor, or he has peculiar means of knowing the truth. Am. & Eng. Enc. of Law, vol. 14, 124-125; First National Bank v. Mattingly, 92 Ky. 657, 18 S. W. 940; Beach's Modern Law of Contracts, §§ 1436, 37, 39. The evidence in this case shows that Wm. Perkins was anxious to sell his land, and that he sent several messages to appellee importuning him to buy it. The latter, however, seemed indifferent about the matter, but did finally go to Perkins' house, and trade with him, upon the terms recited in the deed. No witness has testified to what was said at the time of the trade. Appellant does say that she objected to her husband taking the Ft. Scott Bank stock after the contract was made, and that appellee then represented the stock of that bank to be good, and of the value of \$100 per share; but, if such representations were then made by him, they could not have operated on the mind of her husband, who had already sold the land to appellee, and agreed to accept the bank stock. Some stress is placed on the return of appellee to Perkins' house that evening with the deed, accompanied by the county clerk, to take the acknowledgment of the grantors. This circumstance is not of itself sufficient to show fraud. His apparent haste to obtain the deed may have been, and doubtless was, occasioned by the knowledge that he and all his neighbors possessed that Perkins was liable to die at any time of the disease with which he was afflicted, and as a prudent man appellee may have thought it necessary to have the transaction between them consummated at once. Although Wm. Perkins lived until April following the sale of the land, no complaint ever came from him that he had been mistreated or wronged by appellee, or that he ever regretted his acceptance of the Ft. Scott Bank stock.

The conversations with appellee, to which the Carpenters testified, do not show any fraud in the transaction between him and Perkins. To the one he said, before the

land trade was made, that he would be willing to pay Perkins Lincoln County National Bank stock for his land; and to the other, after the trade, he gave advice in regard to the bank stock that he had transferred to Perkins, saying that stock of the Lincoln County National Bank was gilded, and that of the Ft. Scott Bank was "reliable."

It also appears from the record that many persons in and around Stanford, the county seat of Lincoln county, owned stock in the Ft. Scott Bank, and this fact was in all probability known to Wm. Perkins, as it seemed to have been generally known to others; and it can, therefore, hardly be said that he was wholly without means of ascertaining the value of the bank stock when and before he received it from appellee.

It also appears from the record that the stock of the Ft. Scott Bank paid a 4 per cent. dividend per annum for several years before its sale by appellee to Perkins, and that it likewise paid that dividend for two years after its transfer to him. The president of the bank, whose deposition was read on the trial, testified that its stock was worth \$75 per share at the time of its purchase by Perkins, instead of \$50, as claimed by appellant. The president also testified that he had never communicated to appellee the condition of the Ft. Scott Bank. So, though it be conceded that appellee represented the stock as worth its par value, there is nothing to show that he did not so regard it.

After a careful reading of the record, we are unable to see that there was any evidence of fraud or deceit to go to the jury; and, besides, we are not inclined to brand as fraudulent a transaction of which appellant's intestate, the party most interested, was never known to complain. The rejection by the lower court of the testimony of George Carpenter, offered to prove a conversation between him and appellee, was not prejudicial to appellant, as the conversation occurred before appellee's purchase of the land, and related to another and different proposition from that accepted by Perkins; but so much of Carpenter's statements as related to the fact that Perkins had sent him to appellee to ask the latter to buy his land might with propriety have been admitted by the court.

For the reasons indicated herein, the judgment is affirmed.

CITY OF LEBANON et al. v. KNOTT et al.
(Court of Appeals of Kentucky. March 17, 1903.)

MUNICIPAL CORPORATIONS—BOUNDARIES—REDUCTION—ORDINANCES—REFUSAL TO ENACT—MANDAMUS—DEFENSES—JUDGMENTS—DISMISSAL OF ACTION—BAR.

1. Ky. St. § 3483, provides a method for striking territory from the boundaries of cities, and requires the city council, on petition, to pass an ordinance defining the boundary to be stricken. After publication of such ordinance,

a petition is required to be filed in the circuit court for a judgment for the relief demanded. *Held*, in mandamus to compel a city council to pass the ordinance provided for in such section, that an answer averring that the city had a large bonded indebtedness incurred for water-works, and that many of the petitioners for the ordinance received special privileges therefrom, etc., was demurrable.

2. Where an action to strike off certain territory from a city was never tried on its merits, but was dismissed for failure of the petitioners to file affidavits showing the publication and advertisement of the ordinance proposing the reduction of the city limits, as required by St. § 3483, such suit was no bar to a subsequent proceeding by mandamus to compel the city council to pass another ordinance for the reduction of the limits of the city.

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

Mandamus by J. M. Knott and others against the city of Lebanon and others, to compel the city council to pass an ordinance for the striking of certain territory from the city. From a decree granting the writ, the city appeals. Affirmed.

H. S. McElroy, for appellant. Jno. McChord, for appellees.

SETTLE, J. Section 3483, Ky. St., provides a method of adding to, or striking from, the boundaries of cities of the fourth class. The language of the statute on this subject is as follows: "Whenever it shall be deemed desirable to annex any territory to a city in this class, or to reduce the boundaries thereof, the same may be done in the following manner: The board of council of such city shall by ordinance accurately define the boundary of the territory proposed to be annexed or stricken off, either upon their own motion, or, if requested to do so by a written petition of at least twenty five voters and resident taxpayers of the city, or residing within the boundary to be added or stricken therefrom, shall pass the ordinance in conformity with the request of such taxpayers. * * * Within thirty days after the adoption, publication and advertisement of such ordinance, a petition shall be filed in the circuit court of the county within which said city may be situated in the name and on behalf of the city, or in the name of one or more of said petitioning taxpayers, setting forth the passage, publication and advertisement of such ordinance, the object and purposes thereof, together with an accurate description by metes and bounds, of the territory proposed to be annexed to, or stricken from, the city, and praying for a judgment of the court to annex said territory to, or strike same from, the city as the object may be. * * * The remaining portions of the section provide the manner in which the subsequent proceedings as to the trial in the circuit court shall be conducted, and authorizes any one or more of the resident voters of the territory proposed to be annexed or stricken off to file a defense in the proceedings, setting forth such rea-

sons as may properly be urged in resistance thereof.

It appears that the appellees, J. M. Knott and others, pursuant to the statute mentioned, presented to the Lebanon board of councilmen, on July 4, 1901, a petition signed by more than 25 voters and resident taxpayers of the city, asking of it the passage of an ordinance and publication of same, defining a portion of the corporate limits of the city described in the petition by metes and bounds, which was proposed by the petitioners to be stricken from the boundary thereof. For some reason best known to its members, the council delayed action upon the petition, and demand was again made for the enactment of the ordinance, which was refused. Thereupon appellees instituted this action in the Marion circuit court for a mandamus to compel the council to comply with appellees' petition and request.

The answer filed by the board of councilmen contains three paragraphs, the first being a traverse of the petition, and an averment that it does not conform to the statute. The second paragraph avers that the city has a large bonded indebtedness, incurred for waterworks, and that many of the petitioners for the passage of the ordinance received special privileges for the use of water, and that the bonds for the construction of the waterworks were issued at the request of many of the petitioners. The third paragraph avers that within two years last past the city council, at the instance of appellees, duly enacted an ordinance accurately defining a boundary to be stricken from the city, in which boundary it was sought by the petitioners to strike from the city limits all, and the same, territory that is now sought to be stricken out in this action, by the ordinance asked for in the petition; that suit was then filed in the circuit court by the petitioners in that proceeding, to obtain a decree for the striking out of said boundary from the corporate limits of the city; that the city and its council, being parties to that suit, made defense therein, whereby they successfully resisted and prevented the striking out of the boundary sought to be taken from the city; and that the judgment rendered by the circuit court was adverse to the proposed change, and has never been appealed from or reversed. That judgment is pleaded and relied on as a bar to the present action, in view of a provision of the statute, *supra*, which declares that: "If the judgment of the court is adverse to the proposed change, no further effort to annex or strike off the territory so proposed shall be made within two years after the entering of the judgment." The court—properly, as we think—sustained a demurrer to the second paragraph of the answer, and appellees then filed a reply, which specifically denies the affirmative allegations contained in the first and third paragraphs of the answer.

It further appears from the record that

the answer was filed by the then acting mayor and council of the appellant city, and on December 13, 1901, they filed in the name of the city an amended answer, in which it was averred that they were then no longer members of the council, that their successors had been duly elected at the regular November election, 1901, and that the old or outgoing board had no power to pass the ordinance sought in this action. As a precautionary measure appellees went before the new council with the petition of the taxpayers desiring the change of boundary, and renewed the motion and application to enact the ordinance, which the new board of council failed or refused to do. Thereupon appellees filed in the lower court an amended petition, summons upon which was served on the mayor and each member of the new council. The amended petition merely sets out the application and demand for the enactment of the ordinance that was made of the new council, and their failure to enact same. To the petition as amended the new council filed answer, denying that they refused to pass the ordinance, and adopting the third paragraph of the original answer as a further defense. The averments of the last answer are also controverted by reply. We find, therefore, that there are but two questions to be considered on this appeal: First, is the boundary here sought to be defined by ordinance the same boundary that was involved in the former suit? Second, is the judgment dismissing the first suit a bar to the present one?

It appears from the record that the corporate limits of the city of Lebanon are embraced in a circle, extending three-quarters of a mile in every direction, with the courthouse as the center.

The proof seems to fairly establish the fact that the boundary involved in the former action included several residences that are not included in the present boundary proposed to be defined, and that the present boundary is, while including a part of the former boundary, almost exclusively composed of farming lands, rather remote from the business part of the city. We are inclined to suspect that as, since the adoption of the present Constitution, all lands within the corporate limits of cities, regardless of benefits received, are subject to taxation, the real purpose of this proceeding is to obtain relief from that burden.

We are of opinion that the former suit is not a bar to this proceeding, for it appears from the record that there never was a trial of that action upon its merits, it having been dismissed by the lower court upon the motion of the city of Lebanon, because of the failure of the petitioners to file, as a part of their petition, one or more affidavits showing publication or advertisement of the ordinance proposing the reduction of the city limits. The necessity for the filing of such affidavits is obvious from the following lan-

guage of the statute: "The circuit court shall have no jurisdiction of such proceedings unless the required publication, or advertisement of the ordinance proposing the extension, or reduction, of the limits of the city, is proven by one or more affidavits filed as a part of the petition in said action." Ky. St. § 8483.

This is not an action to obtain the judgment of the circuit court changing the boundary of the city of Lebanon, but it is one to compel, through the judgment of the court, the enactment by the council of an ordinance defining the boundary sought to be changed or stricken out. Under the statute the change of boundary can only be secured through the judgment of the circuit court, by the institution of an action in that court, after the ordinance shall have been enacted by the council. In *City of Lebanon v. Creel*, etc. (Ky.) 59 S. W. 16, which was an action similar to the one at bar, this court, in construing the statute supra, said: "The act being valid, it was the duty of appellants, the councilmen of the city, to pass the ordinance fixing the boundary of the proposed reduction, and to advertise same to the end that the action might be instituted in the circuit court. Upon failure or refusal, the court was authorized to direct by mandamus that such action be taken, as the council upon the filing of the required petition had no discretion in the matter. * * *"

We are of opinion that the circuit court did not err in granting the mandamus asked by the appellees, and the judgment is therefore affirmed.

HOWE & JOHNSON v. SKIDMORE et al.
(Court of Appeals of Kentucky. March 19, 1903.)

WITNESS—IMPEACHMENT.

1. Where plaintiffs attempted to prove by a certain witness that one of the defendants had said he was going to sell out to the other defendant and beat plaintiffs out of their claim against him, but failed utterly to do so, they were not entitled to prove by third parties that the witness had told them he would testify to such statements on the defendant's part.

Appeal from Circuit Court, Powell County.
"Not to be officially reported."

Action by Howe & Johnson against D. B. Skidmore and another. From the judgment rendered the plaintiffs appeal. Affirmed.

Robt. H. Winn, for appellants. W. D. Jackson and Hazelrigg & Chenault, for appellees.

NUNN, J. The appellants sued D. B. Skidmore in the Powell circuit court, on an account, for between \$500 and \$600, and at the same time obtained an attachment against his property. This attachment was issued and levied on the 6th day of May, 1899, on the contents of a saloon in Bowen, Ky. The appellee M. F. Skidmore filed a petition set-

ting up claims to the attached property by purchase from his brother, and asked to be made a party defendant to the action, and it was so ordered by the court. The appellants merely traversed this pleading. They did not charge any collusion, fraud, or other unlawful act on appellees' part. Under this state of pleading and proof, the lower court gave judgment against D. B. Skidmore for the amount claimed by the appellants, and sustained the attachment against him, but found in favor of appellee M. F. Skidmore, and released the property claimed by him from the attachment.

The only question before the court on this appeal is whether or not the court erred in releasing to M. F. Skidmore the attached property under his alleged purchase. The evidence, without any contradiction, shows that defendant D. B. Skidmore had been endeavoring to sell his saloon stock for about a month or more, with a view of embarking in other business, and appellants were informed of this fact at the time they sold the larger part of the bill sued on. Appellee M. F. Skidmore testified, and was corroborated by D. B. Skidmore and others, that he bought the stock from his brother at the price of \$752, the invoice price, and paid for the stock in cash, after deducting an amount his brother owed him amounting to about \$100. We have not been able to find in the record any contradiction of the statement of appellee, nor any fact or circumstance tending to discredit him.

The contention of appellants is that the court erred to their prejudice in refusing to allow to be read as evidence the depositions of R. H. Winn and W. L. Stout. They testified that, on more than one occasion, one John L. Scott told them that "he would testify that D. B. Skidmore told him, on one occasion while up in Harlan county, that he owed Howe & Johnson, and that he intended to sell out to his brother Millard F. Skidmore and beat them out of their debt." Appellants first introduced John L. Scott as a witness, and attempted to prove these statements by him, but they utterly failed to prove them or any fact connected with the issue, either in their interest or to their detriment; then the appellants took the depositions of Winn, Stout, and others to prove what Scott had told them. The court refused to consider this evidence. The court was right in this.

Appellants refer to the case of *Wren's Adm'r v. L., St. L. & Tex. R. Co.* (Ky.) 20 S. W. 215, and contend that this opinion sustains their position. In that case the engineer testified on the trial that he first saw the person sitting on the track when the engine was in about 462 feet of him, and that he could not stop the train in that distance. Then he was asked if he had not testified at the inquest, and then and there testified that he first saw the person sitting on the track when the engine was at a

distance of 1,287 feet from him. The court in that case erred in refusing to permit the witness to answer the question, for the reason that the witness had made a statement contradicting his former statement, and one that was very material and prejudicial to the party introducing him. But in the case before us Scott made no statement in his evidence, material or prejudicial to appellants. The evidence of H. T. Rice was also incompetent, for the reason that it pertained solely to conversations between Rice and D. B. Skidmore after the sale of the stock of goods to M. F. Skidmore.

Perceiving no error in the record prejudicial to the rights of appellants, the judgment of the lower court is therefore affirmed.

HOBSON, J., sitting in place of O'REAR, J., not sitting.

HERRING v. JOHNSTON.

(Court of Appeals of Kentucky. March 11, 1908.)

HUSBAND AND WIFE—HUSBAND'S DEBT—WIFE AS SURETY—ESTOPPEL BY JUDGMENT—REDEMPTION—VOLUNTARY PAROL AGREEMENT—VALIDITY—HOMESTEAD—MARRIED WOMAN'S RIGHT—ABANDONMENT.

1. Under Act 1894 (Ky. St. § 2127, 2128) giving a married woman power to contract debts in her own behalf, and to sue and be sued as though she were single, a married woman, who, when sued, fails to plead that the debt is that of her husband, for which she is merely surety, is estopped by the judgment against her, and cannot sue to set aside an execution sale of realty on the ground of her suretyship.

2. A voluntary parol agreement to allow an execution debtor to redeem land sold at execution sale, made after the statutory period for redemption has expired, is unenforceable by the debtor.

3. Ky. St. § 1702, exempts from liability for debts so much land, including a dwelling house and appurtenances, owned by the debtors, who are actually bona fide housekeepers, with a family, resident in this commonwealth, as shall not exceed in value \$1,000. Section 1708 recognizes a homestead right in married women by providing that the homestead of a woman shall be for the use of her surviving husband and children. Sections 2127, 2128, give a married woman power to contract debts in her own behalf. *Held*, that a married woman living on her own land with her husband and infant children was entitled to a homestead exemption therein.

4. A temporary removal from a country homestead to the city to furnish children with educational advantages is not an abandonment of the homestead.

Appeal from circuit court, Garrard county. "Not to be officially reported."

Action by Myrtle Herring against W. Mc C. Johnston. Judgment for defendant, and plaintiff appeals. Reversed.

W. I. Williams, for appellant. J. W. Alcorn, for appellee.

O'REAR, J. A common-law judgment was rendered against appellant, Myrtle Herring, and her husband, James Herring, at the suit

of the Citizens' National Bank of Lancaster. An execution issued upon the judgment, directed to the county of Garrard, was levied upon the tract of land owned by appellant. At the sale the bank became the purchaser at less than two-thirds of the appraised value of the land. Appellant failed to redeem within the year allowed by the statute. Subsequently, the bank sold the land, and the sheriff conveyed it to appellee, who had been the bank's attorney in the above-named suit. This suit was brought by appellant to set aside the sale and to cancel the sheriff's deed, upon three grounds: (1) That the judgment under which the land was sold was rendered upon a note executed by her and her husband, being the debt of her husband; that she had signed the note as surety only; and that she had never set apart, by deed of mortgage or other conveyance, any part of her estate to secure the payment of the debt. (2) That the judgment creditor, the Citizens' National Bank, granted her the privilege of redeeming the land for the payment of the debt, and that she was prevented from doing so by the acts of appellee, Johnston. (3) That she was entitled to a homestead in the land at the time of the sale, and that none had been set apart to her.

We are of opinion that the first ground relied upon is unavailing. Under the act of 1894 (sections 2127, 2128, Ky. St.) a married woman is given the power to contract debts on her own behalf, and to sue and be sued as though she were single. Having suffered the judgment to go against her in that action, the court will presume that it was for her debt; or, in other words, she was concluded by the judgment in that action. The defense that she was surety only on the debt was one which she might have pleaded in the former action. Failing to do so, under familiar principles, she is now estopped. *Wren v. Ficklin* (Ky.) 59 S. W. 748.

As to the second ground, it appears that the agreement of the bank to allow appellant to redeem was made after her right of redemption had expired. It was a voluntary parol agreement without consideration, and not binding upon either party. The bank could not have enforced it against her, and she consequently cannot now enforce it against the bank or its vendee. We are, furthermore, satisfied that the agreement was never had with the bank by appellant, or at her instance, or with her knowledge. Two of her brothers-in-law volunteered to redeem the land from the bank. The bank officials supposed it was for appellant. Whether these brothers-in-law intended to give appellant the benefit of their assignment from the bank, had they procured it, is not material now, because we are satisfied from the evidence that they had waived any claim they might have had to buy the land by their failure to comply within the time fixed by the bank's proposition. Nor do we see anything in the record that, properly construed, can reflect

¶ 4. See Homestead, vol. 25, Cent. Dig. § 417.

upon the fair dealing and proper conduct of appellee in the premises.

Appellant, at the time of the levy of the execution upon her land, and of its sale thereunder, was a married woman, with a family. The family was composed of appellant, her husband, and a number of infant children. Appellant was the debtor in this case. She was so treated by the bank. By suffering the default judgment upon the note, we have just held that she so admitted herself. The statute (section 1702, Ky. St.) exempts from ordinary debts a homestead. Unlike the statutes of many of the states, this exemption is not to "the head of the family," nor to the "householder," but it is "so much land, including the dwelling house and appurtenances owned by the debtors, who are actually bona fide housekeepers, with a family, resident in this commonwealth, as shall not exceed in value one thousand dollars." It is true, where the husband is living, he is still bound, notwithstanding the removal of most of the former legal disabilities of married women, to provide a home and support for his family, his wife included. But many of them do not do it. Married women have been given more and more rights over their property, and more power to contract and trade as if single. The design of the Legislature has been to enlarge their opportunities and privileges to the end that their conditions might be improved. It could never have been their purpose to give married women the almost unrestricted right to contract debts, and not to afford to them the same exemptions from debt that are given to men. If the woman assumes debts, having a family, she ought to be and is entitled to just the same exemptions as a man with a family. If her husband cannot or will not support her and her children, she must do it herself. When she becomes the debtor, the statute is for her protection, and for the protection of those dependent upon her. *Waples, Homestead & Exemptions*, 125. The Legislature has expressly recognized that the married woman may own a "homestead" in her own right by section 1708 of the Kentucky Statutes, providing that "the homestead of a woman shall, in like manner, be for the use of her surviving husband and her children," etc. *Hemp-hill v. Haas*, etc., 88 Ky. 492, 11 S. W. 510; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74. We are of opinion that appellant was entitled to the homestead exemptions provided by section 1702, unless she had abandoned it.

It is not necessary to determine now, and we do not decide, that both the wife and her husband are entitled each to a separate homestead of \$1,000 in their lands, respectively. That question is not presented in this case, although the husband owned a small tract of land adjoining his wife's, but without a dwelling house on it, and which had never been occupied by either of them as a homestead.

It was claimed that appellant had abandoned her homestead. The facts on this point are shown to be that a short while before the levy of the execution she removed from the premises in question, which were situated in a remote country neighborhood, to the city of Danville. She testified that this removal was temporary only, and was for the express purpose of availing her children of educational advantages not to be had in their country location; that she intended to return to her home. Whether she had abandoned that intention since the execution sale does not appear to us to be material to this case. It was held in *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446, that such a temporary removal by the debtor was not an abandonment of his homestead. We are of opinion that the circuit court erred in denying appellant a homestead in the premises.

The judgment is reversed, and cause remanded, with direction to enter a judgment in favor of appellant canceling the sheriff's deed to appellee and the sale under the execution.

WALLINGFORD v. AITKINS.

(Court of Appeals of Kentucky. March 17, 1903.)

PHYSICIANS AND SURGEONS—SALE OF PRACTICE—CONTRACT—CONSTRUCTION—BREACH—DAMAGES—EVIDENCE.

1. In an action for breach of a contract for the sale of a doctor's practice, statements of defendant's father and mother with reference to what plaintiff's agent said to them concerning the contract and its breach were inadmissible, where such agent had nothing to do with the making of the contract and was not present at any time when it was under discussion.

2. An instruction that, when defendant mailed plaintiff a letter stating that he declined to have anything more to do with the contract, such letter constituted a renunciation of the contract, and plaintiff was entitled to recover damages he had sustained thereby, was proper.

3. Where a doctor, who contracted to sell his practice and relinquish his office to defendant, did not own the office, but rented the same, and used it in connection with another physician, the contract simply required that he vacate the office to the purchaser if he chose to occupy it, and did not require that he should make arrangements with the landlord or the other physician for the use of the offices by the purchaser.

4. In an action for breach of a contract for the sale of a doctor's practice, an instruction that the measure of damages was the difference between the contract price to be paid and the market value of the property at the time of the breach, not exceeding the sum demanded in the petition, was proper.

Appeal from circuit court, Fleming county.
"Not to be officially reported."

Action by O. W. Aitkins against A. M. Wallingford, Jr. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. G. Dearing and A. S. Kendall, for appellant. Jno. P. McCartney and J. H. Power, for appellee.

NUNN, J. This appeal is from a judgment of the Fleming circuit court for \$400 in damages in favor of appellee against appellant for the violation of a written contract made between the parties, by which appellee, C. W. Aitkins, sold to appellant a house and several lots in the town of Flemingsburg, his good will as a physician, and also agreed to relinquish his office for the practice of medicine and surgery to the said Dr. A. M. Wallingford, Jr., for the sum of \$3,500. This contract was dated November 21, 1900, and was to take effect the 1st day of January, 1901, but by a subsequent mutual agreement the time was extended to March 1, 1901. This litigation grew out of this clause in the contract: "The said Chas. W. Aitkins, of the first part, agrees to relinquish his office, for the practice of medicine and surgery, to the said Dr. A. M. Wallingford, Jr., of the second part, on Jan. 1st, 1901." There is not much difference between the parties as to the facts of the case. Dr. Aitkins, appellee, did not own the office in which he was situated, and Wallingford, appellant, knew this fact. Appellee and one Dr. Garr, as partners, had rented and had for several years occupied three rooms over W. S. Fant's bank in the town of Flemingsburg, and appellant understood this also. Consequently appellant knew that appellee could only relinquish the office to him, but he must have understood that to be able to hold the office it was incumbent upon him to contract with the owner thereof. It cannot, by any reasonable construction of the contract, be construed that Aitkins was to rent and pay the rent to the owner of the office for appellant. Before appellant entered into this contract he saw Dr. Garr for the purpose of ascertaining whether or not it would be agreeable to Garr to have him, appellant, as an associate in the practice of medicine, and to occupy the office which appellee was occupying. Garr expressed himself satisfied with the change. On the last day of February, 1901, appellant went to the office of appellee to arrange about taking possession on the next day as agreed, and first went into the room of Dr. Garr, and he presented to appellant a contract for his acceptance and signature, in substance stating that he (Garr) had rented from W. S. Fant the three office rooms before occupied by Garr & Aitkins at \$125 per year, the two rooms consisting of a reception room and one on each side, north and south; and Garr, by the consent of W. S. Fant, subrented to Dr. Wallingford the south private consulting room, and the use of one equal half of the reception room, each to pay half of all expenses to keep the rooms in order, and each to pay half the rent and all expenses. The contract was to be terminated at any time during the year by Wallingford by giving Garr 30 days' notice of his intention to vacate the office. Garr reserved the right to terminate this contract at any time by giving Wallingford 30 days' notice to vacate. Ap-

pellant at once expressed himself dissatisfied with the contract, as it made him a subtenant under Garr, and gave Garr the privilege of turning him out at any time on 30 days' notice. He then said to Garr, "I am looking to Dr. Aitkins to put me in possession of the office, and I do not look to you." Appellant then went to the room of appellee with the contract drawn by Garr, and showed him the contract, and he (appellee) expressed surprise at the turn of the affair, and told appellant to again see Dr. Garr and try to arrive at some satisfactory understanding. Appellant did not do this, but left for home, and the next day wrote appellee a letter stating, among other things, that as Dr. Garr had rented the office from Fant, and that appellee could not deliver him the office, he would decline to have more to do with the contract. Appellee sued appellant, and claimed \$500 damages for breach of contract. A trial was had, and on the trial there was incompetent evidence introduced, without objection or exception.

The appellant contends that the court erred to his prejudice in refusing to allow certain testimony offered by him. We are of the opinion that the court was right in excluding these statements of the father and mother of appellant with reference to what they claimed J. H. Power, the agent of appellee, said to them at their home, to wit: "Dr. Aitkins had not complied with his contract. That it was not the fault of Dr. Aitkins, but of Dr. Garr." J. H. Power, as shown by this record, did not have anything to do with the making of the contract, nor was he present at any time when the contract was under discussion, and a statement by him as to who was in fault amounted only to an expression of an opinion on the subject, and was clearly incompetent.

The appellant also contends that the court erred in its instructions to the jury, which were three in number, as follows: "(1) The court instructs the jury that when the defendant, Wallingford, mailed to plaintiff, Aitkins, the letter in evidence, declaring that he declined to have anything more to do with the contract, then the plaintiff had nothing further to do in the premises; this was a renunciation of the contract upon which the suit is founded. And the plaintiff is entitled to such damages as the jury may believe from the evidence he has sustained by reason thereof, not exceeding the sum of \$500, the amount claimed in the petition. (2) The court instructs the jury that the language of the contract, to wit: 'The said Chas. Aitkins agrees to relinquish his office for the practice of medicine and surgery to the said Dr. A. M. Wallingford, party of the second part,' simply means that he was to vacate said office and leave the same to the use of the defendant, Wallingford, if he chose to occupy it, and if the jury believe from the evidence that said Aitkins was able, ready, and willing to so relinquish, then the law is for the plain-

tiff, and the jury will so find. (3) The court instructs the jury that the measure of damages in this cause is the difference between the contract price of \$3,500 to be paid plaintiff by defendant, Wallingford, under the contract, and the market value of said property at the time of the breach of said contract March 1, 1901, and when sold by plaintiff in March, 1901, not exceeding \$500, the amount claimed in the petition." We think the instructions were proper, and covered the law of the case.

When appellant announced by the letter of date March 1, 1901, that he would not comply with his contract, this was a renunciation of the contract, and appellee then had the right to sue him for a breach of it. It was the duty of the court to construe the contract in its instructions to the jury, and the construction given in instruction No. 2 was right and proper, considering the whole contract and the agreed facts as to the ownership of the offices, and that Garr was in possession thereof jointly with appellee, and appellee had no interest therein except as a renter. Appellant's loss was caused by his failure to deal or trade with W. S. Fant, the owner of the office, or Dr. Garr, and by contract have secured the right to remain in the office after it was relinquished to him by the appellee. It is not stated in the contract, nor attempted to be shown by the pleadings or evidence, that appellee contracted with appellant to keep him in the office after he relinquished it to him.

The instruction on the measure of damages was correct. The amount of the verdict was large, considering all the facts as shown by the record, but it was the province of the jury to fix the amount. We do not feel authorized to disturb their finding. Therefore the judgment of the lower court is affirmed.

STANDARD LIFE & ACCIDENT INS. CO. v. HOLLOWAY.

(Court of Appeals of Kentucky. March 11, 1903.)

ACCIDENT INSURANCE—PERSONS INSURABLE—EXEMPTIONS—WAIVER—AUTHORITY OF AGENT—ESTOPPEL—EVIDENCE—STATEMENT BY AGENT—RES GESTÆ—QUESTION FOR JURY.

1. Where a railroad ticket agent was also the agent of an accident insurance company, and authorized to solicit risks, and was permitted to be the sole judge as to whether a risk would be accepted, such agent had power to waive a provision in a policy which he issued to a cripple, just prior to insured's boarding a train, that the policy did not insure any crippled person.

2. Where an accident insurance agent sold a policy providing that it did not insure any crippled person with knowledge that the purchaser was maimed, the company was estopped to deny that the agent thereby waived such provision.

3. Where insured, who was a cripple, testified that in purchasing an accident insurance ticket of defendant's agent he walked in before him with his usual limp, and on reaching the ticket window he laid his cane on the shelf thereof in plain view of the agent, wheth-

er the agent knew, or had reasonable opportunity for knowing, that plaintiff was a cripple, and therefore waived a provision in the policy that defendant did not insure crippled persons, was a question for the jury.

4. Plaintiff purchased an accident insurance policy from the railroad ticket agent, who was also defendant's agent for the issuance of such policies. Soon after receiving the policy, he boarded a passenger train, and in less than 10 minutes he was injured by the derailling of the car. Held, that a statement made by the agent to a third person, after plaintiff's injury, that such agent knew, when he sold the ticket, that plaintiff was lame, and that it was because he had had so many accidents, and been so unfortunate, that he asked him if he did not want an accident ticket; that a man who had had so many accidents ought to have accident insurance—was inadmissible as *res gestæ*.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by W. S. Holloway against the Standard Life & Accident Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Yeaman & Yeaman, for appellant. M. Merritt, for appellee.

SETTLE, J. This action was instituted by appellee in the court below upon a policy of accident insurance, No. 465, which contains a clause to the effect that "it does not insure any maimed or crippled person." The record discloses the following state of facts, viz.: That the policy in question was purchased by appellee at the price of 50 cents from appellant's agent, who was likewise the local ticket agent of the Louisville, Henderson & St. Louis Railway Company at Henderson, Ky.; that appellee was about to take the passenger train for Louisville, and when securing his railroad ticket he was solicited by the ticket agent to buy the accident policy, which he did; that, after receiving it, he very soon boarded the train for Louisville, and in less than 10 minutes thereafter the passenger car in which he was riding was derailed, and he was greatly and permanently injured thereby in his arm and shoulder, and totally disabled from performing any of his duties in his business of farming for 26 weeks, and was confined to the house under constant treatment of a surgeon for 18 weeks. The policy was made a part of the petition, and by its terms appellant agreed to pay appellee at the rate of \$25 per week, not exceeding 26 weeks, if he should sustain, within two days from its date, injuries in any railroad passenger car which should wholly and entirely disable him from performing or engaging in any and every kind of occupation, and remain within the house, and be subject to the personal and continuous attention of a surgeon in good standing; or \$5 per week if such injury only prevented him from performing some one or more of his daily duties. It is averred in the petition that appellee, by reason of the injuries he received from the derailling of the passenger car, was damaged

in the sum of \$650, and this sum he sued to recover of appellant. Appellant, by answer, controverted the averments of the petition, and, in addition, alleged, in substance, that appellee, at the time of his purchase of the policy sued on, was a cripple—that is, he had but one leg; the other having been amputated some years before—and that the clause in the policy which provides that “it does not insure any maimed or crippled person” was known to appellee, for which reason he is not entitled to recover the indemnity claimed by him. The reply, as amended, traversed the material allegations of the answer, and avers that the agent of appellant knew, when the policy was issued, of appellee’s lameness; and this averment of knowledge on the part of the agent is denied by the rejoinder. Upon the issues thus joined the case went to trial, and the jury returned a verdict in appellee’s favor for \$250. Thereafter appellant filed grounds, and entered motion for a new trial, which the lower court refused; hence this appeal.

It is contended by counsel for appellant that parol evidence was inadmissible to establish a waiver of the provision of the contract that “it does not insure any maimed or crippled person,” and that, as appellee is a cripple, the jury should have been instructed peremptorily to find for appellant. We are unwilling to accept this view of the case, for it seems to be the more recent policy of the courts in most of the states to hold that, where an insurance agent has general powers, and not only solicits, but is the sole judge as to whether he will take, the risk, his knowledge in respect to the nature, condition, or extent of the risk is that of the company which he represents. And it has even been held that such an agent may waive the stipulations in a policy issued by him, and the company will be bound thereby. *Hartford Insurance Co. v. Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64; *Phoenix Ins. Co. v. Splers & Thomas*, 87 Ky. 285, 8 S. W. 453; *Phoenix Ins. Co. v. Phillips*, 16 Ky. Law Rep. 122. In the case of the *Travellers’ Ins. Co.*, etc., v. *Ebert*, 47 S. W. 865, which was an action brought by a woman to recover on an accident policy for injuries received and loss of time resulting therefrom, it being expressed in the policy that recovery might be had by the person injured for loss of time occasioned by injuries resulting from accidental means, except in the case of females, whom it insured against death only, this court, upon the evidence furnished by the record that the agent of the company had, notwithstanding the provisions of the policy, contracted to insure the appellee, *Ebert*, against loss of time, said: “It is insisted by appellant that the agent, *Pemberton*, had no authority to make such a contract as the one claimed by appellee, and, further, that, as the contract contained the exception mentioned, she must be bound thereby. It is evident that the agent was authorized to issue accident poli-

cies of some kind, and it nowhere appears that appellee had any notice or information to the effect that his power in that respect was limited; hence we are of the opinion that appellant is bound by the representations and contract in respect to insurance made by any agent authorized to make any contract for insurance. * * * The face of the receipt clearly shows that the agent knew the insured was a female, and he specifically insured her against loss of time, and it would be a harsh and unreasonable rule that would require her or her son, who acted to some extent for her, to examine the ticket fully, to see whether it was a palpable contradiction of the contract entered into verbally and also reduced to writing. No such diligence should be required of a person in the hurry of travel. * * *” So, in view of the authorities referred to, we are constrained to hold that if *Rogers*, appellant’s agent, at the time he delivered to appellee the policy sued on, knew that he was maimed or a cripple, the provision in the policy intended to exclude cripples was waived in his case, and we think that appellant is estopped to deny the waiver.

It was for the jury to determine from the evidence presented whether the agent had such knowledge or not, and, though he denied having any knowledge thereof, appellee testified that he walked in before him with his usual limp, and that upon reaching the ticket office window he laid his cane on the base or shelf thereof in plain view of the agent. From these facts the jury doubtless found that the agent saw, and had opportunity to know of, appellee’s crippled condition; and, upon the other hand, that the latter did not know, and had no means of learning of, the provision of the policy intended to exclude persons of his class from its benefits, as he took the passenger train immediately after receiving it for the purpose of going to Louisville. We are of opinion, however, that the lower court erred in permitting the witness *Stone* to testify as to the conversation that occurred between himself and appellant’s agent, *Rogers*, after the delivery of the policy to appellee, and after his injury, in which he says *Rogers* informed him that “he knew when he sold the ticket that *Holloway* was lame; that it was because he had had so many accidents, and been so unfortunate, that he asked him if he did not want an accident ticket; that a man who had had so many accidents ought to have accident insurance.” This evidence was clearly incompetent, and necessarily prejudicial to appellant. In commenting on the declarations of agents, and the extent to which they may bind the principal, *Mr. Meachem*, in his very excellent work on Agency, says: “So the statements, representations, or admissions must have been made in reference to the subject-matter of his agency. The mere idle, desultory, or careless talk of the agent, having no legitimate reference or bearing upon the business of his principal, cannot

be binding upon the latter; and the statements, representations, or admissions must have been made by the agent at the time of the transaction, and even while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction; or, to use the common expression, they must have been a part of the *res gestæ*. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such a case they amount to a mere narrative of the past transaction, and do not bind the principal. The reason is that, while the agent was authorized to act or speak at the time, or within the scope of his authority, he is not authorized at a subsequent time to narrate what he had done, or how he did it." *Meachem on Agency*, § 714; *Greenleaf Ev.* §§ 113-114. In *Davis v. Whitesides*, 1 Dana, 177, 25 Am. Dec. 138, it is said: "The circuit court erred in instructing the jury that, if Miller was either the partner or agent of the plaintiff, his [Miller's] statement, as proved by another, was competent evidence against the plaintiff. An acknowledgment of an agent is not admissible as proof against his constituent, unless it formed a part of the *res gestæ*." But a more recent decision in point is to be found in *Hartford, etc., v. Hayden's Adm'r*, 90 Ky. 41, 13 S. W. 588, wherein it is said: "The appellees were improperly allowed to prove some statements of Pursley relative to insuring the deceased, made after it had been affected. The acknowledgments of an agent, made subsequent to the transaction in which he acted as agent, cannot be proven against the principal. They are not a part of the *res gestæ*. * * * We can conceive of no state of case that would have justified the lower court in admitting proof of these statements of the agent, unless the agent had been introduced as a witness by appellant to testify as to what occurred when the contract of insurance was made with appellee, in which event, upon cross-examination, counsel for appellee might have asked him whether he made to Stone the statements testified to by the latter, and upon his denial thereof Stone might have been introduced by appellee to contradict him; but even then it would have been the duty of the court to instruct the jury that the testimony could be considered by them only for the purpose of affecting the credibility of the agent as a witness.

We find no error in the giving or refusing of instructions by the lower court, but for the error committed in admitting proof of the conversation between the witness Stone and appellant's agent, Rogers, the judgment is reversed, and cause remanded, with directions to the lower court to set aside the verdict of the jury, and grant appellant a new trial, and for such other proceedings as may not be inconsistent with the opinion herein.

SUMMERS BROS. v. BLAND.

(Court of Appeals of Kentucky. March 19, 1903.)

HARMLESS ERROR.

1. In an action against the individual members of a partnership, an instruction that an agreement between plaintiff and one of the partners to accept the latter's individual note in payment of the debt sued on was without consideration, and did not release defendants from liability, was not prejudicial error, there being no proof that any such note was ever received by plaintiff, or accepted by him in lieu of the partnership liability.

Appeal from Circuit Court, Hardin County. "Not to be officially reported."

Action by W. H. Bland, as surviving partner of the firm of Bland & Summers, against D. C. and W. P. Summers. From a judgment for plaintiff, defendants appeal. Affirmed.

Lewis McQuown and S. M. Payton, for appellants. L. A. Faurest and W. H. Marriott, for appellee.

O'REAR, J. During 1897 and 1898 two firms of copartners were engaged in Hardin county in buying, feeding, and selling cattle. One was composed of appellee, W. H. Bland, and L. B. Summers, which was styled "Bland & Summers"; the other of the said L. B. Summers and W. P. Summers. The last-named firm was styled "Summers Bros." L. B. Summers was the manager of the firm of Summers Bros. During the years named Bland & Summers, it is claimed, sold cattle and feed and advanced money to Summers Bros. to the amount of \$2,826.26. In the year 1899 L. B. Summers became a bankrupt, and was discharged as such. Appellee, Bland, as surviving partner, thereupon brought this suit against D. C. and W. P. Summers to recover from them, as members of the late firm of Summers Bros., the balance of the above-named account, subject to certain admitted credits. The answer of two paragraphs pleaded, first, a denial that the items charged, or any of them, had been sold or furnished to the firm of Summers Bros.; and, second, that appellee and L. B. Summers had a settlement, by which and in which all the items sued for were embraced, and merged in the individual note of L. B. Summers to appellee, which he "had accepted and received." Appellants' proof was directed to show that the sales of the cattle charged had been by Bland & Summers to L. B. Summers personally, and that he had sold them to D. C. and W. P. Summers in part payment of a debt he was owing them. A jury was called, whose verdict was against appellants.

We think the proof clearly sustains the verdict. The instructions given to the jury by the circuit judge were apt and proper, unless it was the sixth, which is especially criticised by appellants. It is as follows: "If the jury believe from the evidence that Sum-

mers Bros. were indebted to Bland & Summers the amount sued for herein, or any part thereof, any agreement that plaintiff may have made, if any such was made, to look to L. B. Summers alone therefor, or to accept his individual note therefor, was without consideration, and did not release defendants from their liability if there was such liability." This court has held that an account against a partnership may be merged and satisfied by the creditor's taking the note of one of the copartners, provided it was the intention of the parties that the others should be released, and the note was so accepted and received by the creditor. *Sneed v. Wiester*, 2 A. K. Marsh. 277; *Patterson v. Chalmers*, 7 B. Mon. 597; *Macklin's Ex'r v. Crutcher*, 6 Bush, 401, 99 Am. Dec. 680. Without discussing the sufficiency of appellants' plea on this point (of which sufficiency we have grave doubt), the court is of opinion that there was a complete failure of proof to sustain it. The note claimed by L. B. Summers to have been delivered to appellee was not shown to have been received by him at all; nor was it shown, or attempted to be, that appellee accepted it in lieu of the liability of Summers Bros. The instruction complained of was, therefore, not prejudicial to appellants.

The judgment is affirmed.

HUGHES v. ROBERTS, JOHNSON & RAND SHOE CO.

(Court of Appeals of Kentucky. March 18, 1903.)

GUARANTY—NOTICE OF ACCEPTANCE—WAIVER.

1. Where an agreement of guaranty contained the express provision that notice of acceptance was waived, and that it was to continue in force till revoked by notice in writing, it was not necessary to inform the guarantor of the acceptance of the guaranty before extending credit under it.

Appeal from Circuit Court, Ballard County.

"Not to be officially reported."

Action by the Roberts, Johnson & Rand Shoe Company against H. Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Reeves and F. L. Turner, for appellant. I. E. Conley, for appellee.

BURNAM, C. J. Appellee, Roberts, Johnson & Rand Shoe Company, brought this suit against the appellant, H. Hughes, alleging, in substance, that it sold and delivered to J. L. Hughes merchandise of the value of \$1,334.45, beginning on the 29th of December, 1898, on which he paid at various times sums aggregating \$800, leaving a balance due it of \$534.45; and that, to enable J. L. Hughes to buy these goods on credit, J. L. Hughes and H. Hughes executed and delivered the following written guaranty to them:

"Roberts, Johnson & Rand Shoe Co., St. Louis, Mo.—Gentlemen: In compliance with your request for a guaranty of the tenor following, to establish with you credit for J. L. Hughes of Wickliffe, Ky., and in consideration of \$1.00 to us in hand paid by you, the receipt and sufficiency of which is hereby acknowledged, we hereby unconditionally, jointly and severally guarantee payment of whatever said party shall at any time be owing you, whether heretofore or hereafter contracted. The guaranty is to take effect without notice of its acceptance (which is hereby waived), and is to be an open guaranty and is to continue in full force, notwithstanding any renewals or extensions granted by you, without obtaining our previous consent thereto, and until expressly revoked by notice to that effect in writing from us to you. Notification of said party's default is hereby waived, but our liability hereunder is not to exceed the sum of \$1,000.00 at any one time. It is mutually understood that this guaranty is to bind the party who signs it, whether the same be signed by any other party or not.

"Dated this 29th day of December, 1898.

"J. L. Hughes.

"H. Hughes."

The defendant, H. Hughes, in his answer, says that he has no knowledge or information sufficient to form a belief as to whether the account sued on is correct, and therefore denies that J. L. Hughes bought the goods sued on. Second. He alleges that, if they were purchased, as set out in plaintiff's petition, that they had been fully paid for. Third. He denies his liability for the balance alleged to be due. The affirmative averments of the answer were denied by reply, and a trial before a jury resulted in a verdict, pursuant to a peremptory instruction, in favor of the plaintiff for the balance alleged to be due.

Upon the trial J. L. Hughes testified that he had purchased from plaintiff about \$700 worth of goods before the guaranty sued on was executed, and that after that date he bought the goods set out in the itemized statement filed with plaintiff's petition; that he had received credit for all the payments made by him; and that he still owed the plaintiff a balance of \$534.45. The only ground relied on for a reversal of the judgment rendered pursuant to the verdict of the jury is that the testimony did not show any notice of the acceptance of the guaranty by appellee before credit was given to J. L. Hughes.

The rule in this state as to ordinary guaranties by one person of the credit of another is well stated in *Lowe v. Beckwith*, 53 Ky. 184, 58 Am. Dec. 659, in these words: "Notice to the guarantor of its acceptance and an intention to act under it in pursuance of its terms is necessary, because it is in the nature of a proposition where the party addressed may accept or reject at his option, and until acceptance does not constitute a contract be-

tween the parties." See, also, *Ford, Eaton & Co. v. Harris* (Ky.) 43 S. W. 199; *Greer Machine Co. v. Sears* (Ky.) 66 S. W. 521. But the guaranty sued on in this proceeding is far more sweeping in its terms than those in any of the cases in which this rule is announced. It expressly stipulates that notice of its acceptance is waived, and that it was to continue in full force until expressly revoked by notice to that effect in writing. The only limitation upon appellant's liability is that it should not exceed \$1,000 at any one time. There is no suggestion that appellant is not *sui juris*, and no legal reason given why he could not agree to dispense with notice of the acceptance of his guaranty. We are therefore of the opinion that the trial court did not err in its peremptory instruction to find for the plaintiff.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. PARSONS.

(Court of Appeals of Kentucky. March 18, 1908.)

TELEGRAMS—TRANSMISSION AND DELIVERY—DELAY—NEGLIGENCE—EXCUSE—PLEADING—INSTRUCTION—INTRODUCTION OF EVIDENCE—DISCRETION.

1. A delay of 27 hours by a telegraph company in transmitting a message to a place 22 miles distant, not shown by it to be due to the act of God, the fault of the sender, or other matters beyond its control, is unreasonable, and the jury are properly told it makes the company liable for damages.

2. Though a petition does not charge negligence in transmitting a message, but only in delivering it, yet the pleadings will sustain a judgment on the ground of negligent transmission, the answer, after denying the allegations of the petition, adding that defendant denies that it was negligent in transmission or delivery of the message, and both parties on the trial treating the issue as made.

3. Where a message is sent to a mother announcing the death of her son, and, but for negligent delay in transmitting it, she could, by private conveyance, have reached the place in time for the funeral, or by telegram have had it delayed till her arrival by train, the company is liable for damages.

4. It is in the discretion of the court to allow plaintiff, after announcing through, to introduce other testimony before anything else is done.

5. That a telegraph company has no messengers at its office, and its agent is not allowed to leave its office, is no excuse for delay in delivering a message.

6. It is no excuse for delay in transmission of a message that there are two places in the state of the same name as that to which the message is to be sent, the agent having been told, when the message was delivered to him, to which place it was to be sent.

Appeal from Circuit Court, Pulaski County. "Not to be officially reported."

Action by Mandy Parsons against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Richards & Richards and O. H. & R. B. Waddle, for appellant. W. S. Pryor and V. P. Smith, for appellee.

HOBSON, J. Plaintiff, Mandy Parsons, who resides at Greenwood, Ky., was the mother of George Parsons, who resided at Jellico, Tenn. George Parsons died on the evening of May 23, 1901, about 9 o'clock. On the next morning, between 6 and 7 o'clock, his wife, Julia Parsons, sent the following telegram to his mother:

"Jellico, Tenn., May 24, 1901.

"Mandy Parsons, Greenwood, Ky.

"George died yesterday. Body can't be shipped. Burial at Jellico. Julia Parsons."

The distance from Jellico to Greenwood is only about 22 miles; but the message was sent to Louisville from Jellico, and forwarded from there. It did not reach Jellico until about 8:30 a. m. on the morning of May 25th, and was not delivered to Mrs. Parsons until 10 o'clock that morning. She lived in Greenwood, and, according to her testimony, about 200 yards from the telegraph office, or, according to the testimony of the agent, about 500 yards from it. In the meantime, however, Julia Parsons having heard nothing from the mother, and the body being in bad condition, buried her husband about 4 o'clock on the evening of May 24th. Mrs. Mandy Parsons filed this suit to recover damages for the neglect in the delivery of the message. It was agreed on the trial that if the message had been delivered promptly she could not have taken any train that would have carried her to Jellico by 4 o'clock that evening, the time when the funeral took place. But it was also shown that there was a fair road between the two places, and that on her last visit to her son she had returned home by this road by private conveyance. It was also shown that the reason that the burial took place at 4 o'clock on May 24th was that Mrs. Parsons had not come; they had not heard from her; the condition of the corpse was getting bad; but they could have delayed until the next day, and would have done so but for the failure to hear anything from her. Mrs. Parsons testified that when she got the message she did not observe at first that it was dated the day before, and she began getting ready, evidently with a view of taking the train, but when she saw the date of the message thought it was too late to go. If she had gone on the next train she would have reached Jellico some time that night. The court instructed the jury as follows: "If you believe from the evidence that the message read in evidence was delivered to and accepted by the defendant at Jellico, Tenn., on May 24, 1901, at about 6:30 a. m., which it undertook to transmit and deliver to the plaintiff at Greenwood, Ky., and that said message was not transmitted and delivered to the plaintiff until about 10 o'clock a. m. on May 25, 1901, and if by the delay of the defendant in transmitting and delivering said message plaintiff was prevented from being present at the funeral or burial of her son, you will find for the plaintiff such a sum in damages as you may believe

from the evidence will fairly compensate her for the mental anguish to her, if any, caused by the failure to deliver the message, provided your finding will not exceed \$1,500; and, unless you so believe from the evidence, you will find for the defendant."

It is objected that the instruction assumed the defendant's negligence; that it submits an issue not raised by the pleadings; and that it was erroneous in submitting to the jury whether the plaintiff by the delay was prevented from being present at the funeral or burial of her son. It was the duty of the defendant to transmit and deliver the message in a reasonable time. If it failed to do so, *prima facie* it was guilty of negligence. If the delay was due to the act of God or the fault of the sender of the message, or other matters beyond its control, the burden was on the defendant to show these things, and when it failed to do so the court properly told the jury that, if there was a delay of something like 27 hours in transmitting the message, the defendant was liable, for such a delay is unreasonable.

It is urged that the petition did not charge negligence in transmitting the message from Jellico to Greenwood, but only charged negligence in delaying to deliver it after it reached Greenwood. It is unnecessary to determine now what is a proper construction of the petition, for the defendant by its answer, after denying the allegations of the petition, added this: "It denies * * * that it was guilty of any negligence or carelessness in the transmission or delivery of said message," and on the trial of the case and in its preparation both parties treated the issue as made, whether there was any negligence on the part of the defendant in the transmission of the message to Greenwood, or in its delivery after it reached there.

It was held by the Court of Appeals of Texas in *Western Union Telegraph Co. v. Hendricks*, 63 S. W. 341, that where a message was sent to a father announcing the sickness of his son, and he could not have reached the son before he died if the message had been promptly delivered, a delay in delivering the message would not warrant a recovery of damages for the failure to reach the son before his death. It was also held by this court in *Talferro v. Western Union Telegraph Co.*, 54 S. W. 825, that, where a new agency must have acted if the telegram had been delivered, damages could not be recovered for things dependent upon the action of such new agency. But neither of these decisions seems to us in point here. The death of the son in the Texas case was the act of God, and, it turning out that in no event the plaintiff could have reached his son before death, damages were properly refused for his failure to reach his son, because the delay in the message was not the proximate cause of this. In this case, if the message had been delivered in time, there was no new agency to act. The message was to Mrs. Parsons.

When it was not delivered to her promptly she was deprived of all opportunity to act, either by going to her son by private conveyance or by telegraphing for them to wait for her coming. If she could reasonably have gotten to her son before the burial if the message had been promptly delivered, it was proper for the court to submit to the jury whether she was deprived of this privilege by the defendant's delay in transmitting the message. In the *Talferro* Case the telegram was of mere inquiry, but in this case the message bore information of the greatest importance to a mother, and it might as plausibly be argued that there could be no recovery in any case like this where the message was not delivered in time, because it could never be known what the receiver of the message would have done if the message had been promptly delivered. The testimony taken by the appellant and read by the appellee on the trial, which is uncontradicted, shows that the body could have been retained until appellee arrived, so that she might be present at the burial.

The appellant took the depositions of Julia Parsons and of C. G. Lambdin, who sent the message for her, and after appellee announced through on the trial, but before anything further was done, she asked leave to read these depositions on her behalf. The court allowed this done. If the testimony had been offered before appellee announced through no question would probably be made as to its admissibility; and it was discretionary in the court to allow other testimony to be given after the plaintiff announced through and before anything else was done.

The defendant offered to prove by the agent at Greenwood that he had no porter; that by the rules of the company he was not allowed to leave his office; and that the delay in delivering the message after he had received it from 8:30 to 10 o'clock was due to this. This evidence was properly refused. It is the duty of a telegraph company to deliver messages, and it cannot shield itself from this duty by providing that the agent must not leave his office. When it receives messages to be delivered at a certain office it must furnish reasonable facilities for delivering the messages. It was held in *Western Union Telegraph Company v. Crider* (Ky.) 54 S. W. 963, that a company might make reasonable rules for the conduct of its business in accordance with the volume done, and that it was not bound to keep night offices open in small places where the business would not justify it. But this cannot be extended so as to excuse the company for the failure to deliver promptly messages during business hours, and when its office is kept open.

It appears from the testimony of the agent of the defendant who received the message that he was told by the sender that Greenwood was on the Cincinnati Southern Railroad, and the agent wrote the message out. If he failed to put on the message a suffi-

cient direction, or to send it to the proper place, it was not the fault of the sender. There are two places called Greenwood in Kentucky—one in Warren county, and the other in Pulaski county, on the Cincinnati Southern Railroad. The agent was told when the message was delivered to him, according to his own statement, that the latter was the place the message was to go, and it was his own fault if he did not send it correctly, or so send it that it would reach the point he was told it was destined for. There was, therefore, nothing in this to submit to the jury.

The verdict is large, but not so palpably excessive or against the evidence as to justify us in disturbing it.

Judgment affirmed.

MATTINGLY'S TRUSTEE v. MATTINGLY. (Court of Appeals of Kentucky. March 18, 1903.)

ASSIGNMENT FOR CREDITORS—SURCHARGING ACCOUNTS—ALLOWANCE OF ATTORNEY'S FEES.

1. Where an assignor for creditors employed attorneys to surcharge the accounts of the assignee, and their efforts resulted in substantial benefit to the estate and its creditors, it was proper for the court to allow them a reasonable sum out of the estate for their services.

2. A direct allowance to attorneys employed to surcharge the accounts of an assignee for creditors could not be defeated by any subsequent arrangement made by the assignor with his assignee.

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

Proceeding by the Columbia Finance & Trust Company to settle its accounts as assignee of B. F. Mattingly. From a judgment allowing a fee to attorneys employed by the assignor to surcharge the assignee's accounts, and order to pay over the same, the assignee appeals. Affirmed.

Ben Spalding and Richards & Ronald, for appellant. H. W. Rives, for appellee.

BARKER, J. On the 19th day of July, 1894, B. F. Mattingly, being insolvent, in order to provide for an equitable distribution of his estate among his creditors, executed and delivered to the appellant, the Columbia Finance & Trust Company, a deed of assignment for their benefit. The assigned estate consisted of some 1,500 acres of land, and a small distillery in Marion county, Ky., and whisky in bond. There was a mortgage on all this property to the Columbia Finance & Trust Company, to secure an indebtedness of B. F. Mattingly to it, of \$25,000. In addition to this sum owed to appellant, he was largely indebted to many other persons. Appellant accepted the trust and qualified as assignee, as by law required. It seems that the trustee and B. F. Mattingly entertained a hope that, by proper management of the affairs of the estate, it would pay all of the

debts, and leave a surplus over for the vendor; and, under the influence of this hope, the trustee, by the aid, and largely under the advice and direction of B. F. Mattingly, undertook to operate the distillery and the farms. In order to carry out this plan, it was necessary for the trustee to advance, and it did advance, large sums of money either to purchase or to pay off the outstanding unsecured debts of B. F. Mattingly. After the expiration of several years it became evident that the hope of paying off the indebtedness by profits arising from the operation of the distillery and the farms was futile; whereupon an action was instituted in the Marion circuit court for the purpose of settling the accounts of the trustee, and obtaining a judgment for the sale of the assigned property for the payment of the indebtedness. This action was referred to the commissioner for the purpose of settling the accounts of the trustee; whereupon B. F. Mattingly employed C. S. Hill and H. W. Rives, as his attorneys, to surcharge the accounts of his trustee, and to file exceptions to the report of the commissioner, which allowed certain credits to which he objected. A great deal of legal labor and time were expended by the attorneys in question in the performance of the duties assigned them. The estate was a large one, the debts were many, and the accounts embraced a multiplicity of items, as they involved the expense of operating a large property for several years. The final result of the labors of Messrs. Hill and Rives was the disallowance by the court of certain credits allowed by the commissioner's report to the trustee, amounting in the aggregate to \$4,600. All of the exceptions, save these, were overruled by the court. The judgment also ordered a sale of all the assigned property to pay off and discharge an indebtedness aggregating \$50,000. In the sale which was had of the property under the judgment, the trustee became the purchaser, for a sum much less than the amount of its debt against the estate for money advanced to pay the other creditors. From this judgment ordering the sale of his property, and approving, in the main, the accounts of his trustee, B. F. Mattingly prayed an appeal to this court, which, however, he seems never to have prosecuted. Afterwards he and his trustee had a settlement by which he became the purchaser from it of the distillery plant for the sum of \$1,500, and he relinquished his claim to homestead in its favor upon the payment to him of the sum of \$100, and appellant relinquished all claim against him for the balance of its debt, after crediting him by the amount realized from the sale of the assigned property. This resulted, of course, in the abandonment by Mattingly of his appeal. As between the trustee and Mattingly, this was a final settlement of the trust, which had thus resulted in relieving him from all his indebtedness. Afterwards, Messrs. Hill and Rives obtained

a rule from the court against the trustee to show cause why it should not be compelled to pay over to them the sum of \$500, which had been allowed them for their services in surcharging its accounts. This payment was resisted by the trustee, with the final result that the court made the rule absolute, and ordered it to pay over the sum in question. From this order, and the judgment originally allowing the fee, the trustee has appealed to this court, contending that Mattingly had no power or authority to employ counsel, and that the allowance by the court was erroneous.

B. F. Mattingly certainly had an interest in the assigned estate, both in his own right and in the duty of seeing that his creditors received all that was due them therefrom; and it seems to us, therefore, that it was both his right and his duty to have surcharged the accounts of the trustee, if they were erroneous, and withheld from the creditors any sum which was owing them; and, to this end, we see no reason why he was not authorized to employ counsel; and if the efforts of the counsel, thus employed, resulted in substantial benefits to the assigned estate and the interest of its creditors, we know of no principle of law which would deny to them a reasonable sum out of the estate for their services.

The allowance seems to have been made directly to the attorneys, and not to Mattingly for them, and therefore it was not in the power of Mattingly, by any arrangement which he subsequently made with his trustee, to defeat their claim. In the case of *Taylor v. Jones* (Ky.) 39 S. W. 251, this court held that an allowance to counsel directly was permissible. In the case of *Taylor v. Minor and Wife, &c.* (Ky.) 14 S. W. 544, where a devisee employed counsel to surcharge the accounts of a curatrix, which resulted in a benefit to the estate, it was held that the allowance of a fee to the attorney was proper. In the case of *Mitchell v. Tyler and Apperson* (Ky.) 49 S. W. 422, the creditors of an assigned estate employed counsel to force the assignee to account for money unlawfully withheld by him, and it was held by this court that an allowance to the attorney out of the trust fund was proper. It is said in the opinion: "Exception is also taken to the allowance of the fee of five hundred dollars to Tyler and Apperson out of the trust fund. It appears that they were not employed by assignee, and that their services were rendered in hostility to him, to make him account for the profit on the above property, and on other exceptions to the settlement of his accounts. They were manifestly entitled to a reasonable fee out of the additions made to the trust fund by reason of their services, and, as the record does not give the evidence in full heard by the court below, we must presume that it supported the judgment."

It may be conceded, for the purpose of

the question involved on this appeal, that the court below erred in sustaining the exceptions taken by Mattingly to the commissioner's report settling the account of his trustee; but, on the face of the matter, it appears that the estate, on the whole, was augmented by the sum of \$1,600. As no appeal was prosecuted from this judgment, it remains in full force and effect, and must be treated as a correct exposition of the law as to the question involved.

No complaint seems to be made as to the amount of the fee allowed, but only to the right of allowance. We think the sum allowed, considering the work done and the results accomplished, reasonable, and that, under the authority of the decisions of this court above cited, its allowance must be upheld on principle. Wherefore the judgment of the court below is affirmed.

BETHEL v. A. BOOTH & CO.

(Court of Appeals of Kentucky. March 18, 1903.)

STATUTE OF FRAUDS—IMPLIED CONTRACT.

1. Though a contract to give employment for 10 years is void under the statute of frauds, so that action will not lie for its breach, notwithstanding the employé has performed part of it, yet, in consideration thereof, the employé having sold the employer a business for less than its value, he may, on an implied promise, recover the difference between the amount paid for and the value of the business.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by William E. Bethel against A. Booth & Co. Judgment for defendant, and plaintiff appeals. Reversed.

Myers & Howard, for appellant. W. W. Symmes, for appellee.

PAYNTER, J. It is averred in the petition that on the — day of July, 1899, and prior thereto, the plaintiff was the owner of and engaged in keeping a fish and oyster store in the city of Covington, and had been so engaged for about 25 years; that it was a profitable business; that on the — day of July of that year he entered into a verbal agreement with the appellee, A. Booth & Co., a corporation, by the terms of which he, in consideration of employment to conduct a store of like kind for the defendant in the city of Covington for a period of 10 years, sold, assigned, and transferred to it, for the sum of \$600, the assets of his business, which were of the actual value of \$1,200; that pursuant to that contract he performed the services for appellee required by the contract for the period of 12 months, when it, without fault upon his part, discharged him and refused to carry out the contract. For this breach of the contract he avers that he was damaged in the sum of \$1,900. The defendant denies the contract, and seeks to avoid it

because it is a verbal contract not to be performed within one year, and for that reason no action can be maintained upon it. The evidence introduced by the appellant conduces to sustain the averments of the petition, and that the appellee was to pay him \$25 per week for conducting its business for a period of 10 years, and that the assets of his business which he sold to the appellee were actually worth \$1,200, and that the good will of the business was very valuable. The court below, being of the opinion that the action could not be maintained upon a verbal contract, gave a peremptory instruction to find for the appellee. To review that action of the court this appeal is here.

If this action was one purely upon a contract by which the appellee agreed to employ the appellant for a period of ten years at a stated salary, then, under the adjudications of this court, no action could be maintained upon it. This was decided in *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, wherein the court said: "A verbal contract for a year's services to be performed at some future time is within the statute of frauds, because it cannot be wholly performed within a year from the making day." There are other opinions of this court of like effect. This court has held that where one part of the contract was to be, and was actually, performed within a year, an action could be maintained upon it. In *Dent v. Head*, 90 Ky. 261, 13 S. W. 1075, 29 Am. St. Rep. 369, the court said: "It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not to one which is to be or has been performed by one or either of them within such period, and that construction has been adopted elsewhere. *A. T. & S. F. R. Co. v. English* (Kan.) 16 Pac. 82; *McClellan v. Sanford*, 26 Wis. 595; *Curtis v. Sage*, 35 Ill. 22; *Berry v. Doremus*, 30 N. J. Law, 403; *Haugh v. Blythe's Ex'rs*, 20 Ind. 24; *Smalley v. Greene*, 52 Iowa. 241, 3 N. W. 78, 35 Am. Rep. 267; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720. For if the practical effect and operation of the statute is, as has been uniformly held by this court, in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning and import of the language used. In fact, the statute properly applies to agreements that are wholly executory; and one which has been performed by one of the parties within a year is to that extent executed, and cannot with propriety be called an agreement to be performed within a year." This court, in a subsequent opinion, has recognized *Dent v. Head* as announcing the correct rule.

To follow this rule would not enable the appellant to maintain this action, because he did not wholly perform his part of the con-

tract in one year, neither could he do so under the terms of the contract. The contract contemplated that the services he was to perform should be continued for a period of 10 years; therefore the facts do not bring it within the rule announced in *Dent v. Head*. We think, however, that the action can be maintained by the application of another principle. The statute of frauds in question was not enacted for the purpose of enabling one party to practice fraud upon another. It was not intended to protect a party in the enjoyment of the fruits of the contract who wrongfully obtained the property of another by a promise upon which an action could not be maintained. If one borrows money from another and verbally agrees to pay it in two years, no action can be maintained upon the verbal promise to pay within two years, but the law implies a promise to pay the money, and upon which an action can be maintained. Otherwise the borrower could receive full consideration for the promise which he made, and yet shield himself under the statute of frauds.

According to the evidence of the appellant, appellee was to pay \$800 for his store, but only paid \$300 in cash and the other \$300 in stock in the appellee company, which was of little value, yet the appellee obtained assets which were actually worth \$1,200. In addition to that, it obtained the good will of the business, which was proven to have been of considerable value. Suppose the appellant had given the assets and good will of the business to appellee in consideration that the appellee was to give him employment for 10 years; should the appellee be permitted to repudiate its contract to give the appellant employment for the stipulated time, and at the same time hold on and enjoy the assets and good will of the business which it acquired under the contract? If it could not thus enjoy the total value of the assets and good will of the business under the circumstances detailed, then for the same reason it is not entitled to enjoy one-half of the assets and the good will of the business. It is not a question as to the extent of the consideration which it received, but that it actually received property on a promise which it refuses to fulfill. In *Montague v. Garnett*, 3 Bush, 298, this court said: "Where a contract is wholly executory on both sides, as neither could bring a suit for its enforcement, the legal effect would be the same as though the contract had been declared void; but this is not the effect of the statute where there has been an execution of the contract, in part or whole, by one party, for in such cases the law implies a contract to pay for the consideration received, and neither the letter nor spirit of the statute prohibits a suit to recover on this implied obligation of the law. * * * But he could not use it to prevent recovery of the valuable consideration which he had derived by virtue of its terms, because the statute was never designed for such

purposes. It was never designed to enable one man to get the property of another by virtue of a parol contract, and then refuse to either execute the contract or return the property. Even in parol contracts for land, when possession has been delivered, courts adjust the rents and improvements on equitable principles, whilst they refuse to compel a specific execution of the contract." Again, the court said in that case: "But when the consideration, so far from being illegal and vicious, is valuable and virtuous, neither the statute nor public policy forbid a recovery upon the implied promise, in law, to return or pay for it." There is an implied promise in law that the appellee will pay the appellant the difference between the amount paid for the assets of the store which it purchased and its actual value on the day the contract was made, and, in addition thereto, to compensate the appellee for the loss which he sustained of the good will of the business, not exceeding the amount claimed in the petition. Of course, this right to recover is based upon the appellant's ability to establish his contract as averred.

Judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE, H. & ST. L. RY. CO. v. CHANDLER'S ADM'R.

(Court of Appeals of Kentucky. March 18, 1903.)

MASTER AND SERVANT—RAILROADS—OVERLOADING CARS—WRECK—DEATH OF BRAKEMAN—INSTRUCTIONS.

1. In an action for the death of a brakeman, alleged to have been caused by the overloading of a car, a defect in an instruction, in that it did not submit to the jury the question whether intestate's death was caused by the overloading of such car, was cured by another instruction, which expressly charged that that was the issue submitted to the jury.

2. Where, in an action for the death of a brakeman caused by the alleged overloading of a car, it was conceded that the real capacity of a car was 10 per cent. more than its marked capacity, an instruction that if the car was overloaded, that is, was loaded beyond its "estimated capacity," and that fact was known to the conductor in charge of the train whose duty it was to see to the proper loading thereof, etc., plaintiff was entitled to recover, was not erroneous, in that the term "estimated capacity" might have been understood by the jury as equivalent to "marked capacity."

"Not to be officially reported."

On rehearing. Overruled.

For former opinion, see 70 S. W. 666.

J. P. Helm, Helm, Bruce & Helm, and Chapeze Wathen, for appellant. B. H. Young and M. W. Ripy, for appellee.

HOBSON, J. It is urged in the petition for rehearing that the first instruction of the court is erroneous in that it assumes that if the car was overloaded this necessarily caused the cars to be derailed, and brought about the death of the intestate; also, that it is erroneous in that the jury were told

by it that the cars were overloaded if loaded beyond their estimated capacity, and that the question of negligence in overloading the cars was not left to the jury.

The instructions are quoted in full in the opinion of the court heretofore delivered. It is true the first instruction is subject to the criticism that it did not submit to the jury the question whether the death of the intestate was caused by the overloading of the car. But this defect was cured by the second instruction, which expressly told the jury that this was the issue submitted to them, and that the jury were not misled, but understood the instructions, appears from the form of their verdict, in which they, in effect, find from the evidence that the intestate's death was due to the overloaded train.

There was proof on the trial by both sides that the marked capacity of the car was 10 per cent. less than its real capacity. In other words, the capacity was marked at this margin below the real capacity to allow for errors of judgment in loading. It also appeared that one railroad will not receive from another a car loaded over 10 per cent. above its marked capacity. The proof on the trial, on behalf of appellee, tended to show that the cars were grossly overloaded; that, for appellant, showed that they were not loaded up to their marked capacity. There seemed to be no controversy on the trial that the real capacity of a car was at least 10 per cent. more than its marked capacity, and there was testimony on the part of appellant that cars could safely be loaded beyond this. The witnesses all speak of the capacity of the car, or the marked capacity, or the registered capacity, it appearing that a register is kept of the capacity of the cars as marked on them, but the expression "the estimated capacity" does not seem to have been used on the trial until put by the court in the instructions referred to. We do not think, therefore, the jury could have understood the words "estimated capacity" to mean the marked capacity on the car, for it is perfectly apparent from the record that there was no controversy that cars could be safely loaded 10 per cent. above the marked capacity. On the other hand, we think that, as there was nothing in the record to restrict the meaning of the word "estimated," the jury must have understood it in its ordinary sense. The ordinary meaning of estimate is to calculate roughly, or to form an opinion as to amount from imperfect data. In this sense the expression "estimated capacity" meant substantially the supposed or probable capacity of the car, and we do not see under all the evidence that the defendant was substantially prejudiced by the use of the word "estimated."

It is true it would have been better for the court to have told the jury that an overloaded car was one which had more load put on it than should have been placed on

it, in the exercise of ordinary care, but the jury, taking the charge as a whole, could not have understood the instruction to mean that if the cars were overloaded a little above the estimated capacity, but not so much as to show a want of ordinary care, they should find for the plaintiff; for the reason that in the first, second, and fifth instructions the jury were told that it was the duty of the conductor, or other agent of the defendant who had charge of the loading of the cars, to use ordinary care to see that the cars were not overloaded, and that they could not find for the plaintiff, unless the cars were overloaded, and this was known to the conductor, or other agent whose duty it was to see to the loading of the cars, or could have been known to him by ordinary care. There could therefore have been no verdict for the plaintiff, unless he failed to use ordinary care in the loading of the cars, and by the exercise of ordinary care could have known that the cars were overloaded. The proof showed that the cars were loaded with ties along the side of the road. They were not weighed, and the conductor could only estimate or calculate roughly what the weight was or how many ties should be put on a car, but in doing this it was his duty to exercise ordinary care.

Under all the evidence, and taking the instructions as a whole, we are unable to see that the jury could have been misled, or that the rights of the defendant were substantially prejudiced by the form of the instruction.

Petition overruled.

DAWSON et al. v. TRUSTEES COMMON SCHOOL DIST. NO. 40.

(Court of Appeals of Kentucky. March 18, 1903.)

SCHOOLHOUSES — TITLE TO LAND — IMPROVEMENTS — COLLECTION OF TAXES.

1. Under Ky. St. 1899, § 4437, providing that in acquiring land for school sites the trustees shall take a fee-simple title, and that titles to lands now used for school sites shall be perfected as soon as possible, school trustees can be restrained from collecting a tax for the repair or improvement of a schoolhouse, located on land owned by them jointly with several lodges, and with a reversionary interest in the grantor.

Appeal from Circuit Court, Logan County.
"To be officially reported."

Suit by D. C. Dawson and others to enjoin the trustees of Common School District No. 40 from collecting taxes. Judgment dissolving the injunction and dismissing the petition, and plaintiffs appeal. Reversed.

E. B. Drake and S. R. Crewdson, for appellants. W. P. Sandidge, for appellee.

BURNAM, C. J. On the 19th day of September, 1900, the trustees of school district No. 40 in Logan county levied a poll tax of \$1 on each white male citizen over 21 years

of age residing in the district, and 25 cents on each \$100 worth of taxable property in the district, for the purpose of repairing and furnishing the district schoolhouse. On the 20th of March, 1901, appellants, taxpayers residing in the district, brought this suit to enjoin the collection of this tax, on the ground that the county superintendent of Logan county had not notified the trustees of the district in writing that the schoolhouse or inclosure thereof had been condemned or needed repair; second, that there was no valid levy made by the trustees; and third, that there was no necessity for the tax. The answer of the trustees, filed on the 24th day of May following, traversed each and every material allegation of the petition. And upon these issues the proof was taken, and shows that there was a substantial compliance by the trustees with the provisions of the statute regulating taxation of this kind. It is clearly shown that the county superintendent notified the trustees in writing that the schoolhouse and furniture had been condemned; that the trustees, in a regular meeting held for the purpose, made the levy, which was duly entered on the record book; that a treasurer was appointed, who executed bond to the board of trustees, and which was approved by the county judge, who caused to be transcribed from the assessor's books a list of the names of all persons and corporations liable to such tax, the amount of property owned by each, and the total tax due from each, etc.

On the 7th day of February, 1902, the plaintiffs tendered and offered to file an amended petition, in which they allege, in substance, that the defendant trustees did not hold the fee-simple title to the lot on which the schoolhouse sought to be improved was located as required by law, but that the title to the lot was held under a deed made on the 22d of November, 1899, by E. L. Ferguson and John Ferguson, her husband, to John G. Orndorf, Master of Emma Council No. 59, Jo. B. Jackson, High Priest of Whippowill Chap. 27, W. H. Mills, Master of Ansonia Lodge 275, F. A. M., and the trustees of District School No. 40; that the deed provided that the Masonic bodies should keep in repair one-half of the roof and the upper story, and the school district should keep in repair one-half of the roof and the lower story; and that, in the event the school district should vacate this property, the Masonic bodies should become the sole owners, and if the Masonic bodies should vacate the building, it should revert to the grantors, and further stipulated that when it did not conflict with the school, any religious denomination should have the right to use the school-room for religious service, etc. The trial court, at the instance of the defendants, refused to permit the amended petition to be filed, and entered a judgment dissolving the injunction and dismissing the plaintiffs' petition.

Appellants failed to show the existence of any valid reason for enjoining the collection of the tax previous to the tender of their amended petition, and they were a little late in tendering their amendment. But in our view of the law it presents a valid and substantial reason for restraining the collection of the tax. Section 4437 of the Kentucky Statutes of 1899, which is a section of the common-school law, provides: "In the acquisition of land as a site for a school house, the title thereof shall be made in fee simple to the trustees, and the titles to lands now used as sites for school houses shall at the earliest possible time be perfected by the trustees and the county superintendent. Any reversionary interest in land now used as a site for a school house, shall not deprive the district school of other improvements thereon."

There can be no doubt that the statute contemplates that the trustees of a common-school district shall hold the fee-simple title to the land on which they are authorized to expend money, collected in the form of taxation from the people for the erection, maintenance, repair, or improvement of a school building. It was intended that every facility for the proper conduct of the common school should be afforded; and that no person or corporation should hold any interest in the title to the school property, which would give them any claim to its use, control, or management, or which might in any wise affect or conflict with its use for school purposes. The title in this case does not come up to these requirements. Three distinct and separate lodges have vested interests therein, with a joint right to the use, control, and management of the property. In addition to this, all religious denominations are permitted to share in its occupancy. Whilst it is possible that there might be some saving in this arrangement at the start, it is evident that, in the long run, complication might arise, which would compel the abandonment of the use of the property by the common-school district. It is better that both the spirit and language of the statute should be observed, and that the common-school buildings should be devoted exclusively to the purposes for which they were intended.

The trial court erred in refusing to allow the amended petition to be filed, and for this reason the judgment reversed, and the cause remanded for proceedings consistent herewith.

MURRAY v. ROACH et al.

(Court of Appeals of Kentucky. March 18, 1903.)

VENDOR AND PURCHASER—MISREPRESENTATIONS OF CO-PURCHASER—DAMAGES.

1. An old, infirm, and illiterate widow requested her brother-in-law to assist her in purchasing a home. A lot was found on which were two houses, but, as the price was too large, he agreed to take a half on which one of the houses was situated. He told her that a double privy vault and a stable near the cen-

ter of the lot would be for the use of both. In reality the vault was about 10 feet from the middle line, and entirely on his part, as was also the largest portion of the stable. He conducted all the negotiations, and directed how the deeds should be made out. Two deeds were executed, and the widow's deed was read in her presence. After they had been in possession for some time, he denied her the use of the vault, and pulled down the stable, and sold the lumber. *Held*, that she was entitled to have quitclaimed to her so much of his part of the lot as would give her one-half of the vault.

2. She was likewise entitled to one-half of the value of the lumber taken from the stable.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Ann E. Murray against John Roach and others to reform a deed and for damages. From a judgment for defendants, plaintiff appeals. Reversed.

T. J. Hanlon and J. L. Ellison, for appellant. Byrne & Reed, for appellees.

BARKER, J. The appellant, Ann E. Murray, who is a widow of some 70 years of age, residing in the city of Covington, Ky., having some money to invest, entered into negotiations with her brother-in-law, the appellee John Roach, with a view of obtaining his assistance in the purchasing of a home. Appellant seems to have had great confidence in appellee, and to have relied on his friendship and advice. In compliance with her request, he undertook to assist her in the investment of her money. In furtherance of her interest, appellee went to see Logan E. Wood, a real estate agent of Covington, in regard to the purchase of the lot involved in this action. This property, being lot No. 62 in Johnson's subdivision, fronts 25 feet on the north side of Fourth street, and runs northwardly in parallel lines 146 feet to Beach street. It belonged to the estate of Mrs. Natalie Hackmann, deceased, of which estate Charles Mahlman, Jr., was the executor. Appellant claims that the appellee was very anxious for her to buy the property, and used all his influence with her to that end. The purchase price appears to have been \$1,650, and, upon appellant's declaration that she did not have so much money, appellee offered to take the Beach street end of the lot, upon which there was a cottage, at the price of \$425, leaving the Fourth street end for appellant, at the price of \$1,225. Appellant claims that it was agreed between her and appellee that she should buy the whole property, and then resell to him the Beach street end at the price stated. This appellee denies, and it seems to be quite immaterial. As a matter of fact, the purchase of the lot was finally consummated, two deeds being executed therefor—one to appellant, conveying to her that portion fronting on Fourth street, and running northwardly 73 feet, for the sum of \$1,225; the other conveying to appellee that portion fronting 25

feet on Beach street, and running southwardly 73 feet, for the sum of \$425; and each party took possession of the property thus conveyed. There was on the lot, near the middle, a stable, and a double privy vault, which seem to have been designed for, and always used by, the occupants both of the cottage fronting on Beach street and the house fronting on Fourth street. This privy vault was from 6 to 10 feet south of the middle line of the lot, and the largest portion of the stable was on the Beach street half of the lot, although it extended about 2 feet over the middle line. Appellant claims that before the purchase of the lot she went upon it with appellee for the purpose of inspecting it and the buildings thereon; that he pointed out to her the double privy vault near the center of the lot, and told her that it was on the center line, and would be for the use of the occupants of both houses; that the stable was also on the center line, and would belong to them jointly. After taking possession of the property conveyed to her, appellant and her family continued to use the privy for a considerable period of time. The stable was pulled down by appellee, and a part of the old material was used in building a fence across the center line of the lot, but leaving an opening through which appellant and her family could pass to the privy vault. Subsequently appellee undertook to prevent appellant's using the vault entirely, whereupon she instituted this action.

In her petition she alleges the facts of the purchase of the lot, claiming that in the agreement between her and appellee she was to have 25 feet front on Fourth street, running back 83 feet, so that she should own one-half of the privy vault and one-half of the stable; that appellee was acting for her as her agent, and that he fraudulently procured the deed to be made so as to convey to her only 25 by 73 feet, thereby excluding her from any ownership in the vault in question; and praying that the deed to her be reformed, and that appellee and his wife, Minnie Roach, be required to execute a quitclaim deed to her of the 10 feet of the southern end of their lot, so as to make appellant's lot 25 by 83 feet, and thus give to her the ownership of one-half of the privy vault in question. Appellant also claimed damages for her half of the old material in the stable, which was torn down, and which, she says, was appropriated by appellee, and converted to his own use, to her exclusion. Appellees, by their answer, put in issue all the material allegations of the petition. There was a good deal of evidence taken on both sides, and, as is usual in such cases, it is conflicting.

We have no doubt from the evidence that appellant expected to have the use of the privy vault, and that both she and appellee believed that it was upon the center line of the lot in question. That appellant would

have agreed to take the lot if she had known that an equal division would result in placing the vault entirely on appellees' lot is difficult to believe. Appellant, her daughter, and granddaughter all testified positively to the fact that appellee went upon the lot with them, before the purchase, and, pointing with his foot to the middle of the double privy, said, substantially: "This is where the middle line of the lot will come, and one-half of this vault will be for your use and one-half for mine." This testimony is denied by appellee, and he has introduced some evidence which tends to corroborate him. We do not think that the fact that appellant, who is an old, somewhat infirm, and almost illiterate woman, heard the deed read, in which the property was described by metes and bounds, without objection, militates in any wise against her contention that she believed she was getting sufficient depth of property to include one-half of the privy vault. If her statement be true that she had gone upon the premises with appellee, and that he pointed out to her where the middle line would run with reference to the vault, we do not believe that the mere reading of the description of the lot being 25 feet front by 73 feet in depth would have any tendency to convey to her the information that this boundary left the entire vault on appellees' lot.

We think that the great weight of the testimony in this case conduces to establish the truth of appellant's statement with reference to what took place between her and appellee John Roach as to the property in question. He was acting for her as well as himself. He conducted all of the negotiations for the purchase of the lot with the agent, Logan E. Wood, and the executor, Mahlman, and directed them as to how the deeds should be made, and they were made in pursuance of his wishes, and in accordance with his directions. We think that good faith towards appellant required that appellee, in so important a matter as that herein involved, should see to it that she understood all of the facts. The 10 feet in depth added to the lot is not of material consideration, except for the fact that it carries with it the use of the vault involved in this action. We think the evidence shows that it was the understanding and agreement between appellant and appellees that she should have so many feet in depth of the southern end of the lot No. 62 as would include one-half of the stable and one-half of the vault.

The prayer of the petition, so far as the reformation of the deed to appellant, should have been granted; that is, the appellees should have been required to quitclaim so much of the rear end of their lot as would give to appellant one-half of the vault in question. She is likewise entitled to one-half of the value of the old lumber taken from the stable torn down by appellee. Wherefore the case is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. RILEY'S CURATORS.

(Court of Appeals of Kentucky. March 17, 1903.)

TAXATION—DECEDENT'S ESTATE—UNLISTED PROPERTY—SUFFICIENCY OF DESCRIPTION—CURATOR'S LIABILITY.

1. Ky. St. 1899, § 4052, provides that the person owning or possessing property on September 15th shall list it with the assessor, and section 4241 requires the auditor's agent to cause property omitted to be listed, and to file in the clerk's office a statement containing a description and value of such property. *Held*, that a statement designating property sought to be taxed as "money, notes, bonds, mortgages, certificates, and national bank stock," etc., sufficiently described it.

2. Under Ky. St. 1899, § 4052, providing that a person owning or possessing property on September 15th shall list it for taxation, and remain bound for the tax, though he may have sold or parted with it, the curators of an estate, who have failed to list the property thereof while in their possession, may be proceeded against, and the tax collected, even after they have parted with possession of the property.

Appeal from Circuit Court, Mason County.
"To be officially reported."

F. S. Watson, as auditor's agent, filed a statement in the county court, alleging that the curators of George Riley, deceased, had failed to list for taxation certain property belonging to the estate. Demurrers to the statement were sustained, and the commonwealth appeals. Reversed.

G. A. Cassidy, for the Commonwealth. L. W. Robertson, Garret S. Wall, E. L. Worthington, and W. D. Cochran, for appellees.

NUNN, J. On the 31st day of October, 1901, F. S. Watson, auditor's agent for Mason county, Ky., filed in the county court of Mason county a statement alleging that certain property in the hands of appellees, as curators of George Riley, deceased, amounting to \$80,000, was by them omitted to be assessed or listed for taxation for the year 1897, and charged that they had this property in their possession, as such curators, on and after the 15th day of September, 1896, and that they afterwards distributed said estate without ever having listed or paid any tax thereon. It appears that the demurrers to the information and statement were sustained by the lower courts upon the grounds that the statement did not describe the property sought to be assessed as is required by section 4241 of the Kentucky Statutes of 1899. With reference to the description of the property by the auditor's agent in his statement it is, in substance, alleged that the curators, Benjamin Longnecker and J. D. Riley, failed, omitted, and neglected to list moneys, notes, mortgages, and certificate of deposit to the extent of \$80,000, all of which was subject to assessment, and should have been listed but was not listed with the assessor or the board of supervisors of the county, all of which was subject to taxation, but was not assessed, and escaped taxation, although sub-

ject to revenue taxes for state purposes for that year.

Section 4241 of the Kentucky Statutes of 1899 reads as follows, to wit: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment, or railroad commission, for any year or years. The officer proposing to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property proposed to be assessed, * * * and the name and residence of the owner, his agent or attorney or person in possession of the property and the year or years for which the property is proposed to be assessed. * * * On the filing of this statement, the clerk of the court shall issue a summons against the owner to show cause * * * why such property, if any, shall not be assessed at the value named in the statement filed. * * * If it shall appear to the court that the property is liable for taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal as in other civil cases. * * *" Appellees contend that the description of the property in the information filed is insufficient, to wit, "money, notes, bonds, mortgages, certificates and national bank stock of the value of \$80,000.00"; and also that their demurrer was properly sustained. They contend that the information should have stated how much of the \$80,000 was money, how much was notes, and how much of each.

Even if they were correct in this, the proper way to have reached it would have been by motion to make the information more specific, and not by demurrer. By their demurrer they admitted that they had in their possession, as such curators, property of the decedent, Riley, which was subject to taxation, and which was not taxed for the year 1897, of the value of \$80,000. They were in a better position to know the truth or incorrectness of this allegation, and the kind and character of such property, and the amounts of each, if any, than the appellant. Under section 4052 of the Kentucky Statutes of 1899 it was their duty to list with the assessor all the estate of every kind that they had in their hands, as such curators, on the 15th day of September, 1896. They were bound for the taxes, notwithstanding they may have parted with the property. In the case of the Commonwealth, by Etc., v. Singer Mfg. Co. (Ky.) 21 S. W. 354, in discussing section 4241 of the Kentucky Statutes of 1899 (the auditor's agent act), the court, by Judge Hazel-

rigg, said: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the taxgatherer. It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him; and even upon slight information that he is violating this duty the court should give him an opportunity to perform it."

Appellees further contend that they are not bound for the tax, because after the 15th day of September, 1896, and before the beginning of the year 1897, they had parted with the possession of the property. The case of *Baldwin v. Shine, etc.*, 84 Ky. 507, 2 S. W. 164, was where one Robert B. Bowler, of Hamilton county, Ohio, died intestate, being then the owner of a large estate in both that and this state. Administration was granted in both states. Eli C. Baldwin became the administrator of his estate in the state of Kentucky. He acted as such administrator for several years, and it appears that large amounts of property and money came into his hands as such administrator. The auditor's agent filed in the Kenton county court an information against Baldwin, as the administrator of Bowler, in which it was stated that from 1865 to 1882, inclusive, the latter had in his hands each year a certain amount (naming it and the year) of assets, which were subject to taxation under the revenue laws of this state. He filed a response, setting up his settlement, the distribution and discharge from the trust, and it appearing that he had settled with the county court, and distributed the estate among the distributees, and been discharged from the trust. The court in that case, after referring to the section of the statute above quoted, used this language: "The assessment is made as of a certain day of each year. The liability is fixed as of that day, and the owner or possessor of the property upon that day is bound for the tax, although he may subsequently part with it. While the law contemplates that the owner (or possessor) will be called upon by the assessing officer for his list, and makes it the duty of the latter to do so, yet it equally contemplates that all property liable to taxation shall be assessed. * * * It is manifest from these statutory provisions that it was not intended that property should escape taxation by the government which protects it either because the assessor fails to call upon the owner or possessor for his list, or because the latter parts with it before he is proceeded against, but after the time when the liability becomes fixed." The court in this case held the administrator liable for the taxes for the several years, although he had made a final settlement with the county court, and distributed the estate among the several distributees. We are of opinion that the lower court improperly sustained appellees' demurrer.

For these reasons the case is reversed, and the cause remanded for further proceedings consistent herewith.

CLAY v. OLAY'S GUARDIAN et al.

(Court of Appeals of Kentucky. March 18, 1903.)

DEEDS—CONSTRUCTION—ESTATE CREATED—REMAINDER—CONVEYANCE TO WIFE—PAYMENT OF PURCHASE MONEY BY HUSBAND—PRESUMPTION—VENDOR'S LIEN—SUBSTITUTION—AGREEMENT TO REIMBURSE BY LIFE TENANT—ENFORCEMENT AGAINST REMAINDERMAN—WITNESSES—HUSBAND—COMPETENCY AS AGAINST WIFE.

1. A testator provided in his will for the investment of certain funds in land for the use and benefit of his granddaughter during life, with remainder over to the heirs of her body, if living at her death, otherwise to testator's heirs. The executors, at the instance of the devisee's husband, invested the funds in a tract of land. The funds were not sufficient to pay the entire purchase price, and the husband supplied the necessary balance. A deed was made, with the husband's consent, granting the land to his wife for life, remainder to the heirs of her body, if living at her death, and, if none were living, to revert to testator's heirs to the extent of the purchase money paid by the executors. *Held*, that the wife took a life estate in the whole land, and not merely in a part proportioned to the amount paid by the executors, with remainder to her surviving daughter.

2. Where a husband furnishes a part of the purchase money for land, giving his notes therefor, and directs title to be placed in his wife, with remainder to the heirs of her body, it will be presumed that it was his intention to provide for his wife and child.

3. Under the express provisions of Ky. St. 1899, § 2353, no trust results where a deed is made to one person and the consideration is paid by another.

4. Under Civ. Code Prac. § 606, providing that neither a husband nor wife shall testify while the marriage exists or afterwards concerning any communication between them during marriage, testimony of a husband that his wife had agreed to reimburse him for money which he had paid for certain land conveyed to her, or to convey part of the land to him, is incompetent to establish such agreement.

5. Where a husband paid a part of the purchase price of land, directing title to be conveyed to his wife for life, remainder to the heirs of her body, any agreement made by the wife to reimburse him for his outlay cannot be enforced against the land in the hands of the heirs of the wife's body after her death.

6. Where a husband agreed to pay the balance of the purchase price of lands in consideration of the investment in a certain tract of land of certain funds directed to be invested by the will of his wife's grandfather in lands for her use for life, and directed title to the whole tract to be conveyed to his wife, he, and not his wife, was obligated for that part of the purchase price agreed to be paid by him, and no equitable substitution to the lien of the vendor could result to him on payment of the agreed price.

7. A husband could not establish a lien on land conveyed to his wife to the extent of the purchase money paid by him, where it appeared that he had already received from the rent of the land and from money belonging to the wife enough to reimburse him for all the money that he had expended in such purchase.

8. Moneys which he had expended in medical bills and traveling expenses for his wife could not be offset against such receipts.

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

Action by Nannie Clay's guardian and others against Brutus J. Clay, Jr. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. C. Howard and Brutus J. Clay, Jr., for appellant. C. M. Thomas, for appellees.

PAYNTER, J. Under the will of Cabell Chenault, of Madison county, his granddaughter, Estelle Chenault, was a beneficiary of certain funds aggregating \$5,529.36. It was in the hands of the executors of the will, who, by its terms, were directed to invest it in land for the use and benefit of the granddaughter during her life, with remainder to the heirs of her body, if living at her death. If none living at her death, it was to go to testator's heirs according to the laws of descent and distribution. The granddaughter intermarried with the appellant, Brutus J. Clay, Jr., to whom was born on February 14, 1894, the appellee Nannie Clay. The mother died on the 22d day of June, 1899. In March following the birth of the child the deed that is here for interpretation was made under the following circumstances: The executors had taken up the question of investing the money as directed by the will. As the appellant and his wife lived in Bourbon county, it was desired by them that the money should be invested in lands in that county. The appellant entered into a contract with Ray Cunningham and others with reference to the purchase of 122 acres, 2 roods, and 10 poles of land. It was called to the attention of the executors with a view of having them put Mrs. Clay's money in the land. It seems that two persons interested in the land were minors, and it required a proceeding in court to perfect the title to it. Parties interested in it could convey thirteen-fifteenths of it. The agreed price was \$70 per acre, and the consideration amounted to something over \$8,500. The money in the hands of the executors was not sufficient to pay the purchase money by \$3,050, and the appellant agreed with the executors that, if they would invest his wife's money in the land, he would pay the balance of the purchase money. The parties met to consummate the agreement. The appellant was not present when the preparation of the deed began. However, he arrived in time to hear it read, and agreed to its terms. He was advised as to the import of the deed, and knew as to the effect of its provisions, and directed it to be so made. The habendum of the deed is in the following language: "To have and to hold unto said party of the second part for her sole and separate use and benefit during her life and at her death to the heirs of her body, if living at her death, and if none be living at her death to revert to the heirs of Cabell Chenault (to

the extent of the purchase money paid as hereinbefore recited by the executors of said Cabell Chenault and the purchase money hereof which shall hereafter be paid by said executors in the execution of the trust confided to them by the said will of Cabell Chenault) according to the laws of descent and distribution in conformity with the provisions of said will." The land was sold one-third cash and the balance on six and twelve months. The executors subsequently paid the first note maturing and part of the last one.

It is urged by counsel (1) that Nannie Clay only took the remainder in fee to the land in so far as the funds in the hands of Cabell Chenault's executors paid for it; (2) that, as the appellant paid the \$3,050, he has a lien for the purchase money on the land therefor.

Before entering into the consideration of these questions, it may be stated that at first it was contended upon behalf of the appellant that Mrs. Clay made an agreement with her husband to reconvey to him enough of the land to reimburse him for the money which he paid out in its purchase, but that claim is now abandoned. Counsel for appellant invokes a canon of construction universally accepted that, where there is repugnancy between the conveying clause of the deed and the habendum, the latter must control. In support of that rule a number of cases are cited. If there is no repugnancy between the two clauses of the deed, then there is no occasion to invoke the rule in question. The deed only purports to give the use and benefit of the land to Mrs. Clay during her life. When her estate ceases by death, it is to go to the heirs of her body living at that time. The daughter, Nannie, was living at her mother's death, and under this clause of the deed it went to her. It is true that there is another clause, which provides for a condition which might have existed at her death. If there were no bodily heirs living at her death, then it was to go to the heirs of Cabell Chenault; but, as the child was living, the contingency did not happen which would have given the land to the heirs of Cabell Chenault. The clause in the deed which provided for that contingency did not, in the least, affect the preceding clause of the deed, which gave it, without restriction or qualification, to her bodily heirs living at her death. So we conclude that Mrs. Clay took a life estate in the land, and the infant child, Nannie, the remainder in fee. Had Mrs. Clay died without bodily heirs living at her death, then a question would have arisen as to who would have taken the fee in the land other than that represented by the investment which the executors had made in it.

When the appellant agreed to furnish the balance of the money, and consented to the deed, the presumption is that he was endeavoring to provide for his wife and child. The mere fact that he executed his note for

the balance of the purchase money does not affect this presumption. The agreement did not impart that he was to pay the money for his wife and child, but that he made it his debt, and paid it for himself. The effect of the subsequent payment is exactly the same as if it had been a cash one. In *King's Heirs v. Morris and Snell*, 2 B. Mon. 99, the court said: "But there is still another ground which we regard as decisive against the claim of Morris, which is that the wife cannot be presumed to be a trustee for her husband, and, if he purchase an estate in her name, it shall be presumed, in the first instance, to be an advancement and provision for her (1 Cruise's Digest, side page 479); and so if she, while sole, purchase an estate in her own name, taking the title, and he pay the price after marriage, it must, on the same principle, be regarded as an advancement and provision for her. We are inclined to think, however, that there was in this case no effectual election, before marriage, to take the land, which would have bound the wife *dum sola*, or could have been enforced against her, and that, the election and purchase having been made after the marriage, was a purchase by the husband in the name of the wife, and, therefore, coming directly within the rule laid down by Cruise, must be deemed an advancement for her benefit, for which no charge arises against her or her estate; and, even if she made an effectual election before marriage, and was indebted *dum sola* for the price, it was the duty of the husband to pay it, and especially as he had her property, of greater value than the debt, and he should be presumed to have paid it as husband, and for her benefit, and no equity arises in his favor for remuneration." No trust could have resulted in favor of the husband because he paid part of the purchase money, as section 2353, Ky. St. 1899, expressly provides that no trust shall result "when a deed shall be made to one person, and the consideration shall be paid by another." The court has several times so interpreted the statute.

But it is urged that Mrs. Clay had agreed with her husband to either refund the money which he paid, or convey him some of the land. No one testifies, except the husband, that she made such an agreement with him, and, of course, his testimony is not competent under section 606, Civ. Code Prac. Four witnesses were introduced, who testified that, after this deed had been made, Mrs. Clay told them she intended to pay the appellant the money which he had paid for the land, or convey it to him. They do not testify to the fact that she had made any agreement with her husband to repay him for the money which he had put in the land, and, if the contract were enforceable, we do not think a state of facts was made out to justify its enforcement. Mrs. Clay only had a life estate in the property. When she died, she left no interest in it that could be subjected

to the payment of any debt which she owed, nor did she leave any interest that could be seized under any equitable right as against her or her estate. As the remainder in fee was in the daughter, Nannie, at the death of the mother, she was the absolute owner of the interest conveyed by the deed. The mother could make no admissions or declarations which would affect the rights of the infant child, and its interests alone would be affected if the appellant should succeed in establishment of the lien which he claims. If the husband could have at any time looked to the interest of the wife in the land for repayment of his money, it was only in the life estate, because the appellant voluntarily had a remainder in fee conveyed to the child, and it was beyond his or its mother's power to recall. This would be a sufficient answer to the argument of counsel for the appellant to the effect that, as appellant had paid the \$3,050 in the purchase of the land, he is entitled to be substituted to the lien of the vendor upon it. The infant child was never obligated for this purchase money; on the contrary, the father voluntarily assumed responsibility for it and had the land conveyed to the child. Therefore the interest which she took in the land was not, and could not have been, incumbered on account of any money which the father may have paid in its purchase.

Besides, there is a reason why it could not have been asserted against the wife, because the doctrine of equitable substitution has no application to the facts of this case, as Mrs. Clay was never obligated for the purchase money, and she was not bound to pay the notes which the husband executed for it. The husband did not pay the money for her, but for himself, as he agreed with the executors that, if they would invest the money in their hands for the use of his wife in Bourbon county, he would pay the balance of the purchase money. Certainly, the executors never would have invested the funds for the benefit of Mrs. Clay in land that was to remain incumbered by a claim for \$3,050 in favor of the husband. All of the facts and circumstances attending the transaction are against the claim that such was the intention of the parties to it.

We have not overlooked the authorities which the counsel for appellant cites upon this question, but our opinion is that they have no application to the facts of this case. Besides, we are of the opinion, without going into the details of the matter, that the appellant received from the rent of the land in question and money belonging to his wife enough to reimburse him for all the money he paid in the purchase of the land, and these sums could not have been diminished by reason of the fact that he expended money in an effort to restore her to health, or to pay her traveling expenses, physicians' bills, etc., because he was under moral and legal obligation to pay such expenses independent

of her estate, or any expressed desire upon her part to relieve him as far as possible of it. His marital obligations required him to support her in "sickness and in health." Besides that, in consideration that she relinquish her potential right to dower in a tract of land which the appellant had inherited from his father, he agreed to build a house upon the land in question, costing \$1,200, but the wife died shortly afterwards, and he never incurred that expense.

We are of the opinion that the court below properly refused to set aside the deed which the master commissioner made to Mrs. Clay for the two-fifteenths of the land. This deed vested her with fee to it, and, of course, the husband takes an interest in that fractional part of the land, but it is unnecessary to state here what his interest is.

Judgment is affirmed.

ROBERTSON et al. v. ROBERTSON et al.
(Court of Appeals of Kentucky. March 18, 1903.)

CLAIM AGAINST ESTATE—ESTOPPEL—VALIDITY—RES JUDICATA—CONTRACT BY MARRIED WOMAN.

1. Testator devised all his property to his daughter, to be invested in real estate and to be deeded to her for her separate use, and to her children. The daughter invested such trust fund, together with funds of her own and of her husband, in a farm, and took the deed to herself in fee simple. Subsequently, in an action brought by the children, the daughter's accounts as executrix were settled, and the part of the farm bought with the trust fund was allotted to her, with remainder over to the children. A debt owed by the estate to the widow was credited to the daughter's account as executrix, and charged to her personally. *Held*, that the widow was not estopped from setting up her claim against her daughter's estate because she allowed the daughter in the former proceeding to prove that she had paid it off.

2. The validity of such claim as against her husband's estate cannot now be questioned, it having been settled in the former proceeding.

3. A contract by a married woman concerning her separate estate is valid.

Appeal from Circuit Court, Shelby County.
"Not to be officially reported."

Proceeding by J. W. Robertson to settle his accounts as administrator of Martha L. Robertson, deceased. From a judgment overruling the exceptions of H. M. Robertson and others to the allowance of a certain claim, they appeal. Affirmed.

Gilbert, Peak & Gilbert, for appellants.
Willis & Willis, for appellees.

BARKER, J. In 1887, H. B. Morton died testate, domiciled in Shelby county, Ky., leaving a widow, Sarah F. Morton, and an only child, Martha L. Robertson, wife of John W. Robertson. So much of his last will and testament as is pertinent to the issues involved in this case is as follows:

"First. I will and desire that all my honorable debts be paid with all convenient speed.

"I will and desire that all money and cash notes in my possession, or belonging to me at my death, shall be invested in real estate, such investment to be made within twelve months after my decease, for the benefit of my beloved wife and only child, Martha L. Robertson (wife of J. W. Robertson), to be deeded to her for her separate use and benefit, and to her children.

"And I also will and desire the money due to my estate from life insurance to be invested in the same way and for the same purposes; save and except the sum of two hundred and fifty dollars of said insurance, which I hereby give and bequeath to my wife, Sarah F. Morton; and I further will and decree that my wife, Sarah, shall be supported out of such real estate as shall be purchased under the provisions of this will for my daughter, and such support, meaning proper food, clothing, shelter and medical attention; and I further will and decree that upon failure of my daughter and her husband to furnish my wife with the support above named, that she shall have a lien, during her life, upon such part of the real estate to be purchased, as above indicated, as shall insure her a comfortable maintenance."

By the terms of the will, Martha L. Robertson was named as sole executrix, without bond or security. This will was duly and legally probated by order of the Shelby county court, and Martha L. Robertson was appointed and qualified as sole executrix. After the payment of all her father's debts, the executrix invested all of his estate, together with funds of her own and of her husband, in the purchase and improvement of a farm of 190 acres, situated in Shelby county, Ky. The conveyance of this farm was made to Martha L. Robertson alone, in fee simple, and it constituted the home of herself, her husband, and their children, and Sarah F. Morton. Afterwards, in 1895, her son H. M. Robertson, who had become of age, for himself, and as next friend of his infant brothers and sisters, instituted an equitable action in the Shelby circuit court against his mother, Martha L. Robertson, his father, John W. Robertson, and his grandmother, Sarah F. Morton. In his petition he recites the provisions of the will of his grandfather, H. M. Morton, and charges that his mother wrongfully invested the money which came to her hands, as executrix and devisee, in a farm of 190 acres, which she had caused to be conveyed to herself in fee simple, to the exclusion of the rights of himself and his infant brothers and sisters.

It is not necessary to set forth with minute particularity the proceedings which were had in this case. It is sufficient to state that Martha L. Robertson settled her accounts, as executrix, in this action, and that in this settlement it appears that, after the payment of all the debts of her father, there remained in

¶ 2. See *Husband and Wife*, vol. 26, Cent. Dig. §§ 217, 597.

her hands, of the trust fund devised to herself and her children, the sum of \$3,750, which had been invested in the purchase of the farm of 190 acres, and that afterwards, the cause having been submitted, the court rendered the following judgment: "This cause being submitted on pleadings, proof, and exhibits, and the court being sufficiently advised, it is the judgment of the court that the sum of \$3,750 of that fund came to the hands of defendant, Martha L. Robertson, from the estate of Hiram Morton, which was invested in the lands now held by defendant, Martha L. Robertson; that Martha L. Robertson owns to the amount of \$3,750 for her life, with remainder to her children. All the remainder of said lands belong absolutely to the defendant, Martha L. Robertson. And Simeon Cook and E. J. Doss are appointed commissioners, who will go on said lands, on a day to be fixed by them, of which they will give the adult parties hereto notice, and will divide said lands described in the petition thus: They will allot to Mrs. Martha L. Robertson for her life, with remainder to her children, land of the value of \$3,750, and the remainder they will allot to Mrs. Martha L. Robertson absolutely. Before making said survey and division, said commissioners will be sworn to fairly and impartially discharge the duties by this order imposed." In pursuance of this order, the commissioners allotted 76 acres of the farm to Martha L. Robertson for life, with remainder over to her children. The balance of the farm they allotted to her absolutely, and reported their acts to the court. No exceptions having been filed to this report, it was confirmed, and the case went off the docket, and the judgment has never been appealed from or in any way vacated.

On the 18th day of April, 1901, Martha L. Robertson died, a resident of Shelby county, Ky., leaving a husband, John W. Robertson, and four children, H. M. Robertson, Mary R. Martin (wife of Shelby Martin), Charles A. Robertson, and Meredith C. Robertson, who is yet under age. Her husband, John W. Robertson, having been appointed and qualified as administrator of her estate, instituted this action in the Shelby circuit court. In his petition he states, in substance, that his wife left little or no personalty, but that she died seised in fee simple of the 114 acres of land, which had been conveyed to her by the commissioners appointed by the court in the case of H. M. Robertson, &c., v. Martha L. Robertson, &c., heretofore mentioned; that, in order to pay these debts, it was necessary that the farm should be sold. In this action, all the parties in interest were properly brought before the court, the land was sold under judgment, and the case referred to the commissioner for the purpose of reporting the indebtedness of the estate. Among the claims which were asserted was that of appellee Sarah F. Morton for the sum of \$1,976.48, and the validity of this

claim is the only question involved on this appeal.

It appears that Mrs. Sarah F. Morton turned over to her stepdaughter, Martha L. Robertson, the sum of \$250, which she received out of the insurance on her husband's life, and surrendered to her six notes, aggregating \$1,724.48, which she held against her husband's estate, and took from her stepdaughter the following instrument of writing: "Whereas, at the death of my father, H. B. Morton, he was indebted to Sarah F. Morton in the sum of \$1,728.48, evidenced by six notes; and whereas, the said Sarah F. Morton turned over to me \$250.00 of the insurance money on life of said H. B. Morton going to her, and whereas, it was agreed between myself and Sarah F. Morton that the amount of said notes, with interest to death of H. B. Morton, and the \$250.00 aforesaid, making in all \$1,976.48, should be placed in the farm on which I now reside, the said Sarah F. Morton to make her home with me and have a maintenance and support out of the said farm. Said money was so invested, and Sarah F. Morton has so lived since said farm was purchased. Now, I acknowledge by this writing that the aforesaid sum was so invested, and that I am bound and liable to Mrs. Morton to furnish her a home and comfortable support and maintenance as long as she lives, and at her death to pay same to her legal representatives. This Dec. 25, 1895. Mattie L. Robertson. Witnesses: W. A. Bohannon, L. C. Willis." The execution and delivery by Martha L. Robertson of this paper to her stepmother, Sarah F. Morton, is abundantly shown by the evidence. But it is strenuously urged by counsel for appellants that Mrs. Morton is now estopped from setting up this claim, because, it is said, she permitted her stepdaughter, Martha L. Robertson, in the case of H. M. Robertson v. Martha L. Robertson, to prove, before the commissioners, that she, as executrix of the estate of her father, H. B. Morton, had paid off the indebtedness due from the estate to Sarah F. Morton, and thereby lessened the trust fund, to the injury of appellants.

It seems that Martha L. Robertson and her husband, John W. Robertson, and Sarah F. Morton entered into a family arrangement to put all their money together, for the purpose of purchasing a good farm, and so improving it that it would comfortably support and maintain the whole family, including appellants. This was manifestly to the interest of all, and certainly in no way injured, or could have injured, the appellants. Sarah F. Morton was entitled to receive her debt of \$1,976.48 in money, and she was entitled, in addition thereto, to be supported and maintained out of whatever was left of her husband's estate after the payment of his debts. Had she been a selfish woman, undoubtedly she would have adopted this course; but, evidently desiring to further the family interest, she did not take the debt in cash, but loaned it

to her stepdaughter to be invested in a home for all the family. This arrangement worked out with great satisfaction to all concerned, until H. M. Robertson arrived at mature age, when he instituted an action against his mother in order to have his and his brothers' and sisters' rights in the farm determined; and in that action his mother settled her accounts, as executrix of her father's estate, in order that it might definitely appear what sum she held in trust for herself and children. In this settlement she was credited by the sum of \$1,976.48 paid by her, as executrix, to her stepmother, Sarah F. Morton. This payment was effected by crediting her account as executrix with the sum of \$1,976.48 which was due from the estate to Sarah F. Morton, and charging herself personally, as evidenced by the writing above set forth, with the sum of \$1,976.48. This was a perfectly simple transaction, and in no wise injured appellants, or diminished the trust fund in which they were interested; it resulted precisely as if the executrix had handed over to Sarah F. Morton the sum due her from her husband's estate, and afterwards she had loaned that same sum to her stepdaughter, Martha L. Robertson. The arrangement in no wise injured appellants or their estate, but, on the contrary, was greatly beneficial to them, as it enabled them to enjoy the comforts of a home, purchased in part, at least, by money of their stepgrandmother.

The validity of Mrs. Morton's original claim against her husband's estate cannot be called in question here by suggesting the want of consideration for the writing executed and delivered by Martha L. Robertson; that question was settled in the case of *H. M. Robertson v. Martha L. Robertson*, and is now *res adjudicata*.

Nor can the contention of appellants, that the contract between Martha L. Robertson and Sarah F. Morton is void because Mrs. Morton was a married woman, be maintained. The contract concerned her separate estate, and she had the power to contract with reference thereto, and, even if this were not so, we think that, under the arrangement made between them with regard to the purchase of the farm, Mrs. Morton was entitled to receive back her money which she had invested in the purchase.

The learned judge of the circuit court properly overruled the exceptions of appellants to the allowance by the commissioner of this claim of Sarah F. Morton. Wherefore the judgment is affirmed.

CLAY v. KENNEDY et al.

(Court of Appeals of Kentucky. March 18, 1903.)

WAYS—ADVERSE USER—PLEADING—WAIVER OF OBJECTION.

1. Objection that the petition did not allege that the adverse holding of the way was open and notorious, or the exact time when it was

so held, cannot be made for the first time on appeal, the answer having traversed its allegations and denied that the way had been used adversely for the time specified therein or any other length of time, and proof on the issue having been heard without objection.

2. An adverse possession which will defeat a right of way acquired by adverse user must be such as would defeat a right of entry on real estate.

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Suit by J. W. Kennedy and another against William Clay. Judgment for plaintiffs. Defendant appeals. Affirmed.

John I. Williamson and Harry Kennedy, for appellant. J. F. Morgan and Leslie S. Hughes, for appellees.

HOBSON, J. Appellant, Clay, owns a tract of land in Nicholas county, on the Carlisle & Sharpsburg Pike. Appellees own land back of him. As far back as 1839 there was a road leading across Clay's land along the ridge back to the land now owned by appellees, and it seems to have been the main, if not the only, way at that time of reaching it. About the year 1860, Walter Roberts, who lived where appellee Tapp now lives, kept a store there, and the road referred to was used to get from the pike to the store. After Roberts' death a man named Bradshaw lived there, and during this time Clay bought the farm in front. There seems to have been no trouble about the right of way between Bradshaw and Clay, but after Bradshaw's death Clay closed up the road when Wyatt was living there, some time previous to the year 1889. Tapp got the place in the year 1900. He and Kennedy, in August, 1901, filed this suit, alleging that they and those under whom they claimed had for over 30 years claimed and held adversely the passway over Clay's land, and prayed that he be enjoined from obstructing them in the use of it. The defendant filed answer denying the allegations of the petition, and on final hearing the court granted the plaintiffs the relief sought.

The petition of the plaintiffs is certainly good after answer on the merits and judgment. There was no demurrer filed to it. The answer not only traversed the allegations of the petition, but denied that the passway had been used for the time specified therein, or any other length of time, adversely to the owners of the land. Proof was taken on the issues thus raised, and heard in the trial court, without objection. The question cannot be made for the first time in this court that the petition did not allege that the adverse holding of the passway was open and notorious, or that the exact time when it was so held was not stated in the petition.

On the questions of fact the proof is very conflicting, and, giving some weight to the chancellor's conclusion, we do not think we

ought to disturb the judgment. The long use of the road from 1839 until after the death of Bradshaw is sufficient, considering the manner of the use, to raise a presumption in favor of the right, and we are by no means clear, from the evidence, that there has been any such adverse holding by Clay for 15 years prior to the bringing of this suit as to bar the plaintiffs. Their prima facie case, from the long use of the road, its location on the ridge, its being the only practical means of access, and the general use made of it for something like half a century, can only be defeated by such adverse possession as would defeat a right of entry on real estate. This is not shown. At least, the evidence on this subject is not such as to warrant us in disturbing the chancellor's judgment.

Judgment affirmed.

MONTGOMERY v. CONSOLIDATED BOAT STORE CO.

(Court of Appeals of Kentucky. March 18, 1903.)

FOREIGN JUDGMENT—ACTION—JURISDICTION OF FOREIGN COURT—SUFFICIENCY OF ALLEGATIONS—TRANSCRIPT—COMPLETENESS.

1. In an action on the judgment of a sister state, it is sufficient to allege, as showing jurisdiction in the former court, that defendant appeared, and that the court was one of general equity or law jurisdiction, without pleading the statute of the sister state, or setting out further facts showing the jurisdiction of its court.

2. A transcript of the judgment of a sister state on which execution has been issued and certified, as required by U. S. St. §§ 905-909 [U. S. Comp. St. 1901, pp. 677-679], so as to entitle the judgment to full faith and credit, will be deemed to contain a complete copy of the judgment, though it differs in form from the form of judgment used in Kentucky.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by the Consolidated Boat Store Company against Alexander Montgomery. Judgment for plaintiff, and defendant appeals. Affirmed.

M. M. Durrett, for appellant. Myers & Howard, for appellee.

HOBSON, J. Appellee filed this suit to recover the amount of a judgment rendered in its favor against appellant in the superior court of Cincinnati, Hamilton county, Ohio, and, judgment having been rendered in favor of appellee, a reversal is sought on two grounds.

1. It is urged that the petition is not sufficient, in that it fails to state facts showing that the Ohio court had jurisdiction of the subject-matter and of the person of the defendant when it rendered the judgment. Gebhard v. Garnier, 75 Ky. 321, 23 Am. Rep. 721, and Laidley v. Cummins, 83 Ky. 606, are relied on. The last case seems to have

no application, as that involved a judgment of a district court of the United States, and it was held that this court would take judicial notice of acts of Congress defining the powers of the district court. In the other case, suit was filed on a judgment of the circuit court of Dearborn county, Ind., but no facts were alleged showing what the jurisdiction of that court was. It was not alleged that it was a court of general equity or common-law jurisdiction. But in this case it is alleged that appellant appeared personally in the court and filed answer. It is also alleged that the court was one of general equity and common-law jurisdiction. The general averment of a fact of this character is sufficient. It would be needless proximity to require the statute of Ohio to be set out in *hæc verba*. It may be pleaded according to its effect. As the foreign law must be proved as any other fact, it may also be pleaded as any other fact.

2. It is also insisted that the transcript of the judgment is not of the entire decree. We do not see anything in the record to sustain this idea. No such defense was made in the trial court. The forms of procedure vary in the different states in matters of detail, and, while the form of this judgment is not that in use in Kentucky, we think it is the entire judgment in the matter, and was properly treated as such by the circuit court. We cannot understand why the execution issued upon it if it was not intended as a judgment. It is certified according to the acts of Congress, by which the courts of this state are required to give such faith and credit to the judgment as it would have at the place whence the records come. U. S. St. §§ 905, 909 [U. S. Comp. St. 1901, pp. 677, 679].

Judgment affirmed.

GILBERT v. CITY OF PADUCAH et al. CROW v. SAME.

(Court of Appeals of Kentucky. March 18, 1903.)

CITIES—CHANGE FROM THIRD CLASS TO SECOND—STATUTES—RIGHTS OF OFFICERS.

1. Though so much of Ky. St. § 3264, relative to transfer of cities of the third class to another class, as provides for transfer by the circuit courts, is void, as violating Const. § 156, giving the power of transfer to the Legislature alone, yet not only the part providing means for taking the census is valid, so that when the population is ascertained, pursuant thereto, the Legislature may thereon make a transfer, as "in pursuance of a law previously enacted and providing therefor," as required by said section 156, but the part providing for the future government of the transferred city and the rights of existing officers is also valid.

2. The provision of Const. § 161, that the compensation of no municipal officer shall be changed after his election or during his term of office, is to be read with section 156, giving the power to transfer a city from one class to another, and does not impair the power to abolish the municipality or the office.

¶ 1. See Judgment, vol. 80, Cent. Dig. § 1773.

3. The provision of Ky. St. § 3264, that the transfer of a city of the third class to another class shall not in any wise affect the rights and duties of any officer thereof, is to be read in connection with section 3172, being part of the act for government of cities of the second class; so the officers of a city coming into the second class, like those of a city originally in the class, are entitled to hold their offices and receive the same compensation as before till the induction into the office of the officers elected at the next regular election for cities of the second class.

4. The marshal of a city of the third class coming into the second class will be treated as chief of police till the next election, the offices including the same duties.

Appeal from circuit court, McCracken county.

"To be officially reported."

Two suits—one by J. M. Gilbert, and the other by James F. Crow—against the city of Paducah and others. Judgment for defendants. Plaintiffs appeal Reversed.

Bloomfield & Crice, Reed & Berry, and W. S. Pryor, for appellants. J. M. Worten, for appellees.

HOBSON, J. By the act of September 30, 1892 (see Ky. St. § 2740), Paducah was assigned to cities of the third class. At the regular election in November, 1901, it elected various city officers, as provided by the laws governing third class cities. At this election appellant Gilbert was elected prosecuting attorney of the police court, and appellant Crow was elected marshal, each for a term of four years. Ky. St. §§ 3369, 3388. Each of them qualified and entered upon the discharge of his duties. By section 3373, Ky. St., the prosecuting attorney of the police court receives as his compensation 30 per cent. of all fines and forfeitures recovered in the court. By section 3349, the marshal receives such compensation in the way of salary, commissions, and fees as are prescribed in the statute or by ordinance, which shall not be changed during his term of office. While they were discharging their duties, the General Assembly, by an act approved March 21, 1902, struck out Paducah from the list of cities of the third class, and added it to the list of cities of the second class; but the act is silent as to how the transfer is to take effect, or what shall become of the officers of the city elected and holding under the charter as a third-class city, nothing further being provided than that the city shall be transferred from the third class to the second class. Acts 1902, p. 115. By the charter of the second-class cities, the office of city attorney is created, corresponding to the office of prosecuting attorney of the police court, and he is paid such a salary as the general council shall deem proper. Ky. St. §§ 3165, 3167. After the transfer of the city to the second class, the general council passed an ordinance fixing appellant Gilbert's salary at \$100 a month. This he declined to receive. There is no such office as marshal in second-class cities. The duties of mar-

shal in the third-class cities are imposed upon the chief of police in second-class cities. Ky. St. § 3168. A chief of police was appointed, and appellant Crow was dropped. Ky. St. § 3138. Appellants, Gilbert and Crow, filed these suits to restrain the city from interfering with them in the discharge of their official duties, or depriving them of the compensation attached thereto, during the term for which they were elected. Their petitions were dismissed, and they have appealed.

Section 156 of the Constitution, among other things, provides: "The General Assembly shall assign the cities and towns of the commonwealth to the classes to which they respectively belong and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor." It is insisted that the act of March 21, 1902, is invalid, under this provision, for the reason that no law had been previously enacted providing for the transfer of cities from one class to another. The General Assembly in the act of June 14, 1898, made a general law providing for the transfer of cities of the third class. Ky. St. § 3264. It is in these words: "When the population of any city of this class, as ascertained by the last federal census, or by a census taken pursuant to an ordinance of said city, authorizing it to be placed in a class other than that in which it is, the council of such city may enact an ordinance, setting forth the population of the city, and how ascertained, the class it is then in, and the class which it is entitled to be in, and may file a petition in the circuit clerk's office of the county, declaring the facts with reference to its population and the class it desires to become a member of and such other facts as may be thought proper and shall file with such petition a copy of the ordinance, and shall cause notice of the filing of such petition, and the object thereof, to be published in at least six issues of a daily or two issues of a weekly paper, of general circulation, published in the city, or in the county, if none be published in the city; or if no paper be published in the city or county, by notices posted up for at least ten days, at four public places in said city. On the second day of the next regular term of the court, the court shall, if the proper notice has been given, or publication made, and no defense is interposed enter a judgment assigning such city to the class to which it belongs, as appears from the petition and exhibits, and thereafter such city shall be governed by and under the general laws relating to the class to which it has been assigned, but the transfer from one class to another, shall not in any wise impair or affect any or

dinance or by-law theretofore enacted by such city, unless the same is in conflict with the general laws relating to cities of the class to which it has been assigned, and to such extent only shall any ordinance or by-law be repealed by the transfer, nor shall the powers, rights, duties or obligations of the city be in any wise affected by the transfer or any officer or employé thereof, or any debtor or creditor of the city. Defense may be made to the petition by any inhabitant of the city; and if defense is made, the court shall hear and determine the same, and render a judgment transferring or refusing to transfer the city to another class, as may seem proper. The pleadings and practice shall be the same as in equity cases, except as herein provided; but if the court shall be satisfied that the population of the city entitles it to be transferred to another class, it shall so adjudge if the proper notice or publication has been made; and no appeal shall lie from the judgment."

Similar provisions were attempted to be made as to other cities and towns by sections 3661, 3662; but so much of these sections as authorizes the court to assign or transfer a town or city from one class to another was held unconstitutional in *Jernigan v. City of Madisonville*, 102 Ky. 313, 43 S. W. 448. Yet in that case the court said: "So much of said sections, however, as provide means for taking the census or determining the population of any such city or town are constitutional and valid, and when the population of a town is ascertained, pursuant to the provisions of said sections, the Legislature will be authorized to make the proper transfer of such town or city." The same rule must necessarily be applied to section 3264. A census was taken by the city of Paducah, showing that it had the required population, and an ordinance of the city was then passed, setting forth the population of the city, and how ascertained, the class it was in, and the class in which it was entitled to be; and, these facts being laid before the Legislature, the act in question was passed. We are of opinion, therefore, that under the rule heretofore laid down by this court, from which we are unwilling to depart, the act of March 21, 1902, was not invalid because no previous law had been passed providing for such transfer. For if we reject all that part of the section relating to the judicial proceedings for the transfer, as unconstitutional, we have left not only that relating to the census, but the following: "And thereafter such city shall be governed by and under the general laws relating to the class to which it has been assigned, but the transfer from one class to another shall not in any wise impair or affect any ordinance or by-law theretofore enacted by such city, unless the same is in conflict with the general laws relating to cities of the class to which it has been assigned and to such extent only shall any ordinance or by-law be repealed by the

transfer, nor shall the powers, rights, duties, or obligations of the city be in any wise affected by the transfer or any officer or employé thereof or any debtor or creditor of the city." Under the principles laid down in the case referred to, this part of the section must be held in force, no less than that part of it relating to the taking of the census. It is, no doubt, true that if a city is transferred from one class to another, without any provision saving the rights of the officers, they would have only such rights as are conferred by the law governing the city in the class to which it is assigned, as they take their offices subject to the right of the Legislature to transfer the city from one class to another as provided in the Constitution. If the Legislature abolishes a municipal corporation, the rights of its officers cease with its existence, for they take their offices subject to the power vested in the Legislature to abolish them, when such power exists. Although it is provided in section 161 of the Constitution that the compensation of no municipal officer shall be changed after his election or during his term of office, this section must be read in connection with section 156, and does not impair the power of the Legislature to abolish the municipality or abolish the office by assigning the city to a different class, which is, in effect, to create a new municipal entity. A city of the second class is governed by different officers and with different powers from a city of the third class. Appellants, therefore, by the transfer of the city from one class to the other, were legislated out of office, except so far as their rights were saved by the provision quoted from section 3264, Ky. St. But that section must be read in connection with the other provisions of the act for the government of cities of the second class. By the first section of that act (Ky. St. § 3038) the cities of Covington, Newport, and Lexington are declared to be cities of the second class, "and the inhabitants thereof and of such other cities as may hereafter be declared cities of the second class respectively are created and continued bodies corporate and politic within their respective limits." By section 3172 it is provided as follows: "All offices created by laws in force prior to this act taking effect, not herein expressly provided for, shall be, and they are hereby, abolished upon the expiration of the terms for which present incumbents may have been respectively elected; but the general council shall have the power, by ordinance, to re-create such of said offices, and to prescribe the terms and duties thereof, as may be needed to effect the corporate purposes. At the regular election in one thousand eight hundred and ninety-five, and every four years thereafter, there shall be elected by the qualified voters of the city a mayor, city clerk, city treasurer, city attorney, city solicitor, if there be such officer, and civil engineer and assessor and city jailer, who shall hold office for a period of four years, and

until their successors are elected and qualified; also members of the board of aldermen and members of the board of councilmen, who shall hold office as hereinafter provided, and until their successors are elected and qualified. At the general election in one thousand eight hundred and ninety-seven, and every four years thereafter, there shall be elected a judge of the police court. All officers elected under this act shall assume the duties of their several offices on the first Monday in January succeeding their election." In the cities of the second class, officers were elected in November, 1893, for four years. Subsequently the act for the government of cities of the second class was passed, on March 19, 1894; and it was held that the officers elected in 1893 for four years must give way to those elected under the act at the November election, 1895. In other words, the holding over of the old officers was confined to such a period as was necessary to set in motion the machinery of the municipal government under that act, and it was held that after the regular election of officers under the new act, and they entered upon the discharge of their duties pursuant thereto, the old officers must give way. This ruling was made upon the idea that neither the Constitution nor the act contemplated that the city should be left without officers for any time, or that it should have two sets of officers at the same time. *Lexington v. Wilson*, 97 Ky. 707, 31 S. W. 471; *Rhinock v. Evans* (Ky.) 31 S. W. 473; *Newport v. Brown* (Ky.) 31 S. W. 473; *Duncan v. Simrall* (Ky.) 44 S. W. 116.

We are therefore of opinion that, construing the acts together, as must be done, the same rule must be followed now in the case of a city coming into the second class as was applied to the cities originally in that class when the act took effect, and that appellants are entitled to discharge the duties of their offices until the induction into office of the city officers elected in November, 1903, and that in the meantime their powers, rights, and duties are in no wise affected by the transfer of the city from the third to the second class. They are therefore entitled to discharge their duties until then, and to receive the same compensation as before the transfer was made. In the meantime the city shall be governed by and under the general laws relating to the class to which it has been assigned—not to affect the powers, rights, duties, or obligations of the city, or any officer or employé or debtor or creditor thereof. Second-class cities have provided for them offices unknown to cities of the third class. These may be filled. For example, a board of aldermen, police, and fire commissioners are provided for second-class cities, but not for those of the third class. The offices of marshal of third-class cities and chief of police of second-class cities include the same duties. The marshal in this case will be treated as chief of police until

the appointment of a chief of police is made by the new régime after the election in November, 1903, unless a vacancy sooner occurs.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

COMMONWEALTH v. COLLINS.

(Court of Appeals of Kentucky. March 19, 1903.)

TAXATION—OMITTED PROPERTY—INFORMATION BY AUDITORS' AGENT—STATEMENT OF PROPERTY—SUFFICIENCY OF DESCRIPTION.

1. Ky. St. 1899, § 4241, provides that the auditor's agent shall file in the clerk's office a statement containing a description and value of the property to be assessed as omitted property, and the name and residence of the owner, etc. *Held*, that a statement describing such property as certain property amounting to from \$50,000 to \$60,000, and consisting of "cash, mortgages, notes, bonds, accounts, and choses in action," sufficiently described the same.

Appeal from Circuit Court, Mason County. "Not to be officially reported."

Information by the auditor's agent of Mason county against Laura G. Collins. Judgment for defendant sustaining a demurrer to the information, and the commonwealth appeals. Reversed.

G. A. Cassidy and B. S. Grannis, for the Commonwealth. L. W. Robertson, E. L. Worthington, Garret S. Wall, W. D. Cochran, and W. H. Wadsworth, for appellee.

NUNN, J. In the month of July, 1901, the auditor's agent, F. S. Watson, filed in the county court of Mason county a statement alleging that certain property belonging to appellee, amounting to from \$50,000 to \$60,000 each year from 1834 up to and including 1901 was by her omitted to be assessed or listed for taxation for each of the years named. It appears that the demurrer to the information and statement was sustained in the county and circuit courts upon the grounds that the statement did not describe the property sought to be assessed as is required by section 4241 of the Kentucky Statutes of 1899. The description of the property as given by the auditor's agent in his statement is, in substance, that appellee, Laura G. Collins, omitted, neglected, and refused to list with the assessor of Mason county, Ky., or the board of supervisors of said county, and she omitted and neglected to assess said property with any one, and that the omitted property was subject to taxation for each of the years aforesaid, and that the omitted property consisted of cash, mortgages, notes, bonds, accounts, and choses in action.

Section 4241 of the Kentucky Statutes of 1899 is as follows: "It shall be the duty of the sheriff or auditor's agent to cause to be listed for taxation all property omitted or any portion of property omitted by the assessor, board of supervisors, board of valuation and assessment or railroad commission for any year or years. The officer proposing

to have such property assessed shall file in the clerk's office of the county in which the property may be liable to assessment, a statement containing a description and value of the property to be assessed, * * * and the name and residence of the owner * * * of the property and the year or years for which the property is proposed to be assessed. * * * On the filing of this statement the clerk of the court shall issue a summons against the owner to show cause * * * why such property, if any, shall not be assessed at the value named in the statement filed. * * * If it shall appear to the court that the property is liable for taxation, and has not been assessed the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal as in other civil cases. * * *

Appellee's counsel contend that the description of the property in the information filed is insufficient, to wit, "Cash, mortgages, notes, bonds, accounts and choses in action," and that their demurrer was properly sustained. They contend that the information should have stated how much cash, how much notes, and how much of each. If they were correct in this, the proper way to have reached the error would have been by motion to make the information more specific, and not by demurrer. By their demurrer appellee admitted that she was the owner of the property for each of the years of the value stated, and that it was subject to taxation, and had not been listed for taxation, nor any tax paid thereon. She was in a better position to know the truth or falsity of this allegation, and the kind and character of such property, and the amounts of each, if any, than the appellant. Under section 4052 of the Kentucky Statutes of 1899 it was her duty to list with the assessor all the estate of every kind that she had or owned each and every year named in the information. In the case of Commonwealth of Kentucky, by, etc., v. the Singer Mfg. Co. (Ky.) 21 S. W. 354, in discussing the auditor's agent act, the court, by Judge Hazelrigg, said: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general. The citation is rather to search the conscience of one who is presumably evading the taxgatherer. It is the duty of each citizen to help bear the burden of taxation in common with his fellow, and equally with him; and even upon slight information that he is violating this duty the court should give him an opportunity to perform it." It is important to the state, and to each and every taxpayer in the state, that each and every owner of property shall not omit the listing of it, and the payment of taxes thereon. Every owner of property is presumed to be better acquainted with the

value and the description of his property than any other person, and we cannot understand the necessity for the sheriff or the auditor's agent, in proceeding under section 4241 of the Kentucky Statutes of 1899; and, indeed, it would be impossible for them to give a particular description or the exact amount of cash, notes, bonds, mortgages, choses in action, etc., that the owner may have in his possession, or may have had in his possession in the years passed. And this court is of the opinion that when the Legislature used the word "description" in that section, that such a construction of the word was not contemplated. We concur in the language of the court by Judge Hazelrigg, to wit: "The information on which the court is expected to act under this law must be, from the nature of the case, somewhat general." Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

ALBANY MILL CO. et al. v. HUFF BROS. et al.

(Court of Appeals of Kentucky. March 19, 1903.)

CORPORATIONS—CONDITIONAL SALE OF STOCK —DEBTS OF AGENT—LIABILITY.

1. Under the direct provisions of Ky. St. 1899, § 950, no appeal lies from a judgment of the circuit court allowing a separate recovery of claims of less than \$200.
2. Under Ky. St. 1899, § 545, providing that shares of stock shall be transferred on the books of the corporation, a transaction whereby the vendors held the stock until it was paid for—the transfer to be then made—was not a completed sale.
3. Where the stockholders of a milling corporation turned over the property to one under an uncompleted sale of half of the stock, the corporation was liable for debts contracted by him within the scope of his authority, whatever the intention of the stockholders may have been.

Appeal from Circuit Court, Clinton County.
"Not to be officially reported."

Proceeding by the stockholders of the Albany Mill Company for a liquidation. From a judgment allowing claims of Huff Bros. and others the corporation appeals. Affirmed in part, and reversed in part.

Sam C. Hardin and L. O. Winfrey, for appellant. Allen Sandidge and Bertram & Bertram, for appellees.

O'REAR, J. Appellant was incorporated April 6, 1892, to do a milling business at Albany, Ky., and to engage in manufacturing lumber, flour, etc. It owned a mill at Albany, which it operated from 1892 till 1901. The sole stockholders were P. H. Hoskins, who owned 6½ shares; J. F. Brents, 6½ shares; E. J. Hopkins, 1 share; Ben Young, 1 share; and T. F. Guthrie, 5 shares. Each share was of par value of \$200. P. H. Hopkins was president, secretary, and treasurer, and he and Brents and Guthrie constitute the board

of directors. On September 1, 1899, P. H. Hopkins and J. F. Brents contracted to sell 10 shares, or "one-half of the mill property," to one Lee Clark. The contract was written, and is as follows:

"Agreement between Hopkins and Brents and Lee Clark. P. H. Hopkins and J. F. Brents of the first part and Lee Clark of the second part, all of Clinton County, Ky., to contract. P. H. Hopkins and J. F. Brents sold to Lee Clark ten shares (one half) of the Albany Mill to be paid for as follows, four hundred dollars paid, and one note of five hundred and ten dollars due Jan'y 1st, 1900, one note for \$520.00 due May 1st, 1900, one note for \$530.00 due September 1st, 1900, and one note for \$540.00 due Jan'y. 1st, 1901, all to bear interest at 6% per annum after maturity. If any one of the notes fails to be paid off in a reasonable time after it becomes due then all of the notes become due and collectible.

"The said Clark is to have one half of all the assets of the Albany Mill Co. and assume one half of the liabilities of said Company. He agrees to apply the profits of the mill to pay off the old debt after the necessary repairs are paid for and not run the company in debt until he has paid for his part of the mill and discharged the old debts. The said Hopkins and Brents agree to transfer certificates of stock to said Clark as soon as the last payment is made. A lien is retained on said property to secure the payment of the notes and Hopkins and Brents are to retain their offices as directors of said milling Company until the next annual election. It is further agreed that the said Lee Clark has possession and control of the property sold to him from the first of September, 1899."

On the minute book of the corporation this entry appears: "September 1st, 1899, P. H. Hopkins and J. F. Brents placed ten shares or one half of the Albany Mill Company property in the hands of Lee Clark to run and manage same he agreeing in writing to make no debts against said company. They, Hopkins and Brents, retaining the certificates of stock and also continuing to be directors, etc., as formerly." About December, 1899, the Guthrie stock had been contracted to Lee Clark. This entry appears on the corporation's minute book with reference to that transaction: "1900, May 7th. At a meeting of the stockholders of the Albany Mill Co. at Albany, Ky., on May 7th, 1900, the death of T. F. Guthrie, one of the directors was suggested. It was agreed that the two living directors, P. H. Hopkins and J. F. Brents, be continued directors until the one-fourth of the mill property owned by T. F. Guthrie is sold and certificates of stock transferred to purchaser, then a director to be appointed. Said Hopkins to continue to act as president, secretary and treasurer. Adjourned." Clark took charge of the plant and operated it under the foregoing agreement till 1901, when, being unable to pay for the stock, he sur-

rendered the mill to appellant. During his control he had incurred about \$1,200 of debts for labor and material furnished to the mill. In this suit by the stockholders for a liquidation (they having since sold the plant to one Perkins), a reference was had to the master commissioner to audit claims against appellant corporation. A number of laborers and materialmen presented claims which were allowed as debts against appellant. The judgment of the circuit court allowed a separate recovery for each one. The following were less than \$200 and the appeals as to them are dismissed: J. S. Duvall, Russell Bros., C. S. Means, Bill Means. See section 950, Ky. St. 1899; Caldwell's *Adm'r v. Hampton* (Ky) 51 S. W. 174.

The court is of the opinion that, by the contracts above set out, the vendor stockholders had merely contracted to sell the recited portions of their stock, but that the sale was not complete. Section 545, Ky. St. 1899. They continued to hold their stock till it was paid for, and the transfer of the certificates was had. In the meantime, and until the sale of the stock should be completed, the directors of the mill company turned over to Clark its management and operation. His apparent office was such as they had the right, under the articles of their corporation, to create. His duties as manager were not unusual, and were clearly within the scope of the directors' authority to employ. The stationery, sign, and newspaper advertisements used all continued to be in appellant's corporate name. Many of the claimants testified that they contracted with Clark, believing he was appellant's agent, while others said (generally day laborers) that they were employed by Clark, and had heard that he had bought the mill. We find that, as a matter of fact, they were employed for and rendered their services to appellant under the contracts and situation above set out. It may have been, and doubtless was so, that Clark, Hopkins, and Brents believed that their contract operated as a conveyance of the mill property to Clark, and that the retention of the certificates of stock gave their vendors an adequate first lien upon the property, as well as that Clark's operation of the mill would be upon his own responsibility alone. The property of a corporation is not conveyed by a transfer of its stock. However the certificates of stock may be sold and assigned, the title of the corporation to its property remains unchanged thereby. The corporation does not cease by such transfers. Under section 538 Ky. St. 1899, not less than three persons (and under the General Statutes [chapter 56, § 1] not less than two) could form such a corporation as appellant is. Whether the purchase of all the stock of the corporation by one person would ipso facto dissolve the corporation, is not decided. *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 21 S. W. 581, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335.

Nor can the belief or intention of the stock-

holders in the transactions in this case affect the legal status of the corporation in its relation to its property and its creditors. Whatever may have been Clark's motive or belief, under the arrangement described, his act within the scope of the corporate powers was the act of the corporation, and bound it as such. We do not mean to say that Clark's representations and contracts with his laborers might not have bound him personally also. But we are called on here to consider only the effect of his acts upon the corporation. The circuit court adjudged appellant liable for the debts created and mentioned above.

Among the claims presented was one of appellees Huff Bros. for about \$301. Of this sum, the commissioner found that \$222 represented debts contracted by Clark individually, and not in connection with the operation of appellant's mill and business. Nor did it purport to be connected with it. But it was for saw logs and labor furnished at another mill, in another part of the county, owned by other persons, and wholly disconnected with appellant's plant and business. We are of opinion that the circuit court erred in adjudging any part of this \$222 against appellant.

The judgment in favor of Huff Bros. is reversed, and cause remanded, with directions to enter a judgment in conformity to this opinion. As to T. V. Stephenson, the judgment is affirmed.

PITTSBURG, C., C. & ST. L. RY. CO. et al.
v. DODD et al.

(Court of Appeals of Kentucky. March 19, 1903.)

CORPORATIONS—MINORITY STOCKHOLDERS—RIGHT TO SUE—CONTRACTS—CONSTRUCTION BY PARTIES—MODIFICATION—USE OF RAILROAD BRIDGE—TOLLS ON TONNAGE—REBATES—DISTRIBUTION.

1. In a suit by the minority stockholders of a corporation to enforce the corporation's contract with another corporation, it was alleged that the majority stockholders of the plaintiff corporation, who were also its officers and directors, were the majority stockholders, officers, and directors of the defendant corporation, which was deriving such large pecuniary benefits from its breach of the contract that the majority stockholders of plaintiff corporation, owing to their interest in defendant corporation, after being requested so to do, would not sue, as was their duty, to enforce the contract. *Held* sufficient to entitle the minority stockholders to sue.

2. It appearing that under the same contract a third corporation had the same rights and had been guilty of the same breaches as defendant corporation, so that a suit against this third corporation would, if successful, establish the liability of defendant corporation, the minority stockholders were entitled to maintain suit against the third corporation, also, though none of its officers or directors had any connection with the third corporation.

3. A corporation owning a railroad bridge contracted with various railroad companies to allow them to use the bridge in consideration of a sufficient payment annually to produce a

6 per cent. semiannual dividend on the bridge company's stock, and provide a fund for the liquidation of its bonded indebtedness on maturity. After complying with the contract for some time, the railroad companies claimed that the charges were heavier than the traffic would bear, and threatened to withdraw from the contract if a reduction were not made. The railroad companies then provided only 4 per cent. dividends, which the stockholders of the bridge company received for 19 years without demanding more. *Held*, that there was a modification of the contract.

4. In an action by minority stockholders of a corporation owning a railroad bridge against certain railroads using the bridge to recover capital stock of the bridge company alleged to have been wrongfully appropriated by the railroad companies, evidence considered, and *held* to show no misappropriation.

5. A corporation owning a railroad bridge contracted to allow certain railroad companies to use the bridge in consideration of, among other things, the payment by the railroad companies for all necessary repairs and expenses of maintaining the bridge. Many years after the contract was made, increasing traffic in a canal crossed by the bridge, and regulations of the War Department, required the construction of a new draw span and fender piers, which could not have been required by any conditions existing or in the contemplation of the parties when the contract was made. *Held*, that the draw span and piers were not improvements for which the railroad companies were liable under the contract.

6. The approach to a bridge is a part thereof, so that an attempted conveyance by a company chartered to build and operate a bridge of an approach thereto is ultra vires.

7. The directors of a corporation owning a railroad bridge conveyed an approach to the bridge to a railroad company, which was using the bridge by agreement. The conveyance was without consent of the stockholders, and ultra vires. *Held*, that as the deed was void, and the possession of the railroad company was, in effect, that of a tenant, limitations was no defense in an action by the bridge company to recover the approach.

8. Certain railroad companies contracted for the use of a bridge belonging to an independent corporation, the contract providing that they should pay tolls, which "shall not be in excess of a charge sufficient to produce in the aggregate a sum equal to the expense of keeping the bridge in repair and paying a dividend of 6 per cent. semiannually on the capital stock of the bridge company." This was afterwards modified so as to call for 4 per cent. semiannual dividends, and thereafter, for 24 years, the railroad companies paid enough to furnish such dividends. *Held*, a construction of the contract by the parties, so as to require the railroads, during the life of the contract, to furnish 3 per cent. dividends, though the contract merely provided that they should not be required to pay "to exceed" that percentage.

9. Certain railroad companies contracted for the use of a railroad bridge belonging to an independent corporation, agreeing to pay each year a sum sufficient to pay the expenses of the bridge, and a certain dividend on the bridge company's capital stock. To provide this sum, all the railroads paid a certain charge on their tonnage crossing the bridge, and at the end of the year the bridge company returned as rebates the excess of the sum paid in over that required. One road connecting with the bridge at one end delivered to and received from the other roads all its tonnage passing over the bridge, and in its accounts with the other roads was charged with tolls on all such tonnage, but the annual rebates were paid to the connecting roads. This road sued the bridge company for the rebate, and

recovered judgment; the bridge company defending the suit in the interest and at the request of the connecting roads. The bridge company appealed, superseding the judgment. The judgment was affirmed, with 10 per cent. damages against the bridge company. Pending the suit and appeal, considerable sums of interest had accrued, which, together with the judgment and costs, the bridge company paid. *Held*, that the connecting roads were liable to the bridge company not only for the amount of the judgment, but for the damages, interest, and costs.

10. It appearing that two of the connecting lines had become insolvent after the suit against the bridge company, the amounts due from them in satisfaction of the judgment, interest, and costs could not be collected from the other roads, but was the loss of the bridge company.

11. When a contract between a bridge company and railroads using the bridge provided that it might be terminated by any of the parties by giving two years' notice, such a notice, acted on by both the parties, terminated the contract, though the railroad continued to use the bridge on the terms provided in the contract.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Action by John L. Dodd and others against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and others. From a judgment for plaintiffs for a part of their demand, defendants appeal, and plaintiffs bring a cross-appeal. Affirmed on cross-appeal, and reversed on defendants' appeal.

Lawrence Maxwell, for P., C., C. & St. L. Ry. Co. Helm, Bruce & Helm, for appellant L. & N. R. Co. J. C. Dodd, Harris & Marshall, Kohn, Baird & Spindle, and Hazelrigg & Chenault, for appellees.

O'REAR, J. The Louisville Bridge Company was incorporated by an act of the Legislature in 1856, with authority to build a railroad toll bridge cross the Ohio river at Louisville. The bridge was not built and completed till about 1870. The charter of the bridge company authorized it "to contract, at an agreed sum or rate, with any railroad company chartered by the state of Kentucky, or any other state of the United States, for the annual use of said bridge by the cars or for the purposes of said railroad company."

This bridge was built from stock subscriptions and the proceeds of an issue of mortgage bonds. The capital stock paid in was \$1,500,000. The bond issue was \$800,000. When this bridge was built there was no other railroad bridge across the Ohio river below Cincinnati. Then the only railroad connecting with it from the south was appellant Louisville & Nashville Railroad. The only railroads connecting from the north were the Jeffersonville, Madison & Indianapolis Railroad and the Ohio & Mississippi Railway (the latter by way of using the approach owned by the former). The bridge was constructed exclusively for railroad traffic. The bridge company owned no rolling stock, and has never owned or operated any.

On June 5, 1872, the Louisville Bridge Company (hereinafter referred to as the "Bridge Company"), the Jeffersonville, Madison & Indianapolis Railroad Company, the Ohio & Mississippi Railway Company, and the Louisville & Nashville Railroad Company entered into a contract—perpetual, except as it might be terminated by the parties according to its terms—by which the railroad companies agreed to pass over the bridge their traffic destined to cross the Ohio river at or near Louisville, and to pay for this privilege such rates per engine, per car, per ton, and per passenger as the bridge company might from time to time fix, not exceeding in the aggregate a sum sufficient to pay a certain fixed income to its stockholders, and taxes, cost of operating expenses, and the maintenance of the bridge company's organization. It was not agreed, and could not have been, by the bridge company, that the contracting railroads were to have the exclusive right of passage over the bridge. On the contrary, it was expressly stipulated that the bridge company might admit any other railroad or railroads to the same privileges as by the contract were accorded to the then contracting roads, but upon terms no more favorable. As this contract is at the foundation of this litigation, and its construction and application are involved, it is set out at length:

"Agreement made this fifth day of June, 1872, between the Louisville Bridge Company, party of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company, party of the second part, the Ohio & Mississippi Railway Company, party of the third part, and the Louisville & Nashville Railroad Company, party of the fourth part, witnesseth:

"Whereas, the first party owns the bridge over the Ohio river at Louisville, between the commonwealth of Kentucky and the state of Indiana, with the approach thereto on the south or Kentucky side thereof, its capital stock being fifteen hundred thousand dollars, and its mortgage debt eight hundred thousand dollars, bonds for said debt being issued for one thousand dollars each, dated the first day of December, 1868, and payable twenty years after said date with interest at seven per cent. per annum, payable semi-annually in gold on the first day of June and the first day of December, principal and interest payable at the Bank of America, New York City. And, whereas, the second party owns the approach to said bridge on the north or Indiana side thereof and the railroad connecting therewith; and, whereas, the third party owns a railroad connecting with the railroad of the party of the second part at or near the north end of said approach; and, whereas, the party of the fourth part owns a railroad terminating in the city of Louisville and connecting with the track over and across the said bridge.

"Now this agreement witnesseth: In consideration that the second, third and fourth

parties agree respectively to use said bridge as is hereinafter covenanted, the first party hereby covenants and agrees jointly and severally with the second, third and fourth parties, their successors and assigns respectively, that the tolls and charges over and for the use of said bridge and its tracks, owned by the first party, in the transportation of freights, passengers, mails and other goods received from or delivered to the roads of said second, third and fourth parties, per ton, and per passenger or per car, engine or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and the said approach owned by the first party—paying a dividend semiannually of six per cent. on said capital stock of fifteen hundred thousand dollars, the interest upon the said bonds as the same matures and becomes payable—a sinking fund sufficient to pay off said bonds of eight hundred thousand dollars at maturity, the amount necessary to keep up the corporate organization of the party of the first part, with its proper officers and servants, and such taxes as may be chargeable against such bridge company on said bridge or other property pertaining thereto or otherwise; and it is understood and mutually agreed that said charges and tolls shall from year to year be reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund; and that said tolls and charges shall always be the same to each of the second, third and fourth parties, and that the tolls and charges to other railroad companies for like use of said bridge and the approach owned by the first party shall not be less than those charged to or incurred by the parties hereto. And all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends and taxes the same as if paid by the second, third and fourth parties.

"Sec. 2. The first party shall keep in repair, maintain and renew the said bridge and its appurtenances, and the tracks and approach thereto owned by the first party. If, however, said bridge or its appurtenances shall be injured by floods, ice, or other casualty, or by crystallization of the iron, or other inherent decay, so as to render same useless or dangerous, and it shall become necessary to rebuild the whole, or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of current rates and charges, then, and in every such case, it is mutually agreed between the parties that the first party shall issue bonds, secured by mortgage on said bridge and its appurtenances and appendages, owned by the first party, at a rate of interest not exceeding seven per cent.

per annum in gold, payable semiannually, principal payable in forty years, and to an amount sufficient to yield a fund equal to the expenses of renewing and repairing said bridge, and the proceeds of said bonds shall be applied to that purpose, in which event the tolls and charges for the use of said bridge, as hereinbefore provided, shall be increased so as to cover and provide for the payment of the interest on said bonds, and a sinking fund to retire and take up said bonds at maturity.

"Sec. 3. In consideration of the premises, the second and third parties each severally covenant for itself, its successors and assigns with the first party, its successors, and assigns, that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them respectively of said bridge and the tracks and approaches thereto, owned by the first party; and the party of the fourth part for itself, its successors and assigns, covenants with each of the parties of the first, second and third parts, their respective successors or assigns, that it will deliver to said party of the first part, to be passed over said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may for the time being be transporting freight, passengers, mails, express matter and other goods over the said bridge, all the freight, passengers, mail, express matter, and other goods carried on and over its road or any part thereof, destined for Jeffersonville, in the state of Indiana, or any other points which require their passage over the Ohio river at or near Louisville, during the existence of this agreement, and will charge on such traffic, in addition to its rates for transportation service, the then established rates of toll and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.

"Sec. 4. In consideration of the premises aforesaid, and in consideration of the ownership and investment made by the second party in, and its control of, said approach to said bridge, at the north end thereof, the third party hereby covenants and agrees with the second party, to use said approach to said bridge, from the existing point of connection between their respective roads, or such other point as may hereafter be agreed on by the said two parties in going to and from said bridge with the cars, engines, and trains, or other means of transporting freight, passengers, mails, express and other goods over its railroad, destined to and from Louisville, and to or from points at or near

Louisville during the existence of this agreement. It is, however, mutually understood and agreed that all the said trains, cars and engines, passing over said approach and over said bridge, are and shall be, under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars and engines of the second party in the premises, shall be equally applicable to the trains, cars and engines of the third party, each being dealt with alike. It is, however, further mutually understood and agreed between the second and third parties, that so long as the passenger trains of the party of the second part are run to and from said city of Louisville with the proper train engines of the second party, the passenger trains of the third party may also be so run by its own proper train engines. But whenever, in the opinion of the second party, the trains of the parties cannot be so run with safety, the second party shall set apart a sufficient number of engines for that service. The freight trains and freight cars of the parties shall be run over said approach and said bridge, to and from Louisville, with the engines of the second party set apart for that service, and the second party hereby covenants to furnish all needful and sufficient engines for the service hereinabove mentioned, and at all times to transfer with the same promptness and care, over the said approach and bridge, the trains, cars, engines and traffic of the parties of the third and fourth parts, received from or to be delivered to the roads of the parties of the third and fourth parts that it does the trains, cars, engines and traffic received from or to be delivered to its own road; the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.

"For the services aforesaid of the said engines of the second party, and the conducting and management of the same, and of the cars, trains and business over said approach and bridge, the second party shall be allowed a reasonable compensation, to be fixed on signing this agreement, to be apportioned between the parties hereto in proportion to the service to each, per ton and per passenger, or per car, engine or other means of transfer, as the parties may hereafter agree.

"In respect to the use by the third party of the approach to said bridge, owned by the second party, on the north side of said bridge from the point of connection made therewith by the third party the party of the third part hereby covenants and agrees to pay the second party five per cent. per annum on the actual cost of the right of way, the construction of the same and the value of the superstructure thereon, which cost and value are together assumed at — dollars, and also pay in proportion to use the expenses of keeping up, and maintaining and renewing the same. If any of the parties hereto, and in interest, cannot agree as to the compensa-

tion or rule of apportionment for said engine service and management of trains, or upon the expense or rule of apportionment of the expenses relating to said approach, or the cost and value of said roadway and track as above provided then each of the two parties in interest may select one referee to determine the difference, and if said referees cannot agree, an umpire may be chosen by them, and their decision, or a majority, shall conclude the matter. If either party fail to appoint a referee as aforesaid within thirty days after written notice to make such appointment, the referee appointed by the party not in default, shall appoint the referee for the defaulting party, and the two shall proceed to determine the matter or appoint an umpire. No person shall be qualified to act as umpire or referee except disinterested persons of experience and skill in railroad management. The parties mutually covenant to perform the awards.

"Any of said parties in interest, after the expiration of six months from the time such agreement for said compensation for said services and expenses is made, or six months after such award, may then, and semiannually thereafter, upon thirty days' previous notice in writing to the other party in interest, require said compensation to be readjusted, and if they cannot agree upon the terms of such readjustment, the same may be referred to and determined by arbitrators as hereinbefore provided; but no readjustment shall be made of the rate of interest to be paid for the cost of such approach to said bridge.

"Sec. 5. Accounts of all expenditures, tolls and charges and payments required by the terms of this agreement shall be kept by the party authorized by this agreement to charge the same against either of the parties hereto. The account of tolls, however, to be kept by the respective parties chargeable therewith and all such accounts shall be rendered to the proper parties during the month next succeeding the accruing of the items thereof, and the same shall be settled and paid within thirty days after the rendition of each monthly account.

"Sec. 6. If it is found during the month of May or November in any year that the tolls and charges herein provided are not sufficient to meet the said interest and dividend due the first day of the next succeeding month, the parties of the second and third parts each covenant and agree separately with the first party, and mutually covenant each with the other to advance and pay the deficit immediately, and prorate according to the aggregate amount of tolls and charges for the use of said bridge against each for the then current six months. The said advance, with interest thereon at the rate of seven per cent. per annum, shall be refunded by the first party out of the tolls first thereafter accruing.

"Sec. 7. This agreement shall take effect

on the first day of July, A. D. 1872, and the first semiannual interest on said mortgage bonds of the first party and the first semiannual dividend on the capital stock of the first party, provided for by this agreement, shall be payable on the first day of December, A. D. 1872, and the first of January, A. D. 1873, respectively, and semiannually thereafter. If any difference shall arise between the parties or any of them as to the construction of any of the provisions of this contract or the mode of performance, the same shall be submitted to arbitrators the qualification of arbitrators and an umpire, and the obligation to perform the award by them made, to be the same as hereinbefore provided in section four.

"This contract shall continue in force and in operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties of its election to terminate the same at the expiration of two years from the giving of such notice, at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice.

"In witness whereof, each of the parties has hereto set its corporate seal, and has caused these presents to be duly signed by its president, the day and the year first before mentioned. [Signed.]"

In 1882 two other roads were admitted by the bridge company upon terms substantially identical, save as to amount of dividends to be provided for stockholders (the rate being in these contracts stated at 8 per cent., payable semiannually); being the Louisville, New Albany & Chicago Railway Company (in the record called the "Monon," and the Louisville, Evansville & St. Louis Railroad Company (called the "Air Line.") Since 1877 the bridge company has exacted, and the railroads have provided, only 8 per cent., payable semiannually, as a fund for dividends to stockholders upon the capital stock of \$1,500,000. The Ohio & Mississippi Railway Company has long since ceased to use the bridge under the contract, having availed itself of the privilege to terminate its connection upon notice as is therein provided. The Jeffersonville, Madison & Indianapolis Railroad has, by lease and consolidation, become a part of, and is now operated as, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company (in the record called the "Pan Handle"); the latter having taken over the property of the former, and assumed its place under the contract in suit. The Louisville, New Albany & Chicago Railway has, by insolvency, changed hands, and is now operated by the Chicago, Indianapolis & Louisville Railroad Company. The latter is not, and has not been, a party to the contract sued on.

In 1896, because of lack of funds, the bridge company reduced its dividends from 4 per cent., due for the first half of that year, to 2½ per cent., and for the year 1897 they were reduced to 3 per cent. semiannually, and

a similar reduction for the year 1898. No dividend was declared for the first half of 1899.

This suit is by appellee John L. Dodd and others, representing about 700 shares of the capital stock in the bridge company, out of an issue of 15,000 shares, against the bridge company, the Louisville & Nashville Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company (the Baltimore, Ohio & South Western, as successor of Ohio & Mississippi Railroad Company, sued, but not involved on this appeal), and the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company, to compel the railroads named to provide, and the bridge company to collect from them, a sum sufficient to pay the deficit in dividends just mentioned. It is also alleged that the contracting railroads have otherwise broken their contracts, in failing to pay all the taxes assessed against the bridge, and were then in default on that account about \$200,000 to the city of Louisville, and that the railroad companies had illegally and fraudulently distributed and appropriated among themselves about \$108,000 of property, constituting that much of the capital of the bridge company, and for other alleged derelictions, all of which will be particularly noticed and treated of below. The plaintiffs sued for not only the deficits above named, but claimed that they should be paid 12 per cent. for all the time since 1877, and interest on the deficits. In fine, their claims are as follows:

1. For deficit in 6 per cent. dividends, semiannual, and interest	\$2,239,875 00
2. Capital appropriated, with interest	443,842 36
3. To have reconveyed to the bridge company a lot of 10¼ acres of land, on which is built the northern approach to the bridge.	
4. Taxes due by the bridge company	200,002 23
Total (not valuing the 10¼ acres of land)	\$2,882,720 02

The record made up, comprising several thousand pages, is unnecessarily large, for there is little or no dispute concerning the facts. The principal controversies over the facts relate to their application or interpretation. Indeed, no witness is living who participated in the execution of the contract—at least, none is introduced or mentioned as living. The method of dealings between the railroads and the bridge company from the making of the contract are shown principally by the books kept by the bridge company. There are but few provisions of this contract which have not been either altered by agreement or long acquiescence of the parties, or by construction placed upon it and carried into effect in innumerable and almost daily transactions for nearly 25 years; making it to read, as thus altered and practically construed, different from what would probably

have been the judicial interpretation of the terms of the instrument as a matter of original impression.

This suit is brought by the minority stockholders of the bridge company because they aver that the directors of the company refuse to sue to redress the grievances to the company complained of, and will not and ought not to take charge of this litigation, because of a conflict of interest and of duties, owing to their being also directors and interested in the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company and the Jeffersonville, Madison & Indianapolis Railroad Company. The circuit court granted plaintiffs relief in part only. The Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company and the Louisville & Nashville Railroad Company have appealed, and the minority stockholders, represented by the plaintiffs below, have prosecuted a cross-appeal.

The Right of Minority Stockholders to Maintain a Suit for the Corporation.

The first question naturally presented is the right of minority stockholders of a corporation to maintain suit on its behalf. Generally, such a suit cannot be so maintained. The management of a corporation's affairs, involving exercise of judgment and policy, are by law committed to a governing body, usually styled a "board of directors." Touching all things that the corporation might lawfully do, their discretion and acts are conclusively deemed to be those of the corporation. Such are called "intra vires acts." The courts neither can nor should undertake to control or interfere with their exercise. But there are admitted exceptions to the general rule that the acts of the directors are the acts of the corporation, and cannot be interfered with by the courts at the complaint of stockholders, which are as well established perhaps as the rule itself. If the directors have done or are about to do some act ultra vires, the suit of a minority stockholder will be entertained to prevent or redress it. Or if the directors are guilty of fraud, or are committing a breach of trust, as against the corporation, the right of the stockholder to sue is recognized in this country. Whether the fraud or breach of trust must involve moral turpitude on the part of the director, the courts do not seem to be of one mind. It is our opinion that it is much the same thing to the corporation whether the wrongful act flows from an improper motive, or from such acts themselves, so wrong in the eyes of the law, that the improper motive that is an ingredient of fraud is imputed to it.

In the case at bar the holders of the majority of the stock of the bridge company are also owners of a majority of the stock of the Pan Handle Railroad. The same votes elect the board of directors or managers of each corporation. They select the same persons to fill these places in each board. If

there is a misunderstanding between the two corporations, it must be solved substantially by one and the same set of representatives, constituting complainants, defenders, and triors of the fact. The reason of the rule making the judgment of the directors that of the corporation depends in large part upon their having been selected by the stockholders as their representatives, or proxy, in that matter; that their wills being free, as would be the principals', expediency favored the recognition of their act as that of the principals, the stockholders. But where the directors cannot act, and where every presumption founded in reason and ascribed by the law to their acts, is resolved at once into a doubt, the reason of the rule fails, and the rule itself must cease. The directors need not be dishonest. It is enough if their situation is such that by reason of conflict of interest they cannot or should not act.

Under this application of the rule discussed, it does not follow that every contract entered into between two corporations having directors in common is void, or even that it may be set aside upon the complaint of a single stockholder for that fact alone. *Roberts v. Washington Nat. Bank*, 11 Wash. 550, 40 Pac. 225, and notes, 2 Am. & Eng. Dec. Equity, 272-284. We go no further than to say that upon an allegation of fraud on the part of his directors, or upon an allegation of facts showing that the directors (who are also directors of another contracting corporation), because of conflict of interest and duty, could not or ought not to act in the matter, coupled with the further allegation showing material damage to the complaining stockholder by reason of the transaction between the two corporations, a court of equity will hear a single stockholder's complaint, and, if the charges be sustained by the proof, will grant appropriate relief. In this case the complaint shows a contract between two corporations having directors in common, both dominated by the same controlling interest, and that one of them has reaped material advantage over the other because of the former's breach of the contract, which the directors of the latter refuse to sue to redress. In addition, it is charged that one corporation has actually converted over \$100,000 of the capital stock of the other, as well as has caused to be conveyed to the former a material part of the corpus of the latter's property, necessary to enable it to continue to serve the public according to the intent of its charter. The latter acts, if true, are ultra vires, and under all the authorities are the proper subject of a suit for correction by a single stockholder; the others, although intra vires, and although actuated by the most honest purpose of the directors, show a state of case wherein the directors are placed in such an attitude as materially embarrasses and hinders them in giving to the settlement of the controversy either an undivided judgment or such an untrammelled service as the

injured corporation is entitled to. To close the doors of the courts to a single stockholder in such a case upon the theory that the majority must rule, and that, having embarked in a common enterprise with them, he must abide the judgment of the majority, would be to turn over to a possible wrongdoer the adjudication of his own case. In such an unequal struggle between duty and interest, it would more frequently happen that "duty would be overborne in the conflict." It is clear to us that upon the allegations in the petition in this case a cause of action was shown against the Pan Handle Company.

The case of allowing the suit by minority stockholders of the bridge company against the Louisville & Nashville Railroad Company is not so free from difficulty. It is not claimed that the Louisville & Nashville Railroad Company had any part in the selection of the bridge company's directors; nor that their dealings were otherwise than at arm's length, and free from fraud, actual or constructive. Nor was it shown or claimed that the Louisville & Nashville Railroad Company was under any duty whatever toward, or had any connection with, the bridge company, other than as fixed by contract. The Louisville & Nashville Railroad Company asks why may it not, under such circumstances, deal with assurance with the corporate authorities of the bridge company as other people might? We think it can. Its position, so far as the validity of its contracts and settlements with the bridge company are concerned, is distinctly different from that of the Pan Handle Company. In other words, its contractual relation and liabilities to the bridge company, in the absence of fraud, or acts of the bridge directors ultra vires, are to be considered under materially different rules from those affecting a corporation whose officers control the bridge corporation. But there is a distinction between the Louisville & Nashville Railroad Company's contract liabilities in such a case and the right of a single stockholder of the bridge company to maintain a suit on behalf of the bridge company against the Louisville & Nashville Railroad Company to have those liabilities enforced. The instance must be rare when the action by the single stockholder, under the phase now being considered, could be maintained. It will not be questioned that if the bridge company directors, through a fraudulent purpose, refused to bring the suit against the Louisville & Nashville Railroad Company to enforce its liability under the contract, the minority stockholders of the bridge company might maintain the suit on its behalf, although the Louisville & Nashville Railroad Company was not a party to the fraud. *Cook on Stock and Stockholders*, § 645; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Rogers v. Nashville, O. & St. L. R. Co.*, 33 C. C. A. 517, 91 Fed. 299; *Mack v. DeBardelaban Co.*, 90 Ala. 396, 8 South. 150, 9 L. R. A. 650. Here

it is charged, in substance, that the liability of the Louisville & Nashville and of the Pan Handle roads under the contract are identical; that the directors of the bridge company cannot and will not bring the suit against any of the parties to the contract, because to do so would be to subject the Pan Handle Company to liability if the grounds should be sustained. Therefore, if, for improper reasons, or if discretion is denumbed by the jarring conflicting interests, the bridge directors cannot bring the action against any of the parties because of the involvement of their other principal, the Pan Handle Company, certainly every sufficient reason exists for replacing the directors by the minority stockholders in the suit against all the parties for the accounting.

The court is of opinion that the cause of action set out may be maintained by the minority stockholders of the bridge company suing on its behalf, and joining it as a defendant, against all the defendants. Whether the grounds of action are sustained is another question.

Is the Bridge Company Entitled to Collect from the Contracting Railroads Tolls to Produce 6% Semiannual Dividends on Its Stock, in Addition to the Other Charges Provided in Contract of June 5, 1872?

The circuit court adjudged that in 1877 the contract of June 5, 1872, had been modified by all the parties to it, so that 8 per cent. (4 per cent. semiannually) only has since been paid by the contracting railroads for dividends upon the capital stock of the bridge company. The minority stockholders, having sued for 6 per cent. semiannual dividends for this period, prosecute a cross-appeal from the judgment.

Unless the contract of June 5, 1872, has been modified as adjudged, the contention of appellees must be sustained. That the railroads ceased to provide, and the stockholders of the bridge company did not receive, dividends at a greater rate than 4 per cent. semiannually since 1877, is a conceded fact. From 1877 to 1896, without interruption, and regularly, 4 per cent. dividends were supplied by the railroads, and paid over by the bridge company, and were received by its stockholders every six months. No more was exacted of the railroads. It was not claimed that any more would be exacted of them. Their monthly statements to, and quarterly settlements with, the bridge company, and the latter's annual reports to its stockholders, were all made up by the parties respectively upon that basis, and have been carried into innumerable settlements. The reason attributed by the railroads for this action is that one of the contracting roads—the Ohio & Mississippi Company—in 1875 became dissatisfied with its experience under the contract, alleging that the payment of a 6 per cent. semiannual dividend on \$1,500,000 of stock, in addition to the other charges required by

the contract, was a greater burden than commerce would bear. Notice was given that the complaining road would withdraw in two years from date (June 14, 1875), "unless those tolls be at once reduced to conform with the times." The letter to the president of the bridge company, containing this notice, showed that the matter had been the subject of previous conference between the parties. The president of the bridge company testifies that this reduction in dividends was made as the result of this demand and the agitation of the question produced by and preceding it. In 1882 contracts were made between the bridge company and the Louisville, New Albany & Chicago Railroad Company and the Air Line, by which it was stipulated that each of them was to have the same privileges as appellants, and were to be charged tolls at a rate no greater than to produce, with all other tolls, a 4 per cent. semi-annual dividend to stockholders, after defraying the other corporate charges referred to. This, in connection with the clause in the original contract of June 5, 1872, that no other road was to be admitted to use the bridge upon more favorable terms than were accorded to these appellants, would of itself have operated as a modification of the original contract. Besides, the stockholders have for more than 20 years before this suit was brought received the reduced dividends, and suffered the matters to proceed upon that basis without material complaint. True, plaintiffs claimed that they submitted to this reduction upon the assurance of the bridge directors, officials of the Pan Handle (or the Pennsylvania interests, as they are sometimes called), to stockholders that a stock dividend would be provided in lieu of the reduced dividends, and that it would be to their interest to yield the point, and that they did yield upon that assurance alone. A stock dividend ought not, and properly could not, have been declared upon any basis other than that of an increase in value of corporate assets justifying it. This was probable only by capitalizing that value represented by the bonded indebtedness, after the debt had been discharged. As the contract provided unquestionably for the liquidation of the bonded debt without reference to any reduction of dividends in the meantime, this reason does not appear to us to have been either substantial or as affording ground of action if the stockholders were subsequently disappointed in not receiving a stock dividend; for manifestly the stockholders' property, whatever its value, is there, and their stock, be it so much or more, represents that total value. Nor can we find the fact to be that there was an agreement by the directors and the minority stockholders to the effect that the stock dividend would be issued in consideration of the reduction of dividends. While there is evidence in the record that a stock dividend was for years contemplated as a possibility, and doubtless is yet, the agreement relied on

is disputed, and by no means proved. Mr. Dodd's testimony of conversations on that subject, had with officers of the company who are now dead, cannot be admitted, Mr. Dodd being one of the plaintiffs in interest and in fact. Sec. 606, Civ. Code.

It would be now impossible to equitably adjust the accounts of all interested parties upon the 12 per cent. basis. This is owing not only to the fact that a number of railroads have since been admitted to the use of the bridge on the 8 per cent. basis, and have settled their accounts and been discharged, and some have since gone out of existence, but it would probably be impossible, owing to the great lapse of time, of death and removal of witnesses, and loss of proper records, to reach a just settlement. The stockholders of necessity knew all these years of this state of affairs. They should have taken action sooner, if determined not to abide the reduction. In all probability, if the point had not been yielded at the demand of the Ohio & Mississippi Company, other contracting railroads might soon thereafter have come to the same conclusion, and availed themselves of the privilege, under the contract, of withdrawing from the bridge. The parties have so long rested upon the present status, have treated it as satisfactory and valid till such material changes in conditions and circumstances have occurred as to constitute an estoppel against them. Furthermore, in view of changed and changing conditions, the action of the bridge company seems to us to have been wise, and fully justified, as based upon sound business judgment and experience.

Misappropriation of Capital Stock.

Appellees assert that appellants and the other railroad companies using the bridge under the contract referred to herein have appropriated to their own use and distributed among themselves about \$108,000 of the capital stock of the bridge company. Appellants deny the charge. In addition they plead the statute of limitation (the 10-years statute), section 2519, Ky. St.

Before considering the plea of limitation, we have deemed it best to determine whether the charge was true in fact. Of the authorized capital of \$1,500,000, \$1,208,928 had been paid in when the railroads entered upon their contract of 1872, and took charge of the bridge. In addition, the bridge company owed a floating debt of \$134,619.35 shortly before or about the time of the contract of June, 1872. This was paid off partly with the proceeds of the remainder of the capital stock, leaving a balance of \$87,513.05, which was paid in some time after the railroad companies took charge of the bridge traffic. This sum seems to have been placed in the bridge company's sinking fund. In addition to that, the bridge company sold a right of way under its northern abutment in 1886 for \$10,000, which was placed in the sinking

fund. In 1885 the bridge company conveyed to the Jeffersonville, Madison & Indianapolis Railroad Company 10¼ acres of land in Indiana (forming the subject of a distinct branch of this litigation, and treated of further along) for \$10,286.91. This sum also seems to have gone into the sinking fund. These three items, making a total of \$107,799.96, are the only ones that we are able to trace as having belonged properly to capital stock that went into the sinking fund of the bridge company.

To understand how it may be worked out whether these sums have been appropriated, it is necessary to state the purpose and uses of this sinking fund, how created and supplied by the contracting railroads, and how disposed of. The contract of June 5, 1872, required the contracting railroads (including, of course, all others who subsequently came to use the bridge upon the same terms) to provide, from tolls on their traffic passing over the bridge, for discharging the interest annually of 7 per cent. per annum, and the principal of the mortgage debt of \$800,000 against the bridge, due in 1888. The main thing of this matter, so far as the bridge company was concerned, was to have its property freed of the mortgage debt by the time it was due. So far as the railroads were concerned, it was to discharge this debt in the easiest way, and by the one least burdensome to their traffic. A number of experiments seem to have been tried before one was finally adopted as the permanent sinking fund scheme. In the first place, a rate, or schedule of rates, was adopted by the bridge company with the concurrence, and presumably upon an agreement with, the railroads, by which it was thought and estimated that the fixed and current charges under the contract would be met. It is plain that the railroad companies were interested in keeping the bridge tariffs down to a minimum figure, because they were a charge upon their business, and necessarily affected the ability of the roads to get the traffic. The problem was to arrange a schedule of bridge tolls in advance, so that surely enough, but no more than enough, would be raised to satisfy the contract with the bridge company. As the volume of business fluctuated—a matter that it was utterly impossible to foretell—there would be either a deficit or a surplus of income. In the contract the deficit was provided against. But not so as to the surplus. It appears that the tolls first adopted did not meet the anticipations of the responsible parties, nor probably the requirements of the contract, for we find that in 1878 but comparatively little had been accumulated in the way of a sinking fund. So in that year a somewhat elaborate and formal sinking fund scheme was devised and adopted. Further than to retain its general purpose, and the service of its trustees, it was not continued longer, however, than 1881, when a re-arrangement was had. It was then agreed

between the railroads and the bridge company that all the income of the bridge company was to be pooled (such as rents, interest on daily balances of deposits, etc.) The railroads were then to pay in each month, without reference to tolls charged or chargeable against them, except as a basis of prorating it among themselves, the annual sum of \$36,500. It was thought, and it proved to be true, that this arrangement would safely provide for paying the interest as it became due, and for retiring the mortgage bonds at their maturity. Under the sinking fund scheme finally resorted to by the railroads, and above outlined, it soon developed that the bridge company's income from tolls was frequently greatly in excess of the requirements of the contract. To whom did this excess or surplus belong? Under the contract the bridge company had stipulated that its tolls should not exceed a rate to produce a sum sufficient to pay the enumerated charges. But the rate fixed produced a sum that did exceed those requirements. First and last that question has troubled the railroads contributing to the surplus a good deal, and has been the subject of more than one controversy. The bridge company treated it as belonging to the railroad companies contributing to it in the proportion contributed by them respectively. It therefore rebated it to the railroads accordingly; that is, without collecting it, it was credited back in the proportions in which it had been originally charged. In no instance, so far as the record shows, was a dollar of it collected in fact, and then the money paid back. It was merely a matter of bookkeeping. Annually at the regular stockholders' meetings elaborate statements were submitted by the bridge company's fiscal officers, showing generally in detail, among the other items, that this system of "rebates" or "redistributions of surplus" was being indulged as shown. No protest or complaint was made by the stockholders, or any of them. From this we find that the stockholders of the bridge company likewise approved and ratified the scheme, and that its execution was a practical interpretation and fulfillment of those requirements of the contract.

Subsequently a controversy arose between the bridge company, the Pan Handle Company, and the Monon Company over the surplus remaining after the discharge of the bonded indebtedness. This came up in an effort to settle an account of the bridge company against the Monon Company for tolls, in which numerous matters were in dispute. A suit was instituted by the bridge company against the Monon Company in the Jefferson circuit court. Availing themselves of the contract, the parties submitted its final decision to the Honorable H. W. Blodgett, of Chicago. He adjudged that the surplus arising from excessive rates of bridge tolls belonged exclusively to the railroad companies contributing thereto in the proportion of their

traffic, respectively, passing over the bridge and creating the surplus. Later the Louisville & Nashville Railroad Company, conceiving that the continuance of this excessive rate was an unnecessary burden, and a source of annoyance and trouble to the roads contributing it, as well as to the commerce bearing it, brought a suit in Jefferson circuit court against the bridge company and the other railroads to compel a reduction of the rates to a point where they would yield no more than enough to meet the requirements of the contract of June 5, 1872, as modified by the parties, and above set out. The Honorable W. O. Harris, as special judge, granted the relief prayed for. In another suit in the Jefferson circuit court, law and equity division, the Louisville & Nashville Railroad Company sued the bridge company and the other railroads to recover its share of the excessive tolls collected by the bridge company over and above the actual requirements of the bridge company under the contract of June 5, 1872, as modified as stated, and that court granted the relief, and adjudged a recovery against the bridge company, which, upon appeal, was affirmed by this court. *Louisville Bridge Company v. L. & N. R. R. Co.*, 51 S. W. 185. Thus it will be seen that all who have had occasion to handle this subject have come to the same conclusion.

If the \$107,799.96 was in the sinking fund all this time, its accretions in the way of interest or otherwise, under the pooling arrangement of 1881, acquiesced in and continued all this while, was properly used in discharging the bonds and interest. Whatever may have been the technical rights of the parties on this subject under the original contract, they seem to have treated the matter in this manner as one satisfactory to themselves. Perhaps a reason was that, as the railroad companies were paying 8 per cent. annually net to stockholders on the total capital of \$1,500,000, it was thought to be but right that they should have the use of the earning capacity of that total capital.

This brings us to consider whether this \$107,799.96 is yet on hand. That it is not in cash is conceded. When the mortgage debt was paid off in 1888 by the sinking fund trustees, they did not use the \$107,799.96 of capital alluded to above. From the proof in the record we find that the actual physical condition of the bridge has been maintained, and that it is in as good state of repair and preservation, so far as is known, as is possible. On this item alone the railroad companies have provided, and the bridge company has expended, during the existence of the contract, \$371,649.06, up to the closing of the proof in this case. From the fact of this condition, and of the proven earning capacity of this property, we think it fair to assume that it is worth in money at least what it is shown to have cost, nothing appearing in the evidence to the contrary.

In the record are annual statements, made up from the bridge company's books. It is in evidence that the assets of the company shown in these statements, excepting the items of accounts against the Monon and Air Line Companies for tolls, are absolutely good, and convertible into cash at at least the figures used. By deducting from these assets all the liabilities of the bridge company that it will be compelled to pay, it is shown that there would be left, on a liquidation of the company as of the date of the last statement in evidence (issued a short while before the judgment in this case), a sum that would pay to all stockholders about \$1.50 to the dollar of the company's capital. The assets so treated as good are the bridge structure (including fender piers) at the original cost of \$2,134,261.50; the new draw span, \$36,540.67; real estate, \$68,011.50; securities (Pennsylvania Company 4½ guaranteed bonds), \$62,412.75; cash and cash accounts, \$117,310.20.

The item on the liability side of the statement "surplus of sinking fund divisible among the railroads contributing thereto" of \$12,929.45 is eliminated from consideration, because if there was not a surplus, then there could not be a liability on that account. We are of opinion from the state of the record that the bridge company does not owe any part of this item to anyone.

It is true that there is owing a greater sum for taxes than is shown on this statement. At that time, however, the matter was in litigation. The railroad companies admit their liability for the difference, and say they are preparing to pay it, and the circuit court reserved control of the case to enforce their payment, if necessary. Therefore, if the \$800,000 of bonds paid off for the bridge company be treated as capitalized, it is clear that no part of the capital, either of the \$1,500,000 or of the \$800,000, has been withdrawn by either of the railroad companies, or anybody else, for the very sufficient reason that it appears to be yet there in the property, in the bridge company's custody and control.

The last item on the "statement," viz., "Balance to credit of income account, \$799,649.95," is vigorously attacked as being false in fact and in toto. To our mind it is but a bookkeeper's fancy. It is an arbitrary entry to produce a balance between the two sides of the general statement. It might as appropriately have been entered in one of several other ways. But the name given to it is not material.

There were two other pieces of real estate sold by the bridge company, one sold in 1874 for \$5,745.77, and the other for \$730, sold in 1885. It is not shown that either of these pieces of property ever represented a part of the capital stock of the company, nor is it clearly shown what became of the proceeds. There was also a balance of undivided earnings claimed to be on hand in 1872, when the railroad companies took

charge of the bridge. We assume the theory to be sustained that all these proceeds were used in defraying operating expenses. If they were, those roads that received the benefit of the improper diversion of these funds would be liable therefor. But the plea of limitation has been interposed against this recovery, and must be applied, as was done by the circuit court.

The Draw Span and Fender Piers.

Included among the assets of the bridge company, chargeable to that extent to its capital, is the cost of the two fender piers and a draw span built since the contract of June 5, 1872, and within the last few years. The fender piers cost \$20,000, and the draw span \$36,540.67. It is the contention of appellees that by the terms of the contract of June 5, 1872, the contracting railroads were to build such improvements, or, what is the same, furnish enough additional tolls to enable the bridge company to make them without using its other assets. Of course, if the duty was upon appellants to provide for such improvements at their own expense, it must be because of the terms of the contract alone. The draw span and fender piers are entirely new, and have been made necessary because of conditions not existing, and evidently not contemplated by the parties, when the contract of June 5, 1872, was entered into. In recent years the canal at Louisville has been completed and materially altered, so that, during most of the year, nearly all of the boating traffic on the Ohio river at that point passes through the canal, instead of using the river channel, as was formerly more generally done. The bridge crosses the canal. The great increase of boating traffic at that point, and the widening of the canal, made it a source of constant danger to the bridge structure, because of the liability of passing boats coming in contact with the bridge work. To avert that danger, the fender piers were found to be necessary, and were accordingly provided. The new draw span is what is called a "through span." The old span was a "deck span," on which the trusswork was below the plane of the track. This necessitated quite frequent openings of the draw to allow boats to pass, which, with the span changed so that below the track it was free from obstruction, was obviated in a very considerable number of instances. Furthermore, complaint had been made to the Secretary of War concerning the old span, it being claimed that it was an obstruction of navigation. The War Department had required some such change. It was deemed expedient by the bridge directors, therefore, to substitute the more modern span, which was done. The old span was not out of repair, or apparently worse than when originally built. Changed conditions required, or at least made wise, the substitution of the new one.

Both of these improvements were substan-

tial and permanent betterments of the bridge company's property, which must be left in good condition when the contract ends. They are not repairs, and are not charges, by the terms of the contract, to be provided for by the railroads. It was proper that their cost should have been paid by the bridge company out of its unexpended capital.

The 10½ Acres Conveyed to J. M. & I. R. R. Co.

In the contract of 1872 reference is made to the fact that the Jeffersonville, Madison & Indianapolis Railroad Company then owned, and was by that contract conceded to own, the "northern approach" to the bridge. Exactly what is meant by that expression is uncertain. The Jeffersonville, Madison & Indianapolis Railroad Company owned an extension from its southern terminus near Ninth and Broadway streets, Jeffersonville, Ind., connecting with the bridge track; also a spur running north to New Albany. It may be that this is the approach referred to. It is argued for appellant Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company that the term was meant to describe the track over the 10½ acres in question, and extending about 1,700 feet northeast from the northern abutment of the bridge. This contention is not without force. That which inclines us, though, to the other one is the fact that the Jeffersonville, Madison & Indianapolis Railroad Company did not at that time own that part of the northern approach to the bridge located over this 10½ acres, nor had it ever owned or contracted for it, so far as the record shows. It is claimed that the Jeffersonville, Madison & Indianapolis Railroad Company actually made the fill and built the track on this plat of land. Conceding that to be true, it would not confer ownership of the land, or of the track, upon the railroad company. It would, at the furthest, have created only a liability from the bridge company to the railroad company for the work and material furnished. Whether they have been paid for is not clear from the evidence. But, whether the railroad company had or had not furnished the work and labor claimed, the account therefor was barred by limitation, for aught that the record shows, in 1885, when the bridge company attempted to convey to the Jeffersonville, Madison & Indianapolis Railroad Company the 10½ acres of land, including the track thereon.

The railroad company pleads and relies on the statute of limitation to defeat the recovery for the bridge company. It is charged in the petition seeking to have this conveyance set aside that it was ultra vires, and was in fraud of the rights of the stockholders.

We do not think it necessary to elaborate the idea that if, in fact, this approach belonged to the bridge company, its attempted conveyance by the directors, even by the stockholders' concurrence, for that matter, would have been ultra vires. The approach

of a bridge is as essentially a part of the bridge as any span or other part. To dispose of the approach is to dismember the bridge, and render it impossible for the bridge company to serve the public as required by its charter. *Thompson, Corp.* § 5373; *Thomas v. R. R. Co.*, 101 U. S. 83, 25 L. Ed. 950; *Whitcher v. Somerville*, 138 Mass. 455.

Section 2519, Ky. St., is invoked by the railroad company. It is:

"In actions for relief from fraud or mistake, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

We are of opinion that that section of the statute cannot be applied to this part of appellees' suit. Although, strictly speaking, the Jeffersonville, Madison & Indianapolis Railroad Company may not have been a tenant of the bridge company, its relation was so closely akin to that of tenant to landlord that the principles applicable to that relation ought to be applied. The principles governing the rights of a tenant under such state of case are fairly stated thus in *Trabue v. Ramage*, 80 Ky. 325: "We understand the law to be that a tenant can, under no circumstances, after the lease and entry under his landlord, attorn to another without his consent, or deny the title or claim under which he entered, whether the title or claim be good or indifferent." To this proposition appellant *Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company* responds that it has always been lawful for a tenant to acquire his landlord's title. True; but he must get it from the landlord. The directors of the bridge company, who acted for it in this transaction, were also officers of the *Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company*, and, by reason thereof, also represented the *Jeffersonville, Madison & Indianapolis Railroad Company*. It was not competent for these officials to transfer to the latter company the bridge company's property in violation of its charter rights and duties, and, too, without adequate consideration. That is one of the acts of the directors that does not bind the corporation. Therefore the *Jeffersonville, Madison & Indianapolis Railroad Company*, taking the deed with full knowledge in law of the incapacity both of the corporation to execute it and of the directors to represent the corporation in that transaction, acquired no title by the deed. In other words, it was not the act and deed of the corporation. As between the putative grantor and the grantee, it was void. Nor can the lapse of time aid it, because the statutes of limitation can never protect one in a right to property when his claim under the statute is not connected with a possession consistent with the claim. *Sewell v. Nelson* (Ky.) 67 S. W. 985. Appellant's deed was

incompatible with its possession. It was hostile to the title by which and under which it had been let into the possession. It was inconsistent with the implied and continuous undertaking of the contracting railroads to hold and use the bridge as the property of the bridge company. Appellant's possession was not under the deed. It follows, then, that, as the deed was void and the possession not adverse, neither has conferred or can confer upon the *Jeffersonville, Madison & Indianapolis Railroad Company* or its successor any title whatever against the bridge company. The circuit court correctly decided that the statute was not a bar to appellees' claim to have the lot conveyed to the bridge company so as to clear the record of the spurious deed. This relief, though, should have been only upon condition that the bridge company repaid to the *Jeffersonville, Madison & Indianapolis Railroad Company* or its successor the consideration of \$10,288.91 paid by the railroad company for the conveyance.

The Reduced and Omitted Dividends for Years July, 1896, to July, 1899.

Having found that the contract of June 5, 1872, has been modified by the parties so that 4 per cent. semiannual dividends are provided for in lieu of the 6 per cent. named in the contract, we come to determine whether the contracting railroads are to pay that rate at all events. It is the contention of the railroads that they did not contract to pay any fixed dividend, or any sum; but that they agreed, each for itself, to pay the tolls charged against them for their use of the bridge, at a rate or rates to be fixed by the bridge company, but that such tolls "shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and its approach, paying a dividend semi-annually of 6 (4) % on said capital stock of \$1,500,000," the interest upon the bonds, provide a sinking fund to discharge its mortgage debt, the expense to maintain the bridge company's corporate existence, and to pay the taxes assessed against it.

Whatever may have been the correct construction of this undertaking, the parties have from the first given to it the construction that the railroads were to pay these charges, viz., the taxes, the cost of maintaining the organization, the repairs and operating expenses, the interest upon and the principal of the mortgage debt, and at first 6 per cent., and latterly 4 per cent., semiannual dividends upon the capital of \$1,500,000. All of these undertakings seem to be of the same rank.

As contracts are a meeting of the minds, or the agreement of the understandings, of those engaging in them, it is generally held to be not so material what words were used, as what was meant and understood by the parties. In disputes over the construction

of written contracts, the words employed are first considered. But where the terms are not entirely clear, and the parties have themselves, through a long term of years, by a consistent course of dealing under the contract, with full knowledge of all the facts affecting their rights, construed its meaning and accordingly applied it, the usual labor of the courts is done. We have but to accept and enforce their own construction.

Here the parties have construed that each of the contracting railroads using the bridge was bound to pay to the bridge company, in proportion as the roads' traffic over the bridge bore to the whole volume of traffic by all the contracting roads over the bridge, its proportion of a sum which would discharge the items named. This construction has been from 1872 till this suit was brought. In July, 1896, for the first time under the contract, the bridge company failed to pay its stockholders a semiannual dividend of at least 4 per cent. It then paid them $2\frac{1}{2}$ per cent. only. For each of the half years following, until 1899, only 3 per cent. was paid. The dividend of July 1, 1899, was passed entirely. These reductions and omissions, on the basis of 4 per cent., amounted to \$142,500.

The Louisville, New Albany & Chicago Railway Company, for some time prior to 1896, had been falling behind in the payment of its tolls under the contract. In 1896 it failed, owing a balance of \$128,009.15. The Air Line Company about the same time also fell behind in the payment of its tolls, and failed, owing a balance of \$11,331.86. But the whole of these two sums, amounting to \$139,341.11 against the railroad companies named, was not actually going to the bridge company as tolls. Part of it represents a charge over and above the necessary requirements of the bridge company as fixed by the 1872 contract, and represents the tolls charged to the Louisville & Nashville Railroad Company, over and above those requirements, to the extent of about \$34,000. This item arises out of the facts stated in that part of this opinion dealing with the judgment of the *L. & N. R. R. Co. v. The Bridge Company*.

We are of the opinion that the contracting roads undertook, and that all parties then understood it so, that the tonnage of freight would produce, in the aggregate, a sum sufficient to pay all the fixed charges named in the contract, dividends included. Each for itself agreed to pay its own share, but all undertook, in the proportion that their traffic respectively bore to the total traffic of the bridge, to pay the whole of the sum needed to be raised for the bridge company under the contract. The railroad companies must have so understood it, for they have, in every instance till 1896, acted upon that theory, and lived up to it. The failure of the Monon and of the Air Line to pay their proportions began long before 1896, yet the other roads, parties to the contract, continued

to pay enough of tolls, without question or complaint, to provide for the payment of the regular semiannual payments of 4 per cent. dividends. When the Monon finally became insolvent, for the first time appellants contended that their subsequent tolls should be decreased; not because of the failure of the bridge company to collect current accounts, but because an old account, incurred some four years prior, could not be collected. That was an account, too, which, had it been collected, would, under the system in vogue, have merely "rebated" to the responsible contracting roads.

We are of opinion that, for their failure to provide an income from tolls sufficient to pay the full dividend of 4 per cent. semiannually for the years in litigation, appellants are liable, and that the circuit court has properly fixed and apportioned the liability between them.

L. & N. R. R. Co. v. Bridge Co. Judgment.

Instead of reporting its tonnage of freight direct to the bridge company, the Louisville & Nashville Railroad Company delivered its freight destined for the North by way of Louisville to, and received its northern freight crossing this bridge from, the northern roads using the bridge. These roads made up their accounts and reports of freight so as to include the Louisville & Nashville Railroad Company's. The latter settled and paid upon the basis of the reports made out by these roads, and they in turn paid the tolls to the bridge company. By the system of rebating above alluded to, this matter resulted in the rebates being made to the Northern roads alone. As these rebates were not in fact money paid out by the bridge company, but were credits entered on the current accounts against the respective railroads receiving them, the result was that, to the extent of these rebates, the Louisville & Nashville Railroad Company was being required to pay a higher rate of tolls to the bridge company under the contract than other contracting roads were paying. The Louisville & Nashville Railroad Company sued the bridge company and the railroads north of the river to recover the excess of freight so collected from it. A judgment was rendered in its favor against the bridge company for about \$168,000. On appeal to this court that judgment was affirmed. 51 S. W. 185. In the opinion in that case it was said: "It was the plain duty of the defendant bridge company to have restricted its charges to such rates as would have produced a sum of money sufficient to pay its legitimate charges under the contract, and, as it has violated this contract and collected from plaintiff tolls in excess of the amount authorized by the contract, it is liable therefor, with interest from the date of such illegal exactions, at least from the time it had accurate and distinct information of the amount due plaintiff from this excess." That action was in court for some time be-

fore the final judgment. On appealing, the judgment was superseded. The affirmance carried 10 per cent. damages to the appellee Louisville & Nashville Railroad Company against the bridge company. In the meantime, a considerable sum of interest had accumulated. The bridge company then proceeded to collect from the railroad companies north of the river, to which the Louisville & Nashville Railroad Company's part of the "surplus" had been credited, the amount so wrongfully given over to them. These were not paid back at once, but in installments, and without interest. Appellant Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company has paid back all that it received of money that should have gone to the Louisville & Nashville Railroad Company. Other roads have also paid back their part of the original sum, but none of them paid any interest, or cost, or any part of the damages. The bridge company has paid off the judgment, including damages, interest, and costs. We are of opinion that, in so far as the roads north of the river procured and participated in this wrongful distribution of the fund charged by the bridge company against the Louisville & Nashville Railroad Company, and collected in the arrangement detailed, they should reimburse the bridge company, not only the principal of the judgment incurred by it on this account, but the interests, costs, and damages as well. We find that the bridge company defended the suit in the interest and at the request of the Northern roads. The railroad companies receiving the credits in the wrongful distribution of the Louisville & Nashville Railroad Company's accounts should bear the burden imposed by the judgment in the proportion only in which they received the improper credits, and each one for itself. So much of this item as may be chargeable against the Monon and Air Line Companies must be collected from them, or be a loss to the bridge company. The Louisville & Nashville Railroad Company cannot, of course, be required to bear any part of this item or of this loss.

Assuming that the Air Line and Monon accounts are insolvent (as they appear in fact to be), so far as they embrace parts of the liability for the Louisville & Nashville Railroad Company judgment paid off by the bridge company (estimated at from \$34,000 to about \$37,158.89, plus their proportion of interest, costs, and damages upon that judgment), these liabilities, when ascertained, are to be treated as if they had been collected by the bridge company and then lost. In other words, this sum has been once collected by the bridge company from appellants and other roads as tolls on traffic. Instead of applying it to paying dividends, it was used to pay a judgment against the bridge company for which the Air Line and the Monon Companies were to that extent alone liable, as among the railroads. Therefore, when ascertained, the amount of unsatisfied liabilities

of the Air Line and Monon Companies, on account of their part of the Louisville & Nashville Railroad Company judgment, will be deducted from the sum herein directed to be paid in by appellants to enable the bridge company to pay the deficits in dividends for the years in litigation.

In providing for the \$142,500 of deficit in dividends, regard should be had also to the sums that may be collected from the roads north of the river under this item for reimbursing the bridge company for its payment of the Louisville & Nashville judgment. For whatever sum is collected will represent that much of tolls collected from the traffic by the bridge company, and which was available for dividends, but had been wrongfully diverted. So that, when collected again, it should be applied to its original purpose.

The Termination of the 1872 Contract.

The circuit court adjudged that the contract of 1872, as modified and heretofore explained, was still in full force and effect, and binding upon both appellants. The last clause of the contract provides for its termination as to all parties embraced in a two years' notice given by one of the parties to terminate it. On the 25th of September, 1897, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Jeffersonville, Madison & Indianapolis Railroad Company gave notice to the bridge company of the former's intention to terminate the contract on September 25, 1899. On the latter date the parties acted upon that notice, but the railroad company has since continued to send its freight to and from Louisville over that bridge upon the terms fixed by the bridge company as to all other freight. We are of opinion that by the notice and action under it the contract was terminated on September 25, 1899, as to the parties included in the notice.

Wherefore, the judgment upon the cross-appeal is affirmed. Upon the original appeal the judgment is reversed, and the cause is remanded for proceedings and the entering of a judgment consistent with this opinion.

HICKS v. GALVESTON, H. & S. A. RY. CO.
(Supreme Court of Texas. March 19, 1903.)

NEGLIGENCE—PLEADING AND PROOF—EXPERTS—ANSWER TO HYPOTHETICAL QUESTION.

1. Under a petition alleging that the employes in charge of the train negligently jerked and jolted the car in which deceased was a passenger, causing it to lurch back and forward with such violence as to throw him backward against and across the arm of a seat, evidence that the lurch of the car was sidewise does not prevent recovery; the substance of the issue being whether the employes' negligent operation of the train caused the car to lurch, thereby inflicting the injury, and the direction of the motion being immaterial.

2. An expert asked a hypothetical question may not give an answer based partly on his

understanding of the evidence, and not solely on the facts supposed in the question.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by Ardella A. Hicks against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for defendant was affirmed by the Court of Civil Appeals (71 S. W. 322), and plaintiff brings error. Reversed.

W. L. Adkins, for plaintiff in error. Baker, Botts, Baker & Lovett and A. L. Jackson, for defendant in error.

WILLIAMS, J. Plaintiff in error brought this suit to recover damages for the death of her minor son, Ellis Hicks. She alleged that, while Ellis Hicks was traveling as a passenger on one of the defendant's trains, its "employee in charge of and managing said train and coach upon which Ellis Hicks had taken passage negligently managed said train and cars, and the locomotive pulling them, and negligently and recklessly jerked and jolted the coach in which said Ellis was a passenger in a violent and unusual manner, causing it to lurch back and forward with such force and violence as to throw Ellis violently backward against and across the arm of one of the seats in said car," inflicting injuries which caused his death. Some of the evidence introduced by plaintiff was that the jerk or jolt caused the coach to lurch sideways, and that this threw the boy backward across the arm of the seat. At the request of defendant the court charged the jury, in substance, that, as plaintiff had not alleged any jerk or jolt causing the coach to lurch sideways, she could not recover if Ellis Hicks was caused to fall "as the result of some movement or jerk or jolt causing the coach to lurch or move sidewise." The assignment of error founded on the giving of this instruction should, in our opinion, have been sustained by the Court of Civil Appeals. It is true, as contended by counsel for defendant in error, that, if the plaintiff in such a case unnecessarily specifies the acts or omissions of defendant in which its negligence consisted, the plaintiff must recover upon proof of such acts or omissions, and not upon others disclosed by the evidence, but not mentioned in the pleadings. But nevertheless the rule applies that only the substance of the issue need be proved. This does not require proof of every unnecessary and immaterial detail stated in the pleading as connected with the alleged negligence. The rule prevailing in this state on the subject is stated by Judge Wheeler in *Kottwitz v. Bagby*, 16 Tex. 661. In that case bank bills had been paid by defendant to plaintiff, and the latter sued to recover the sum in payment of which the bills had been taken, alleging that the bills were worthless and counterfeit. The proof showed only that the bills were worthless, and the objection was urged that the

allegations and proof did not correspond; but the court said: "Under the common-law pleadings and practice, the consequence, perhaps, would be that, failing to make the corresponding proof, he would fail in his action; such being the consequence of needlessly averring what the party could not prove. But with us the practice has been different. The proof must meet and conform to the material and essential averments, in the pleadings; but, if the pleadings contain averments which are not material and essential, these, unless they occasion repugnancy or inconsistency, may be treated as mere surplusage, which does not vitiate on demurrer, or defeat a recovery on proof of the essential allegation of the party, though the matter unnecessarily averred be not proved." In *Texas & Pacific Railway Co. v. Kirk*, 62 Tex. 232, Justice Stayton said: "The petition alleged that the rail which caused the cars to be thrown from the track was and had been broken for several days before the injury, and that a part of the rail was missing, and it is claimed that both of these defects must have been proved, to authorize a recovery. We do not so understand the rule. The general rule regulating the sufficiency of evidence is that it is sufficient if the substance of the issue be proved. 1 Greenl. 561. The substance of the issues in this case was, was the track of the appellant's road unsound and unsafe by reason of defective rail, and was that the cause of the injury? It was alleged that the track was defective in two respects: (1) That the rail was, and had been for some time, broken; (2) that a part of the broken rail was missing. Proof of either of these facts would have been sufficient to establish the defective character of the track, and to sustain so much of the issue; and, if the other evidence in the case showed that such defect caused the injury, then the matter in issue was sufficiently proved, in so far as it was necessary to show the cause of the injury, and so far as the issue under consideration was concerned." In *Gulf, Colorado & Santa Fé Railway Co. v. Johnson*, 83 Tex. 631, 19 S. W. 151, the plaintiff alleged that he was thrown from a hand car by derailment of it, and the proof showed that, as he was falling, he jumped from the car in order to save himself; and this was held to be a sufficient correspondence between the allegations and proof. In *International & Great Northern Railway Co. v. Dyer*, 76 Tex. 160, 13 S. W. 377, the plaintiff alleged that the defendant, by a "flying switch," propelled cars along its track across a public street. The proof showed that the cars were not moved by a "flying switch." The court said: "We do not think the allegation of a flying switch a material or essential one. The gist of the complaint was that defendant, without proper care and in disregard of the safety of the public, propelled unguarded cars along its track, which forced other detached cars on

the street crossing, thereby causing the injury." These examples will suffice to show the proper application of the rule relied on to the facts of this case. The substance of the issue was whether or not defendant's employes, by negligence in operating the train, caused the coach to lurch or jerk, and thereby inflict injuries which caused the death of plaintiff's son, and the direction of the motion is wholly immaterial. The instruction was erroneous, and the judgment must therefore be reversed.

One of the assignments of error questions the admission of evidence of a physician in answer to a very lengthy and involved hypothetical question. The answer of the witness seems, to some extent, to be based upon his understanding of or conclusions from the evidence, and not solely upon the facts supposed in the question. This was not within the province of the witness, but seems to have been produced by questions interposed by counsel for plaintiff. The same questions will not probably recur in another trial, and we refer to the matter only to prevent any inference that we hold that such testimony was admissible. The same disposition may be made of the assignment complaining of the action of the court in sustaining objection to the hypothetical question put by counsel for plaintiff to Dr. Beall. For the reason that these questions, as they are presented now, will not likely arise again, it is unnecessary that we pass upon them more definitely. Other points were properly disposed of by the Court of Civil Appeals.

Reversed and remanded.

Ex parte ELLIOTT.

(Court of Criminal Appeals of Texas. March 18, 1903.)

LOCAL OPTION—AMENDMENTS OF LAW—EFFECT—REPEAL OF LAW—HOW EFFECTED.

1. The Legislature, in amending the provisions of the local option law, cannot affect territory in which the law is already in force.

2. The local option law as in force in 1892 could only be repealed by vote of the entire people in the territory in which it was operative, and that territory could not be subdivided, and the law repealed in certain subdivisions only.

Original application by W. R. Elliott for a writ of habeas corpus. Granted, and applicant discharged.

Smith, Templeton & Tolbert, for relator. Robt. A. John, Asst. Atty. Gen., for respondent.

DAVIDSON, P. J. Applicant was arrested under complaint and information charging him with violating the local option law in School District No. 54, Grayson county. Having been arrested, he resorted to the writ of habeas corpus, which was granted by this court. The facts are agreed upon, and show that on February 1, 1892, local option went

into effect in Justice Precinct No. 3 of Grayson county, and has been in effect since that time, and is still in effect; that on February 1, 1902, 10 years after the law went into effect in Justice Precinct No. 3, the said law was put into effect in said School District No. 54. That in Justice Precinct No. 2, which is divided from Justice Precinct No. 3 by an imaginary line under the order of the commissioners' court, local option is not now, and never has been, in force; that School District No. 54 is partly in Justice Precinct No. 3 and partly in Justice Precinct No. 2. That within the limits of said School District No. 54 is the incorporated town of Bells; that the town of Bells is divided from east to west by the Texas & Pacific Railway; that the portion lying north of the railroad is in Justice Precinct No. 2, and that lying south of said railroad is in Justice Precinct No. 3, and was so situated on December 9, 1901, when the election was ordered for School District No. 54; that portion lying south of the Texas & Pacific Railway is in Dugganville voting precinct, and in Justice Precinct No. 3; that lying north of said railroad is in Bells voting precinct, and in Justice Precinct No. 2; and that School District No. 54 includes all of the town of Bells, as well as other territory besides that included within the incorporated limits of the town. It is further agreed that applicant sold intoxicants to Tom Ferguson within said School District No. 54.

There are several questions presented for revision. It is contended the election in School District No. 54 is invalid because, under the law as it then existed, such subdivisions as School District No. 54 were unknown, and, under this condition, the law was put into operation in the entire Justice Precinct No. 3, and that no subsequent legislation could affect the law as in force in Justice Precinct No. 3; that the Legislature has no power to repeal the law in force in any given territory; that this must be by the voters living in that territory. We believe this proposition sound. Such we understand to be the doctrine of *Dawson v. State*, 25 Tex. Cr. App. 670, 8 S. W. 820; *Aaron v. State* (Tex. Cr. App.) 29 S. W. 267; *Adams v. Kelley* (Tex. Civ. App.) 44 S. W. 530. The fact that the Legislature may alter the provisions of the local option law cannot affect territories in which the law is then in force. The law in force in the given territory will stand as its provisions were at the time it was voted into operation, despite subsequent amendments to the law by legislative enactment. The Legislature may amend the local option law; but this ends their power. It takes the vote of the people of a given territory to put it into operation, and it takes the vote of the same people to end its operation. All that portion of School District No. 54 which lies within Justice Precinct No. 3 was under the operation of the law as it existed on February 1, 1892; therefore the election in School District No. 54 in 1902 could not

affect the law as put into operation in Justice Precinct No. 3, and, as to that part of School District No. 54, the election of 1902 was inoperative and void. This being true, it would vitiate the election in that portion of the school district, because under the law it is only for the entire school district that such an election can be held or the law made operative. This would be true whether the act of the Legislature creating subdivisions be valid or invalid. If, under section 20, article 16, of the Constitution, the act of the Legislature undertaking to define subdivisions of a county other than justice precincts, cities, and towns, was invalid, then the commissioners' court could not order such an election. If it was valid, then it would not relate back so as to affect the territory which was already under operation of the law.

It is suggested that that portion of the act of the Legislature with reference to subdivisions in counties, other than justice precincts, cities, and towns, is invalid, at least in part, because the Constitution relegates the matter of subdivisions to the commissioners' court, thereby excluding legislative authority in pointing out these subdivisions. This may be true, and that, by virtue of the provisions of said article in the Constitution, the commissioners' court alone may subdivide their county for local option purposes other than justice precincts, cities, and towns. However, it is not necessary to decide that question here, for if there were no other objections this law might be sustained upon the theory that the commissioners' court had designated this territory by metes and bounds, and it was as well the act of the commissioners' court as that of the Legislature.

By the terms of the law as in force in 1892, the only way by which the local option law could be repealed in a territory where it was operative would be by a vote of the entire people of the territory who put it in operation. For instance, where the law had been put into operation in a justice precinct, the only way to repeal that law would be by a vote of that people within that prescribed territory. The justice precinct could not be subdivided and elections held in such subdivisions, and thus, by piecemeal, repeal the law in the justice precinct. The statute provides it must be by vote of the entire justice precinct. To hold otherwise would bring about a state of confusion, and give a construction to the statute which would lead to an absurdity. The law prohibits the repealing of the law in the justice precinct except by a vote of the people of the entire precinct. If the justice precinct could be subdivided, and an election held in each subdivision resulting against prohibition, then the statute would be of noneffect by indirection, and the law repealed by piecemeal, when it could not be so done by a vote of the entire precinct directly.

There are other questions of interest in the

case, but, under the view we take of the record, we believe the question discussed disposes of the matter, and the election was void.

The applicant is ordered discharged.

HENDERSON, J., absent.

Ex parte RICHARDS.

(Court of Criminal Appeals of Texas. March 4, 1903.)

BRIBERY OF OFFICER—ILLEGAL ARREST—HOLDING ACCUSED TO ANSWER.

1. A prisoner held under an illegal arrest cannot be convicted of offering to bribe the officer to allow him to escape.

2. Where the evidence was conflicting as to whether defendant offered to bribe the officer while he was being held under an illegal arrest, or whether the offer was made after the officer had discovered goods in his possession which would entitle him to hold defendant on another charge, the examining court was justified in holding him to further answer the action of the grand jury.

Appeal from District Court, Hill County; W. Poindexter, Judge.

Habeas corpus by R. B. Richards to obtain discharge from legal custody. From a judgment denying the writ, defendant appeals. Affirmed.

Jordan, Collins & Walker, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was taken in charge by Cranford at Abbott on a telephone communication from Hillsboro, and, while so in charge of said Cranford, it is claimed, offered him \$50 to permit him to escape. The writ of habeas corpus was resorted to to obtain his discharge, on the ground that the affidavit of Cranford does not show a violation of the law. When the case came on for trial, Cranford testified that he had received a telephone message from the sheriff of Hill county to look for a man of a particular description, who was wanted upon a charge of misdemeanor, and, receiving said message, walked over to the depot, looking out for a man of the description mentioned; and seeing a man coming toward the hotel, and later seeing him coming out of the Walker store with a bundle under his arm, went up to him and informed him that Cranford thought he (relator) was the man he wanted, and took him in custody upon the information received from sheriff at Hillsboro over the phone. He then went to the telephone office and talked with the sheriff at Hillsboro, and, after this conversation, informed appellant he would have to take him to Hillsboro, and to consider himself under arrest. He states that he then thought he recognized "a mark on the package of goods out of the house of J. L. Walker." He investigated, and found the package had been taken from Walker's

store, and was a bolt of ladies' dress goods. While at the telephone office, he searched Richards, and took all the money he had from his person, and gave it to Howell to count, which he did, and, after counting it, wrapped it up in a paper and gave it back to the officer. While in Howell's store, sitting on one of the stools in front of the cigar case and soda-fountain, Cranford says relator "said to me that he had rather give \$50 than to go to jail one night, and that he had business in Waco, and, as I would not get but \$7 or \$8 out of the case, he would give me \$50 to let him go on; and at the time he made this statement he had some silver money in his hand." This witness further states that at the time he offered this \$50 he had relator in custody for the taking of the bolt of goods from Walker's store, as well as the charge against him at Hillsboro, phoned by the sheriff, but he did not make the arrest for the theft of the goods, "but, finding the goods, and that they were stolen, I held him for that." This witness testified that he had no warrant of arrest for appellant, nor had relator committed any offense in his presence or view, nor had he committed any offense against the public peace, and he had not been directed by any magistrate to arrest relator, nor had it been shown by satisfactory proof, by the representation of a credible person, that a felony had been committed by relator and that he was about to escape, so that he could have no time to procure warrant; nor was relator carrying a pistol on his person. Cranford arrested relator simply upon the telephone communication from the sheriff at Hillsboro, and the sheriff did not inform him at the time that he held a warrant for the man, either for a misdemeanor or felony, and he never found the goods, which he says were taken from Walker's, until after relator's arrest, and he did not know whether Richards had taken them or not. It is not even certain whether, at the time the supposed offer to bribe was made, he had discovered any of Walker's goods had been stolen, and he says this may have occurred after he had taken Richards to the depot on the way to Hillsboro. He says that Richards never at any time tendered or offered to pay him anything, but said he had business in Waco, and would rather pay \$50 than go to jail one night, and proposed to pay \$50 if he could be turned loose and permitted to go. This, he states, was said in an ordinary tone of voice, where there were quite a number of people. It was placed beyond any question that no warrant was issued for relator up to the time of the arrest. There had been no complaint filed against him, but the complaint was filed and warrant issued before Cranford reached Hillsboro with relator, and complaint was filed charging him with the theft of \$30.

Howell testified that he was within eight feet of Cranford and relator during the time they were in the store, and they never had

any private conversation at any time, and neither did relator whisper to Cranford, nor did relator at any time say he would give Cranford \$50 to release him, nor did relator ever at any time, while in his store, have any money in his hands. He paid close attention, he says, to relator, because he was a stranger in the town, and was brought in his store under arrest by the constable. They talked all the time they were in the store in an ordinary tone of voice, and he was near enough to hear everything that occurred while they were in the store. That he had no interest whatever in Richards, and never saw him before until he was brought into the store.

Witness Beavers testified that he heard all that was said between Cranford and relator while they were in Howell's store, talking in an ordinary tone of voice, and there was no private conversation or whispering between them; that relator never stated to Cranford at any time while they were in the store that he would give him \$50 to release him, so that he could go on to Waco, nor did he have any money in his hands while in the store. This witness was assisting Cranford in making the arrest of relator, and in investigating the matter of the charge against him made at Hillsboro.

Witness Davidson testified that he saw Cranford search relator and take his money from him, and gave it to Howell, and witnessed the count. This amounted to \$221. That they tied it up in a package and handed it back to Cranford. He testifies as did the other witnesses in regard to the conversation, and denied that there was any offer made by Richards to pay Cranford \$50 for his release. This is practically the case.

There are two propositions relied upon: First, that there was nothing offered by relator for his release from custody; and, second, if there was, it was not a violation of the statute. The arrest was clearly illegal, so far as the case at Hillsboro is concerned; and under the authority of *Moore v. State*, 69 S. W. 521, 5 Tex. Ct. Rep. 583, before the offer to bribe could be a violation of the statute, the arrest must be a legal one.

In regard to the theft of Walker's goods, for which relator was also being held, the evidence discloses that he was in possession of same. Cranford leaves it doubtful whether he examined into this theft case before or after the bribe was offered. If offered before the officer ascertained the theft, he was not holding him by virtue of article 364, Code Cr. Proc. 1895. But if the offer was made after ascertaining this fact, then his detention was legal, relator being in possession of the stolen goods. Being in doubt as to this fact from the evidence, the court was justified in holding relator to answer this charge of offer to bribe, because, under article 364, Code Cr. Proc. 1895, the officer could arrest, and it would become a question for the jury, if indictment is found, whether bribe was offered

before or after arrest. In so far as the contradiction as to whether the bribe was in fact offered, this is a question of fact to be decided in the final trial; the evidence being contradictory in this record. Where it is in doubt that an offense has been committed, the party should be held by the examining court to further answer the action of the grand jury.

The judgment is affirmed.

HERNANDEZ v. STATE

(Court of Criminal Appeals of Texas. March 4, 1903.)

HOMICIDE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

1. In a prosecution for murder, circumstantial evidence held not sufficient to exclude every reasonable hypothesis than defendant's guilt, and insufficient to support a conviction.

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Calixto Hernandez was convicted of murder, and he appeals. Reversed.

Uvalde Burns, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 45 years.

The following is a brief synopsis of all the facts adduced on the trial, to wit:

Juana Tranca testified that Cruz Pena (deceased) lived at her house in El Paso; that she last saw him alive about 4 o'clock in the morning of Sunday, October 12, 1902, when he came into the house, and got his coat, and at that time Calixto Hernandez and Petronello Teran were with him, but they remained on the outside; and on Saturday evening these same two men were at witness' house with deceased about 6:15 o'clock. She further states: "I saw them plainly Sunday morning about 4 o'clock, when they came to my house with Pena. I was awake when Pena came, and asked him to go to bed. He said, 'No,' he was going with his friends, meaning defendant and Teran, who were standing on the outside. I got up, and went outside of the house, and followed them some distance up the alley to see which way he (Pena) was going. Pena was drinking. They were going towards town. When they left, they were going in the direction of where Pena was found dead. It was within two blocks of where I last saw them. I had not known Hernandez and Teran before Saturday eve, when I saw them as stated. When they came to the house at 4 o'clock Sunday morning, he (Pena) had one-half bottle of sotol, which he left at the house. When Pena came to my house on Sunday morning, he had me give to him five American dollars.

I was in the habit of keeping his money for him until he would send it to his family. I am certain that Hernandez and Teran are the men I saw at my house at 4 o'clock on Sunday morning. I don't know when they left town. Understood they left the following Wednesday." On cross-examination she stated that deceased had lived at her house for three months and one day, the house consisting of one room, and having one bed. Cruz slept on a pallet in the room every night except the one previous to his death. That witness' husband is a musician, and was away from home on the night of October 11th, and did not return until 11:30 o'clock October 12th. Cruz Pena was a first cousin of her husband. Deceased was 33 years old, and had a wife in Mexico. She states that she was within four feet of the parties, and saw and knew them, and could not have been mistaken in their identity, though it was quite dark on that Sunday morning. The reason witness did not say anything about the five American dollars on the examining trial of defendant was because she was not asked about it.

Fred Delgado, a policeman in El Paso, testified that about 5 o'clock on Sunday morning, October 12th, he and Capt. W. A. Mitchell went to a place on Utah street, between Third and Fourth streets, "where we found a man dead, whom I afterward learned to be Cruz Pena. The man had been killed by being struck on the head and his skull crushed in on the right side. I judge he had been struck with a rock, as we found a rock near by the body, which, upon applying to the skull of Pena, fit the indentation in his head. I judge Pena had been dead 25 or 30 minutes. His body was yet warm, and the flesh trembling. His pants' pockets were turned inside out. Several days afterward I was led to believe, from what I heard through Juana Tranca and Rita Garcia, that Calixto Hernandez and P. Teran had killed Pena. I went about and near the house of Hernandez daily for about a week, but did not see either Hernandez or Teran until the 19th of October, when I arrested them at Hernandez' house, a little after sunrise. Hernandez was in bed at the time. Mitchell testifies to the same facts as Delgado with reference to the finding of the body and the character of the wounds.

Dr. Anderson testified that deceased died from the effects of a blow on his head, inflicted with some blunt instrument.

A. W. Spencer, justice of the peace, testified that he was called early on Sunday morning October 12th, between 5 and 6 o'clock, to Utah street, between Third and Fourth streets, and found the dead body of Cruz Pena. His head was crushed in on the right side, and he was also struck on the left side of his head. A rock was lying about four feet from the body, and it fit in the wound on the right side of the head. "I found nothing on his person except his cloth-

ing and a piece of watch chain, his pocket was turned wrong side out. * * * When I arrived at the body, there were present George Barrett, W. A. Mitchell, Fred Delgado, policeman, and Pancho Munoz, and some other people."

Pancho Munoz testified that about 5 o'clock on the 12th of October his attention was called to a body on Utah street, and that he called George Barrett, a policeman, on the opposite side of the street, who left witness to watch the body, and telephoned to the police station; and in about 15 or 20 minutes Mitchell and Delgado arrived, and shortly afterwards Justice Spencer. The body of deceased was exactly in the same position and condition when these parties arrived as when witness found it.

Fouseca testified that defendant Hernandez lived in his house—not the same one witness lived in, but an adjoining one; that witness was at home next door to defendant's home every day from October 1st to November 1st, and did not see defendant at his home or anywhere else during all that time; that witness saw his wife every day during that time; witness did not see Petronello Teran during that time, and had not seen defendant since August, 1902, until here in the courthouse; that witness was not at home the morning defendant and Teran were arrested.

Rita Garcia testified that he saw defendant and Teran with Cruz Pena on the evening of the 11th of October, 1902. "I saw him at 6:15 p. m., at the corner of Juarez avenue and Seventh street. Defendant and Teran were then with him. As I passed them, I heard defendant say to Pena, 'Come on.' I passed on. I saw nothing more of the parties till the next day, when I saw Pena dead as heretofore described. Did not see defendant or Teran till the following night, October 12th, when I talked with them at Consecos's house. I remarked in the presence of Consecos's family, where defendant was visiting, that Pena had been killed. Hernandez remarked, 'Poor fellow,' and shortly thereafter he and Teran went out." Witness states he had known Pena since he was five years of age. Witness denies that he went to defendant's house before October 12th and requested the loan of money, toquilla, and pistol, and, being refused, did not get mad, and threaten to do them harm, but asked them for medicine for a sick person.

Amillo Consecos testified that "defendant was a laborer, and often goes off to work; have heard of his working near Alamogordo; don't know when he went off the last time to work;" that witness rents to defendant, and did not notice him about the place on 13th or 14th of October, but he may have been there.

Calixto Hernandez testified as follows: "I never saw deceased in my life. Never quarreled with or spoke to him in my life. I was visiting my next-door neighbor, only a few

feet from my house, Sunday night about 8 o'clock, October 12th. Rita Garcia remarked somebody had murdered Cruz Pena. I remarked, 'Poor man.' I am a laboring man, and live with my family on El Paso street, in El Paso. I work whenever I can get work. Have been working up near Alamogordo, cutting wood. On the night of October 11th I went to the El Paso & Northeastern Railway Depot with my wife and Teran, intending to go to a point near Alamogordo to work; but the train pulled out a short time before we got to the depot. I remained at home until Wednesday night, October 15th, when I and Teran went up to Alamogordo. Stayed up at a point near Alamogordo, working at a log camp, until the party with whom I and Teran was boarding left. Having no place to stay, Teran and I then walked back to Alamogordo. Reached there about 11 o'clock p. m., and took the train immediately for El Paso, and reached home about 4 o'clock a. m. Teran and I went at once to bed, and we were arrested a little after sunup the morning of my arrival home. I got back the last part of the month. I stayed up there working about 7½ days. Teran and I remained at my house continuously from the time we returned from the depot Saturday night till we went off to Alamogordo on the following Wednesday night, except when I went to a neighboring store to buy some provisions for myself and family, and also to visit my next-door neighbor. On the morning of my return, and before my arrest, I saw from my bed Rita Garcia, and bade him good morning." Cross-examined: "Yes, Petronello Teran and I were together all the time, every day and every night, from October 11, 1902, until we were arrested at my house after we came back from Alamogordo."

Defendant's wife, — Hernandez, testified: "I am wife of the defendant. Never saw him with or in the presence of Cruz Pena. My husband, Teran, and myself went to the depot of the El Paso & Northeastern on Sunday night, October 11, 1902. They intended to go to Alamogordo to work, but the train left a few minutes before we got to the depot. We then returned home at 9 o'clock, and my husband and self retired. He did not go out of the house after we retired. He remained around the house continuously till he went off to work at Alamogordo, which occurred on the following Wednesday night. He remained away 15 days. Returned about 4 o'clock a. m. from Alamogordo. Went immediately to bed, and was arrested a little after sunrise by an officer. Rita Garcia was mad with Calixto because we refused to let him have some toquilla, some money, and a pistol only a few days before Pena was killed. He [Garcia] became very angry, and said he would yet cause us to regret having refused his request."

It will be seen from the foregoing state-

ment, that the evidence is purely circumstantial as to appellant's guilt. In our opinion, it is not of that cogency that excludes every reasonable hypothesis than that of the guilt of appellant. In fact, it merely shows appellant was seen a short while before the homicide with deceased, and he left the town of El Paso, and did not return for some time.

We cannot permit this verdict to stand. Because of the insufficiency of the evidence, the judgment is reversed, and the cause remanded.

HAWK v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1908.)

LOCAL OPTION LAW—VIOLATION—PHYSICIANS—PRESCRIPTIONS FOR LIQUORS.

1. Pen. Code 1901, art. 405, prohibits any physician from giving a prescription to be used in obtaining any intoxicating liquor in a county, justice precinct, city, or town in which the sale of intoxicating liquor has been prohibited under the laws of the state, to any one who is not actually sick. *Held* not to prevent a physician writing such a prescription for himself.

Appeal from Parker County Court; D. M. Alexander, Judge.

W. L. Hawk was convicted of crime, and appeals. Reversed.

Martin & Martin, for appellant. R. B. Hood, for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

The charging part of the information is as follows: "That in Parker county in said state, on the 28th day of April, A. D. 1900, an election, in accordance with the laws of this state, was held under authority of and order of the commissioners' court of said county theretofore duly made and published, to determine whether or not the sale of intoxicating liquors should be prohibited in Springtown school district number three (3) in said state and county, the metes and bounds of said district and subdivision being fully set out and described in the records of the commissioners' court of Parker county, Texas, volume three (3), and beginning with the top of page 539; and the qualified voters at said election did then and there determine that the sale of intoxicating liquors should be prohibited in said district and subdivision of said county, and thereupon the commissioners' court of said county did pass and publish an order declaring the result of said election, and prohibiting the sale of intoxicating liquors in said district and subdivision, and thereafter, to wit, on or about the 11th day of January, A. D. 1902, one W. L. Hawk, late of said county and state, who was then and there a practicing physician, did unlawfully give a prescription to be used in obtaining intoxicating liquor in said district and sub-

division to himself, the said W. L. Hawk, who was then and there not actually sick, and without a personal examination of himself, the said W. L. Hawk," etc.

Accused filed a motion to quash: "(1) Because the information does not charge the defendant with the violation of any penal law of the state. (2) It only charges defendant with having given a prescription to be used in obtaining intoxicating liquor in a school district subdivision of the county which had adopted local option, when the law only prohibits the giving of such prescriptions in counties, justice precincts, or incorporated cities. (3) Because said information shows the prescription was given by defendant to himself, which in law is not a violation."

Article 405, Pen. Code 1901, provides: "If any person, who is not a regular practicing physician shall give a prescription to be used in obtaining any intoxicating liquor in any county, justice precinct, city or town, in which the sale of intoxicating liquor has been prohibited under the laws of this state; or if any practicing physician who is directly or indirectly, either for himself or as the agent or employé of another interested in the sale of intoxicating liquor, shall give a prescription to be used in obtaining any intoxicating liquor in any such county, justice precinct, city or town; or if any physician should give a prescription to be used in obtaining any intoxicating liquor in such county, justice precinct, city or town, to any one who is not actually sick, and without a personal examination of such person, he shall be punished," etc. We think it was the intent of the Legislature by this article to make it an offense to give a prescription to another party than the one writing the prescription, and that it does not cover the case at bar. In other words, it is not unlawful for any one to write a prescription for himself. In this view of the case, it is not necessary to pass upon appellant's other grounds of objection.

For the error discussed, the judgment is reversed and the prosecution ordered dismissed.

MCANALLY v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—REVIEW—SPECIAL CHARGES—STATEMENT OF FACTS.

1. The overruling of an application for a continuance, the rejection and admission of evidence, and the argument of the district attorney cannot be reviewed on appeal in the absence of a statement of facts.

2. Misconduct of the district attorney in argument cannot be reviewed where defendant did not request a special charge that the jury should disregard the argument.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1681.

Fred McAnally was convicted of burglary, and he appeals. Affirmed.

Thompson & Payne, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of 2½ years.

Appellant complains of the overruling of his application for continuance, and the rejection and admission of various testimony, as shown by bill of exceptions; but none of these matters can be revised in the absence of the statement of facts. He also complains of the argument of the district attorney. Neither can this be reviewed without the facts, because we are unable to determine whether or not it prejudiced the rights of appellant. Besides, appellant did not request a special charge instructing the jury to disregard such argument.

No reversible error appearing by the record before us, the judgment is affirmed.

ALDREDGE v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

MANSLAUGHTER—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

1. Evidence held sufficient to suggest the issue of manslaughter, so as to justify its submission to the jury.

2. The concluding clause in a charge on self-defense based on threats, that, "unless you find beyond a reasonable doubt the defendant is not justifiable, you will acquit him," will be held not misleading, the court having instructed that, if deceased had threatened to take defendant's life, and defendant knew thereof, and at the time of the shooting deceased by any act manifested an intention to execute the threat, defendant would be justified, but if at the time of the shooting deceased had done no act manifesting an intention to execute such threat, then the threat would afford no justification, "unless," etc., as above, by which is meant, unless the jury find beyond a reasonable doubt that defendant is guilty, they will acquit.

Appeal from District Court, Angelina County; Tom C. Davis, Judge.

Charlie Aldredge appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of four years.

One of the contentions in appellant's motion for new trial is that the issue of manslaughter was not suggested by the facts. Appellant's testimony while upon the stand as a witness suggested this theory, as well as did the state's witness Della McKaney.

On the morning of and prior to the difficulty, appellant, who was boarding at the residence of Dave McKaney, got up early, and went hunting. Upon his return, and while cleaning a squirrel, deceased was sitting on the gallery, near appellant, and a conversation ensued, in which deceased informed appellant that he must seek another boarding place. Appellant states he hesitated before replying, and then said: "What have I done? I don't care for getting another boarding place, but I would like to know what I have done to you." Deceased replied: "Never mind. I don't care to tell you now, but you must get another boarding place." The conversation was pursued along this line, and matters that had previously occurred were discussed between them, which was more or less offensive to both; and finally appellant said to deceased: "'Some time ago you came down to the field, and told me that you had something to tell me that a friend had said about me, but refused then to tell me.' I said, 'Dave, you know you are not treating me right.' In reply to this he said I was a damn liar, got up, picked up his chair, raised it up in a striking attitude, and started towards me. I then jumped up, picked up my gun, stepped back a few steps, and said to him, 'Dave, stop; don't you come on me with that chair.' I said this to him three times. The third time he stopped, put the chair down by his side. He had then advanced three or four steps toward me. When he put the chair down, he turned around, and I saw his right hand under his jumper behind. I saw the appearance of something which I took to be a pistol. I then threw up my gun, and shot as soon as I could. I shot him with a load of squirrel shot in the head, and he fell upon the floor, his feet near the gallery, his head near the wall of the house. As he fell, a hammer fell on the floor. I do not know where it came from, but it fell as he did. Shortly after he fell, his little boy came around, and picked up the hammer." The only other eyewitness to the transaction was the widow of deceased. Her testimony is to the effect that about 10 o'clock in the morning appellant returned from his hunting excursion, having with him a double-barrel shotgun and a squirrel. About the time defendant came up deceased came to the house for the purpose of getting a drink of water. After drinking the water, he sat down in a chair near a post on the gallery. About this time appellant walked to the edge of the gallery, and laid his gun on the edge of the gallery, and commenced skinning the squirrel. Deceased and appellant began disputing, and witness' husband informed appellant that he must seek another boarding place. She was then about 8 or 10 feet from her husband, and heard appellant give her husband the damn lie. Her husband replied with same expression, and arose, picked up the chair, and had it in a striking attitude, starting in the direction of appellant. Appellant told

deceased not to come on him with the chair; if he did, he would kill him. Deceased stopped, and set the chair down. At this moment witness crossed the hall into a room, where she was in full view of appellant, but could not see her husband. Appellant shot, and when she went to the door she discovered the whole load had taken effect in deceased's head.

There is evidence from the witnesses Melton and Phelps showing boisterous and unbecoming conduct on part of appellant at the residence of deceased, while in an intoxicated condition, a night or two before the homicide, and expostulations on the part of deceased. Nichols testified that he had spent the night at the residence of deceased, and slept with appellant a short time before the difficulty, and appellant asked witness if he had ever heard deceased say anything about him, and, being informed in the negative, appellant remarked that deceased had better not talk about him; "if he did, he would knock his triggers from under him." He also introduced evidence of one or two witnesses to the effect that deceased had said he intended to kill appellant on the day of the homicide. We are of opinion that this testimony suggested the issue of manlaughter, and it would have been a fatal oversight not to have submitted that issue.

It is not necessary to discuss the charge of the court with reference to murder, as appellant was acquitted of that offense. This excerpt of the charge is criticised: "Unless you find beyond a reasonable doubt the defendant is not justifiable, you will acquit him." This is the terminating clause of the charge on threats, and the criticism is that it is confusing. We are inclined to the opinion that the charge is not given in usual language, and might have been clearer, and less confusing, and it is rather negative in its statements; but the charge in regard to threats as a whole is sufficiently clear and explicit. We understand this charge to mean that, unless the jury should find beyond a reasonable doubt that defendant is guilty, they would acquit. The court instructed the jury that, if deceased had threatened to take the life of defendant, and defendant knew of the threat, and at the time of the shooting, deceased, by any act then done, manifested an intention to execute the threat, as viewed from the standpoint of defendant, he would be justified. But, on the contrary, if, at the time of the shooting, deceased had done no act which, as viewed from defendant's standpoint, manifested an intention to execute such threats, then the threats of themselves would afford no justification. Unless they should find beyond a reasonable doubt that defendant is not justifiable, they would acquit. The excerpt criticised is a line taken out of the entire charge with reference to self-defense based on threats. In our view, in the light of the whole charge, in regard to this matter, even though it is not as clear and

intelligible as it might be, it did not mislead the jury to appellant's injury.

We are of opinion the evidence justified the conviction, and, there being no such error as requires a reversal of the judgment, it is affirmed.

BYNUM v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—PRINCIPALS—THEFT—EVIDENCE—INSTRUCTIONS.

1. It is not error to refuse to give requested instructions covered by the general charge.

2. Where defendant assisted in taking certain mules as a principal, and went 25 or 30 miles for that purpose, and was present at the taking, he was guilty of larceny as a principal, whether he advised and encouraged the taking at the time or not.

3. Where an indictment contained counts for a theft, and for receiving two mules alleged to have been stolen, it was not necessary for the state to elect on which count it would rely for conviction.

4. Two mules were taken from the owner's pasture at night, and three or four days afterwards were offered for sale by defendant in a city some 90 miles away. The mules were tracked from the pasture to the city, and defendant, when questioned, first stated that he had raised them, and, afterwards, that he had bought the mules from another. *Held*, that the evidence was sufficient to sustain a conviction for theft.

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Claud Bynum was convicted of the theft of certain mules, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment contains counts for theft and receiving stolen property, alleged to be two mules. The mules were taken at night from the lot or pasture of Mrs. Childers, in Red River county, and three or four days afterwards were offered for sale by appellant near Texarkana, in Bowie county, about 90 miles distant. The witness Stevens, upon being informed of the theft of the mules by his sister, the alleged owner, immediately went in search, and pursued the tracks of the mules until he found them in the possession of the officer near Texarkana. The tracks, after leaving the pasture of Mrs. Childers, led to appellant's residence, and thence to Texarkana. Appellant, when his right to possession of the mules was challenged or called in question, stated he had raised them. In a subsequent conversation, a few hours later, he made another statement, to the effect that he had recently purchased them. Appellant introduced evidence to the effect that he bought the mules from another party, who was also indicted for the theft of the mules. Some criminative facts we deem unnecessary to detail.

¶ 3. See Indictment and Information, vol. 27, Cent. Dig. §§ 443, 444.

It is not necessary to consider the count with reference to receiving and concealing the stolen property, as the jury convicted him on the first count, charging theft.

It is contended the court erred in not giving special instruction requested by appellant in reference to his theory of purchase. This was not error, inasmuch as the court gave a charge upon this theory of the case. The charge on principals is also criticised, but, as we understand the charge as given, it is most favorable to appellant, and not only charges that he must have been present at the time the mules were taken, if taken by another, but it was necessary, in addition, that he advised, encouraged, etc., those doing it. Certainly appellant cannot complain of this, for it is more favorable than called for by the law. If appellant assisted in taking the animals as a principal, he went 25 or 30 miles for that purpose; and if he did, and was present at the taking, it would make no difference whether or not he advised and encouraged at the time; if he had so advised in advance, and was present, he would be a principal.

It is insisted the court erred in not requiring the district attorney to elect upon which count he would rely for a conviction. This was not necessary. Where more than one count is inserted in the indictment to meet the probable state of facts introducible on the trial, as in theft and receiving stolen property, it is not necessary for the state to elect.

It is contended that the evidence is not sufficient to support the conviction. In our judgment enough of the facts have been stated to show the jury were justified in their conclusion.

The judgment is affirmed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—CHARGE ON WEIGHT OF TESTIMONY—CORROBORATION OF ACCOMPLICE.

1. A charge that the jury cannot convict defendant on the testimony of the accomplice unless it is corroborated is on the weight of testimony, as assuming the truth of the accomplice's testimony; which is not cured by the jury being told that they are the judges of the facts proved and the credibility of the witnesses, and the weight to be given their testimony.

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Price Jones appeals from a conviction. Reversed.

T. W. Carlock, W. F. Moore, and Fred S. Dudley, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in

the penitentiary for a term of 15 years; hence this appeal.

The state's theory is that the homicide was committed by appellant, in connection with Sam Tittsworth. The state's case mainly depends on Tittsworth's testimony, in connection with the circumstances proved by other witnesses, which the state claims tend to corroborate the accomplice, Tittsworth. Deceased, a negro woman about 19 years of age, was the stepdaughter of Tittsworth, and lived at his house. Appellant lived some 2½ or 3 miles therefrom. Deceased was last seen alive on Monday morning. She left the field, where she was working with other hands, about 8 or 9 o'clock, went to the house, a short distance off, changed her clothes, and came back through the field, and in a short time went in the direction of Pine creek, towards an old untenanted house, some quarter of a mile distant. On the following Wednesday her body, which was considerably decomposed, was found in the timber not far from said house. The back of the head was found to have been struck and crushed with some hard or heavy instrument, and there were bruises on her thighs and ankles. Tittsworth, the accomplice, testified, in substance, that appellant had agreed Sunday night before the homicide, Monday morning, to meet deceased and himself where the body was found, for the purpose of producing an abortion on her; that when he approached the place he saw appellant there on the body of deceased, or kneeling close to her body; that when he came up appellant evidently had given her some drug which caused her to froth at the mouth; and she was about to have a fit, and tried to halloo or scream. Appellant told him to come and hold her, and witness caught her hands, when appellant struck her on the back of the head with a heavy stick, and this blow killed deceased. As stated before, there was other testimony tending to corroborate the witness and connect appellant with the homicide. The state also used the testimony of one Jasper Fisher, who appellant claimed was an accomplice. This witness testified that deceased was pregnant, which was caused by himself, and that he intended to marry her; and a short time before the homicide agreed to give appellant \$5 to produce an abortion on her. This is a sufficient statement of the case to discuss the issues raised in the assignments.

Appellant excepted to that portion of the charge of the court on accomplice testimony; and insists said charge is erroneous, because it assumes the truth of the testimony of the accomplice Tittsworth, and only requires him to be corroborated in order to convict appellant. The court gave a charge on accomplice testimony in connection with both the witnesses Tittsworth and Fisher. As to Fisher he submitted the issue to the jury, and authorized them to determine whether or not said Fisher was an accomplice; and he also

instructed the jury that one accomplice could not corroborate another. As to the witness Tittsworth, the court instructed the jury as follows: "You are instructed that the uncontradicted evidence before you shows that, if Malinda Alexander was murdered, Sam Tittsworth was an accomplice to said murder, as the term 'accomplice' is above defined to you; and you cannot convict defendant upon his testimony unless the same has been sufficiently corroborated by other evidence before you tending to connect defendant as a principal with the commission of the crime charged against him in the indictment." In the succeeding paragraph, the court instructed the jury as follows: "The defendant, Price Jones, cannot be convicted in this case, unless you believe beyond a reasonable doubt that there is evidence before you independent of the testimony of Sam Tittsworth, and independent also of the testimony of Jasper Fisher, if you find that Jasper Fisher was an accomplice, corroborating the said witness upon material matters which tend to connect said defendant with the commission of the murder charged." In support of his contention that said charge assumes the truth of the accomplice testimony, and is a charge on the weight of testimony, appellant cites us to the case of *Bell v. State* (Tex. Cr. App.) 47 S. W. 1010. We have examined said case, and the charge there given was much like the charge in this case. We there held that such a charge was error, as upon the weight of testimony, assuming, as it did, the truth of the accomplice's evidence. Here, the court tells the jury that they cannot convict defendant upon the testimony of the accomplice, unless the same has been corroborated by other evidence, etc. This charge is reiterated three several times. In our opinion it is tantamount to telling the jury that, if they believe the testimony of the accomplice has been corroborated, they could convict. In other words, the charge simply requires the jury to believe that the accomplice has been corroborated, thus suggesting to them the truth of the accomplice's testimony. The very fact that the accomplice is required to be corroborated is a recognition of the weakness of his testimony; and for the court to assume, as was done here, that the accomplice is to be believed, and the only required step for the jury to take is to find that he has been corroborated, is the most vicious character of a charge on the weight of the testimony. We do not think it cures the vice by telling the jury, as was done in this instance, in the conclusion of the charge, that they were the judges of the facts proved and the credibility of the witnesses, and the weight to be given to their testimony. As was said in *Bell's Case*, supra, "the court should not tell the jury that, if they believed that the testimony of the accomplice has been corroborated, to find defendant guilty; but in some method they should be clearly told, if they believe the ac-

complice's testimony to be true, and that it showed or tended to show defendant was guilty of the offense, still they could not convict, unless they further believed that there was other testimony, outside of the accomplice testimony, tending to connect defendant with the commission of the offense charged." We are not laying down a form of charge, but we are stating the essential elements that should be embodied in such a charge.

Appellant also complains that the judgment should be reversed because the testimony of the accomplice is not corroborated by other testimony which tends to connect appellant with the commission of said offense. We are not inclined to agree with appellant in this contention. But the very fact that the outside testimony of a corroborative character is questioned affords a strong reason why the court, in a charge on accomplice testimony, should be careful to present such a charge fairly and without in the least assuming the truth of the accomplice evidence.

For the error discussed, the judgment is reversed and the cause remanded.

ALBERT v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—FORGERY—INDICTMENT—VERDICT—SUFFICIENCY.

1. A variance in an indictment for forgery between the name "H. A." L. in the tenor clause and "H. O." L. in the purport clause was immaterial.

2. An indictment for forgery, alleging the forged instrument as follows: "El Paso, Texas, Nov. 8, 1902. No. First National Bank, pay to the order of Henry Albert \$15.00 Fifteen ⁰⁰/₁₀₀ Dollars. H. A. Lockwood"—was not objectionable on the ground that it did not create a pecuniary obligation, as it purported to be drawn on any First National Bank as well as the First National Bank of El Paso.

3. A verdict reciting: "The State of Texas vs. Harry Albert. 3,276. We, the jury in the above styled and numbered case, find the defendant, Harry Albert, guilty as charged in the second count of the indictment, and assess his punishment at two years in the penitentiary," signed and dated, was not objectionable on the ground that defendant was prosecuted under the name of "Henry" Albert, since the names "Henry" and "Harry" are synonymous, and the verdict otherwise sufficiently identified defendant as the person charged in the indictment, and by the number of the case corresponding with the number of the indictment.

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Henry Albert was convicted of forgery, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The second count of the indictment, under which appellant was convicted, is as follows: "And the grand jurors aforesaid, on their oaths aforesaid, do further say and present in and to said district court

at said October term, 1902, thereof, that heretofore, to wit, on or about the 5th day of November, 1902, in El Paso county, Texas, Henry Albert did then and there without lawful authority, and with intent to injure and defraud, unlawfully, willfully and fraudulently did make a false instrument in writing, purporting to be the act of another, to wit, purporting to be the act of H. A. Lockwood, a fictitious person. The tenor of said false instrument is as follows, viz.: 'El Paso, Texas, Nov. 5, 1902. No. First National Bank, pay to the order of Henry Albert \$15.00 fifteen ⁰⁰/₁₀₀ Dollars. H. A. Lockwood.' Against the peace and dignity of the state."

Appellant filed a motion in arrest of judgment and to quash the indictment, because it did not charge any offense; that there was a variance between the name "H. A. Lockwood" in the tenor clause and "H. O. Lockwood" in the purport clause; and because, if said false instrument were true, it did not create a pecuniary obligation, inasmuch as it is from H. A. Lockwood to the "First National Bank," and purports to have been drawn on any other First National Bank as well as the First National Bank of El Paso. We do not think any of these objections are well taken, but, in our opinion, the indictment is good.

Appellant also insists that judgment cannot be legally rendered against him, because the verdict of the jury is insufficient. The verdict is as follows: "The State of Texas vs. Harry Albert. 3,276. We, the jury in the above styled and numbered case, find the defendant, Harry Albert, guilty as charged in the second count of the indictment, and assess his punishment at two years in the penitentiary. Gray Jones, Form. Dec. 29th, 1902." We believe appellant's objections are hypercritical. "Henry" and "Harry" are synonymous, being one and the same name. Furthermore, the verdict sufficiently identifies defendant as the one charged in the indictment in the second count, and the number of the case given in the verdict corresponds with the number on the indictment. Appellant's contentions are without merit.

No error appearing in the record, the judgment is affirmed.

WRIGHT v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—APPEAL—RECORD.

1. The indictment, charge, and sentence being in conformity with law, and there being in the record neither bill of exceptions nor statement of facts, a conviction cannot be disturbed.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Will Wright appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of nighttime burglary, and his punishment assessed at confinement in the penitentiary for a term of 11 years.

There is neither bill of exceptions nor statement of facts in the record. Nor does the same contain a motion for new trial. The indictment, charge of the court and sentence are in conformity with law.

No error appearing in the record, the judgment is affirmed.

COYLE v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

AFFRAY—SELF-DEFENSE—INSTRUCTIONS.

1. Self-defense is available as a defense in a prosecution for an affray.

2. In a prosecution for an affray, where evidence was introduced showing that prosecutor advanced on defendant, who picked up a stick to defend himself, and prosecutor struck him on the head before defendant did anything, it was error to refuse to instruct on the issue of self-defense.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Will Coyle was convicted of an affray, and appeals. Reversed.

W. T. Strange, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an affray, and his punishment assessed at a fine of \$5; hence this appeal.

Appellant complains of the action of the court refusing to give a charge on self-defense as against the count charging him with an affray. We have examined the record, and find that the information contains two counts—one for aggravated assault, and one for an affray. The court gave a charge on self-defense in response to the first count on aggravated assault, but failed to give a charge on self-defense as applicable to the second count on affray, although a charge was requested by appellant on this subject. The verdict is general, finding appellant guilty, and assessing his punishment at a fine of \$5. Evidently the jury found appellant guilty of an affray, and not of an aggravated assault. The state contends that the charge on self-defense is not applicable to an affray, and cites us to Pollock v. State, 32 Tex. Cr. R. 29, 22 S. W. 19. We have examined said case, and do not regard it as applicable to this case, or as deciding that one charged with an affray cannot rely on self-defense. The headnotes are misleading. The opinion itself finds that self-defense was not an issue in the case, and that defendant could not justify his action on the ground that he did not strike the first blow. We

¶ 1. See Affray, vol. 2, Cent. Dig. §§ 5, 10, 12.

have examined the facts of that case, and, according to appellant's own testimony, he did not fire in self-defense. He stated that he had to fight or take back what he had said, having applied an opprobrious epithet to the prosecutor; and that he got out of his gig, in which he was riding, for the purpose of fighting the other party. In this case there was a quarrel between the parties; the testimony for the state showing that defendant occasioned the quarrel, while appellant's testimony shows that prosecutor brought it about. It is further shown that the prosecutor advanced on appellant, and when he saw him coming he picked up a stick to defend himself with, and prosecutor struck him on the head before he did anything. Under the facts of this case we think it should have been left to the jury, under appropriate instructions, to say whether or not appellant acted in self-defense in engaging in the fight. We do not understand that a person charged with an affray cannot set up self-defense, and defeat the prosecution, if he maintains his plea.

The judgment is reversed, and the cause remanded.

BURROWS v. STATE.*

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

MURDER—COPY OF INDICTMENT—FAILURE TO FURNISH ACCUSED—ARRIVAL AT VERDICT BY LOT—INSTRUCTION ON MURDER IN FIRST DEGREE—HARMLESS ERROR—MURDER IN SECOND DEGREE—SUFFICIENCY OF EVIDENCE.

1. It is too late after verdict to complain that the statute, giving accused the right to a two-days service of a copy of the indictment before trial, has not been complied with.

2. Where jurors in a prosecution for homicide, who disagree as to the degree of crime, agree that if on a ballot they concur on murder in the second degree a low penalty shall be assessed, and when the ballot is cast up it shows that all have voted for murder in the second degree, with punishment ranging from 5 to 50 years, whereupon, after further discussion, they determine on a punishment of 10 years, the verdict is not vitiated as having been reached by lot.

3. In a prosecution for murder, the indictment charged, as one method of killing, a beating with a stick. The evidence shows that accused, after firing several shots into the body of deceased, one of which penetrated the brain, took a large walking stick, and beat deceased about the head. *Held*, that an instruction authorizing a verdict of murder in the first degree by striking with a stick as well as by shooting was not reversible error, as, even if deceased were already dead when the beating occurred, accused was not prejudiced.

4. In a prosecution for homicide, any error in submitting the question of murder in the first degree is rendered harmless by a verdict of murder in the second degree.

5. In a prosecution for homicide, the evidence showed that accused went to deceased's house and shot the latter while lying on a pallet on the gallery, inflicting at least four wounds, two

of which were necessarily fatal, one of the bullets passing through the brain. Accused then jumped on the gallery, seized a large walking stick, and inflicted on deceased several heavy blows. *Held*, that a verdict of murder in the second degree was sustained by the evidence.

Appeal from District Court, Van Zandt County; T. B. Butler, Judge.

Joe Burrows was convicted of murder in the second degree, and appeals. Affirmed.

T. R. Yantis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant's punishment was assessed at confinement in the penitentiary for a term of 10 years, under a conviction of murder in the second degree.

The first bill of exceptions was reserved to the action of the court refusing a new trial, on the ground that appellant had not been served with a certified copy of the indictment, prior to being placed on trial. This matter comes too late after conviction. The statute gives to accused the right to have two days' service of the indictment prior to being placed on trial, in order that he may prepare himself for trial, and file written pleadings. This statute was enacted for the purpose of granting time to the accused to prepare for trial. After having gone to trial, without urging this right, and after his conviction, this statute does not apply. This does not constitute a reason for granting new trial.

It is also contended the verdict of the jury was arrived at by lot. The bill of exceptions shows that the jury upon their retirement stood four for murder in the first degree, five for murder in the second degree, two non-committal, and one for manslaughter. After some deliberation, the two jurors who were noncommittal agreed with the one who stood for manslaughter, and subsequently agreed to find a verdict for murder in the second degree. As the matter thus stood they reported to the court the fact that they could not agree. The court sent them back for further deliberation. After their second retirement, each juror wrote on a slip of paper the number of years he thought appellant ought to serve in the penitentiary, "and the agreement was that, if the jury agreed on murder in the second degree, a low penalty should be assessed, and when said ballot was cast up, it was shown that all the jurors had voted for murder in the second degree, and they ranged from 5 to 50 years; that the juror who voted for 50 years refused to come to 5 years; and the juror for 5 years, who was originally for manslaughter, agreed to go to 10 years; and the verdict was thus found, which was returned into court." Under this statement, we do not believe there is any evidence showing the verdict was arrived at by lot. The only agreement shown by this statement is that if the jury agreed to find appellant guilty of murder in the second degree then they should assess a light pen-

*Rehearing denied March 18, 1903.

¶ 4. See Criminal Law, vol. 15, Cent. Dig. § 3036; Homicide, vol. 26, Cent. Dig. § 720.

the vote should be for murder in the second degree, then it was agreed to give a low penalty. There was no penalty agreed upon under this agreement. It seemed to have been the subject of considerable discussion after they had agreed upon the degree of guilt.

In motion for new trial appellant criticises that portion of the charge in which murder in the first degree is submitted for the consideration of the jury, in this: that it would authorize the jury to find appellant guilty of murder in the first degree, by hitting deceased, and striking him with a stick as well as by shooting with a pistol. In this connection, the evidence shows that appellant, after firing into the body of deceased several pistol shots, took a large walking stick, and beat him about the head, and perhaps on the body. We do not see how this could have injured appellant, even had the verdict been for murder in the first degree. If appellant had already killed deceased by shooting him through the brain with a pistol, it could not have injured him in the slightest for the court to have charged as it did. The beating with the stick was one of the means alleged in the indictment. If deceased was not killed by the pistol shot, and the beating with the stick aided in bringing about the death, the charge was correct. But aside from this, it is not necessary to discuss the question, because appellant was acquitted of murder in the first degree, and for this reason this charge ceased to be an element in the case.

It is contended that the evidence is not sufficient. We are of opinion the verdict is remarkably mild. The evidence for the state shows that appellant went to the house of deceased, and shot his victim to death while lying upon the pallet on the gallery, inflicting at least four wounds, two of which it seems were necessarily fatal, one of them passing through the brain. He then jumped on the gallery, seized a large walking stick, belonging to deceased, and inflicted on his victim several heavy blows.

The judgment is affirmed.

SEBASTIAN v. STATE.*

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

LOCAL OPTION LAW—VIOLATION—INSTRUCTIONS—EVIDENCE.

1. Under the provisions of the statute, a local option law is put into operation in a county by the orders and declarations of the result and of the proper publication thereof, of the commissioner's court, and, until this has in some way been attacked, the trial court, in a prosecution for violating such law, is justified in informing the jury that the law is in force.

*Rehearing denied March 12, 1903.
72 S.W.—54

an expert, who drank some of the liquor, that it was alcohol, is admissible.

3. In a prosecution for violating the local option law, where the proof shows that the liquor sold was alcohol, it is not necessary to submit a special charge defining intoxicating liquor within the meaning of the law, as there is no question but that alcohol is intoxicating.

4. A charge that alcohol is an intoxicant is not on the weight of evidence.

5. In a prosecution for violating the local option law, a witness testified that he gave defendant a dollar to buy witness something to drink; that defendant said he would try to get it, and shortly returned and told witness he could "find it by some barrels by the bathroom"; that he went back there, and found two small bottles. It was proved that the liquor was alcohol. Defendant rested his case on the testimony of the state. *Held*, the evidence was sufficient to sustain a conviction.

Appeal from Hale County Court; W. C. Mathes, Judge.

B. E. Sebastian was convicted of crime, and appeals. Affirmed.

Wilson & Kinder and H. C. Randolph, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50 and 20 days' confinement in the county jail.

Exception was reserved to the introduction of the order of the commissioners' court, under and by virtue of which the election was held; also the order of said court declaring the result, and entry by the county judge certifying the result of said election had been published for four successive weeks in the Hale County Herald, on June 13, 20, and 27, and July 3, 1901. This entry by the county judge was made on the 10th of July, 1901, seven days after the last day of publication. The objection to the first two orders was "because local option did not exist in the county"; second, that the result was not properly published; and, third, said order "does not prohibit the sale of liquor by every one." These matters have been so frequently decided that we deem it hardly necessary to discuss them. The commissioners' court, of its own volition, had the authority to order the election. It is not necessary to incorporate, in the order declaring the result, exceptional sales; nor the manner in which these sales are excepted from the provisions of the law; and that the law was published the proper length of time is made certain by the statement of the county judge that it was published on June 13th, 20th, and 27th, and July 3d. The certificate of this fact was entered on the minutes of the court on July 10, 1901. Wherein the publication was not for four successive weeks or the proper time required by law, pointed out by appellant in any of its attacks upon the orders of the court simply a statement.

The court charged the jury that the law was in force in the county. Under the facts of this case, this was correct. Under the provisions of the statute, the law was put into operation in that county by the orders and declarations of the result and the proper publication. Until this has been in some way attacked, the court is justified in informing the jury that the law is in force. If there had been an attack upon the legality of the election, and there was evidence tending to cast doubt upon it, or to raise the issue as to whether the law was properly put into effect in the county, the court would have been in error in assuming that it was in operation; and in such an event it should have been submitted to the jury, under proper instructions, as to whether or not it was in force. But that rule does not apply here, nor has it since *Irish v. State*, 34 Tex. Cr. R. 130, 29 S. W. 778.

Hunsaker was permitted to testify that "he drank some of the stuff. Mapes brought it from some place, and told me he had something to drink. I asked him what it was, and he told me it was alcohol; told me where he got it, and I drank some of it." This was objected to because irrelevant, immaterial, and hearsay, and made in the absence of the defendant. The bill is confused and uncertain to some extent; but the evidence shows that Mapes bought the alcohol from appellant, and immediately carried it over to Hunsaker, and himself, Keith, and Hunsaker drank a pint bottle of it. Mapes testified this was the identical alcohol or liquor that he bought from appellant, and that he immediately carried it to Hunsaker, and the parties mentioned drank it. Hunsaker seems to have been placed upon the stand to prove that it was alcohol; that was the force and point of his testimony. While this might be said to be matters occurring between Hunsaker and Mapes, at the same time this alcohol was identified as being that purchased from defendant; and the state was seeking to prove its intoxicating properties. This objection would be more to the weight than to the admissibility of the testimony. Unquestionably the evidence of an expert could have been used, if he analyzed the liquor and testified in regard to the result reached by the analysis. How expert Hunsaker may have been, he testified that it was alcohol. While it may not have been as cogent as that of an expert, or may have been more so, according to the belief of the jury, still it was admissible to prove that the liquor bought by Mapes was intoxicating. As before stated, it was unquestionably identified as the liquor sold by appellant to Mapes. We think this testimony was properly admitted.

A special charge was asked defining intoxicating liquors within the meaning of the law; that is, "such as intended for use as a beverage, or is capable of being so used, which contains alcohol, either obtained by

fermentation or by the additional process of distillation, in such proportion that it would produce intoxication when taken in such quantities as may practically be drunk; and, unless you believe from the evidence beyond a reasonable doubt that the liquor sold by the defendant comes within the above definition, you will find defendant not guilty." It was not necessary to give this charge, as there is no question that alcohol is intoxicating; and the proof shows that the liquor sold by appellant to Mapes was alcohol. However, the court did charge the jury that alcohol was an intoxicant. We believe the court was correct; and such charge was not upon the weight of evidence.

The court was also requested to charge the jury, if they should believe that defendant purchased intoxicating liquors for Mapes, or acted as the agent of said Mapes in the purchase of the intoxicants, they would find him not guilty. This might be a proper charge under a statement of facts suggesting that issue, but there is nothing in this record indicating appellant bought the alcohol from anybody. Appellant did not see proper to take the stand in his own behalf, and rested his case upon the testimony of the state. Mapes testified that he gave appellant \$1 with which to buy him something to drink, and asked appellant if he could get it for him. He said that he would try, but did not know whether he could or not. He went out, and came back after a short time, and "told me that I would find it by some barrels by the bathroom. I went back there, and found two small bottles. I think they were half-pint bottles. I took them over to Hunsaker's place of business, and Hunsaker, Fred Keith, and myself drank one of the bottles. I think it was alcohol in the bottles." We do not believe this evidence suggested appellant bought the intoxicants.

The evidence is sufficient to sustain the verdict of the jury and the judgment is affirmed.

WILKERSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

GAMING—STATUTES—PLACE — HOTEL — NEGATIVING FACT OF PRIVATE RESIDENCE.

1. Pen. Code, art. 379, as amended by Acts 27th Leg. c. 22, p. 26, enacts that if any person shall play at any game with cards at any house for retailing spirituous liquor, storehouse, tavern, inn, or other public house, or in any street, highway, or other public place, or at any place except a private residence occupied by a family, he shall be fined. *Held*, that the phrase "any place except a private residence occupied by a family" does not relate to the previous provisions, and an indictment charging gaming at a hotel is sufficient, though it does not negative the fact that the game was in a private residence.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Pat Wilkerson was convicted of gaming.

and he appeals. **Affirmed.** Rehearing denied.

Miller & Fouraker, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The charging part of the indictment under which appellant was convicted alleges that he "did unlawfully play at a game with cards in a public place, to wit, a room in the St. George Hotel building, then and there occupied and used for the purpose of gaming." It is contended, under article 379, White's Ann. Pen. Code, as amended, that this indictment is not sufficient, because it fails to negative the fact that the game of cards was in a private residence. The amended article reads as follows: "If any person shall play at any game with cards at any house for retailing spirituous liquor, storehouse, tavern, inn or other public house, or in any street, highway, or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family, he shall be fined." The contention is that the expression, "or at any place except a private residence occupied by a family," relates to and qualifies all the provisions of the article. This article prohibits gaming in four different sections—at public places, such as houses for retailing spirituous liquor, storehouse, tavern, inn, and other public houses; or any street, highway, or other public place; or in an outhouse where people resort; or at any place except a private residence. The latter clause is simply to cover all other places not enumerated in the three previous subdivisions, and does not apply to and qualify the previous subdivision. Appellant was indicted under the first clause of this statute, and *Comer's Case*, 26 Tex. Cr. App. 509, 10 S. W. 106, is in point. Therefore we are of opinion that the indictment is sufficient. *Hodges v. State* (decided at present term) 72 S. W. 179. This is the only question presented for revision.

There being no error in the record, the judgment is affirmed.

On Rehearing.

(March 18, 1903.)

On a former day of this term the judgment herein was affirmed. The only question discussed was the sufficiency of the indictment. We are now asked to review the original opinion sustaining the indictment, urging error in so doing under the act approved March 12, 1901, on page 26, c. 22, Acts 27th Leg. Article 379, White's Ann. Pen. Code, was so amended by said Legislature to read as follows: "If any person shall play at any game of cards at any house for retailing spirituous liquors, store house, tavern, inn, or other public house, or in any street, highway or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family; or

if any person shall bet or wager any money or other thing of value, or representative of either, at any game of cards, except in a private residence occupied by a family, and the provisions of this act that permit gaming in a private residence shall not apply in case such residence is one commonly resorted to for the purpose of gaming, he shall be fined not less than ten nor more than twenty five dollars." Article 381: "In prosecutions under the two preceding articles it shall not be necessary for the state to prove that any money or article of value, or the representative of either, was bet at such game when the prosecution is for playing cards at a house for retailing spirituous liquors, store house, tavern, inn, or any other public place, or in any street, highway, or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family: provided, that nothing in this title shall be so construed as to prevent the playing of any game for amusement at a private residence occupied by a family." The contention of appellant is that in the first portion of article 379 the clause "at any place except a private residence occupied by a family" enters into and forms a part of the definition of the preceding clause of said article, and, that being true, it is necessary, wherever the indictment charges the playing of cards at a house for retailing spirituous liquors, storehouse, tavern, inn, public house, etc., the indictment must also negative the fact that it is a private residence occupied by a family. We have carefully reviewed this matter in the light of the authorities, and are more fully convinced that the original opinion is correct, and appellant's contention erroneous. We think this is manifest from reading the subsequent portion of said article with reference to betting at these places, as well as the matters mentioned in article 381, quoted above. If appellant's contention is correct, then every indictment under article 379 with reference to playing cards at a house for retailing spirituous liquors, storehouse, tavern, inn, or other public houses, or any street, highway, and other public places, or any outhouse where people resort, must negative the exception that these various places are not private residences occupied by a family. It occurs to us that the mere statement of this portion of the article negatives the idea that the latter clause, "or at any other place except a private residence occupied by a family," enters into the preceding clauses of the statute. For instance, if a party was charged with playing at an outhouse where people resort, it would be necessary to negative the fact that said outhouse was a residence occupied by a family. A great deal has been written in regard to the question of negating in indictments the exceptions contained in articles denouncing penal offenses.

"Text-writers and courts of justice have sometimes said that, if the exception is in the

enacting clause, the party pleading must show that the accused is not within the exception, but, where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense, and must be shown by the accused. Undoubtedly, that rule will frequently hold good, and in many cases prove to be a safe guide in pleading; but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exceptions. Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception, contained in the subsequent clause, section, or statute. Obviously, such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. Support to these views is found in many cases where the precise point was well considered. Much consideration was given to the subject in the case of *Commonwealth v. Hart*, 11 Cush. 130, where it is said that the rule of pleading a statute which contains an exception is the same as that applied in pleading a private instrument of contract; that if such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that otherwise would be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself is incorporated in the general clause, then the party relying on 'the general clause must, in pleading, state the general clause, together with the exception,' which appears to be correct; but the reasons assigned for the alternative branch of the rule are not quite satisfactory, as they appear to overlook the important fact in the supposed case that the exception itself is supposed to be incorporated in the general clause. Commentators and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is to be incorporated with the substance of the clause defining

the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and, if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but, if it is not so incorporated with the clause defining the offense, then it is matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence." This quotation is from *U. S. v. Cook*, 17 Wall. 168, 21 L. Ed. 538, opinion delivered by Justice Clifford. From the same opinion we quote: "With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error." Page 174, 17 Wall., and 21 L. Ed. 538. *Archibold's Cr. Plead.* (15th Ed.) 54; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; 1 *Bishop Cr. Proc.* (3d Ed.) § 636, subsecs. 2 and 3. A prima facie case must always be stated under the law; and it is not so much the location of the exception as it is the effect upon the definition of the offense. *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Mosely v. State*, 18 Tex. App. 311; *Blasdel v. State*, 5 Tex. App. 263.

Referring to the first portion of article 379 of our Penal Code, as amended by the Acts of the 27th Legislature, supra, we find that the offense of playing at any game of cards may be committed in which such game is played in a house for retailing spirituous liquors, storehouse, tavern, inn, or other public house, or it may be committed by such playing in any street, highway, or other public place, or it may be committed in any outhouse where people resort, or it may be committed at any place except a private residence occupied by a family. So a violation may be had under this portion of the article in any manner or by any of the means indicated, and the language seems to be all sufficiently clear to show that the offense could be committed in either of the named subdivisions of this portion of the article without reference to either of the others. For instance, the playing of the game of cards at a house for retailing spirituous liquors is independent of the playing at a game of cards at an outhouse where people resort. So the playing at a house for retailing spirituous liquors is an independent offense, without any connection with the streets, highways, or other public place; and it is not necessary under these circumstances to allege that either or all of these places are not private residences occupied by families. The latter clause, "or at any place except a private residence occupied by a family," is

the last clause in this portion of this article, and does not enter into the definition of any of the previous clauses of this portion of said article. After prohibiting the game in the different places and under the circumstances mentioned, there is the general clause, covering all games at cards when played at any other place than those mentioned before, except at a private residence occupied by a family. In other words, that this latter clause with reference to playing at a private residence occupied by a family was intended to cover all places not previously prohibited. If appellant's contention is correct, then if a party is charged with playing cards at a house for retailing spirituous liquors, such as a saloon, the indictment would necessarily have to negative the fact that the saloon was not a private residence occupied by a family. It occurs to us that this clause with reference to private residences has no connection with the definition of that portion of the offense which prohibits the playing at houses for retailing spirituous liquors any more than it does to playing in a street, or highway, or at an outhouse where people resort. In other words, that portion of the statute which prohibits the playing at cards at any other place than a private residence occupied by a family constitutes an offense within itself, and does not enter into any of the preceding portions or clauses of this portion of the article.

If, as contended by appellant, there are but few hotels, if any, that do not form the residence of one or more private families, either the proprietor of the hotel, or families who take board in such hotel, this being true, it would be necessary to plead the negation and negative the exception. It would necessarily follow that a violation of the law could not be had in any hotel where a private family resided, and the fact that one or more of the rooms of a hotel are occupied by a private family would necessarily defeat that portion of the statute which inhibits playing in such hotels. This would lead to absurdities, and defeat the plain provisions of the statute. If, in fact, these rooms of the hotel should be occupied by a family as a private residence, then there could be no violation of the law, under this statute, by card playing in any portion of the hotel. A private residence occupied by a family does not mean a hotel, does not mean a saloon, does not mean a public street or highway, nor an outhouse where people resort. Therefore the clause with reference to private residence occupied by a family does not enter into the definition of the previous portions of the statute, wherein it defines and punishes card playing at the different places mentioned. It is an independent clause, set out in the definition, and is complete within itself, without reference to the other clauses, and the other clauses are complete within themselves without reference to a private residence occupied by a family.

We are more thoroughly satisfied the original opinion is correct and appellant's contention is error.

The motion for rehearing is overruled.

CATLING v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

HOMICIDE—ASSAULT WITH INTENT TO MURDER—SIMPLE ASSAULT—EVIDENCE—SUBMISSION OF ISSUE.

1. Accused, convicted of assault with intent to murder, testified that when he shot at the prosecuting witness he shot over him to scare him off, but did not mean to hit him; that he was right at the witness' shoulder, and could have hit him had he wanted to. He also testified, in support of a plea of self-defense, that he thought the witness was going to kill him, as witness threw up his hand and accused thought he had a pistol. *Held*, that the question of simple assault should have been submitted to the jury, notwithstanding any discrepancy in accused's testimony.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Sam Catling was convicted of assault with intent to murder, and appeals. Reversed.

P. B. Ward and O. T. Plummer, for appellant. Howard Martin, Asst. Atty. Gen., and Mason Cleveland, Co. Atty., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

There are a number of assignments of error, but none that require notice, save one. Appellant in paragraph 10a of his motion for new trial excepts to the action of the court failing to charge on simple assault, claiming that his own evidence presented this issue, and the court should have charged in response thereto. We have examined the record with reference to appellant's testimony, and find upon this point that he testified as follows: "When I shot, I shot over him. I did not mean to hit him; I wanted to scare him off. I was right over his shoulder, and could have hit him had I wanted to, as he was close enough for me to put my pistol right to his shoulder." True, appellant relied on self-defense; he also testified "that I thought Mr. Dees was going to kill me at the time I shot; that Dees threw up his hand, and I thought he had a pistol." Yet we take it, from his testimony, that the question of simple assault is clearly raised; and it was the duty of the court to present this phase of the case. It may not accord with appellant's plea of self-defense and with other portions of his testimony, but he testified distinctly and emphatically that he did not shoot at appellant, but shot his pistol in order to frighten him. The court may not have believed this, because it did not accord

with other portions of his testimony, but it was the province of the jury, and not the court, to pass upon this issue.

Accordingly, we hold that the error complained of is well taken; and the judgment is reversed and the cause remanded.

PLEMONS v. STATE

(Court of Criminal Appeals of Texas. March 4, 1903.)

FORGERY—CHARACTER OF INSTRUMENT—DEFENSE—CLAIM AGAINST PROSECUTOR—INSTRUCTIONS.

1. An instrument in the following terms: "October 20 Mr. W. J. Claybrook, pleas pay to Joe Plemons Eight Dollars an fifty cents \$8.50 fore I. A. Butler"—can be the subject of forgery.

2. Where, in a prosecution for forgery, the court, in defining the crime and applying the law to the facts, instructed the jury as to the necessity to show an intent to injure or defraud, it was not error to omit this in an intermediate part of the charge instructing that defendant was guilty if he forged the instrument with intent to obtain the money therein specified.

3. It is no defense to a prosecution for forgery that when the accused signed prosecutor's name to the instrument, which purported to be an order for money on a third party, prosecutor was owing him money, and he only took this method to collect the debt.

Appeal from District Court, Johnson County; W. Poindexter, Judge.

Joe Plemons was convicted of forgery, and he appeals. Affirmed.

J. B. Warren, for appellant. Howard Martin, Asst. Atty. Gen., and Mason Cleveland, Co. Atty., for the State.

DAVIDSON, P. J. Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for a term of two years.

In our opinion, the instrument set out in the indictment is the subject of forgery. It is as follows: "October 20 Mr. W. J. Claybrook, pleas pay to Joe Plemons Eight Dollars an fifty cents \$8.50 fore I. A. Butler." This is the original instrument, without innuendoes, which, however, are properly set forth in the indictment. Under *Hendricks v. State*, 26 Tex. App. 176, 9 S. W. 555, 8 Am. St. Rep. 463, this instrument can be made the basis of forgery, and, as alleged, we think the indictment is sufficient.

In the motion for new trial the following portion of the court's charge is criticised: "If in fact defendant, as alleged, did, without lawful authority from said Butler, make and write the order set out and described in the indictment, and sign the name of I. A. Butler thereto, with intent then and there to obtain the amount of money therein specified from the said Claybrook upon said order, then he would be guilty of forgery, whether said Butler was at the time indebted to him or not,

and although defendant may have thought that he could collect his debt in no other way." It is contended this is a charge upon the weight of evidence, and is defective in that it fails to insert in the proper connection the intent to injure or defraud. We cannot agree with this contention. The charge both before and immediately following the excerpt fully called the attention of the jury to that phase of the law which requires the intent to injure and defraud. It is given in the definition of forgery as well as in the application of the law to the facts which authorized the jury to convict or acquit.

Appellant contends he should have had a charge to the effect, if he did not intend to injure or defraud at the time of making the order, but only used and adopted that means of collecting his debt from I. A. Butler, he should be acquitted. Butler denied owing him anything. They were brothers-in-law; Butler a married man, and appellant a 16 year old boy, who had been working for Butler several months. Appellant says that Butler had treated him badly in not settling with him fairly and honestly; that he agreed to pay him 45 cents per 100 for picking cotton, 75 cents per day for gathering corn, and at the same rate for other work he did about the premises, and to give him money with which to return to his home in the Indian Territory. Appellant's mother testified as to the terms of the agreement, and that Butler insisted she should leave her son with him for the purposes indicated, and she did so. Appellant says he and his sister, Mrs. Butler, went over the books of Butler about two weeks, or such a matter, before he left Butler's, and at that time Butler owed him \$7, and that his work subsequent to that time fully covered the remaining \$1.50. However, Butler denies this, and says when his brother-in-law left he (defendant) was owing him 50 cents, but he gave him an order for \$1.50 on Claybrook. Appellant admits signing the instrument, but says he had no intention of committing forgery or of injuring any one; that his idea was he could in this manner collect his money from Butler; that he was afraid to dispute the account while talking with Butler, for fear he would jump on, kick, and beat him. We do not believe, under the facts, appellant was entitled to a charge relieving him of the intent to defraud, under the instrument which forms the basis of this prosecution. If appellant's order was directed or could have been directed exclusively against the property of Butler, it would have presented a very nice—perhaps close—question, and one probably that might have required very serious consideration. This is true in regard to cases of theft. *Young v. State*, 34 Tex. Cr. App. 290, 30 S. W. 233. Bishop, as quoted in *Young's Case*, uses this language: "In larceny, if the object of the taker is to compel, though in an irregular way, the owner of the goods to do what the law requires him to do with them, there is no

¶ 3. See *Forgery*, vol. 23, Cent. Dig. § 56.

legal principle rendering the act a felony." In a case of theft, the accused, by means of taking the property of his debtor, compels the payment of a debt. This is a matter between the debtor and creditor, and third parties are not involved. But had the accused in a theft case taken the property of another party to pay the debt due him from his debtor, he would not be guiltless, because he could not appropriate the property of one man to pay the debt of another. In *Young's Case*, supra, the justification of the principle laid down is found in the fact that it is not a fraudulent appropriation; it is an appropriation to pay a debt, which relieves it of fraud. This might also be the case in robbery, for that is but an enhanced case of theft. But, unfortunately, in forgery, as applied to the case in hand, the third party is the injured one. And so appellant could not, by forging the name of Butler, collect his debt from Claybrook. If he could have collected it from none other than Butler, an analogous case to that of theft might be presented; but Claybrook is the injured party. *Amer. & Eng. Ency. of Law*, vol. 13, p. 1084, notes 2 and 3, for authorities. We believe, therefore, the court did not err in refusing to charge the jury as suggested by appellant.

The evidence is sufficient, and the judgment is affirmed.

KEES v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

CRIMINAL LAW—AGGRAVATED ASSAULT—CONSPIRACY—INSTRUCTIONS—APPEAL—RECOGNIZANCE—SUFFICIENCY.

1. A recognizance to support an appeal, reciting that defendant was convicted of an "aggravated assault," which is a misdemeanor, was not objectionable for failure to recite that he was convicted of a misdemeanor.

2. Where a recognizance on appeal bound defendant not to depart without leave of "the" court, it was not objectionable for failure to identify the court capable of granting such leave, in that it did not bind him not to depart without leave of "this" court.

3. Where in a prosecution for assault the state proved a conspiracy between others than the defendant to commit the assault, and the only evidence connecting defendant therewith was the fact that during the difficulty he came up and stabbed the assaulted party, and the court charged that if the parties were connected the words and acts of each from the beginning of the enterprise until it was completed were the words and acts of all, it was error to omit to charge the alternative proposition that, if it had not been shown that defendant participated in the conspiracy, the jury should disregard the evidence relating thereto as against defendant.

4. In a prosecution for aggravated assault, an instruction that if B. assaulted D., and defendant interfered on behalf of D. to prevent the latter being killed or seriously injured, and cut B. with a knife, then defendant should be acquitted, unless D. provoked the difficulty with B. for the purpose of obtaining a pretext to take his life or do him some bodily injury, in which case D. could not justify his conduct, though at the time he may have been acting in

self-defense, and that defendant was not justified under the law of self-defense in stabbing B. in the back, if he did so, was erroneous in making defendant's rights depend on the action of D. in provoking the difficulty, regardless of whether defendant had any knowledge of such conduct on D.'s part.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

John Kees was convicted of an aggravated assault, and he appeals. Reversed.

Templeton & Harding, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$25; hence this appeal.

The Assistant Attorney General has filed a motion to dismiss this appeal because of alleged defects in the recognizance: First. Because the recognizance does not recite that appellant was convicted of a misdemeanor, and the recitation that he was convicted of an "aggravated assault" is not a compliance with the statutes. We hold that aggravated assault (the same being a misdemeanor) is equivalent to a recitation that appellant was convicted of a misdemeanor, and the appeal will not be dismissed on this ground. And, second, because the recognizance uses this language, "and not depart without leave of the court," when it should read, "and not depart without leave of this court." The contention is that the use of the word "the" in that connection instead of "this" leaves it uncertain whether the district court or the Court of Criminal Appeals is meant; and refers us to *Thompson v. State*, 35 Tex. Cr. R. 505, 34 S. W. 124, 612. There is some difference between the recognizance in that case, which was pronounced defective, and the one here. In the former case, the expression "shall appear before this court" is omitted, while here it is inserted, and, following this, the article "the" is used instead of "this." It is not necessary to review the correctness of the holding in the *Thompson Case*, as there is a difference between the two cases. We hold, however, in this case, that the recognizance is sufficiently definite and certain to indicate the particular court before which appellant bound himself to appear. The motion of the Assistant Attorney General is accordingly overruled.

The theory on the part of the state tended to establish that Ed Derrett made an assault on T. L. Bentley at a show or exhibition of some sort at a schoolhouse, and that during the progress of the difficulty appellant came up to the parties and stabbed T. L. Bentley in the back. The state further insisted that said assault was made by Derrett on Bentley in pursuance of a previous conspiracy between Derrett, Phillips, Newman, and appellant. The state's testimony tended to show that said Derrett either made the first assault on Bentley or provoked Bentley to make the assault on him, and that the

other parties joined in said assault. Appellant, on the other hand, urged that he had no connection with any conspiracy with said parties to assault said Bentley, and what he did at the time was merely to aid in separating Derrett and Bentley. During the difficulty Derrett used a knife, and Bentley used a pistol as a club. Appellant knocked Derrett down with his pistol, and Derrett cut him with the knife; and there was testimony on the part of the state tending to show that appellant also cut Bentley with a knife.

During the trial, the state proved, by the witness Jim Howell, that on the evening of October 10th, before the difficulty which occurred that night, John Phillips came to where he lived at Oak, some two miles from Ozro, and put in a phone call for Ed Derrett at Ozro; that Phillips took the receiver and started to talk, and said, "Oh, hell! I don't want Jim Newman; I want Ed Derrett;" and shortly afterwards asked over the phone if that was Ed Derrett, and then began talking to him, and inquired of him about "that business." Derrett did not seem to understand what business he was alluding to. Then Phillips said, "God dern you, stand there like you don't know what I mean. You know what I mean." And then said, "The tree is falling," or "about to fall"; that he had a 44, and would be there that night. The state also proved by the witness Henry Jackson that on the night of October 10th he heard Derrett, at the store of Jim Newman at Ozro, tell John Phillips "to get his hat and let's go up to the schoolhouse and whip hell out of T. L. Bentley"; that Phillips said, "All right"; that when they closed up the store and started for the schoolhouse that they talked like they were mad. That he told them they had better get Bentley away from the schoolhouse, that there were many women and children there, and they said they could beat it in Ozro." All this testimony was objected to on the ground that appellant was not present and could not be bound by it, and because there was no testimony showing he was in any way connected with any agreement or conspiracy with said parties. We have carefully examined the record, and, aside from what the state proved appellant did at the schoolhouse on that night, there is absolutely no evidence tending to show appellant engaged in a conspiracy with said parties to whip Bentley on that occasion. If it be conceded that what he did there, as testified to by the state's witnesses, indicate a conspiracy on his part to join with the others in the assault on Bentley, then very clearly the court should have safeguarded appellant's rights with reference to said testimony. We have examined the court's charge, which is excepted to on this branch of the case, and find that the court in effect told the jury that, if they believed said parties acted together in accordance with the previous agreement or understanding, the

words and acts of each of the parties having relation to the offense from the beginning of the unlawful enterprise and until it should have been completed became the words and acts of each and all of the parties. If it be conceded that said charge was proper, as applied to the facts of this case, on the ground that the conspiracy was shown in which this appellant participated, then unquestionably the alternative proposition should have been given to the jury, predicated on the idea that, if the conspiracy had not been shown in which defendant participated with said Ed Derrett and other parties, then the jury should not regard the testimony of Jim Howell and Henry Jackson, because in such case the evidence could not affect appellant.

Appellant also insists that the court's charge was erroneous and injurious to him, because, in the charge which cut off Derrett's right of self-defense as against Bentley on the ground that he provoked the difficulty, the court made appellant's rights depend on the action of Derrett in provoking the difficulty, regardless of whether defendant had any knowledge of such conduct on the part of Derrett. The court's charge in this respect was substantially as follows: "That if the jury believed Bentley assaulted Derrett, and defendant Kees interfered in the difficulty on behalf of Derrett, to prevent his being killed or seriously injured, and that he cut or stabbed said Bentley in the back with a knife, then to acquit defendant, unless they should believe that Derrett provoked or brought about the difficulty with Bentley for the purpose of obtaining a pretext to take his life or of doing him serious bodily injury; in such case Derrett could not justify his conduct in cutting T. L. Bentley with his knife, although at the time he may have been acting in self-defense. Neither would the defendant be justified under the law of self-defense in stabbing T. L. Bentley in the back, if he did so." As we understand this charge, it is subject to the criticism of appellant; that is, his right of self-defense was cut off in case the jury believed that Derrett provoked the difficulty, regardless of whether appellant knew the fact that he did provoke the difficulty. This charge was erroneous.

For the errors discussed, the judgment is reversed, and the cause remanded.

MILLER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

GAMING—FORMER JEOPARDY—EVIDENCE.

1. Defendant played poker in the morning, got broke, and quit the game, but returned later in the day and played again. Held two separate offenses, and hence not the same transaction, within the contemplation of the law of jeopardy.

Appeal from Collin County Court; J. H. Faulkner, Judge.

John Wylie Miller was convicted of gaming, and appeals. Affirmed.

Church & Doyle, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of gaming, and fined \$10.

Appellant filed a plea of former jeopardy. The information filed in the county court charged that appellant did on or about the 15th day of March, 1902, unlawfully play, bet, and wager at a game of cards in a place which was then and there not a private residence occupied by a family, which said game of cards was then and there commonly known as "poker." Appellant's plea of former conviction sets up the following facts: That on the 14th day of July, 1902, in the justice court of precinct No. 1, Collin county, there was duly and legally presented in said court a valid complaint against him, the charging part of which is as follows: That on or about the 16th day of March, 1902, and anterior to the filing of this complaint in the county of Collin, and state of Texas, John Wylie Miller did then and there unlawfully bet at a game of cards about one mile east of Princeton, in the woods; the said point not being a private residence occupied by a family. This was signed by Jas. Aiken, and sworn to by him before the justice of the peace of precinct No. 1 of Collin county. To this complaint appellant pleaded "Guilty," and paid the fine and costs, aggregating the sum of \$18.07. Appellant's plea sets up the fact that John Wylie Miller, who pleaded guilty in the justice court, was the same person who is now on trial, and that the conviction in said court was predicated upon a complaint setting up the same facts as the information on which he is now being prosecuted, and that the same was one and the same transaction. The main prosecuting witness testified that about the 15th day of March, 1902, he played at a game of cards with defendant; that the game was one commonly called "poker"; that he played with defendant some three or four hours; that they bet at the game, and the amount would be anywhere from five cents up. Witness arrived at the place where the playing was done about 11 or 12 o'clock, and stayed until about 4 or 5 o'clock in the evening. The playing was done in the woods, and not at a private residence. Witness thinks he played with appellant as many as 50 times, and maybe more. After the defendant had played awhile, he got broke, and dropped out of the game for a while, borrowed some money, and then came and played again. In support of his plea of former conviction, appellant introduced Jim Aiken, who testified that he played cards with appellant on the 16th of March, 1902, in Collin county, about one mile east of Princeton, at the same time and place as mentioned by the state's witness. Witness made complaint in the justice court against appellant for playing at the same

time and place as mentioned by the prosecuting witness. "Defendant is the identical person that I made the complaint against in the justice court." Witness made the complaint on the 14th day of July, and the conviction was had and the fine paid that day. Witness told appellant one day that the grand jury had got all of the other boys for playing cards, and that they would get him before the next grand jury, and that witness would have to give him away, and witness would make complaint against him, and maybe he could get out of it cheaper. Witness told him this about a week before making the complaint. It would cost about \$35 or \$40 to pay a fine for gaming in the county court, and about \$19 or \$20 in the justice court. Appellant gave witness the money to pay the fine off. Witness does not know whether he was arrested on the 26th day of June, or not, on this case. "Was not summoned before the court, but went on my free will. I did it as a matter of friendship for the defendant. He gave me the money on the day I came up here, July 14th. That was about two weeks before the county court met. The complaint I made against him was for playing cards. It was not for betting at cards. If he has paid any fine for betting at cards, I have not heard of it."

In *Campbell v. State*, 2 Tex. Ct. App. 187, under an indictment for keeping a bank on July 1, 1878, where the accused pleaded former conviction, and adduced in evidence two judgments for conviction of having kept such a bank, under two previous indictments found within 12 months prior to the filing of the indictment on trial, one of which laid the time on the same day alleged in the indictment on trial, there being no testimony identifying the offense on trial with either of those charged in the former indictments, and there being evidence that on at least three occasions within 12 months accused kept and exhibited such a bank, we held, under the evidence, that the plea of former conviction was not sustained, and the charge on trial was sufficiently proven. In *Bruce v. State*, 39 Tex. Cr. App. 26, 44 S. W. 852, the trial being for a violation of the local option law, where the state showed three distinct sales, defendant pleaded former jeopardy; and we held, while it was error to permit the jurors in the former cases to testify that they had not on said former cases convicted defendant on the charge in the pending case, since they could not recollect the exact date of the sale upon which the former conviction was had, and that the prosecutor delivered testimony with reference to the three distinct sales on the former trial, still the testimony was harmless, because there was no proof in the record that defendant had been convicted of the particular sale involved in the pending case.

Reverting to the facts before us, the evidence shows that appellant played three or four hours, with an intermission at dinner

time. Concede that he has pleaded guilty (which the record shows) in the justice court to one offense, still the evidence shows that he committed more than one offense, there being two games—one before and one after dinner—and hence it is not the same transaction, within the contemplation of the law of jeopardy. Where a party plays at a game of cards under the present statute, whether with or without betting, if the same is not played at a private residence, it is a violation of the law, and a complete offense. We do not think the evidence sustains appellant's plea of former jeopardy.

The court charged the jury: "If you believe, however, from the evidence, that the defendant has paid a fine for the offense, as charged in the information in this case, and that the case for which he was fined in the justice court of this precinct 1 is one and the same—that is, that the defendant has heretofore paid a fine in this identical case—then you will find defendant not guilty on his plea of former conviction." This charge was all that appellant could ask.

The jury found against appellant on his plea. The evidence amply supports their verdict, and the judgment is affirmed.

On Rehearing.

(March 18, 1903.)

This cause was affirmed at a former day of this term, and now comes before us on motion for rehearing. We find this statement in the motion: "The court, in its opinion in this cause, finds that appellant played in two games, one before dinner and one after dinner, with an intermission between the games for dinner. A careful inspection of the record shows this to be incorrect. No witness testifies that appellant was at the gaming place before dinner—much less, playing cards." The testimony of John Aycock, the first witness for the state, is as follows: "I know John Wylie Miller. On or about the 15th day of March, 1902, I played at a game of cards with defendant. The game was one commonly called 'poker.' I played with him some three or four hours. We bet with one another at the game. The amount of the bet would be anywhere from five cents up. I got to the place where we played about 11 or 12 o'clock, and stayed until about 4 or 5 in the evening. I suppose I bet as many as fifty times with defendant in the day, and maybe more than that. We would bet every time we played a hand, or nearly every time. After the defendant had played awhile, he got broke, dropped out of the game for awhile, borrowed some money, and then came and played again." Joe Aycock testified, in substance, that he did not play with defendant at the time stated by John Aycock, but saw defendant play before and after witness played, but he was not playing at the time witness was. We have copied this evidence in answer to appellant's insistence that the

original opinion was wrong, wherein it states that appellant played two games—one before dinner and one after dinner. In this there seems to have been error. However, the testimony above quoted does show there was an intermission between the games. The record shows appellant was at the place where the playing was done before 12 o'clock, and stayed there until 4 or 5 o'clock; that he lost his money, quit the game, and came back and played. This certainly would make two transactions, as stated in the original opinion, regardless of whether he ate dinner.

The motion for rehearing is overruled.

HENDERSON, J., absent.

GRAY v. STATE.*

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

FORGERY—INDICTMENT—INNUENDO AVERMENTS—CONFESSION—WARNING—EVIDENCE—SUFFICIENCY.

1. An indictment charged defendant with forging an instrument set up in the indictment as follows: "Mr. Bryant: Kind sir: The guitar and case the boy has down there is all right. I am sick and in bed and want the money to get me some things I need. I want as much as \$5.00 on it and the case. It is all right. Ella Laurence (col) 405 San Jacinto St. P. S. Sign his or my name will do." *Held*, that the indictment did not require innuendo averments.

2. It is only where some time has elapsed between the warning and the confession that the state is required to show that the confession was made in view of, and in connection with, the warning.

3. Evidence in a prosecution for forgery held to sufficiently establish the corpus delicti without the aid of defendant's confession.

4. While the corpus delicti cannot be proved by the defendant's confession alone, the confession may be considered along with the other evidence.

Appeal from District Court, Dallas County; Chas. F. Clint, Judge.

George Gray was convicted of forgery, and appeals. Affirmed.

Randolph Paine, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Forgery was alleged upon the following instrument:

"Dallas, Texas, Dec. 21st, 1901. Mr. Bryant: Kind sir: The guitar and case the boy has down there is all right. I am sick and in bed and want the money to get me some things I need. I want as much as \$5.00 on it and the case. It is all right. Ella Laurence (col) 405 San Jacinto St.

"P. S. Sign his or my name will do."

Appellant's criticism is directed at the supposed weakness of the indictment for want of innuendo averments. The contention in the brief is that, unless Ella Laurence, in case the instrument should be true, would receive the money, it would not be a valid

*Rehearing denied March 18, 1903.

instrument, because Bryant could not recover upon it. We find this language in the brief: "If in this state of affairs Mr. Bryant had sued Ella Laurence on the note set out in this indictment, would it not be sufficient answer for Ella Laurence to say she had never received the money? But Mr. Bryant says the defendant claimed to be the agent of Ella Laurence to receive the money. What if he did? It would only be a falsehood on the part of defendant at the worst. Nowhere does Ella Laurence state in her note that defendant is to receive the money for her." This contention is not sound. If Ella Laurence had signed the instrument declared upon, and appellant had received the money as her agent, or for her, by virtue of the note, whether she received the money, or not, would be immaterial. If the note had been a true one, it made Ella Laurence responsible legally, and the fact that her agent may have appropriated the money received from Bryant would not render it the less forgery; it being a false instrument. Innuendo averments, as we understand, only serve the purpose of explaining a forged instrument when not complete by its terms. Therefore we are of opinion that the indictment is not subject to the criticism, and innuendo averments were unnecessary. We are not discussing the difference between innuendo and explanatory averments.

It is contended that appellant's confession was not admissible, and we are cited to *Petty's Case* (Tex. Cr. App.) 65 S. W. 917, in support of this contention. The *Petty Case* is authority to the extent that, when the confession is made, the previous warning should be operative upon the mind of the party making the confession. We adhere to the rule in the *Petty Case*, and think it is correct; that is, where there is some time elapsing between the warning and the confession, and there might arise a question as to whether the warning was in the mind of the defendant at the time of making it, the state, in order to introduce the confession, must make it apparent that the confession was made in view of and in connection with the previous warning. That rule has no application to the confession in this case, because the confession immediately followed the warning.

It is contended as a third ground for reversal that the evidence is insufficient to support the conviction. The proposition under this assignment is that the corpus delicti cannot be established solely on a confession made before the grand jury; that it must be corroborated by other testimony. It is a correct proposition that the corpus delicti cannot be proved or established alone by the confession before the grand jury or anywhere else. Extrajudicial verbal confessions are not sufficient to establish the corpus delicti, and, if that constitutes the state's case, a reversal would necessarily follow. But the state does not rely upon a confession

alone. Appellant committed the theft of a guitar from Mrs. Carroll, and took it to the pawnshop of Bryant, and offered to pawn it for money. Being questioned as to the ownership of the guitar, he informed Bryant that it belonged to Ella Laurence. Bryant informed appellant that before he could get the money he would require a note from the owner. Appellant disappeared, but returned in a short time with the note set out in the indictment. Appellant then signed his name to the pawn ticket. Bryant testified the signature was in the same handwriting as the name signed to the note. "It was here admitted by defendant that the signature on the pawn ticket referred to, and that to the alleged forged instrument, and the signature to the alleged confession of defendant before the grand jury, were written by the same person." And appellant, testifying in his own behalf, stated to the jury that he had signed the note declared upon. It was further shown that he had been gone but a few moments—not a sufficient length of time to reach the point in the city he designated as the home or residence of Ella Laurence. Appellant's confession admitted the theft of the guitar and case testified by Bryant, and further stated that he went out from Bryant's establishment, on the street corner, and wrote the order declared upon, and then went back to Bryant and tried to get some money on it, but Bryant refused to let him have it. He further states, "I did not ask Ella Laurence if I could sign her name, and I signed it without her consent." This is practically the state's case. We are of opinion that the corpus delicti is sufficiently proved without the aid of the confession, but, if this is not true, we can look to the confession in aid of the corpus delicti. *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S. W. 989. If there was any question of the corpus delicti without the confession, it is certainly clearly proved by aid of the confession, but we are of opinion that the corpus delicti was proved independent of the confession.

Finding no error in the record, the judgment is affirmed.

Ex parte ROBERTSON.

(Court of Criminal Appeals of Texas. March 18, 1903.)

CONTEMPT—JURISDICTION.

1. After an appeal to the district court from an order of the county court of H. county appointing R. permanent administrator, said county court had no jurisdiction of the subject-matter; said district court having complete and perfect jurisdiction and control of said litigation; so that said county court had no jurisdiction to adjudge R. in contempt for signing an agreement, as administrator, in the district court, to change the venue to another county, though after the appeal the county court also appointed him temporary administrator.

Application by Joseph A. Robertson for writ of habeas corpus. Relator discharged.

Maco & Minor Stewart and Wilson & Jackson, for relator. Howard Martin, Asst. Atty. Gen., for respondent.

BROOKS, J. This is an original application for the writ of habeas corpus. The relator was fined in the sum of \$100 and one day's confinement in the county jail of Harris county by Hon. Blake Dupree, county judge of Harris county. The judgment is as follows: "In the Matter of the Estate of William Dunovant, Deceased. March 7th, 1903. Joseph A. Robertson, heretofore appointed temporary administrator in the estate of William Dunovant, deceased, having been duly cited to appear before me, Blake Dupree, county judge of Harris county, to show cause, on this, the 2d day of March, 1903, why he should not be held in contempt of this court for participating with other parties to the procurement of an order purporting to transfer the certain cause No. 32,914, being the Matter of the Estate of William Dunovant, Deceased, vs. Appeal of Paul T. Gordon, and a certain cause No. 32,918, the Estate of William Dunovant, Deceased, vs. Appeal of J. A. Harbert and A. M. Waugh, Administrator de Bonis Non, from the Eleventh District court of Harris county, where said appeals were pending, to the district court of Colorado county, and the said Robertson having duly appeared and substantially confessed his acquiescence and participation in said purported transfers of said causes, and the court finding that he has participated therein, and the said Robertson then being temporary administrator only of said estate, his appointment as permanent administrator being suspended by such appeals, and having only such powers as are vested in him under the appointment made by this court in vacation on or about the 21st day of August, 1902, and reappointment by this court on or about the 18th day of January, 1903, and no other, as will fully appear from the orders of this court entered on said days last aforesaid—is hereby adjudged to have acted in contempt of this court by his participation in said purported transfers of said causes, and a fine of one hundred dollars (\$100.00) is hereby assessed against said Joseph A. Robertson as punishment for said contempt, and the sheriff of Harris county is hereby ordered and directed to take the body of said Joseph A. Robertson in his custody, and him safely keep until said fine is paid; and as further punishment for said contempt the said Joseph A. Robertson shall be confined in the county jail for the period of one day, and the sheriff of Harris county is hereby ordered and directed to carry out this order by confining said Robertson in the county jail for the period of one day; and the sheriff of Harris county is hereby ordered to make due reports to this court showing how he has carried out the orders of this court. The sheriff is hereby instructed and ordered to suspend so much of this order as confines

the said Robertson in jail for one day for the period of five days from this date, after which time he will execute this order of confinement of said Robertson."

Without copying all the evidence in detail, the following is substantially the facts upon which this contempt was predicated: It appears that relator had been temporary administrator of the estate of William Dunovant. Subsequent to said appointment he made an application to the county court of Harris county for permanent letters of administration, which application, upon proper notice and hearing, was acted upon, and relator appointed permanent administrator of the estate of William Dunovant. During the progress of this hearing certain parties intervened, and, upon the court appointing relator administrator, and adjudging that Harris county had jurisdiction of the estate of said Dunovant, said parties appealed to the district court of the Eleventh Judicial District of Texas, in Harris county. Pending this appeal in the district court, relator signed an agreement with other litigants, which appears to have been done with the knowledge and consent of the heirs and creditors, which agreement was for the purpose of changing the venue in said litigation to the district court of Colorado county. It is further made to appear that a third party had been appointed administrator of the estate of William Dunovant, deceased, by the county court of Colorado county, and certain parties perfecting an appeal from the order so appointing him to the district court of said county. Relator states, and the facts appear to bear out this contention, that he made an agreement with the litigants in the Eleventh Judicial District court of Harris county, by which all parties agreed to transfer the matters in dispute to the district court of Colorado county. Upon this agreement being reduced to writing and signed by relator as administrator of the estate of William Dunovant, the district court of Harris county changed the venue of said litigation to the district court of Colorado county.

It appears from the judgment above recited that it was the signing of this agreement to change the venue of said litigation from Harris to Colorado county upon which the contempt is predicated. It seems from the record before us that, after the appeal had been perfected by the relator from the order of the county court of Harris county appointing him permanent administrator, the county court, in order to protect the interests of the estate, again appointed relator temporary administrator of the estate; he having previously served in that capacity. Now, the question for our decision is, does the mere fact that relator signed an agreement in the district court of Harris county to change the venue of litigation to which he was a legal party from that county to another, and would the fact that at the time he was permanent and temporary administrator, affect the said

agreement, so that the same could be made the subject of contempt by the county court of Harris county? We think not. When relator was appointed permanent administrator, and parties disputed his right to so serve, appealing the case to the district court of Harris county, then, under the Constitution and Statutes of this state, the district court became the court having jurisdiction over the subject-matter, and, being a probate matter, the law requires the case to be tried anew in said district court. It follows, therefore, that the county court had lost jurisdiction over the matter. The statute authorizes a change of venue from one county to another by the parties to the litigation consenting, and we see no reason why a permanent administrator could not avail himself of this clause of the statute, as well as any other litigant, whether he is legally in the court or not. If he was not legally in the court, then the court had no jurisdiction over him. If the court did have jurisdiction over the subject-matter—of which there is no controversy—then the mere fact that relator signed an agreement to change the venue, and the court acted upon such agreement and changed the venue, would not be the relator changing the venue, but merely the act of the court. It is not disputed but that said district court had perfect and complete cognizance of the subject-matter and constitutional jurisdiction thereof. In order to render a judgment for contempt valid, the court must have jurisdiction over the subject-matter, the person of the relator, and the authority to render the particular judgment. If either of these essential elements are lacking, the judgment is fatally defective. *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111; *Ex parte Duncan*, 62 S. W. 758, 2 Tex. Ct. Rep. 404. It is made to appear beyond dispute that the county court had no jurisdiction of the subject-matter, since, after appointing relator permanent administrator of the estate, and after the cause was appealed to the district court of Harris county, said court had complete and perfect jurisdiction and control of said litigation. The mere fact that relator may have been temporary administrator would not affect this question.

Without discussing the various questions raised by relator, we hold that the county court did not have authority to render the order of contempt, and besides had no jurisdiction of the subject-matter. This being true, the relator is ordered discharged.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—EVIDENCE OF OTHER SALES.

1. Where, in a prosecution for illegal sale of liquor in a local option district, the prosecuting witness had given direct testimony that de-

fendant had sold him whisky and received pay therefor on the date charged in the information, it was error to permit him to testify to other sales.

Appeal from Eastland County Court; J. R. Stubblefield, Judge.

John Walker was convicted of violating the local option law, and he appeals. Reversed.

J. J. Butts, D. G. Hunt, and Earl Conner, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100 and 30 days' confinement in the county jail. The fifth bill of exceptions complains that while the prosecuting witness, H. H. Alexander, was on the witness stand, and having testified to the sale of intoxicating liquor to him by the defendant on the date charged in the information, counsel for the state thereupon asked witness the following question: "State whether or not you ever bought any intoxicating liquors from defendant at any other date than on January 10, 1902, or immediately thereafter." To which question the witness replied: "I never bought any before January 10, 1902, but on January 16, and February 6, 7, and 9, 1902, I bought other intoxicating liquors from the defendant." To which counsel for defendant objected, because irrelevant, immaterial, and prejudicial to defendant; and because evidence of other and distinct offenses than the one charged is never admissible unless for the purpose of showing intent, system, or *res gestæ*, neither of which were involved in this case; and because the state had elected and there was then pending prosecutions against defendant for selling intoxicating liquor in violation of the local option law to said witness on the dates mentioned. This testimony was inadmissible. In prosecutions for illegal sale of liquor in a local option district, evidence of sales other than the one charged is admissible only when tending to develop the *res gestæ* or to connect defendant with the sale charged. If the evidence in this case had shown any peculiar method by which appellant effected the sales to the prosecuting witness, similar method or methods resorted to to sell whisky to said witness or other witnesses would be admissible to show the manner or system whereby appellant sold the whisky. But in this case there is direct, positive, and unequivocal testimony on the part of the prosecuting witness that appellant sold him the whisky and received his pay therefor. This being true, evidence of other sales could throw no possible legitimate light upon the sale charged in the information, but would merely serve, as indicated by appellant's counsel, to prejudice defendant's cause and increase the verdict of the jury. Where the sales are separate and distinct, as in this case, one sale could throw

no light upon the other. We accordingly hold that the court erred in admitting this testimony. See the two cases of *Johnson v. State* (Tex. Cr. App.) 62 S. W. 755, 756. We do not deem it necessary to discuss other alleged errors.

For the reason indicated, the judgment is reversed, and the cause remanded.

GRIMES v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

INTOXICATING LIQUORS—EVIDENCE—SALES—PROOF OF OTHER SALE.

1. On a prosecution for an unlawful sale of liquor, evidence as to other sales is inadmissible where it does not indicate any system of sales, and cannot serve to identify the transaction, or is not a part of the *res gestæ*.

Appeal from Midland County Court; E. R. Bryan, Judge.

R. J. Grimes was convicted of a violation of the local option law, and appeals. Reversed.

Woodruff & Hughes and Cunningham & Oliver, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

Bill of exceptions No. 2 complains of the following matter: "The state placed Pap Smith on the stand, and asked said witness what intoxicating liquors, if any, he had bought from defendant within two years prior to the filing of the information herein. Whereupon defendant objected, because the evidence of said witness was not shown to be necessary to prove the intent of appellant, to develop the *res gestæ* of the transaction charged against defendant, or to identify the transaction with the information alleging a sale to Charley Clark, and that the evidence elicited would be proving a substantive, separate, and distinct offense from the one charged in the information, and was irrelevant and inadmissible for any purpose whatever, and calculated to materially prejudice the rights of the defendant. The court then asked the state for what purpose said evidence was admissible. State's counsel replied, 'To prove system of sales by defendant.' Defendant objected because the same did not prove system. The court overruled defendant's objection, and said witness was permitted and did testify that in the month of November—some time in the latter part thereof—1901, he purchased from defendant a bottle of beer, paid him twenty cents therefor, and said purchase was in the town of Midland, Midland county." This testimony

was not admissible, for the reasons stated by appellant. Appellant concedes in his able brief that we have held in *Young v. State* (Tex. Cr. App.) 66 S. W. 567, that it is permissible to show other sales where the crime is committed in a peculiar manner, and thereby indicates a system under which the law is being violated. But where there is no system, and the evidence cannot serve to identify the transaction, or is not a part and parcel of the *res gestæ* thereof, it cannot shed light upon the transaction, but would merely serve to prejudice the rights of appellant. Proof that appellant sold whisky to Smith *per se* would not be evidence of the fact that he sold whisky to the purchasing witness in this case. *Freedman v. State* (Tex. Cr. App.) 38 S. W. 993; *Smith v. State* (Tex. Cr. App.) 24 S. W. 27.

The judgment is reversed, and the cause remanded.

WILSON v. STATE.*

(Court of Criminal Appeals of Texas. Feb. 25, 1903.)

ROBBERY—GOOD CHARACTER—EVIDENCE—REMARKS OF COURT—RIGHT TO ARGUMENT—INDICTMENT—SUFFICIENCY—CONTINUANCE.

1. Where a continuance was asked for want of the testimony of a witness, and such witness subsequently came into court and stated that he would not testify as was alleged, the motion was properly overruled.

2. On a prosecution for robbery, a remark by the court, on sustaining an objection to evidence offered as to what defendant was doing several years before, that "it is immaterial what he was doing. It is admitted that his character was good, and it is immaterial whether he was running a sawmill, a thresher, a farm, or did nothing"—was not prejudicial, as calculated to impress the jury that defendant's good reputation was of no importance whatever.

3. On a prosecution for robbery, defendant's reputation having been admitted as good, it was not error to exclude evidence on that question.

4. Under Code Cr. Proc. 1895, art. 705, providing that in prosecutions for felony the court shall never restrict the argument to a less number of addresses than two on each side, the mere fact that defendant's counsel was sick and declined to make an argument did not deprive the state of its right to two addresses.

5. An indictment for robbery, alleging the money taken as "one ten dollar bill United States paper currency money of the value of ten dollars, a better description of which the grand jurors are unable to give," was sufficient, though the evidence showed that the money was carried before the grand jury and exhibited to them.

Appeal from District Court, Hill County; W. Poindexter, Judge.

J. L. Wilson was convicted of robbery, and appeals. Affirmed.

A. W. Cunningham and Spell & Phillips, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

*1. See Criminal Law, vol. 14, Cent. Dig. §§ 830, 833, 834; Intoxicating Liquors, vol. 29, Cent. Dig. § 284.

*Rehearing denied March 12, 1903.

BROOKS, J. Appellant was convicted of robbery, and his punishment assessed at confinement in the penitentiary for a term of seven years. This is a companion case to cause No. 2,647, J. L. Beard v. State (decided at the present term) 71 S. W. 960.

Appellant filed a motion for continuance for want of the testimony of Jim Brown, stating that he expected to prove by said witness that on the morning of November 3, 1901, he saw prosecuting witness, Wesley Miles, on the road between defendant's house and Mt. Calm, with something looked like a bundle of clothes under his arm. To this bill the court appends the following explanation: "That this witness came into court afterwards, and in open court stated to the sheriff and county attorney that he had never seen the witness Wesley Miles on the road from Mt. Calm, either with or without a bundle of clothes, and knew nothing about the case. The court instructed the county attorney to take his affidavit to this fact, but the witness left before this was done, all of which was called to the attention of Mr. Cunningham, one of defendant's attorneys." This explanation disposed of the motion for continuance, and the court did not err in overruling the same.

Appellant introduced E. H. Ballard, and was proceeding to prove by said witness that he and defendant had worked together for a number of years, and during the years 1900 and 1901 owned and operated a self-binder in the neighborhood in which Mr. Wilson lived. The state objected to this evidence, and the court sustained the objection, making this statement: "It is immaterial what he was doing. It is admitted that his character is good, and it is immaterial whether he ran a sawmill, a thresher, a farm, or did nothing." To the exclusion of which evidence, and the language of the court, defendant excepted, because the evidence offered was material, and the language of the court sustaining it was prejudicial to defendant, and was calculated to impress the jury that defendant's good reputation and honest life were of no importance whatever in the trial of this case. There was no error in the action of the court excluding the evidence, or in the language used. The court states that the character of defendant was admitted to be good, and certainly it was then immaterial what vocation he was following.

In motion for new trial, appellant insists that the court erred in refusing to permit him to prove by 10 witnesses that his reputation for honesty and fair dealing and as a law-abiding citizen was good, because that fact, being admitted by the state, was calculated to impress the jury with the idea that the question was of no importance to defendant or injurious to the state, and therefore the admission did not have the same effect in defendant's favor that the evidence of the witnesses would have had. We do not think there is any error in this; and, for

a further discussion of the matter, see Beard v. State (decided at present term), 71 S. W. 960.

After the case had proceeded to the argument, Mr. Cummings, the assistant county attorney, made a speech to the jury, of 23 minutes, in behalf of the state. At the conclusion of his argument, Mr. Cunningham, attorney for defendant, and the only attorney representing him in the case, stated to the court and jury that on account of his illness during the preceding night and his illness at that time he was unable to make any argument, and was obliged to submit the case as it was. The court then, over appellant's objections, permitted C. F. Greenwood, Esq., county attorney, to make another speech in behalf of the state. Mr. Greenwood then spoke 24 minutes. To all of which defendant then and there excepted. Article 705, Code Cr. Proc. 1895, provides that "in prosecutions for felony the court shall never restrict the argument to a less number of addresses than two on each side." In Vines v. State, 31 Tex. Cr. R. 31, 19 S. W. 545, after the opening argument by the associate counsel for the state, defendant's counsel declined to make any argument in the case, whereupon the district attorney, over appellant's objections, was permitted to further address the jury in behalf of the prosecution, after which the court offered defendant's counsel the right to reply, and which they declined, and assigned as error the action of the court in allowing the district attorney to make a second argument in behalf of the state, when they had made no argument at all. In that case we held that the order of argument was within the discretion of the court, and limited only by the provisions of our statute, which provides that, when a criminal case is to be argued, the order of argument may be regulated by the presiding judge, but in all cases the state's counsel shall have the right to make the concluding address to the jury. Unless the discretion of the court is abused, and it is shown that defendant has been injured by said abuse, no revision of the court's action will be justified on appeal. We see no abuse of the discretion of the court in this case. The statute above quoted indicates that state's counsel, as well as defendant's counsel, has the right to two arguments in all felony cases, and only two were accorded in this case. The mere fact that appellant's counsel was sick and declined to make an argument would not deprive the state of its statutory right.

Appellant insists that the verdict should be set aside because there is a fatal variance between the allegation and the proof, in this: that the indictment alleged the description of the money as follows, "one ten dollar bill United States paper currency money of the value of ten dollars, a better description of which the grand jurors are unable to give," while the evidence showed that the money

was carried before the grand jury by the witness Stirman, who exhibited it to them. Having alleged that no better description could be given, the state was bound to prove that fact, and the verdict should therefore be set aside, as the proof showed that a better description could have been given. The indictment alleges the description of the money as follows, "one ten dollar bill United States paper currency money of the value of ten dollars, a better description of which the grand jurors are unable to give"; and the proof showed that the money recovered was a \$10 bill, United States paper currency money, of the value of \$10; said bill being introduced in evidence. We have heretofore held that an indictment describing the money in the following language, "United States paper currency money of the aggregate value of twenty dollars," was sufficient; that "United States paper currency money" embraces that character of paper currency issued and allowed to be issued as a medium and circulate as money under the authority of the laws of the United States. *Kimbrough v. State*, 28 Tex. App. 387, 13 S. W. 218.

Appellant also insists that the verdict of the jury is contrary to the law and the evidence. The evidence in this case is the same as in the companion case of *Beard v. State* (decided at present term) 71 S. W. 960, and we believe it amply supports the verdict.

The judgment is affirmed.

GRIFFIN v. SANSOM.

(Court of Civil Appeals of Texas. March 7, 1903.)

PARTY WALL—REBUILDING—LIABILITY OF ADJOINING OWNER—SUBSEQUENT USE.

1. Evidence, in an action to recover one-half of the cost of rebuilding a party wall, that defendant, on being told of plaintiff's intention to rebuild, said it would be two or three years before he would use it, and he would not assist, though he expected to build some time, coupled with defendant's failure to object to the rebuilding, will not establish an alleged agreement by defendant to pay one-half the cost.

2. The mere fact that an adjoining owner makes use of a party wall rebuilt and standing partly on his land, but the rebuilding of which he has not agreed to contribute to, nor induced by countenancing an expectation of contribution, will not render him liable for part of its cost.

Appeal from Hill County Court; L. C. Hill, Judge.

Action by L. H. Sansom against John R. Griffin. Judgment for plaintiff, and defendant appeals. Reversed.

Spell & Phillips, for appellant. Douglass & Shurtleff and Thos. Ivy, for appellee.

TEMPLETON, J. A party wall which stood on the dividing line between the lots

of Sansom and Griffin was destroyed by natural causes. The wall was rebuilt by Sansom, and he brought this suit against Griffin to recover one-half the cost of rebuilding. A trial resulted in a judgment in favor of the plaintiff, and the defendant appealed.

It was alleged in the plaintiff's petition "that the defendant had notice of the rebuilding of said wall, one-half on plaintiff's and one-half on defendant's lot, and it was so rebuilt with the knowledge and consent of defendant; that said defendant agreed that said wall be rebuilt, and promised to do what was right about his part of same; that defendant meant and promised thereby to pay for his part, or one-half of same; that plaintiff, relying thereon, rebuilt the wall; and that the defendant thereby became indebted to plaintiff for one-half of said wall so rebuilt by plaintiff." On the trial the plaintiff testified as follows: "When I went to rebuild the division wall between my lot and defendant's, I went to defendant and asked him to help me rebuild it, and he told me that it might be two or three years before he would use it, and he would not help me build it back. I asked him if he did not expect to build there sometime, and he said 'Yes,' and I said then why not help me build it back. That is all the conversation I think we had."

* * * When I went to rebuild the wall, I went to him and told him about going to rebuild; and he told me in this connection just what I stated awhile ago, and I told him that he had to pay for one-half the wall. He never made any objection to paying for one-half the wall. He knew of my rebuilding the wall, and never objected to it." It is manifest that this testimony does not establish the promise or agreement alleged, and that if the plaintiff's petition does not state a cause of action, independent of such promise or agreement, the judgment in his favor was not warranted. It was alleged in the petition that after the plaintiff had rebuilt the wall the defendant joined to and made use of the same. That fact would not, of itself alone, render the defendant liable for any part of the cost of rebuilding. The owner of real estate may lawfully appropriate to his own use improvements which have been voluntarily placed thereon by another, without becoming liable for the value of such improvements. *Automarchi's Ex'r v. Russell*, 63 Ala. 356, 35 Am. Rep. 40. The defendant herein was under no legal obligation to assist in rebuilding the wall, and mere knowledge on his part that the plaintiff was rebuilding the wall would not create such obligation. If, however, the plaintiff built the wall with the expectation that the defendant would, when he got ready to make use of the same, pay part of the cost of construction, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the defendant, when he joined to and made use of the wall, would become

¶ 2. See *Party Walls*, vol. 38, Cent. Dig. §§ 17, 36, etc.

liable to the plaintiff for one-half of the cost of the wall. Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347. No such cause of action is set up in the petition, and no other theory of liability is suggested by the evidence. The judgment will therefore be reversed, and the cause remanded.

Reversed and remanded.

HUME v. S. NETTER, A. GEISMAR & CO.*

(Court of Civil Appeals of Texas. Feb. 11, 1903.)

SALES — TIME FOR DELIVERY — CONSTRUCTION OF CONTRACT — EXPIRATION OF TIME — BURDEN OF PROOF — WRONGFUL ATTACHMENT — DAMAGES.

1. Under a contract of sale of 1,000 tons of cotton seed hulls, made by the owners of a cotton seed hulling plant—said hulls to be delivered "during our running season of 1901 and 1902"—the sellers had the right to make deliveries during such season at such time and in such quantities as they should see fit.

2. Parties buying cotton seed hulls under a contract whereby they were to be delivered during the sellers' "running season of 1901 and 1902" had the burden of proving that at the time they had instituted suit for breach of the contract the season had ended.

3. Where no injury to defendants' credit or reputation in business had resulted from the attachment of their plant, and it did not appear what was the reasonable value of the use of the plant during the time it was in the possession of the sheriff, defendants were not entitled to recover damages for the levy of the attachment.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by George T. Hume against S. Netter, A. Geismar & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

Walton & Walton and A. S. Phelps, for appellant. Brooks & Shelley, for appellees.

FISHER, C. J. Plaintiff below, George T. Hume, instituted this suit on the 15th day of February, 1902, against the defendants, S. Netter, A. Geismar & Co., to recover of them damages for their alleged partial failure to comply with the terms of a certain written contract by which the defendants agreed to deliver to the plaintiff, from the cotton seed hulling plant of the defendants, 1,000 tons of cotton seed hulls during the running season of defendants' said plant for its running season of 1901 and 1902. Contemporaneously with the filing of his original petition, the plaintiff sued out a writ of attachment, which he, on same date, caused to be levied upon the cotton seed hulling plant of defendants; and the plant was seized by the sheriff by virtue of the writ, and continuously remained in possession of that officer until the final trial of the cause.

The defendants, in their answer, denied that the running season of their plant was over on the date when the suit was instituted

and the plant seized by the sheriff, and alleged that they could and would have performed the contract during such running season if the plaintiff had not, by his own wrongful acts in filing this suit and causing their plant to be seized on February 15, 1901, rendered further performance of the contract, in the manner contemplated by the parties at the time of its execution, impossible. Defendants also reconvened, made the sureties on the attachment bond of plaintiff parties to the suit, and prayed for judgment for damages against them, occasioned by the wrongful levy of the writ of attachment.

The case was tried before the court without a jury, and a general judgment was rendered in favor of defendants; the trial judge finding as facts that the plaintiff had failed to prove that the running season of defendants' plant was over on the date when the suit was instituted and the plant seized, and that the defendants had failed to prove the damages alleged in their cross-action to have resulted from the seizure.

The conclusions of law and fact, as found by the trial court, are as follows:

"(1) On August 21, 1901, the plaintiff and defendants entered into a written contract which is as follows:

" 'Austin, Texas, August 21st, 1901.

" 'We agree and do sell to Geo. T. Hume one thousand tons of cotton seed hulls at our mill loose at \$3.12½ per ton of two thousand pounds, said Hume to furnish wagons and teams and hands to move said hulls from our mill without expense to us; hulls to be placed by us where they can be loaded on wagons with one handling by said Hume; said hulls must be in reasonably good condition at the time of delivery to said Hume, for which said Hume is to pay in cash three dollars and twelve and one-half cents for every ton of two thousand pounds so delivered to him at the end of every fifteen days for all hulls so delivered; said hulls are to be delivered to said Hume during our running season of 1901 and 1902. In all deliveries to said Hume of said hulls a reasonable time must be allowed for breakdowns of our machinery, if any should occur. Said Hume is to begin receiving said hulls not later than the first day of October, 1901.

" 'S. Netter, A. Geismar & Co.,

" 'Per Manesse Legare, G'l M'gr.

" 'Geo. T. Hume, Geo. L. Hume.'

"(2) The defendants at the time of making this contract were engaged in the business of hulling cotton seed, shipping the kernels, and selling the lint and hulls, and at that time owned a mill, with necessary machinery for that purpose, situated at Austin, Texas, which mill was the place of delivery mentioned in said contract. The capacity of defendants' mill was about thirty tons of cotton seed per day, when run ten hours per day; and, so running the same, the product of cotton seed hulls per day would be about thirteen tons. It was contemplated by

*Rehearing denied March 18, 1903, and writ of error denied by supreme court.

both plaintiff and defendants, at the time the contract was made, that the cotton seed hulls to be furnished plaintiff by defendants would be the product of defendants' said mill.

"(3) The purpose of plaintiff in contracting for such hulls was to use the same for feeding and fattening beef cattle for the spring market of 1902. The season for feeding beef cattle for the spring market of 1902 ended about April 1, 1902, and plaintiff at the time said contract was made knew when said feeding season would end. The defendants knew when they made the contract that plaintiff's purpose was to use such hulls for feeding cattle, but the evidence is conflicting as to whether or not defendants at that time knew or were apprised by plaintiff of the fact that such feeding was for the spring market, and that such feeding season would end about April 1, 1902, and does not warrant a finding by the court to the effect that defendants at said time either knew or were apprised of such facts by plaintiff.

"(4) The written contract was the result of previous negotiations between plaintiff and defendants, and the contract was written by J. L. Hume, who was the agent of plaintiff, and represented him in all the dealings with defendants relating to the forming or making of such contract.

"(5) Plaintiff began receiving hulls on September 26, 1901, and up to the time of filing this suit the plaintiff had received from defendants, under the contract, 271 $\frac{1}{4}$ tons of hulls, of which amount about 163 tons were delivered during the month ending October 26th, about 58 tons during the month ending November 26th, about 38 tons during the month ending December 26th, and the remainder—about 14 tons—between that date and January 30, 1902; the last delivery being made on said January 30, 1902, and being 1 $\frac{1}{4}$ tons.

"(6) This suit was instituted by plaintiff on February 15, 1902, and at his instance an attachment was issued in this case and levied upon defendants' entire plant—that is, upon the lots upon which the mill was situated, and upon all of the machinery of said mill—the officer making the levy taking actual possession thereof; and all of such property has since said time remained in the possession of such officer.

"(7) The plaintiff between the — day of January, 1902, and the — day of March, 1902, bought from other parties 750 tons of cotton seed hulls, paying therefor an average of \$10.48 per ton; and I find as a fact that said \$10.48 per ton was as low a price as said hulls could have been bought at on the market in Austin, or laid down in Austin, during the time plaintiff was so purchasing same, and that said price was as low a price as such hulls could have been purchased at or laid down in Austin from any other point on either January 31, 1902, or February 15, 1902, or any time between said dates. The plaintiff, in purchasing the hulls

from other parties, did so to use same as feed for his cattle, and would not have needed same had the defendants furnished the entire 1,000 tons called for by the contract at regular intervals up to January 31, 1902.

"(8) The entire evidence on the question as to when defendants' running season for the years 1901 and 1902 ended does not authorize a finding that the running season had ended either on January 31, 1902, the date on which plaintiff claims that same ended, nor that such running season had ended on February 15, 1902, the date when this suit was instituted.

"In stating this conclusion, I deem it proper to state briefly the material evidence and facts bearing on this issue, auxiliary to above findings, stating the evidence and facts tending to show that such season had ended before the suit was instituted under 'a,' and the evidence and facts tending to show that such running season had not expired under 'b':

"(a) The supply of cotton seed in Travis county, and points in Texas immediately tributary to Austin, during the fall of 1901, was small, and such supply, for practical purposes in operating a hulling plant or cotton seed oil mill, was exhausted by January 1, 1902, though some seed could have been bought after that time. The defendants began operation of their plant on September 9, and up to January 31, 1902, bought all the cotton seed which they could obtain at the market price on the market in Austin. They ran their mill (working ten hours per day) 19 days during September, and about 21 days in October. During November the mill ran nine days only, during December three days only, and during January two days only; the reason for not running more in November, December, and January being on account of the scarcity of cotton seed on the market at Austin. On January 31st defendants ran their mill a part of the day, and then discharged their hands, with the exception of the engineer. The defendants' foreman testifies that he was employed by defendants for their running season, and that when he was discharged, on January 31st, he called the attention of the defendants' manager, Lezard, to this fact, and that Lezard replied that 'the running season was over.' The foreman admits, however, that at that time the manager asked him if he would come back to work if the mill should run again, and that he refused. When the writ of attachment was levied, the officer executing it (Matthews), in the presence of Scot Wilson, who was placed by the sheriff in charge of the mill, said to Lezard, defendants' manager, in effect, 'As you have closed down, you will not be damaged by the attachment,' to which Lezard answered, 'No,' and then said to Wilson, in effect, 'You will not be here but a few days, as we will replevy.'

"(b) The defendants in November, 1901, authorized L. Geismar, of Geismar, La., to make inquiry as to the supply of cotton seed

in Louisiana, and as to freight rates on same to Austin, Texas, but up to February 15, 1902, had given said Geismar no definite instructions to buy, or what quantities would be wanted. On February 18, 1902, said L. Geismar purchased and shipped to defendants one car of seed—about 18 tons—he not knowing at that time that the mill had been attached, and without any instructions from defendants to buy. Defendants, immediately on being notified of such purchase, telegraphed said L. Geismar not to buy any more seed, as the mill had been attached. Said L. Geismar had been making investigations for defendants as to quantities of cotton seed, and prices at which same could be purchased, and freight on same to Austin, Texas. Said L. Geismar could have purchased cotton seed in considerable quantities in Louisiana (probably enough to have filled defendants' contract with plaintiff) at from \$17 to \$18 per ton, and the freight on same to Austin would have been about \$8 per ton; making the cost in Austin about \$23 or \$24 per ton. The cost of operating defendants' mill was about \$1.75 to \$2 per ton of cotton seed. The approximate result of the operation of defendants' mill was to produce about 45 per cent. of hulls and about 55 per cent. of kernels. The evidence shows some linters to have been produced, also, but does not show quantity or value; and quantity would seem, from the evidence, to be inconsiderable. The kernels produced netted the defendants in Austin about \$39 per ton. Defendants could have bought seed in Louisiana to run their mill, shipped same to Austin, and from their mill furnished hulls to fulfill their contract, taking into consideration operating expenses, at about the same loss per ton as they would have sustained by buying hulls to fill such contract, or by paying plaintiff the difference between the contract price and the market price of such hulls. The hands employed by defendants in running their mill, with the exception of the bookkeeper, engineer, and foreman, were paid by the day, and only when they were actually at work; that is, when the mill was actually running. The bookkeeper, engineer, and foreman were paid by the month. When the hands were discharged, they were informed by defendants' manager that, in case the mill should run again, they would be wanted to work again. The engineer, who was retained, was instructed, when defendants' manager was not at the mill, to buy seed offered at the market price. On the day the attachment was run, before same was run, defendants, not knowing that the attachment was contemplated, bought a small load of cotton seed. More seed were to be had on the market in Austin after the cotton planting season of 1902 than during January, February and March, and at a lower price. On January 11, 1902, plaintiff wrote defendants, complaining of quantity of hulls being furnished; and defendants replied that they would fill their contract, and had until the

end of their running season to do so. Defendants' manager, Lezard, testified that their running season had not ended on January 31, 1902, nor on February 15, 1902, but that they intended to buy more seed and resume operation and fill their contract with plaintiff, and that the running season of a mill began in the fall, when cotton seed could be obtained, and closed when seed could be no longer obtained. He also testified that the foreman was not employed for the running season, and denied that he told the foreman when he was discharged that the running season was over. The cotton seed oil mill at Austin (the only other mill as to which evidence was introduced) closed down about January 1, 1902, on account of supply of seed at Austin being exhausted, but resumed operation in March, and ran a portion of the time in March and April, using seed obtained in Louisiana.

"The foregoing ('a' and 'b') is not intended as a statement of all the evidence bearing upon the issue under consideration, but as a brief statement of the facts ascertained and testimony bearing materially on such issue.

"(9) The plaintiff at the time he brought this suit believed that defendants' running season had ended, and that there had been a breach by defendants of their contract, and that his right of action on the contract had accrued. He was not without probable cause for so believing, and did not act with malice or other improper motive in bringing the suit, and causing the issuance and levy of the attachment.

"(10) No injury to defendants' credit or reputation in business is shown to have been occasioned by the issuance and levy of the attachment.

"(11) There is no evidence before the court showing or tending to show the reasonable value of the use of the property attached during the time the same has been in the possession of the sheriff under the attachment.

"Conclusions of Law.

"(1) Under the contract sued on, the defendants had their entire running season for the season of 1901-1902 within which to fulfill their contract to deliver to plaintiff the 1,000 tons of cotton seed hulls, and had the right to make deliveries during such season at such times and in such quantities as they should desire or determine; that is, the times of delivery and quantities delivered were at their option during such season—their obligation being only to deliver the entire quantity by the end of such season.

"(2) The burden was upon the plaintiff to show by a preponderance of the evidence that defendants' running season for the season of 1901-1902 had ended when he brought this suit and attached defendants' mill, thereby rendering further performance by defendants of the contract, in the manner contemplated by the parties at the time the contract

was made, impossible; and, he not having so shown, he is not entitled to recover.

"(3) The defendants are not entitled to recover on their cross-action for damages.

"(4) That a general judgment should be rendered for defendants."

The evidence in the record warrants the findings of fact, and we approve the legal conclusions reached by the trial court. We have carefully considered all of the questions raised by appellant's assignments of errors, and are of the opinion that none are well taken. Therefore the judgment of the trial court is affirmed. Affirmed.

DOUGLAS v. ROBERTSON et al.

(Court of Civil Appeals of Texas. March 4, 1903.)

LIEN—FORECLOSURE—INTERVENTION—JUSTICES COURT—AMENDMENT ON APPEAL.

1. In a suit to foreclose a lien on property, another lienholder may intervene, and have the status of his lien as to priority determined.

2. One who intervened in a suit in justice's court to foreclose a lien on property, but who failed to ask for judgment against defendant, could amend in the county court.

Appeal from Collin County Court; J. H. Faulkner, Judge.

Action brought originally in justice court by A. T. Robertson against one Mooneyhan, in which F. W. Douglas intervened. Judgment against intervener, and he appealed to the county court, in which a motion to strike out the intervention and dismiss the appeal was sustained. Intervener appeals. Reversed.

Abernathy & Mangum, for appellant. Abernathy & Beverly, for appellees.

JAMES, C. J. Robertson sued Mooneyhan in a justice's court upon a note and to foreclose a landlord's lien on certain cotton, with distress warrant on two bales. Douglas intervened, and the judgment of the justice was against him, and he appealed. In the county court Robertson moved to strike out the intervention and dismiss the appeal: (1) Because intervener does not show himself entitled to intervene; (2) because he does not show himself interested in the subject-matter of this suit; (3) because intervener cannot try the priority of liens as against defendant Mooneyhan in this suit; (4) because the effect of the intervention is to unnecessarily hinder and delay plaintiff in the collection of his debt, and intervener has no interest whatever in plaintiff's debt nor in the subject-matter of this suit. This motion was sustained in all things, and a writ of procedendo ordered to issue.

The petition of intervention alleges substantially that Mooneyhan is indebted to intervener in the sum of \$120, secured by a mortgage upon the cotton upon which the distress warrant had been levied in this case,

and states sundry grounds why his mortgage was prior and superior to plaintiff's lien, and prayed that it be adjudged that plaintiff take nothing by reason of his distress warrant, and that intervener's lien be declared prior to any claim of plaintiff, and be foreclosed on the two bales of cotton, and that he have judgment against Mooneyhan for the debt. In support of the judgment rendered in the trial court striking out the intervention, appellee's proposition is that, "before a party will be allowed to intervene in a pending suit, he must show himself interested in the subject-matter of the suit, and the subject-matter of this suit is plaintiff's debt against Mooneyhan, and not the property upon which it is sought to foreclose the lien." On the contrary, that it is well settled in this state that in a suit to foreclose a lien upon property a lienholder may intervene, and assert his lien upon the same property, and have its status as to priority determined. *Noyes v. Brown*, 75 Tex. 461, 13 S. W. 36; *Polk v. King*, 19 Tex. Civ. App. 666, 48 S. W. 601; and cases there cited. The fact that intervener may not have asked in the justice's court for judgment against Mooneyhan is of no importance. The whole case was transferred by the appeal to the county court for trial de novo. Intervener could amend there, and ask for such judgment.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. CHENAULT.*

(Court of Civil Appeals of Texas. March 7, 1903.)

NUISANCE—CATTLE KILLED IN RAILROAD ACCIDENT—REMOVAL BY INDEPENDENT CONTRACTOR—LIABILITY OF COMPANY.

1. A railroad company contracting with a local butcher to remove cattle killed in a railroad accident, in consideration of the hides, to a place where they would not bother any one, is liable for damages for a nuisance created by the butcher's depositing the carcasses in proximity to a third person's premises, though the butcher was, so far as the facts were concerned, an independent contractor.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by George Chenault against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Terry and Alexander & Thompson, for appellant. W. A. Kemp, for appellee.

RAINEY, C. J. Appellee sued below to recover damages on account of a nuisance. The facts are that a cattle train on defendant's road was wrecked at the town of Garland, killing 18 head of cattle. Wm. Charles, defendant's road master, contracted with one Phillips, a butcher, to remove the cattle to his (Phillips') pasture, some two or three miles

*Rehearing denied March 14, 1903, and writ of error denied by supreme court.

distant from Garland; he assuring Charles that it was far enough away not to bother any one. Phillips was to receive for moving the cattle the hides thereof. The cattle were hauled to said pasture, and where placed were near enough to plaintiff's premises to create, and did become, a nuisance to plaintiff and his family. Plaintiff notified defendant's agent at Garland of the nuisance. Word was communicated to the road master at Cleburne by letter, and he came up next day, and as soon as he could secure men he had the cattle burned on the day after.

The contention of appellant is that Phillips was an independent contractor, and, having undertaken to place the carcasses where they would not create a nuisance, appellant is not liable. Under the facts in this case, it is immaterial in what capacity Phillips acted—whether as an independent contractor, or as agent or servant of appellant. It was due the public by appellant to dispose of the carcasses so as to prevent a nuisance, and this duty could not be delegated to some one else, and appellant thereby escape liability. It was responsible for the acts of Phillips in failing to properly dispose of them. *Railway Co. v. Meador*, 50 Tex. 77; *Railway Co. v. Warner*, 88 Tex. 648, 32 S. W. 868; 3 Elliott, R. R. § 1063.

The evidence is sufficient to support the judgment, and it is affirmed.

Additional Facts.

(March 14, 1903.)

At the request of appellant, we find the following additional facts, viz.:

(1) Defendant exercised ordinary care in selecting E. J. Phillips as a suitable person with whom to contract for the removal of the carcasses.

(2) Phillips employed his own means and facilities in removing the carcasses from defendant's right of way near Garland to his pasture, remote from said right of way. He was an independent contractor, provided it was possible, as a matter of law, for the defendant railway company to create such a relation in the disposition of said cattle.

ALFORD v. CARVER.

(Court of Civil Appeals of Texas. March 14, 1903.)

LANDLORD AND TENANT—LANDLORD'S TITLE—ESTOPPEL TO DENY—THREATENED EVICTION—ATTORNEYMENT TO THIRD PERSON.

1. November 1, 1897, plaintiff leased to defendant certain lands, they to be subject to sale, possession to be surrendered on return of unearned rent, the lessee having the right to terminate the lease, at the end of any year, on 30 days' notice. The land was sold under foreclosure. The purchasers, on November 1, 1898, threatened to eject defendant, whereupon, on advice of counsel, defendant attorned to the purchasers without notice to plaintiff. *Held* that, plaintiff being in no way a party to the trust deed or foreclosure proceedings, his right

to recover rents from defendant was unaffected thereby.

2. October 5, 1897, plaintiff purchased a tract of land on foreclosure sale of a trust deed. November 1st, he leased the same to defendant. May 3, 1898, he bought in the same land under a tax sale, and on April 27, 1899, conveyed such title as he had acquired under the trust deed to another, to whom defendant attorned. *Held*, plaintiff having conveyed only such title as he had acquired under the foreclosure, reserving the tax title, defendant was liable to him for rent under the lease, whether the tax title was valid or not.

Error from Clay County Court; H. A. Allen, Judge.

Action by A. N. Alford against E. B. Carver. From a judgment for defendant, plaintiff brings error. Reversed.

No opinion filed in original hearing.

A. M. Carter, for plaintiff in error. Matlock, Miller & Dycus, for defendant in error.

On Motion for Rehearing.

SPEER, J. There is no statement of facts in the record, but the case is before us upon the trial court's findings of facts and conclusions of law. The sole question raised is the sufficiency of the findings to support the judgment rendered. The findings and conclusions are as follows:

Findings of Fact.

"First. That on the 1st day of November, 1897, defendant and plaintiff entered into and executed the lease contract sued on and attached to the plaintiff's original petition, which is made a part of this finding. (This contract provided that plaintiff lease to the defendant 11,633 acres of land in Archer county, Tex., described in said lease, from the 1st day of November, 1897, to the last day of November, 1902, for \$3,500, payable, \$350 on the 1st day of November, 1897, and \$350 on or before the 1st day of May, 1898, and a like amount on the 1st day of November and May of each following year thereafter during the lease. It was agreed that said land should be subject to sale, and that possession should be surrendered to lessor on return of any unearned rent paid for same. That the lessee might terminate and surrender the lease at the end of any one year by giving thirty days' notice to lessor or his agent.) Second Conclusion of Fact. That, by virtue of last said contract, the defendant paid the two first installments of rent, being in possession of the land mentioned in the contract. Third. That plaintiff made to one R. J. Russell an assignment for the benefit of accepting creditors July 4, 1898, and on June 12, 1899, said Russell wound up said assignment and turned over all property back to plaintiff that came to said Russell by virtue of the assignment, and said Russell made a formal deed of release of said deed of assignment to plaintiff on November 20, 1900, attached to the supplemental petition and referred to and made a part there-

of. Fourth. The lands mentioned in the lease contract under item 1 of this finding of fact were patented about the year 1870 to the Texas Copper Mining & Manufacturing Company. Fifth. That afterwards, on April 19, 1884, Carson & Lewis obtained a judgment against the Texas Copper Mining & Manufacturing Company for the sum of \$7,000, with interest at 10 per cent., foreclosing a vendor's lien on the land mentioned in said lease contract. Sixth. The said last judgment was, on the 25th day of March, 1885, transferred by Carson & Lewis to the Dundee Mortgage & Investment Co. by a deed of that date in legal form. Seventh. That on the 28th day of March, 1885, the Texas Copper Mining & Manufacturing Co. made a deed of trust on the lands mentioned in said lease to one Summerville, trustee, to secure the Dundee Mortgage & Trust Co. in the sum of \$10,000 and interest at 10 per cent., which last said amount included the amount of the judgment mentioned under item 4 in these findings. Eighth. On June 3, 1890, the Dundee Mortgage & Investment Co. brought suit in the district court of Tarrant county, Tex., against the Texas Copper Mining & Manufacturing Co., to foreclose the trust deed mentioned under item 7 in these findings, and on February 15, 1898, judgment was rendered in said cause foreclosing said trust deed on the land mentioned in said lease contract, with a judgment for the sum of \$32,599.00. On the judgment an order of sale was issued, and the said land was, on the first day of November, 1898, under said judgment and order of sale, sold to the Alliance Trust Company, Limited, for the sum of \$12,000, and a deed made to last said company by the sheriff of Archer county, Tex., the officer executing said order of sale. Ninth. On the first day of November, 1898, said defendant was in possession of the land mentioned in said lease contract, under said last contract, and had paid all rents due up to that time, and the said Alliance Trust Company, Limited, threatened to put defendant Carver out of possession of said land, and in order to avoid being put out, without notice to plaintiff, on the advice of counsel, defendant rented the land from the said Alliance Trust Company, Limited, and since that time has paid the rent on the premises to last said company. Tenth. George M. Alford, in the district court of Archer county, Tex., on the 4th day of March, 1897, obtained a judgment against John N. Philbin, R. D. Harris, J. H. Parsons, Geo. W. Parsons, and Louis Powers, foreclosing a deed of trust in favor of plaintiff on said land in said lease contract, in the sum of \$43,400. That afterwards an order of sale dated 9th day of September, 1897, was issued on said judgment, and said land mentioned in said judgment and lease contract was, on the 5th day of October, 1897, sold by virtue of last said judgment and order of sale to plaintiff A. N. Alford, and transferred by deed of last said

date by sheriff executing said order of sale in Archer county, Tex. Eleventh. That on September 1, 1897, a judgment was rendered in the district court of Archer county, Tex., for the state and county taxes, in the sum of \$448.08 in favor of the state of Texas, and against R. D. Harris, John N. Philbin, George M. Alford, A. B. Bright, L. M. Lawson, and the Dundee Mortgage Trust & Investment Company, Limited, with a foreclosure of a lien for taxes on the lands mentioned in said lease contract herein sued on, and on this judgment an order of sale was issued April 6, 1898, and under this last said judgment and order of sale said land was sold by the sheriff of Archer county, Tex., on the 3d day of May, 1898, and bought in by A. N. Alford, plaintiff, and a deed was made to plaintiff by last said sheriff, purporting to convey the land in said lease contract and in last said judgment described on last said date. Twelfth. That afterwards, on the 27th day of April, 1899, A. N. Alford, plaintiff, conveyed the land in the lease contract sued on herein to the Alliance Trust Company, Limited, by deed of last said date, stating in said deed that it was only intended to convey such title only as he had acquired to said land by virtue of the deed to him mentioned under item 10 of this finding of fact. Thirteenth. The lands in question were held under lease from R. D. Harris to Harrold and East for many years prior to date of lease contract sued on herein."

Findings of Law.

"First. Under the foregoing findings of fact, I find the law to be: That the sale and deed to the Alliance Trust Company, Limited, and mentioned under item 8 of the findings of fact, terminated the lease contract sued on, and that under the law defendant was not, and has not been, liable to plaintiff on the contract sued on for rents since the first day of November, 1898. Second. I find that under the judgment, order of sale, and sheriff's deed in favor of the state of Texas, mentioned in the findings of fact herein, I find that plaintiff was not entitled to rents or possession of the land described in the contract sued on during the period from November first, 1898, to November first, 1899. Third. I, therefore, find for the defendant."

We think the eighth finding of fact does not show sufficient termination of appellant's rights or title to authorize his tenant to attorn to the Alliance Trust Company, Limited, the purchaser at the foreclosure sale therein mentioned. Alford was not a party to the suit, and, for aught the record shows, was in no manner affected by the decree. Nor can the judgment be sustained upon the twelfth finding. The appellant conveyed only the title acquired at the George M. Alford foreclosure sale. Any other title held by him was reserved. It may be that he did not acquire a good or perfect title under the tax sale, but whatever defects there may be

in his title, the appellee, his tenant, cannot question the same or attorn to another. This is the general rule, and the present, as presented by the court's findings, is no exception. The appellee has not shown that appellant is without title.

The motion for rehearing is granted, the judgment reversed, and the cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. JOLLEY.

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

RAILROADS—CROSSING ACCIDENT—JOINT USE OF TRACKS—NEGLIGENCE OF ONE COMPANY—LIABILITY OF OTHER COMPANY—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

1. Rev. St. art. 4440, provides for the crossing, etc., of railways, and for the construction of necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of such connections. Articles 4535, 4536, and 4539 require the interchange of business of railroads crossing each other. Defendant company maintained a joint depot and yards with another company, the two having a joint agent in charge. Plaintiff's horse was frightened, and plaintiff injured, by a sidetracked car left standing in the street by servants of the other company. *Held* that, though the statute did not in terms authorize joint sidings, or the lease of sidings owned by one company for a joint use, yet as such acts were in furtherance of the purposes of the statute, and were not illegal, defendant was not liable for the negligence of the servants of the other company, even though the car stood on defendant's ground.

2. It is error in a personal injury case to instruct that the burden of proving contributory negligence is on defendant, where the issue has been raised by testimony produced by plaintiff.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by A. W. Jolley against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

T. S. Miller and Head & Dillard, for appellant. W. E. McMahon, Richard B. Semple, and Thos. P. Steger, for appellee.

RAINEY, C. J. Appellee sued appellant to recover for personal injuries alleged to have resulted to him from being thrown from his buggy by reason of his horse becoming frightened at a car standing on appellant's track, and partly in the street along which plaintiff was traveling. Verdict and judgment for plaintiff.

The accident occurred at Bells, where the appellant's road and that of the Texas & Pacific Railway Company cross. These two roads have and maintain there a joint depot and yards, having a joint agent in charge. They have certain Y and switch tracks, which are used by both. One of the tracks is known as the "team track," on which cars containing merchandise for customers at

Bells are left to be unloaded by such customers. The car at which plaintiff's horse had become frightened had been brought in and left there by a local freight train operated solely by the servants of the Texas & Pacific Railway Company to be unloaded by one of its customers, and with and over which appellant had no connection or control whatever. The street crossed the tracks there, it being a public thoroughfare, and the car was left standing partly in the street, with room enough for vehicles to pass. The plaintiff was traveling in his buggy west, and first came to the east Y track, on which a car of appellant had been left close to the north side of the street to be taken up by the Texas & Pacific and transported to some point on its line. When passing this car, plaintiff's horse showed slight evidence of fright, and he tapped him with his whip. When he approached the second car—the one left on the team track by the Texas & Pacific—the horse became frightened, backed the buggy, and threw plaintiff out, and he was injured as alleged.

The evidence fails to show liability on the part of appellant. While it does not definitely appear what agreement or arrangement existed between said companies relative to the use of said track, we take it that under the circumstances said use by either was not illegal. Article 4440, Rev. St., provides for the crossing, etc., of railways, and for the construction of necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of such connections. Articles 4535, 4536, and 4539 require the interchange of business of railroads crossing each other. While the statutes do not, in express terms, authorize the construction and maintaining of joint sidings, etc., or the lease of sidings, etc., owned by one to the other for a joint use, etc., yet, as the joint construction and maintenance of sidings, etc., or the lease thereof, would lessen the expense and facilitate the interchange of business, such would not be in contravention of the statutes and illegal. Nor would it render both roads liable when the injury resulted solely from the negligence of one of them. In this case the injury resulted solely from the negligence, if any, of the servants of the Texas & Pacific Railway Company in conducting its own business, with which appellant had no connection, over which it had no control, and in which it had no interest. Had the injury resulted from a failure of duty imposed upon them jointly, then a different state of case would be presented. *Railway Co. v. Cardwell* (Tex. Civ. App.) 59 S. W. 288; *Pierce on Railroads*, p. 283, approved in *Railway Co. v. Underwood*, 67 Tex. 506, 4 S. W. 216. The plaintiff alleged, in substance, as a basis for recovery, that appellant's servants negligently left and permitted said car to stand so near to and upon said crossing as to obstruct safe travel, etc. The proof showed that the car was left there by

¶ 1 See Negligence, vol. 37, Cent. Dig. § 370.

the servants of the Texas & Pacific Railway Company in conducting its own business on a track used by both roads. Under these allegations and proof no recovery could be had against appellant.

But it was insisted that the track on which the car was standing was on the ground of appellant. This, we think, does not alter the case, unless the Texas & Pacific Company was using the track illegally.

The court, in its charge, placed the burden of proof on defendant to establish contributory negligence. This was error, as the testimony which raised the issue of contributory negligence was produced by plaintiff. *Railway Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Railway Co. v. Lewis* (Tex. Civ. App.) 63 S. W. 1091.

The judgment is reversed, and the cause remanded.

WATKINS v. HOPKINS COUNTY.

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

HIGHWAYS—CONDEMNATION—NOTICE—NON-RESIDENT—DAMAGES—COSTS—APPEAL—RECORD—CONSTITUTIONAL LAW.

1. Where, in proceedings to condemn land for a road, the owner claims an estoppel, based on an agreement made in a former proceeding by which he gave a road in another place, and the county was to be perpetually enjoined from occupying or working the land in question, and a judgment entered thereon, but neither such agreement nor the judgment is included in the transcript, an assignment of error based thereon cannot be considered.

2. Acts 1897, p. 87, providing for the creation of a road system for certain specified counties, is constitutional, though no local notice of intention to apply therefor was given.

3. Where a landowner is a nonresident, notice of condemnation proceedings for a highway across his land is properly served on his agent.

4. In proceedings to condemn land for a highway it is error to receive evidence that the entire tract out of which the road is taken would sell for more if cut up into small tracts, as the owner is entitled to the value of the strip taken, and any depreciation of the value of the remainder of the tract for the uses to which it was adapted and to which he applied it.

5. In proceedings to condemn land for a highway, the reception of evidence that, after the contest was filed, the county fenced that part of the land made necessary by the location of the road, there being no plea to that effect, was error.

6. The fact of such fencing could be shown, if pleaded, in order to prevent a recovery by the landowner of the expense of fencing.

7. In considering the question of costs, the expense of such fencing should be added to the amount awarded, and, if the sum exceeds the amount fixed by the commissioners, the landowner is entitled to costs.

Appeal from Hopkins County Court; R. B. Keasler, Judge.

Proceedings by Hopkins county to condemn lands and establish a road across the land of J. B. Watkins. From a judgment condemning the land and awarding damages, the owner appeals. Reversed.

Frank E. Scott, for appellant.

RAINEY, C. J. This is an appeal from a judgment rendered in a condemnation proceeding by appellee to establish a public road across appellant's land.

The appellant complains of the action of the trial court in sustaining a special demurrer to his plea of estoppel. The order sustaining the demurrer is not incorporated in the record, but a bill of exception was reserved to the court's ruling, which states that the plea set up "that Hopkins county, by its legal representative, made an agreement in the case of J. B. Watkins vs. R. B. Keasler, County Judge, et al., No. 3,875, pending in the district court of said county, said agreement made at the Aug. term 1901, that the defendant J. B. Watkins have a judgment forever perpetuating an injunction restraining said Hopkins county from using, occupying, or in any manner working the land described in plaintiff's original petition herein as a public road, and that a judgment was rendered on said agreement." And it was further stated that, as a part consideration of said agreement, defendant gave plaintiff a right of way across another portion of said land, which was embodied in said agreement and judgment, etc., and said plea referred to said agreement and judgment, and made them a part of said plea. The transcript in this case contains neither the agreement nor the judgment mentioned, hence we cannot intelligently pass upon this assignment of error. We will remark, however, that it seems to be the prevailing opinion that a municipality cannot surrender, abridge, or barter away its right of eminent domain relative to the establishment and maintenance of public roads. *Lewis' Eminent Domain*, vol. 1, § 261.

It is contended that Hopkins county was attempting to proceed under a special law authorizing said county to lay out roads, etc. (Acts 1897, p. 87), that same is a local law, and that the requisite notice was not given, and is therefore unconstitutional. There is no merit in this contention. *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921.

The appellant requested the court to instruct the jury to find for the defendant, among other grounds, for the reason that the notice required by statute of the time and place of the meeting of commissioners to assess damages was not given. Notice is necessary to make the condemnation proceedings legal, and it was essential in this proceeding for the county to show that proper notice had been given. *Parker v. Railway Co.*, 84 Tex. 333, 19 S. W. 518; *Bowie County v. Powell* (Civ. App.) 3 Tex. Ct. Rep. 855, 60 S. W. 237. The record shows that service of notice was properly executed by a deputy sheriff on an agent of the appellant, appellant being a nonresident. This was sufficient under the statute.

Complaint is made of the court's action in permitting the county to introduce evidence

to the effect that defendant's land, if cut up into small tracts, would sell for more than if permitted to remain in one body. The land was in a solid body, and the defendant was entitled to the damages done to it in that condition. Where part of a tract of land is condemned, the owner is entitled to recover the market value of the land actually appropriated at the time it is condemned, and such damages, if any, as depreciates the value of the remainder for the uses to which it was adapted and to which he applied it. If, by reason of the establishment of the road, it was made necessary for plaintiff to expend money to place the land in condition for use as a pasture, that being the use to which he had applied it, such as fencing, making pool for stock water, etc., then he was entitled to recover such an amount as the evidence shows was reasonably necessary for that purpose. *Morris v. Coleman* County (Tex. Civ. App.) 28 S. W. 380. That the land would be more valuable if cut up into smaller tracts in this instance was immaterial, for it applied to the condition of the land as well before as after the location of the road, and, therefore, it fixed no basis for determining plaintiff's damages. The court erred in permitting appellee to prove that it had fenced that part of the land made necessary by the location of the road after the contest had been filed, there being no plea to that effect. If appellee had pleaded this, then it could be shown in order to prevent a recovery therefor, but it would not affect the question of costs. If plaintiff recovered an amount which, if added to the cost of said fencing, would exceed the amount fixed by the commissioners, then he would be entitled to recover his costs.

Some other questions are raised, but it is not probable they will arise on another trial, and it is not deemed necessary to pass upon them.

For the reasons stated, the judgment will be reversed, and the cause remanded. The former opinion rendered in this case is withdrawn, and this substituted therefor.

Reversed and remanded.

SITES et al. v. LANE.

(Court of Civil Appeals of Texas. March 4, 1903.)

PLEADING — JURISDICTION OF COURT — PERSONAL PRIVILEGE — SUFFICIENCY OF PLEA — SUBMISSION TO JURISDICTION.

1. A plea of personal privilege, alleging residence in a different county, is good though it does not affirmatively state that the pleader had not submitted herself to the jurisdiction of the court.

2. Where a stranger to an action was cited at the instance of defendant, and interposed a plea of personal privilege, and further, in reply to defendant's answer, denied under oath that she had submitted herself to the jurisdiction of the court, the reply supplied the defect in her plea, if it was such, in failing to state therein

that she had not submitted to the court's jurisdiction.

3. Where a stranger to an action asked leave to intervene, and subsequently withdrew her motion on leave granted by the court, without filing a plea of intervention, and no plea was filed against her by defendant until after adjournment of that term of court, her right to plead personal privilege on the ground of residence in another county, when cited into court at the instance of defendant, was not lost.

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Suit by Jonathan Lane against W. B. Sites and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McNeal & Ellis, for appellants. A. B. Storey, for appellee.

STREETMAN, J. Appellee brought this suit March 13, 1902, to recover of W. B. Sites and M. T. Hendricks and wife the principal, interest, and collection fees on a vendor's lien note executed by W. B. Sites, and afterwards assumed by said Hendricks and wife.

On March 25, 1902, Mrs. Eliza Kempner, doing business in the name of H. Kempner, filed a motion alleging that she had an interest in the note, and asking leave to intervene. On April 19th this motion was called up by the court, and Mrs. Kempner, by attorney, stated that the motion had been filed through mistake, and declined to file a plea in intervention, and asked leave to withdraw the motion, which was granted. Appellant Hendricks excepted to this action of the court, and asked leave to file an amended answer making H. Kempner a party defendant, because he had been prevented from paying said note by letters from said Kempner asking him not to pay it and agreeing to hold him harmless if he would not pay it. The court refused to grant this permission, and Mrs. Kempner was dismissed from the case. Appellant Hendricks excepted, but there is no assignment of error which complains of the action of the court in permitting Mrs. Kempner to withdraw from the case, or in refusing to permit appellant to file his pleadings against her. No pleadings were, in fact, filed, which sought any relief against her, until after that term of court adjourned. Appellant Hendricks then, on September 26, 1902, filed an amended answer, alleging that at the maturity of the note sued on he had deposited the amount due on the note in the bank where it was payable, but about that time said Kempner had written him that she owned said note, and agreed to hold him harmless if he would refuse to pay it, and that he had complied with her request, and for that reason said Kempner was responsible to him for the interest and attorney's fees which had accrued by reason of his failure to pay said note at maturity. Mrs. Kempner was cited, and interposed a plea of personal privilege, alleging her residence to be in Galveston county, and not in Caldwell county. Appel-

lant Hendricks excepted to this plea of privilege, because it failed to negative all the facts which would give jurisdiction to the district court of Caldwell county, and failed affirmatively to state that she had not submitted herself to the jurisdiction of said court in this case. The action of the court in overruling these exceptions is the only matter complained of on this appeal.

The assignments do not point out, nor do we discover, any phase of the case which would have conferred jurisdiction on the district court of Caldwell county which was not negated by the plea of privilege. We do not think it was necessary in this case, any more than it would be in any other, for such pleading to affirmatively allege that the defendant had not submitted herself to the jurisdiction of the court. If such pleading were necessary, however, the necessity was met in this case, as Mrs. Kempner, in a reply to appellants' answer, filed a further pleading, in which she denied under oath that she had submitted herself to the jurisdiction of the court.

It is urged that the proceedings above stated show that Mrs. Kempner had submitted to the jurisdiction of the court over her person, and, for this reason, the court erred in sustaining her plea of privilege. It is doubtful if this proposition can be considered under the assignments, which only complain of the ruling upon the exceptions to the plea of privilege; but, at any rate, we do not think there is any merit in the contention.

Mrs. Kempner was permitted to withdraw her motion to intervene. She had never filed a plea of intervention. When she withdrew from the suit, there was no pleading of any kind in the case seeking any relief against her. No such pleading was filed until after the adjournment of that term of court. When the pleading was afterwards filed, she occupied the same position with reference to it as if she had never appeared, and, in our opinion, had the same right to assert her personal privilege to be sued in the county of her residence.

The judgment is therefore affirmed.

SEATON et al. v. McREYNOLDS.

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

SURETIES—SIGNING ON CONDITION—APPEAL—PRESUMPTION.

1. A surety though signing on condition that another sign as surety, which was not done, is liable, the bond having been delivered without the obligee knowing of the condition.

2. An issue neither requested nor submitted will, on appeal, be presumed found so as to support the judgment.

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Action by J. F. McReynolds against H. H. Seaton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Sturgeon & Stone and W. F. Moore, for appellants. Burdett & Connor, for appellee.

NEILL, J. This suit was brought by the appellee against the appellants, H. H. Seaton, as principal, and C. R. Pride and F. C. Sims, as sureties, for an alleged breach of the condition of a bond, executed by the appellants to appellee to secure the faithful performance of a certain contract made by Seaton with him.

After a general denial, the appellants pleaded that the bond was signed by Pride upon condition that one J. W. Clark should sign the same as his co-surety; that Clark refused to sign it, and that then Seaton procured the name of appellant Sims to the bond, and informed appellee when he delivered it to him of the condition under which Pride signed, and that if the latter was not satisfied with Sims as a co-surety, the whole matter should end; that appellee took the bond with knowledge of such condition; and that Pride afterwards, learning the condition upon which he had signed had not been complied with, notified plaintiff that he would not be bound by the instrument, and demanded the erasure of his name therefrom. The cause was submitted to a jury upon special issues, and upon their verdict the judgment appealed from was entered against the appellants.

The only issue of fact in the case was whether appellee knew when the bond was delivered to him that Pride had signed it subject to the condition that J. W. Clark should sign it as his co-surety. This issue was in this manner submitted by the court to the jury: "Did the plaintiff, J. F. McReynolds, know at the time the bond was handed him by Seaton, or at any time before the bond was handed to him, that the defendant C. R. Pride had signed said bond on the condition that it was to be signed by J. W. Clark (commonly called Wes Clark), and that the defendant C. R. Pride was not to be bound unless it was signed by said Clark?" In reply to the question, thus submitting the issue, the jury answered, "No"; and as the evidence is sufficient to support their verdict we approve it. If a surety sign an obligation upon the condition that another shall also sign as surety before it shall be binding upon him, and this condition is known to the obligee when he takes the obligation, the surety is not generally liable unless the condition is complied with. Brandt on Sur. & Guar. § 402.

As the undisputed facts show that the bond was signed by Pride upon such condition, and was delivered by Seaton, the principal, to the appellee, and that he sustained damages in the sum of \$753.78 by reason of the breach of the contract, the faithful performance of which the bond was given to secure, the only question to be determined by the jury was, did the appellee take the obligation with knowledge of such condition?

This question was clearly submitted by the charge of the court, and it did not err in refusing to submit it in a different form, or in failing to submit any other issues. Besides, upon appeal or writ of error (where a cause is submitted on special issues), an issue not submitted and not requested by a party to the case, is deemed as found by the court in such a manner as to support the judgment. Rev. St. art. 1331; Breneman v. Mayer, 24 Tex. Civ. App. 178; Railway v. Spencer, 67 S. W. 196, 4 Tex. Ct. Rep. 518.

There is no error in the judgment, and it is affirmed.

VOGES v. DITTLINGER et al.

(Court of Civil Appeals of Texas. March 4, 1906.)

JUSTICE COURT—APPEAL—DEFECTIVE BOND—PLEA OF PERSONAL PRIVILEGE—RECORD—STATEMENT OF FACTS—PRESUMPTIONS—EVIDENCE.

1. On appeal from a justice court to the district court, it is not necessary for the appellant to give a bond, where no judgment against him, except for costs, is rendered, and defects in the bond given are therefore immaterial.

2. Where there is only a partial statement of facts in the record, all reasonable presumptions will be indulged in favor of the judgment of the lower court.

3. In the partial statement of facts contained in the record there was a written agreement, signed "Herman Voges," promising to pay an account by delivering wheat at a town in precinct No. 1, where suit on the account was brought. Defendant's plea of personal privilege was that he lived in another precinct. Held that, the pleadings being sufficiently full to admit proof that Heinrich Voges was doing business in the name of Herman Voges, and that the written instrument and the signature thereto were in fact the act of Heinrich Voges, which evidence would have sustained the judgment against Heinrich Voges, it would be presumed that it was offered.

Appeal from District Court, Comal County; L. W. Moore, Judge.

Action by Hippolit Dittlinger and another against Heinrich Voges and another. Judgment for plaintiff, and defendant Heinrich Voges appeals. Affirmed.

A. E. Altgelt, for appellant. F. J. Maier, for appellees.

STREETMAN, J. H. Dittlinger, appellee, brought suit in justice's court, precinct No. 1, Comal county, Tex., against Herman Voges and Heinrich Voges, to recover an indebtedness on account. The petition alleged a partnership, and was also broad enough to recover upon either a verbal or written promise against either or both of said defendants. Both defendants filed pleas of personal privilege, Herman Voges alleging that he lived in Bexar county, Tex., and Heinrich Voges alleging that he lived in precinct No. 3, Comal county, Tex., but not alleging that there was a qualified justice of the peace in said precinct, nor that precinct No. 1 was not the nearer precinct to his residence. The

justice's court sustained the pleas of privilege, and dismissed the suit. Plaintiff appealed, and executed an appeal bond.

The first assignment complains of the refusal of the district court to dismiss the appeal because of defects in the bond. It was not necessary for plaintiff to have given an appeal bond, as no judgment, except for costs, was rendered against him in the justice's court. It was, therefore, immaterial whether the bond was defective or not. H. & T. C. Ry. Co. v. Red Cross Stock Farm, 91 Tex. 628, 45 S. W. 375.

The district court, notwithstanding the pleas of privilege, rendered judgment against Heinrich Voges for the amount of the account and interest. The only complaint urged is that the court should have sustained this defendant's plea of privilege. There is no complete statement of facts in the record, but what purports to be only a partial statement of facts; and, in this condition of the record, all reasonable presumptions will be indulged in favor of the judgment of the lower court.

There is in this statement a written agreement signed "Herman Voges," promising to pay the account in question by delivering wheat at New Braunfels, Tex., which is in precinct No. 1, where the suit was brought. The pleadings were sufficiently full to admit proof that Heinrich Voges was doing business in the name of Herman Voges, and that said written instrument, and the signature thereto, were in fact the act of Heinrich Voges. This evidence would have sustained the judgment, and we will presume that it was made, in the absence of a statement of facts. There being no error in the judgment, it is, therefore, affirmed.

Affirmed.

INDUSTRIAL LUMBER CO. v. TEXAS PINE LAND ASS'N.*

(Court of Civil Appeals of Texas. Feb. 5, 1903.)

LIENS—CREDITORS—CONTRACT LIMITING LIABILITY—JOINT-STOCK COMPANIES—TRUST FUND FOR CREDITORS—DISMISSAL—EFFECT.

1. Where an action was instituted against a voluntary association for a money judgment, and a foreclosure of a lien against the property of the association, including property leased to plaintiff, all of which property had been conveyed to other parties, who were joined as defendants, and exceptions were sustained to so much of the petition as sought to foreclose a lien on land not leased to plaintiff, and on land conveyed before the suit, whereupon the plaintiff dismissed all claim for a money judgment and to the consideration passing for the sale of land, such dismissal did not dismiss the action for the foreclosure of the lien.

2. Where it was provided in a contract between plaintiff and defendant, a voluntary association, that plaintiff should look exclusively to the trust property in the hands of defendant's trustees and not to the shareholders for any debt or damages arising thereunder, such

*Rehearing denied, and writ of error denied by supreme court.

limitation of liability did not create an equitable lien in favor of plaintiff against the association's property.

3. Where a voluntary association disposes of all its property, and ceases to be a going concern, the purchaser of its assets does not take the same incumbered with a trust for the benefit of creditors of the association, even though such creditors had contracted with the association to look only to the assets for satisfaction of their claims.

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action by the Industrial Lumber Company against the Texas Pine Land Association. From a judgment for defendant, plaintiff appeals. Affirmed.

John Broughton, Cruse & Nall, and Smith, Crawford & Sonfield, for appellant. Lanier & Martin, for appellee.

GILL, J. This is an appeal from a judgment sustaining demurrers to the plaintiff's amended original petition. The pleading is very lengthy, and it is not deemed necessary to set it out in full. In view of the conclusion reached by us, a statement of its substance will be sufficient for the purposes of this opinion.

It was averred that plaintiff, the Industrial Lumber Company, a Texas corporation, entered into a written contract with the Texas Pine Land Association, by which the last-named concern leased to plaintiff a certain sawmill at Liberty, Tex., and certain land on which it was situated, for the term of two years from April 1, 1898, and bound itself, among other things, to cut and furnish at the sawmill for a named price a sufficient number of logs to enable the mill to be operated at its full capacity during the full term of the lease; that plaintiff took possession of the mill and operated it during the term, but the defendant association failed to furnish a sufficient number of logs to enable plaintiff to run the mill at its full capacity, whereby much time was lost, to plaintiff's damage, for which judgment is asked. It is further averred that, a short time before the expiration of the lease, plaintiff procured a two-years extension of the contract according to its terms, whereby both plaintiff and defendant association were bound as before; that, as required in the first instance, plaintiff deposited with the association the sum of \$5,000 to secure it against default on the part of plaintiff, said sum to be returned to plaintiff at the expiration of the lease or extension, in case plaintiff had complied with its obligations; that, in pursuance of the agreement of extension, plaintiff, with the full knowledge and acquiescence of defendant association, put into the sawmill and upon the property covered by the lease certain necessary improvements and repairs, permanent in their nature, at the reasonable cost of over \$15,000, and for this plaintiff also prays judgment by reason of the facts hereinafter

set out. It is further averred that on the — day of —, 18—, after the expiration of the original lease, the defendant association sold and conveyed to John H. Kirby and to the Kirby Lumber Company and the Houston Oil Company (two Texas corporations) all its holdings in Texas, including the property leased to plaintiff, and all the lands from which the association expected to get logs to be furnished for the operation of the mill; that the vendees ousted plaintiff from its holdings, and the association, by reason of such sale, ceased to be a going concern, and by that act has rendered it impossible for the association to comply with the terms of the lease. Large damages are averred to have resulted from this breach by the association growing out of the failure to furnish logs for the two-years extension of the lease, and for this plaintiff prays damages also. John H. Kirby and the two Texas corporations above named were made parties defendant for the purpose of foreclosing an asserted lien upon all the property conveyed by the association to them, and plaintiff also sought, by injunction, to hold in the hands of Kirby, the Houston Oil Company, and the Kirby Lumber Company all the consideration for the purchase from the association which had not theretofore passed. A lien, as before stated, was asserted against all the property purchased, and was averred to exist by reason of the following facts: That the Texas Pine Land Association was a voluntary association or joint-stock company, the membership of which is very numerous, and the names of all the members are unknown to plaintiff, and all are alleged to be nonresidents of this state; that the membership is so large it is impracticable, if not impossible, to make each and all of them parties to this suit; that the Texas Pine Land Association was organized for the purpose of and was engaged in the investment of capital in pine and other timber lands in Texas, and in cutting and selling logs, and operating sawmills, trams, and booms, and operating a general lumber and timber business; that the business of the association had been intrusted by its members to Thomas L. Nelson, Francis Peabody, Jr., and Noah W. Jordan (residents of Boston, Mass.), as trustees, who were fully empowered to transact all the business of the association, and to make all necessary contracts, sales, and bargains in furtherance of the purposes of the association. But the power of these trustees was specifically limited by the following stipulation, embodied in the written instrument, denominated "Declaration of Trust," which was the source of their authority: "Art. 13. The trustees shall have no power to bind the shareholders personally, and, in every written contract they shall enter into, reference shall be made to this declaration of trust. And the person or corporation so contracting with the trustees shall look only to the funds and property of the trust for the payment

under such contract, or for the payment of any debt or damage, judgment or decree, or of any money that may otherwise become due and payable, by reason of the failure on the part of the trustees to perform such contract in whole or in part, so that neither the trustees nor the shareholders, present or future, in this trust shall be personally liable therefor." That in pursuance of this clause there was incorporated in the original lease contract the following clause: "It is further distinctly understood that the party of the first part is a joint-stock association without personal liability of its stockholders, and that for any debt, demand, or damage arising under this instrument against the party of the first part the party of the second part, or other party in whose behalf such demand may arise, shall look exclusively to the trust property in the hands of the trustees of the party of the first part, and upon no account and in no event shall there be any individual liability of the shareholders, party of the first part, or its trustees." The large amount of lands and other property in Texas owned by the association is specifically set out and described in the petition. It is alleged that the association owned all the lands for miles around the sawmill site, so that in no event could plaintiff have operated the sawmill after the sale of its property by the association; that, as above stated, plaintiff had agreed in set terms not to hold the members of the association personally liable, but to look alone to the trust property for the satisfaction of its demands, and that as a result it has no remedy except against the property and funds of the concern; that the contract of lease itself evinces a purpose on the part of the parties thereto to charge the property with a lien, and that if that does not do so an equitable lien clearly arises in favor of plaintiff by reason of the declaration of trust, the terms of the lease, and the attendant facts averred. It is further alleged that Kirby and the two defendant corporations had actual notice of all the facts and the existence of plaintiff's demands, and that same were secured by a lien at the time of and before the purchase by defendants. A foreclosure of the asserted lien is prayed for against the trust property in the hands of the defendants.

The Kirby Lumber Company and the association interposed an exception to that portion of the petition which seeks to foreclose a lien upon land not leased to plaintiff in 1898, and, further, that the land had been conveyed before the beginning of this suit, and therefore no lien existed.

These exceptions were sustained by the court, whereupon plaintiff filed the following motion: "And now comes the plaintiff and dismisses all that part of its cause of action seeking a recovery against the Houston Oil Company, the Kirby Lumber Company, or any one else, for the moneys, stocks, and bonds or other things of value alleged to be the consideration passing to said Texas

Pine Land Association for the lands described, as sold to the said oil company and lumber company of date July 31, 1901, because it now alleges that all of said consideration passed to said association before the filing of this suit, and has been removed from this state in the shape of money, and is beyond the reach of plaintiff; and plaintiff says that all the property of said association had been removed from this state before the institution of this suit, except the land herein involved, and that it is the only source through which it can collect any judgment that may be rendered. And plaintiff does not seek to recover any money judgment against said association as an individual, or any of the trustees as members, but only such judgment as may be a charge upon the real estate described in plaintiff's petition."

The motion, being heard by the court, was allowed. Plaintiff also dismissed as to defendant John H. Kirby, and also as to the three named trustees in their individual capacities, they having answered both for the association and for themselves. Thereupon defendants renewed their general demurrers, which the trial court sustained. Plaintiff refusing to amend, the action was dismissed, and from the judgment of dismissal plaintiff has appealed.

Before taking up appellant's assignments of error it is necessary, first, to dispose of a point made by appellee which, by reason of its importance, is entitled to precedence. Appellee contends that appellant's motion to dismiss was a practical dismissal of his entire action, and that the trial court properly sustained general demurrers to a petition, which, after the dismissal contained nothing but assertions of liens, with no money or other personal demand as a basis therefor. We are of opinion that this contention places a strained and unnatural construction upon the motion to dismiss. We gather from its terms that its primary purpose was to eliminate from the case all questions as to the funds due the association by the other defendants for the purchase of its Texas properties. The remainder of it did no more than the amended original petition, namely, concede that plaintiff was entitled to no money judgment against any of defendants enforceable against them personally, but only such judgment as was necessary to support and foreclose the asserted liens, and subject the property of the trust to the satisfaction of plaintiff's demands. Any other construction does violence not only to the motion itself, but to the manifest theory upon which this suit was brought and is sought to be maintained.

The question which includes all others necessary to be disposed of on this appeal is, did the court err in sustaining the general demurrer to plaintiff's amended original petition? Plaintiff seems to rest his cause of action upon two theories, and asserts a right to recover upon either the one or the other:

First. Where a person, or association of persons, contract in lieu of personal liability that the property of such person or association shall stand pledged to the performance of such agreement, and to the payment of any money demand of whatever nature which may result from such contract or grow out of its breach, an equitable lien is thereby created upon the property. Second. Inasmuch as by the very nature of the association, as created by the declaration of trust, there could be no personal liability, and the property of the association could alone be looked to by the creditors of the concern, such property became a trust fund in the hands of the trustees chargeable with a lien in favor of its creditors, and this lien followed it into the hands of purchasers with notice, where by such sale and purchase the association went out of business, and ceased to be a going concern. In order to clearly and correctly determine whether either of these propositions can be maintained, it is necessary, first, to ascertain the nature of the association as a legal entity, and, second, the legal effect of the contract of lease, with its stipulations exempting from liability the individuals at interest as parties of the first part. In disposing of these questions we will pretermitt all inquiry as to whether the portions of plaintiff's demands, which are of the nature of unliquidated damages, could in any event be declared to be secured by an equitable lien, and shall dispose of the case as though the suit in all other respects was free from question.

It appears from plaintiff's allegations that the defendant association is a joint-stock company or voluntary unincorporated association, composed of a great number of persons whose interests are evidenced by certificates of stock, and which transacted its business and managed its affairs through named trustees with prescribed powers. Such concerns are uniformly held in the United States to be partnerships, subject to be sued as such, and governed by the laws fixing partnership responsibility. 22 Ency. Law (2d Ed.) p. 637; Cook on Stock and Stockholders, volume 1, § 508; Thompson on Corp. volume 1, § 14, p. 16. They are distinguishable from "partnerships," as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and that the stock can be bought and sold without affecting the integrity of the concern. In these respects they partake of the nature of corporations, but these peculiar characteristics do not affect the nature or extent of the individual liability as to third parties. The agreement among members, or between themselves and the trustees appointed to manage the affairs of the concern, that no personal liability should rest upon the members, would not have the purposed effect, any more than such an agreement between the members of an ordinary partnership would accomplish

that end. A. & E. Ency. Law, vol. 22, pp. 143-173.

Our statute prescribes how a limited partnership may be constituted, and compliance with its terms, requiring certain evidences of its peculiar nature to be placed of record, puts the world on notice of the nature of its liability. Rev. St. tit. 76. But it does not follow by reason of the existence of this statute that either an ordinary partnership or an association of individuals may not contract with another that, as to liabilities growing out of the particular transaction evidenced by the contract, the partners or the members of the association shall be exempt from personal liability, and that the other contracting party must look alone to the common holdings of the firm or association for indemnity. The statute merely confers a power. It does not limit or destroy any common-law right. We are aware of no rule, either of law or public policy, which forbids the making of such a contract. 1 Cook on Stockholders, § 216; 22 A. & E. Ency. Law, p. 173; Lindley on Partnerships, 377, 378, 382. These things being true, it is plain also that such contract does not necessarily create a lien upon the property or any part of it. Lindley on Partnership, p. 380. Whether it does or not depends upon the intention of the parties, as expressed by the language of the instrument itself, or gathered from that and attendant circumstances. If the instrument itself declares the lien, it needs no aid from a court of equity. If the instrument evinces a purpose on the part of the parties that a lien should exist, but falls short of its creation, proceeding upon the maxim that equity considers as done that which ought to be done, the courts will carry out the just purposes of the contracting parties. 11 Ency. of Law (2d Ed.) p. 123. But it must appear that a lien was intended or promised upon some specific property. 3 Pom. Eq. § 1235.

With these rules and principles in mind, an inspection of the contract of lease convinces us that a lien was neither created nor promised. If read in the light of the declaration of trust, to which it refers, and especially in view of the surrounding facts at the date of its creation as disclosed by the petition, the correctness of this construction becomes very plain.

The association is averred to have owned vast quantities of land, and to have been engaged in the cutting and selling of timber and lumber, and in the operation of trams, booms, and sawmills situated in various counties in the state. To hold that such a contract, in the absence of specific language to that effect, created a lien on all the property of the concern in Texas, would lead to the absurd conclusion that the logs, being cut and sold, were subject thereto; that other mills and land, leased by other parties under the general purposes of the concern, were also covered, and if subsequent in date

would be subject to such lien. We do not mean to say that a contract involving such consequences might not have been made, but are of opinion that these facts go far to show that no such purpose was in the minds of the parties here. It is well to remember in this connection that the trustees were not empowered to make any other sort of contract than one exempting the members from liability, and that of this restriction plaintiff was aware, and hence must have known that all other contracts made by the concern in Texas must have been couched in like terms.

Does the fact that the members of the association were exempted from individual liability, and that plaintiff was bound by the contract to look to property held in common by the members of the concern, of itself authorize a court of equity to imply a lien upon the common property? If the contract of lease had pointed out specific property to which the lessee should look, there might be much force in appellant's position on this point. But the case before us presents a different aspect. No property was described except the property leased, and that simply for the purposes of the lease feature of the contract. The property of the association was vast in amount, scattered over many counties, and consisted of realty and personality. It may be inferred from the petition, if not in fact alleged, that much of the property was then involved in like contracts with others, and much of the personality exposed to daily sale.

We do not think the facts alleged authorize the conclusion either that a lien was intended by the parties or that equity should imply one from the facts. We have said the contract was not one forbidden by law, and this means of course that thereunder plaintiff must be accorded some effective remedy. In holding that no lien existed, plaintiff's rights are not precluded. It seems to us the most natural and reasonable construction to place upon the contract would be to hold that the exemption from personal liability simply gave direction to any execution which might be issued on any judgment procured by plaintiff against the concern, its members or representatives. Thus, if plaintiff had procured judgment against the association, and it had pleaded in defense the restrictive clause of the contract, the judgment should have directed the execution to be levied only upon firm property, and if it should be made to appear that the other defendants had purchased the property of the association, with knowledge of a purpose on its part to defraud its creditors, such property, under well-settled rules of law, could nevertheless be subjected to the debt. It is perhaps true, also, that plaintiff has a remedy against the trustees personally for misappropriating the funds of the association. *Lindley on Partnership*, p. 383. If, however, we are in error in holding that

the contract of personal exemption was valid, then plaintiff had the right, under appropriate pleading, to a personal judgment against each member of the association, or such members as he could identify and serve with process, with right to general execution against them, and execution against the firm property as to all. So that, in any event, the demurrer was properly sustained, unless plaintiff's proposition is sound, to the effect that parties purchasing all the assets of such a concern are responsible for its liabilities, and that a lien exists upon such assets to secure such claims. The funds and property of a defunct corporation are a trust fund in the hands of the directors for the benefit of the stockholders and creditors. It is also true that when one corporation buys out the property of another corporation, whereby the first concern becomes defunct, the purchaser becomes responsible for the debts of the defunct concern at least to the value of the property purchased; but we are of opinion this rule as to corporations cannot be applied to the association in question, which, as to third parties, is in all essential respects a mere partnership.

Upon the proposition that, irrespective of whether the contract itself sufficed to create a lien or would authorize a court of equity to declare one, the nature of the association and the nature of plaintiff's contractual relation did nevertheless create one, plaintiff relies on the case of *Society of Shakers v. Watson*, 15 C. C. A. 632, 68 Fed. 730. In that case the appellant was composed of a membership of 100, consisting of minors as well as adults, its membership constantly shifting and changing. None of the members individually owned any interest in the property of the society, nor were the interests represented by shares. It was neither a corporation nor joint-stock company, was not engaged in business for profit, and the common holdings were intrusted to and managed by trustees. These latter borrowed money which went to the betterment of the society's holdings. The court held it was not a partnership, that there could be no individual liability, and that from all the facts it was manifest the parties intended the claim should constitute a lien against the property of the society. Even if we should regard the case as binding authority, it is nevertheless clearly distinguishable from this in the respects above mentioned, and the court was doubtless correct in holding that, under the peculiar facts of that case, a lien existed. Such an association is neither a corporation nor a partnership. 22 A. & E. Ency. of Law, p. 53. So in *Bank v. Eaton* (C. C.) 100 Fed. 8, on which the plaintiff also relies. The case is much like the one at bar, but with this distinction: the articles of trust specifically declare that the money borrowed, and for which the suit was brought, should constitute a lien upon the trust property then existing and thereafter to be ac-

quired. The case cited contained a fact element which is lacking in the one before us.

We do not deem it necessary to discuss the other cases cited by appellant. We do not regard them decisive of the question determined here. That partnership creditors have no lien upon partnership assets is well settled, and the mere fact that the partners have seen fit to contract against personal liability does not vary the rule.

The judgment is affirmed.

SUPREME COUNCIL, AMERICAN LEGION OF HONOR v. LANDERS.*

(Court of Civil Appeals of Texas. Jan. 28, 1903.)

BENEFIT CERTIFICATE—BY-LAWS OF ORDER—FAILURE TO COMPLY WITH—FORFEITURE OF CERTIFICATE.

1. A benefit certificate stipulated that liability should attach only on compliance by assured with all the by-laws of the order, and on payment by him of all assessments to the benefit fund within the time and in the manner required by the by-laws. A by-law provided that the certificate should be void if assured failed to pay within a specified time all assessments called by the executive committee. *Held*, that the fact that the certificate required a payment of the assessment due the benefit fund, did not relieve the assured from the duty of paying other valid and legal assessments and of complying with the by-law providing therefor; and, if he failed to do so, the certificate was avoided.

Appeal from District Court, Bell County; Marshall Surratt, Judge.

Action by Georgia Landers against the Supreme Council, American Legion of Honor. Judgment for plaintiff and defendant appeals. Reversed.

Ewing & Ring and A. M. Monteth, for appellant. W. R. Butler, for appellee.

FISHER, C. J. This is the second appeal in this case, the first having been determined by the Court of Civil Appeals for the Fourth District. 57 S. W. 307. The action was by Georgia Landers against Supreme Council, American Legion of Honor, to recover, besides interest, \$2,000, the amount of a benefit certificate issued by defendant May 11, 1894, on the life of her deceased husband, William A. Landers, payable to her "upon satisfactory proof of the death, while in good standing upon the books of the supreme council," of said assured; subject to the condition, among others, that he, at the time of his death, "shall have paid all assessments called to the benefit fund within the time and in the manner prescribed by the by-laws of the supreme council in force at the time of the issuance of this certificate, or as the same may be hereafter amended." The defendant resisted recovery on the ground, *inter alia*, that deceased was not, at the time of his death, in good standing upon the books of the supreme council, (a) because he had

become suspended from the order by failing to pay, as required by the laws of the order, assessments which had been called by the executive committee, and were payable by him; and (b) because he had previously voluntarily abandoned his connection with the order. The case was tried with the aid of a jury, and resulted in a verdict and judgment in plaintiff's favor, to wit, on February 26, 1902, for \$2,672.33, being principal and interest to that date, besides costs of suit.

The facts necessary to a disposition of this case are as follows: The benefit certificate sued upon is as follows:

"This is to certify that William A. Landers is a companion of the American Legion of Honor, said companion having made application for 3 degree membership to Eureka Council, No. 1276 A. L. of H. instituted and located at Temple, in the state of Texas, and passed the requisite examination and been duly initiated into said council, and this certificate is issued to said companion as an evidence of the facts in it contained, and as a statement of the contract existing between said companion and the Supreme Council American Legion of Honor. In consideration of the full compliance with all the by-laws of the Supreme Council A. L. of H. now existing or hereinafter adopted and the conditions herein contained, the Supreme Council A. L. of H. hereby agrees to pay Georgia Landers, wife, \$2,000 upon the satisfactory proof of the death while in good standing upon the books of the supreme council of the companion herein named, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations following:

"First:—That all statements made by the companion in the application for membership and all the answers to the questions contained in the medical examination are, in all respects, true and shall be deemed and taken to be express warranties.

"Second:—That said companion shall have paid all assessments called to the benefit fund within the time and in the manner required by the by-laws of the Supreme Council in force at the time of the issuance of this certificate or as the same may be hereinafter amended.

"Third:—That all money which the Supreme Council American Legion of Honor may advance against this certificate by way of relief benefit to the companion named herein for sick or disability benefits under existing or hereinafter-acted by-laws or regulations, may be deducted at the death of the companion from the amount payable to the beneficiary named herein.

"Fourth:—That the amount designated by said companion in his application for membership and stated herein as a funeral benefit may be deducted at the death of the companion from the amount payable to the beneficiary named herein.

"Fifth:—That this benefit certificate is is-

*Rehearing denied March 18, 1903.

sued by the supreme council and accepted by the companion herein named for himself and his beneficiary upon express conditions and agreement that in case of any false or fraudulent statement or misrepresentation or violation of any of the covenants herein contained, the same shall be void. In witness whereof, Supreme Council of the American Legion of Honor has hereunto affixed its corporate seal and caused this certificate to be signed by its Supreme Commander and attested by its Supreme Secretary at Boston, Massachusetts, this 11th day of May, A. D. 1893."

By-law 62 of the order is as follows: "On or before the last day of each calendar month every member of the order shall pay to the collector of his council and without notice, all assessments which may have been called by the executive committee and are payable by him during said month. In default thereof he shall stand suspended from membership in the order and all benefits therein, and his benefit certificate shall be void."

A quorum of the executive committee of the Supreme Council of the American Legion of Honor, in accordance with the rules and by-laws of the order, and at the time and place required, called or levied an assessment for the month of January, and regularly and properly notified the subordinate lodge of which Landers was a member. According to this assessment, Landers was due for the month of January, 1896, \$4.80, \$3.20 of which he paid, but declined and refused to pay the balance; and thereafter, when requested to pay the balance, directed the receiving officer who had collected from him the \$3.20, and who was the collecting officer of the council of which Landers was a member, to apply the \$3.20 to an indebtedness due by Landers to the subordinate lodge of which he was a member. From this time Landers ceased to be a member of the lodge in good standing upon the books of the council. The assessment for the month of January and those for the subsequent months were not paid by him, nor was the amount paid for him by any one else. Landers died in July, 1896, and from January to that time there were properly levied by the executive committee of the supreme council assessments for each of said months, notice of which was given to the council of which Landers was a member.

There is no dispute as to the facts as above stated. The conclusion that they lead to is that Landers had ceased to be a member in good standing upon the books of the supreme council, and that he was suspended as a member of the order, by reason of his failure to comply with the by-law as above quoted. The by-law became a part of the contract of insurance, and he was bound by it, unless there is some expression in the benefit certificate which indicates that the by-law was waived, or was not intended to

be applied to his contract. It is one of the stipulations of the benefit certificate that the appellant shall become liable only when Landers complies with all the by-laws of the order existing or hereafter adopted, and while he remains in good standing upon the books of the council, subject to certain restrictions and limitations, one of which is that he pays all assessments to the benefit fund within the time and in the manner required by the by-laws. It is contended by appellee that there can be a suspension from the order or forfeiture of the benefit certificate only when the assured fails to pay the assessments that are called for the benefit fund, and that by reason of the fact that the \$3.20 paid by Landers for the assessment of January was all that he was due to the benefit fund, and that, the remaining \$1.60 being for a different purpose, he was wrongfully suspended from the order. This narrow construction of the contract evidenced by the benefit certificate is untenable. The rule referred to is made a part of the contract of insurance by the certificate itself. The certificate requires a compliance with the rules, and also a compliance with the terms of the contract as evidenced by the certificate, one of the conditions of which was that a forfeiture should result in the event the assessment for benefit funds was not paid. The other was, as evidenced by the by-law, which is a part of the certificate, that not only the benefit fund should be paid, but also all of the assessments levied by the executive committee of the supreme council. The fact that the certificate requires a payment of the assessment due the benefit fund does not relieve the assured of the duty of paying other valid and legal assessments; and the provision of the certificate rendering the policy void for failure to pay the benefit fund does not relieve the assured from the burden of complying with the terms of by-laws 62, as above set out. They are both provisions of the benefit certificate, made so by the terms of the certificate itself, and both may be harmonized and be construed together so as to give effect to each.

With this view of the question, together with the facts as found, it is unnecessary for us to pass upon the other questions presented in the briefs, for in our opinion, the judgment ought to be reversed, and here rendered in favor of the appellant.

Reversed and rendered.

AUSTIN v. WELCH.

(Court of Civil Appeals of Texas. March 4, 1903.)

CONDITIONAL SALES—SALES FOR CASH—PASSING OF TITLE—CHATTEL MORTGAGES—FILING—LANDLORD'S LIEN—PRIORITY.

1. Plaintiff sold certain furniture to defendant for cash on delivery. Certain of the furniture was delivered, and defendant paid \$150 on account, when plaintiff left the city and instructed

his clerks to complete the delivery and collect the purchase money. On plaintiff's return, finding the money had not been paid, he at once demanded payment, and received an additional \$100, and was promised the balance the succeeding day, when defendant informed him that she was unable to pay the balance, whereupon it was agreed that the sale should be turned in to one on credit, and an additional price was charged, and notes and a chattel mortgage executed therefor. *Held*, that the sale was conditioned on cash payment, and that the title did not pass until the notes and mortgage were executed.

2. Rev. St. art. 3251, gives a landlord a preferred lien on all property of the tenant in the building for the payment of rent, etc., and article 3328 declares that every chattel mortgage not accompanied by immediate delivery, etc., shall be absolutely void as against the mortgagor's creditors unless such instrument, or a copy, shall be "forthwith" filed in the county clerk's office. *Held*, that where a chattel mortgage on a tenant's property was executed on Saturday, about 2 o'clock p. m., and the mortgagee passed the clerk's office during that afternoon before 5 o'clock, but gave no reason why he did not file the instrument on that day, his filing the same on the succeeding Monday was not a filing "forthwith," and the lien of the landlord was prior to the lien of the mortgage.

Appeal from El Paso County Court; Jas. H. Harper, Judge.

Action by E. B. Welch against Flora D. Reeve, in which W. H. Austin intervened. From a judgment in favor of plaintiff, intervenor appeals. Reversed.

R. C. Walshe and M. W. Stanton, for appellant. Richard F. Burges, for appellee.

NEILL, J. This suit was originally instituted by the appellee against Flora D. Reeve upon 11 promissory notes, aggregating \$610.90, given by her for the purchase money of certain furniture and household goods, and to foreclose a mortgage on the property made to secure their payment. The appellant intervened, claiming an indebtedness against the defendant of \$200 due for rent secured by a landlord's lien on the property, and that such lien was prior and superior to the one asserted by the appellee. Pending the suit, it was agreed by all the parties that the value of the goods should be assessed, and, when it was, they should be turned over to appellee upon his filing with the sheriff his bond with two good securities in the amount of their assessed value, "conditioned that if, upon the first disposition of the case, it be determined that the defendant, Flora D. Reeve, or the intervenor, W. H. Austin, is entitled to said furniture, or any interest therein, then that said E. B. Welch shall pay to said Flora D. Reeve, or W. H. Austin, as the case may be, a sum equivalent to the proportion that any such interest bears to the total amount of such bond;" and that the court rendering final judgment, in the event it should find in favor of defendant or intervenor, should render such judgment against Welch and the sureties on his bond, not to exceed the sum for which it was given. In accordance with such agreement, the value of the property was assessed at

\$250, the bond given for that sum, and the property turned over to appellee. The case was tried without a jury, and the court entered a judgment in favor of appellee, Welch, against the defendant, for the sum of \$610.90, in favor of the intervenor, Austin, against her for \$200, with legal interest from the 1st of May, 1902, declared appellee's to be the first lien, credited his judgment with \$250 (the value of the goods), and discharged Welch and his sureties from further obligation on the bond referred to.

The vital question to be determined on this appeal is whether the trial judge erred in holding, upon the facts found by him, that appellee's mortgage was prior to appellant's landlord's lien. As there is no statement of facts in this case, the findings of the court must be taken as conclusive against the appellant upon all issues of fact favorable to appellee that they are reasonably sufficient to support. The facts found by the court, so far as they affect the question under consideration, are substantially as follows: On the 3d or 4th day of January, 1902, the defendant, Flora D. Reeve, agreed with appellee to purchase from him furniture to furnish a house, and pay cash therefor, and at the time paid him on account \$150. The furniture was delivered to her from time to time, and placed in and upon premises leased by her from intervenor, until the 25th of January, 1902, when the delivery was complete. Before it was all delivered, appellee left the city on business, leaving instructions with his clerks to complete the delivery and collect the purchase money therefor. Upon his return, finding the money had not been paid, he called upon her and demanded payment, and was paid \$100, and promised the balance at once, but she informed him next day that she could not pay it, and, for the first time, asked him to sell the goods to her on credit. He told her if he sold on credit he would have to charge her 10 per cent. more, and upon her agreeing to increased price he drew up the notes and chattel mortgage sued for. They were signed by her about 2 o'clock p. m., on March 1, 1902, which was Saturday, and it was filed for registration in the office of the county clerk on March 3d, at 11:20 a. m., and immediately registered there in accordance with law. The third paragraph of the court's findings of fact is as follows: "(3) That said notes and chattel mortgage were signed by the defendant in the house at 820 San Antonio street in the city of El Paso, Texas, and said plaintiff passed by the court house of El Paso county, Texas, in going from his place of business to and from the place where said notes were executed during the afternoon of March the 1st, A. D. 1902, prior to the hour of five o'clock." On the 31st day of December, 1901, the intervenor leased the defendant the house and premises on which it is situated, known as the "Mackanack House," at 820 San Antonio street in the

city of El Paso, Tex., for a term of one year from said date, for which she agreed to pay \$100 per month, payable monthly in advance, on the 1st day of every month. She entered into possession on the 1st day of January, 1902, and paid the rents for the months of January, February, and March as they became due, but failed to pay the rents, or any part thereof, for the months of April and May, 1902, which were due and unpaid when this suit was tried. It was in this house the property was placed by the defendant as it was delivered to her by plaintiff, and for the rents due thereon the intervener claims a landlord's lien on such property. Upon these facts the trial court concluded, as matters of law, that the title to the property sold by appellee to defendant did not pass until the execution of the chattel mortgage, and that appellee's mortgage lien is prior and superior to intervener's landlord's lien, in that the latter did not attach to the property until after the execution of the mortgage, and that it was filed "forthwith," within the meaning of the statute in reference to filing chattel mortgages. The contentions of appellant are: (1) If the original sale were conditional, it was waived by the delivery of the goods; and (2) that the mortgage was not filed forthwith after its execution, as required by statute. "All persons leasing or renting any residence, storehouse or other building shall have a preference lien upon all property of the tenant in such residence, storehouse or other building, for the payment of the rents due and that may become due." Rev. St. art. 3251. "Every chattel mortgage * * * which shall not be accompanied by an immediate delivery and followed by an actual and continued possession, shall be absolutely void as against the creditors of the mortgagor, * * * unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall be situated." Rev. St. art. 3328. If, then, in view of these statutes, either contention of the intervener is sustained, it must follow that the court erred in its conclusions of law, and, for such error, its judgment be reversed, and, upon the facts found, judgment rendered in this court for the appellant.

The expressions "cash," "cash down," or "cash on delivery," as used in sales, may be used in two different senses—one where the words indicate simply that the goods must be paid before the buyer is entitled to possession; and the other, where they indicate an intention not to part with the title until the price is paid. A cash sale is not necessarily in law either a conditional or an unconditional sale. If, by the use of these terms, the parties understood merely that no credit is to be given, and the seller will insist on his right to retain possession of the goods until the payment of the price, the sale is so far complete and absolute that the property passes; but if it is understood that the goods

are to remain the property of the seller until the price is paid, the sale is conditional, and the title does not pass. *Scudder v. Bradbury*, 106 Mass. 428; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450. Whether the phrases have one meaning or the other is a question of intention, which, if the facts are in dispute, is for the jury; but if the contract is in writing, or the facts not disputed, is a question for the court to determine. *Davis v. Giddings*, 30 Neb. 209, 46 N. W. 425; *Scudder v. Bradbury*, supra. When the words are given the first meaning, the title passes at once upon the completion of the contract, by the force of it, so as to cast the risk upon the buyer and entitle the seller to the price. *Clark v. Greeley*, 62 N. H. 394; *Hayden v. Demets*, 53 N. Y. 426. However, the buyer, though he has title, is not entitled to possession until he pays the price; for payment and delivery in such a case are presumed to be concurrent acts, and until payment is made the seller may retain the goods by virtue of his vendor's lien. But he retains the goods and not title. Where the words are given the second meaning, title will not pass until the price is paid or the condition waived; for, until the payment or its tender, the seller retains, not simply the possession, but the title also. The condition of cash payment, whether express or implied, is for the benefit of the seller, and he may waive it if he elects to do so. But whether, in fact, under all the circumstances, there has been a waiver is a question for the jury. It is not necessarily to be inferred, where a conditional sale has been made and delivery has immediately taken place upon the expectation that the promised payment or security will shortly be given, that the sale ipso facto becomes absolute. There is always an implied understanding that the vendee is acting honestly, and that he takes the goods subject to the contract. It is not necessary, therefore, that the owner shall in express terms declare that he makes the delivery conditional. It is sufficient if the intent of the parties that the delivery is conditional can be inferred from the acts and circumstances of the case. Waiver is the voluntary relinquishment of some right which, but for such waiver, the party would have enjoyed. The important question is: "Has the vendor manifested, by his language or conduct, an intention or willingness to waive the condition, and make the delivery unconditional, and the sale absolute, without having received payment or the performance of the conditional sale? This must depend upon the intention of the parties at the time, to be ascertained from their conduct and language, and not from the mere fact of delivery alone. Whether there has been a waiver is a question of fact. It may be proved by various species of evidence; by declarations, by acts, or forbearance to act. But, however proved, the question is: Has the vendor voluntarily and unconditionally delivered the goods without intention to

claim the benefit of the condition?" Mechem on Sales, §§ 551, 552. In this case there is no question, under the facts found by the court, that the sale was conditioned upon a cash payment. It is manifest, from the instructions given by the plaintiff to his clerks when he went off, and by his action upon his return, that he never voluntarily and unconditionally delivered the goods without intention to claim the benefit of the condition. We must, therefore, sustain the finding of the trial court that the plaintiff never waived the condition, and that the title never passed to the defendant until the notes sued on and the mortgage given to secure their payment were executed and delivered.

This brings us to the second question in the case—was the mortgage forthwith deposited with and filed in the office of the county clerk? In *Hackney v. Schow* (Tex. Civ. App.) 53 S. W. 714, in considering the meaning of the word "forthwith" as used in Rev. St. art. 3328, the court says: "The term 'forthwith' is an 'imperative term, and certainly admits of no unnecessary delay.' Mr. Webster defines the term as meaning 'immediately; without delay; directly.' Bouvler: 'As soon as the thing may be done by reasonable exertion confined to that object.' Mr. Rapalje and Mr. Black also give this definition, substantially. * * * Sec. 8 Am. & Eng. Enc. Law, p. 571, and notes, the term being thus defined in the text as meaning 'immediately; within reasonable time; with all reasonable celerity.' Indeed, as was said by our Supreme Court in the opinion by Chief Justice Gaines in the case of *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163, the term 'has been too often construed to require discussion.' It will be sufficient to say that in the case cited the term, as used in our chattel mortgage statute, was defined to mean, 'with all reasonable diligence and dispatch.'" Did the plaintiff use such diligence and dispatch in this case? The facts found by the court show that the mortgage was executed in the building on San Antonio street rented by intervener to the defendant, at about 2 o'clock p. m., and then and there delivered to the plaintiff, and that afterwards, during that afternoon, before 5 o'clock, he passed along that street by the courthouse in going to his place of business. No reason is given or shown why he did not then step into the courthouse and deposit the instrument with the county clerk and have him file it for registration. In the absence of any such showing, it must be presumed that no good reason could be given for his not doing so. Had he deposited and filed it then, it would have been done "forthwith," within the meaning of the term; but, having failed to do so, he let slip the time and opportunity for complying with the letter and spirit of the statute, and when his instrument was filed, on the following Monday, the lien created by it was subsequent and inferior to the intervener's. That intervener

was in no way injured or misled by plaintiff's failure to file the mortgage on Saturday afternoon does not alter the case. The intervener was a creditor, he having a landlord's lien, within the purview of the statute, with the right to stand upon it and maintain that the mortgage was absolutely void as against him, because it was not "forthwith" deposited and filed in the office of the county clerk. If provisions of the statute are not observed, the chattel mortgage is for that reason void as against creditors, irrespective of bad faith or of any intention to defraud. *Button Co. v. Spielmann*, 50 N. J. Eq. 128, 24 Atl. 571; *Scharer v. Schmidt*, 50 N. J. Eq. 796, 27 Atl. 1033.

This conclusion requires us to reverse the judgment in favor of the plaintiff, and render final judgment in favor of the intervener. Therefore, in accordance with the agreement referred to in our statement of the case, judgment will here be rendered in favor of W. H. Austin against the plaintiff, E. B. Welch, as principal, and Chas. B. Stevens and Henry L. Capell, as sureties, on the bond made in conformity to said agreement for the sum of \$200, with interest thereon from the 1st day of June, 1902, at the rate of 6 per cent. per annum.

Reversed, and rendered for appellant.

ST. LOUIS S. W. RY. CO. OF TEXAS v. BARRETT et al.

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT—ASSUMPTION OF RISK—FAMILIARITY WITH APPLIANCES—FAILURE TO TAKE PRECAUTIONS—CONTRIBUTORY NEGLIGENCE.

1. A railroad employé, engaged in loading cotton on a car, the track, platform, and appliances being charged to have been negligently constructed and to be defective, who had loaded cotton in the same manner on a former day, and who was familiar with the conditions and cognizant of the danger, assumed the risk of injury from the slipping of a bale.

2. A railroad employé engaged in loading cotton on a car, whose duty it is to nail cleats, furnished by the company, at each end of the gang plank, but who fails to do so, whereby the plank slips, causing a bale to fall on him, killing him, is guilty of contributory negligence.

Appeal from District Court, Collin County; J. E. Dillard, Judge.

Action by Mrs. G. G. Barrett and others against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiffs, and defendant appeals. Reversed.

E. B. Perkins and Head & Dillard, for appellant.

BOOKHOUT, J. This is a suit by appellees, as plaintiffs, to recover damages against appellant for personal injuries to C. R. Barrett, the husband of Mrs. G. G. Barrett. A trial resulted in a verdict and judgment for plaintiffs for \$1,000, and defendant appealed. In the month of September, 1900, C. R.

Barrett was in the employ of the St. Louis Southwestern Railway Company at Nevada, Tex., at a salary of \$25 per month. His duties were to work about the depot, sell tickets for night trains, check baggage, and help about express matter. Loading cotton on cars was extra work, and when engaged in it he was paid $2\frac{1}{2}$ cents per bale for loading cotton from defendant's platform into the cars. The railway company had under its control a platform for the storing of cotton to be loaded on its cars, said platform being 80 feet long from east to west and 40 feet wide. When first erected, the platform was level, but the storing of cotton thereon had caused it to settle, and become uneven. The railway company, after such settling, raised the north side of the platform, and at the time of the accident the north side thereof throughout its entire length was about two feet higher than the south side. The defendant's switch track runs north of the platform, and comes within about two feet of its northwest corner. The track then gradually curves north, so that the east end of the platform is from 16 to 18 feet therefrom. The railway company had placed a freight car, which belonged to another road, at the northwest corner of the platform, for the purpose of having the same loaded with cotton then on the platform. On the morning of September 10, 1900, C. R. Barrett was directed by the railway company to load certain cotton then on the platform into said car. The said cotton was in bales, each weighing about 500 pounds. In order to load the cotton, trucks were provided, which were run up against a bale of cotton, the bale was pulled over on the truck, and hauled thereon over the gang plank into the car. About noon of the said 10th day of September, 1900, C. R. Barrett was discovered suspended on the side of the car with a bale of cotton pressing against his breast. He was dead.

It was charged by the plaintiffs, in substance, that the defendant was guilty of negligence in that the platform, tracks, skids, and appliances furnished by defendant for the loading of cotton were defective. Appellant contends that Barrett was guilty of negligence which contributed to the injury, and that for this reason the judgment ought not to stand. It is further insisted that, if there was negligence on the part of the railway company by reason of the defects in its track, platform, skids, and appliances for loading cotton, such defects were patent and obvious to C. R. Barrett, and that he had knowledge of the danger, and assumed the risk of working with such defective appliances when he entered upon the work.

If the defects in the track, platform, and gang plank were patent and obvious to Barrett, and he knew the danger of loading the cotton with such defective appliances at the time he entered upon the work, then he assumed the risk, and plaintiffs cannot recover.

The evidence shows that he had loaded cotton from this platform into a car standing upon the same track upon a former day, and that he was familiar with the conditions, and, we are of opinion, was cognizant of the danger.

Again, it is shown that it was his duty to nail cleats at each end of the gang plank, so that it would be kept in place, and that on the prior occasions of his loading cotton the gang plank was so cleated. The evidence tends to show that the gang plank had not been so cleated at the time of the accident which resulted in Barrett's death. If a cleat should have been nailed on the floor of the platform at the end of the gang plank and another on the floor of the car to hold the gang plank in place, and such cleats were provided by the railway company for that purpose, and it was the duty of Barrett to have nailed them on, and he failed to do so, and by reason of such failure the end of the gang plank slipped out of the car, causing the bale of cotton to fall upon and injure him, then he was guilty of contributory negligence, which would prevent a recovery by plaintiffs. Under the evidence contained in the record, we are of opinion that the same shows that Barrett assumed the risk of working with defective appliances, and that such defects were patent and obvious, and for this reason the court erred in overruling the motion for a new trial based upon this contention.

The judgment will be reversed, and the cause remanded.

HOUSTON & T. C. R. CO. v. BRYANT et al.

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

CARRIERS—INJURY TO PASSENGER—FAILURE TO FURNISH SEAT—CUSTOM—RIGHT OF WIFE TO DAMAGES—CONTRIBUTORY NEGLIGENCE—DRUNKENNESS.

1. Failure of a railroad company to furnish every passenger with a seat, and allowing a passenger to board a car when there is no seat for him, is not negligence per se.

2. The customary violation of the rule against passengers riding on the platforms of cars cannot avail a passenger who was requested by the conductor and porter to enter the car, and not stand on the platform.

3. Whether a wife was damaged by the death of her husband is a question for the jury, though she had abandoned him with the purpose of never returning to him, and had repudiated the relation of wife to him, and had determined not to receive any benefits or aid from him.

4. Though a passenger acts with prudence in taking his position on a car platform, yet, if he would not have fallen therefrom but for his drunkenness, it was the proximate cause of his falling, and prevented recovery for his death.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by W. C. Bryant and others against the Houston & Texas Central Railroad Com-

¶ 1. See Carriers, vol. 2, Cent. Dig. § 1202.

pany. Judgment for plaintiffs. Defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frost, Neblett & Blanding, for appellant. A. A. & Y. D. Kemble, for appellees.

FLY, J. This is a suit for damages alleged to have arisen from the death of Will Bryant, instituted by W. C. Bryant and M. M. Bryant, his parents, and Lila Bryant, his widow. The recovery was for \$4,000.

The facts established that Will Bryant got on a crowded car in Dallas to go to his home in Rice. He took a position on a platform of the car. The evidence was conflicting as to whether there was room in the car. Just before reaching Ferris, Will Bryant fell from the train, and was killed. He was 17 years of age, and had, a few months before his death, been married to Lila Bryant, a girl 13 years of age, from whom he had separated.

We do not deem it necessary to take up the questions presented by the numerous assignments of error and discuss them, but will advert only to those points that appear to be of importance. The following charges were given by the court:

"Fourth. It is the duty of a railway company carrying passengers to furnish a sufficient number of coaches to supply all its passengers with room and seats inside its coaches, and a failure to do this is negligence.

"Fifth. It is the duty of a railway company carrying passengers to have its passenger coaches, and the means of getting on and off of them, in a safe condition, and a failure to do this is negligence on the part of such railway company.

"Sixth. It is the duty of a railway company to carry passengers on its trains, and it is still a higher duty to carry them safely.

"Seventh. If on public or otherwise exceptional occasions it is reasonably apparent to a railway company carrying passengers that an unusually large number of persons will apply to be carried, then it is the duty of the railway company, and the managers of its passenger trains, to provide sufficient means of transportation to accommodate all applicants with room and seats in the coaches, if that can reasonably be done; and, if it is not practicable to furnish such means of transportation, then the duty to carry safely should control, and to overcrowd the coaches in such manner as to endanger the safety of passengers, by reason of such overcrowding, would be negligence on the part of the railway company.

"Applying these definitions of negligence and contributory negligence and care to the case now in hand, the court charges you:

"Eighth. If the defendant railroad company, its servants, agents, or employes in charge of the passenger train at the time and place of the negligence, injury, and death complained of in the petition (if they

did so occur), knew, or had reason to believe, or could have known by the exercise of such reasonable diligence, that the passenger train on which the deceased, W. C. Bryant, Jr., took passage, and from which he was so killed, was or would be so crowded with passengers as to render it impracticable for all the passengers to have room and seats inside the coaches, then in such case it was the duty of the defendant railway company to furnish additional coach room, if that could be reasonably done; and if it was not reasonably practicable so to furnish such additional room, then it was the duty of said railroad company, its servants and employes, to take only so many passengers as could be furnished rooms and seats in the coaches then available. And if the said W. C. Bryant, Jr., was received as a passenger as alleged, and if there was not room inside the coaches for him to be seated, and if the defendant company, its agents, servants, or employes in charge of said train knew, or by the use of reasonable diligence could have known, such crowded condition of the coaches, then to receive and undertake to carry W. C. Bryant, Jr., as a passenger under such conditions was negligence upon the part of the defendant company. And if, under such conditions, a man of ordinary prudence would have taken a position on the platform, or would have been practically under the necessity to take that or a like dangerous position, then, in such case, the deceased, W. C. Bryant, Jr., would not be chargeable with contributory negligence on account of being on the platform.

"Ninth. If there was a broken or defective car step to the coach on which deceased, W. C. Bryant, Jr., was riding, in case he was riding as a passenger on defendant's coach or train, and if the defendant railroad company, its agents, servants, or employes in charge of such train or coach knew, or by the exercise of reasonable diligence could have known, of such broken or defective car step, and if, without negligence of W. C. Bryant, Jr., such broken or defective condition of the car step was the cause of the fall and death of W. C. Bryant, Jr., then the defendant company would be liable in damages to the plaintiff. If said deceased, W. C. Bryant, Jr., was on or about such car step by reason of defendant company, its agents, servants, or employes, having failed to furnish room in its coaches, if they did so fail, and if such defect in the car step, if any, was unknown to said Bryant, and would not have been known to a man of ordinary prudence under the same or like conditions, then in such case the said Bryant is not chargeable with contributory negligence in being on or about such broken car step."

We cannot subscribe to the doctrine enunciated by the charge that a railroad company is guilty of negligence as a matter of law because it does not furnish a seat for each passenger who may get on its cars. There is no statute requiring railway companies to fur-

nish seats for passengers, nor does proof of a failure to furnish a seat for a passenger make out such a case of negligence as would justify a judge in depriving the jury of the prerogative of passing upon the facts. The right given juries of exclusive determination of the weight of the evidence and the credibility of witnesses has been most carefully guarded by statute and zealously enforced by judicial construction, and no appellate court can or will countenance or approve any attempt to weaken such prerogative, or detract from its full force and effect. As said by Judge Roberts in the case of *Railway v. Murphy*, 46 Tex. 356, 28 Am. Rep. 272: "The judge is forbidden by law either to aid a jury, or to infringe upon their province in weighing the evidence or in deciding upon the facts, in every case submitted to them. It presupposes that the jury is as competent to find the facts as the judge is to decide the law. This admits of no exception, so far as his duty is concerned, whether the facts are plainly established by the evidence for one side or the other, or are complicated or doubtful." In the case of *Railway v. Gasscamp*, 69 Tex. 547, 7 S. W. 227, it was said: "According to the rule in this court, in order that an act shall be deemed negligent per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence that we can say without hesitation or doubt that no careful person would have committed it." The rule is still more rigidly stated in *Railway v. Hill*, 71 Tex. 451, 9 S. W. 351: "We have been cited to no case where it had been held competent for the court to charge upon any particular combination of facts as constituting negligence, save when so declared by law. Courts have insisted upon the right in plain cases to exercise such prerogative; but it has been a barren right, and no exercise of it has been known to us by our courts."

The statutes of Texas, as well as the decisions of its appellate courts, have gone as far, perhaps, as the laws of any state in the Union, to protect the prerogative of juries to pass upon facts; but Texas does not stand alone in demanding that in cases similar to that under consideration the question of negligence must be left to the jury. In the case of *Werle v. Railway*, 98 N. Y. 650, the car was crowded, no seat was vacant, and the passenger, with others, took a position on the platform. The train, on turning a curve, ran at a high rate of speed, and the passenger was thrown off and killed. The Court of Appeals of New York held that the case presented questions of fact to be determined by a jury. In *Dennis v. Railway*, 31 Atl. 52—a Pennsylvania case—a passenger was told by the conductor that there was room inside the car, but there was not, and he stood on the platform, and was pushed off and hurt, and the court held that the question of negligence was one for the jury. In the case of *Burton*

v. Ferry Company, 114 U. S. 474, 5 Sup. Ct. 980, 29 L. Ed. 215, a woman got on a crowded ferryboat, and could not procure a seat, and, while standing, was thrown down and injured by a lurch of the boat in landing. The contention was that the trial court erred in refusing to instruct the jury that the defendant was guilty of negligence in failing to furnish the injured party with a seat. It was held to be a question of fact for the jury. In the case of *Goodwin v. Railway (Me.)* 24 Atl. 816, a passenger was thrown from the platform of a crowded car, and the court said: "The plaintiff's counsel urges that the jury was the legal tribunal not only to determine all the facts and circumstances, but also to adjudicate whether the acts or omissions of the parties were prudent or negligent. This is true. We have repeatedly so held."

In view of the fact that the charges are so repugnant to the letter and spirit of our statutes, and so antagonistic to Texas decisions, it was doubtless unnecessary to cite the decisions of other states, and it was only done to show that the doctrine is peculiarly applicable to the facts in this case, for in each one of the cited cases the passenger was killed or injured by being thrown from the platform of a crowded car. Under the terms of the charges it was the absolute legal duty of the railway company to furnish room and a seat for the passenger, regardless of the circumstances surrounding it; and the only question left to the jury was to determine if deceased had acted with ordinary prudence in standing or sitting on the platform or steps of the car. It must not be understood that this court holds that a railway company is not under obligation to furnish accommodations for its passengers; but, on the other hand, we hold that ordinarily a railroad is bound to furnish seats and other accommodations for those occupying its cars as passengers, but when it fails to furnish such accommodations a trial court is not justified in declaring such failure negligence per se. Such failure is only evidence of negligence, to be weighed and considered by a jury. In the seventh paragraph of the charge the jury was not only instructed that it was the duty of the railway company to furnish sufficient means of transportation, and furnish all applicants with room and seats, if that could be reasonably done, but it went further, and instructed the jury that, if room and seats could not be furnished, then the duty to carry safely should control; or, in other words, no passenger, however desirous he might be to board a train, should be allowed to do so unless he could be furnished with a seat. There might be circumstances under which a passenger might prefer to enter a car and stand up in the aisle, rather than not make the journey; and we undertake to say that no railroad company could, as a matter of law, be held to be negligent in permitting him to exercise such privilege. It was for the jury to say whether, under the circum-

stances, appellant had been guilty of negligence.

It is claimed by appellees that the case of *Railway v. Blan*, 62 S. W. 552, decided by this court, sustains the charge given by the court. The contention is not sustained by the decision in that case. In that case it was held that the existence of certain facts constituted negligence, and it was not error to so inform the jury, and such opinion may be justified because it was utterly impossible for such facts to exist without constituting negligence, and nothing could prevent it from being negligence. A railroad company might fail to furnish a seat for a passenger, and yet not be guilty of negligence. *Railway v. Morris*, 94 Tex. 505, 61 S. W. 709.

The court instructed the jury that, if the rule prohibiting passengers from riding on platforms was usually and customarily disregarded, with the knowledge of appellant, the abrogation of the rule will be presumed, and the conduct of deceased should be considered without reference to such rule. The uncontroverted evidence showed that the conductor and porter had requested deceased to enter the car, and not remain on the platform, but that he refused to do so; and no custom could relieve him from the effect of notice that his presence on the platform was contrary to the wishes of the railroad company. The customary violation of the rule could not have influenced the action of deceased when he was told that it was dangerous on the platform, and was requested to enter the car.

Special charges numbered 2, 4, 5, 6, 7, 11, 12, 13, 14, and 16, requested by appellant, were properly refused, as each one of them declared that certain acts on the part of Will Bryant constituted contributory negligence. They are subject to the same objections urged against the charge of the court.

Appellant requested the following charge: "If, from the evidence, you believe that the plaintiff, Lila Bryant, widow of Will Bryant, voluntarily abandoned her husband with the fixed purpose of never returning to him, and wholly repudiated the relation of wife to Will Bryant, and had determined not to receive any benefits or aid from him had he lived, then his death, under such circumstances, inflicted no injury upon her, and consequently, though you may believe Will Bryant's death was the result of negligence on the part of defendant, no recovery can be had by her." The charge was properly refused. It was a clear invasion of the right of the jury to pass upon the facts, and determine whether the wife was damaged by the death of her husband.

It was alleged in the answer that the death of Will Bryant resulted from his standing on the platform of the car while drunk, which rendered him careless, and incapable of properly protecting himself from danger. There was evidence tending to establish the allegation. The court charged the jury that drunkenness alone would not be contributory neg-

ligence. "But if, while either drinking, drunk, or sober, the said decedent went upon the platform of the car, and if so going on the platform was an act which a man of ordinary prudence would not have done under the circumstances then existing, then, if so being on the platform was the immediate or proximate cause of his death, then in such case he would be chargeable with contributory negligence, and the plaintiff would not be entitled to recover." The charge was calculated to lead the jury to believe that, if the deceased acted prudently in going upon the platform, he was not guilty of contributory negligence, although he would not have fallen from the platform but for his drunkenness. Will Bryant may have acted with reasonable prudence in taking his position upon the platform of the car, still if, after assuming that position, his intoxication caused him to fall from the platform, such drunkenness would be the proximate cause of his death, and his wife and parents could not recover damages. There was no evidence that justified the recovery of exemplary damages, and that issue should not have been submitted to the jury.

We have considered every matter deemed of importance, raised by the 53 assignments of error.

For the errors indicated, the judgment is reversed, and the cause remanded.

KEMPNER et al. v. STATE.*

(Court of Civil Appeals of Texas. Feb. 4, 1903.)

PUBLIC LANDS—INNOCENT PURCHASERS—DUPLICATE LAND CERTIFICATE—SUIT FOR CERTIFICATE—ISSUE OF PATENT.

1. There is no such thing as an innocent purchaser, as against the state, claiming under a patent issued without authority of, and contrary to, law.

2. A duplicate land certificate, issued in place of one lost, by the commissioner of the land office, confers no greater right than the original.

3. Act Feb. 4, 1841, § 1, provides that if, in a suit to have a certificate for land issued, the jury find for claimant, the clerk shall make out a certificate to that effect, which shall be given to the claimant. Section 2 provides that the clerk of court shall, within 20 days after adjournment of court, transmit to the commissioner of the land office a list of successful claimants, certified to by the judge. Section 3 provides that on receipt of said list by the commissioner of the land office, and on claimant's presenting his certificate, said commissioner shall issue a patent. Section 6 provides that the court may grant a new trial to either party. *Held*, that a patent issued on a certificate by the clerk of court to claimant, or a duplicate thereof, no list including claimant having been returned, was void; new trial having been granted, in which judgment was against claimant.

4. Though the files of a suit to require a certificate for land to be issued, and in which the clerk gave claimant a certificate that the jury found for him, contained no motion for new

*Rehearing denied March 11, 1903.

trial, reasonable diligence would have disclosed that a new trial had been granted, and a verdict and judgment rendered against him; the files containing a notice served on him, showing a new trial had been granted, and an appeal bond given by him showing a verdict and a judgment against him.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Suit by the state of Texas against Eliza Kempner and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is a suit by the state to cancel a patent and recover a league and labor of land patented to Eli Langford. Mrs. Eliza Kempner and the heirs of Eli Langford were made defendants, and, upon trial, judgment was rendered for the state, as prayed for, and Mrs. Kempner has appealed.

The case is submitted in this court on the following testimony:

"In the year 1841, Eli Langford made application to the investigating board appointed under an act of the congress of the republic of Texas of January 29, 1840, for a certificate for a league and labor of land, which said application was rejected by said board as not being a genuine and legal claim against the government, as shown by the report of said investigating board in the general land office. On the 24th day of September, 1841, the said Eli Langford filed his petition in the district court of Red River county, Texas, against the republic, setting up his said application to said investigating board for a certificate for a league and labor of land, and its rejection as fraudulent, and praying that the court issue to him a certificate for a league and labor of land. This cause was tried in the district court of Red River county on the 14th day of October, 1841, and, upon a verdict of the jury in his favor, the court rendered judgment that the plaintiff, Eli Langford, have and recover of the republic his land as assessed by the jury, and that a certificate issue to him for a league and labor of land. The records and papers with regard to this case in the district court of Red River county do not contain a motion for new trial, nor a judgment or order of the court thereon, but it appears from said papers on file that on the 6th day of November, 1841, the district attorney of that judicial district filed in said court a petition for injunction, which, with the indorsements thereon, is as follows:

"The Republic of Texas, County of Red River. To the Hon. John M. Hansford, Judge of the Seventh Judicial District: The petition of the undersigned district attorney pro tem. for the Seventh Judicial District would represent unto your honor that at the fall term of the district court for the year 1841, in and for the county of Red River and the republic of Texas, begun and held at the town of Clarksville, a certain Eli Langford brought his appeal from the investigating board of land commissioners to said

court, and after issue joined and a verdict in his favor for one league and labor of land, and that, before a motion was made in said case for a new trial by the republic, the said Langford applied to the clerk of said district court, immediately after the verdict rendered by the jury, for his certificate for one league and labor of land, and received his certificate from the clerk as aforesaid for one league and labor of land, which was certified by your honor; and the petition of your orator would further represent to your honor that, on the last day of the term of said court, petitioner moved for a new trial upon the part of the republic, which said motion was granted. Therefore your petitioner would pray that an injunction be granted, prohibiting the commissioner general of the land office from granting a certificate unto the said Eli Langford for one league and labor of land until the final issue of said suit, and that the said injunction be made perpetual. And your petitioner, as in duty bound, will ever pray,' etc. 'Jesse Bruton, Jr., District Atty. Pro Tem.'

"The Republic of Texas, Red River County. Personally appeared before me Jesse Bruton, Jr., district attorney pro tem. for Red River, Seventh Judicial District, and says the facts set forth in the foregoing petition are true. Subscribed and sworn to before me this 5th day of November, 1841. J. Bruton, Jr., District Atty. Pro Tem. John M. Hansford, District Judge.'

"Republic of Texas, Red River County. The clerk of the district court will issue the writ of injunction as prayed for in the above petition. Given under my hand this 5th November, 1841. John M. Hansford, District Judge.'

"Indorsed: 'No. 376. Republic of Texas vs. Eli Langford. Petition for Injunction. Filed 6 Nov., 1841. W. H. Vining, Clk. D. C. R. R. Co.'

"And also that on the 2d day of December, 1841, a writ of injunction issued upon the prayer of said application of the district attorney, which, with the indorsements thereon, is as follows:

"The Republic of Texas, Red River County. To the Commissioner General Land Office of the Republic of Texas, Greeting: Whereas, Jesse Bruton, Jr., district attorney pro tem. of the Seventh Judicial District, has filed in the district court for the county aforesaid his petition for injunction, directed to the Hon. John M. Hansford, judge and chancellor of the district court for the Seventh Judicial District, showing that, among other things, that at the fall term of the district court in the year 1841, in and for the county of Red River and republic of Texas aforesaid, that Eli Langford brought his appeal from the investigating board of land commissioners to the court, and after issue joined, and a verdict in his favor for one league and labor of land, that, before a motion was made in said cause for a new trial by the

republic, the said Eli Langford aforesaid applied to the clerk of said district court, immediately after verdict rendered by the jury, for his certificate for one league and labor of land, and received his certificate as aforesaid for one league and labor of land, which was approved by the honorable court; and whereas, on the last day of the term aforesaid, the said Jesse Bruton, Jr., district attorney pro tem. as aforesaid, moved for a new trial on the part of the republic, which said motion was granted. Thereupon said district attorney, as aforesaid, prayed that an injunction be granted, enjoining and prohibiting the commissioner of the general land office from granting a certificate unto the said Eli Langford for one league and labor of land until the final issue and decision of said suit. In pursuance of his honorable's fiat, dated 5th November, 1841, now these are therefore to command you, in the name of the republic of Texas, restraining and prohibiting you, the said commissioner of the general land office of said republic, from issuing a certificate to the said Eli Langford as aforesaid, mentioned in complainant's petition, and you are commanded to obey and observe this mandate and order of this writ of injunction, under the pains and penalties incident to a contempt of the court aforesaid.

"To the Sheriff of Travis County and Republic Aforesaid, Greeting: You are hereby commanded to make known the foregoing writ of injunction to the commissioner general of the land office as aforesaid, and due return make to the clerk's office of said court on the return day hereof, certifying what has been done on the premises. Given under the seal of said court, and under my official signature, at office in Clarksville, this 2d day of December, A. D. 1841. W. H. Vining, Clk. D. C. R. R. Co. [L. S.]"

"Indorsed: 'No. 375. Republic of Texas vs. Eli Langford. Injunction. Issued 2d day of December, 1841. W. H. Vining, Clk. D. C. R. R. Co.

"Came to hand Dec. 30th, 1841. Executed by serving a copy Jany. 3, 1842. Charles F. King, Sheriff T. C.

"Sheriff's fees, \$2. Charles F. King, Sheriff T. C."

"And it was proven that on the 5th day of March, 1842, a notice of a new trial was issued by the clerk of the district court of Red River county to the said Eli Langford, which, with the indorsements thereon, is as follows:

"The Republic of Texas, County of Red River. To the Sheriff of Said County, Greeting: You are hereby commanded to make known to Eli Langford, whereas, in the suit which was tried at our last past district court between Eli Langford, plaintiff, and the republic of Texas, defendant, and said cause determined in favor of said Langford, and verdict for one league and labor of land, upon motion of Jesse Bruton, Jr., district at-

torney pro tem., new trial has been granted the republic, and said cause stands for hearing at our next term of the district court for said county. Given under my official signature at office in Clarksville, and under the seal of said court, this 5th day of March, 1842. W. H. Vining, Clk. D. C. R. R. Co.'

"Indorsed: 'Republic of Texas (No. 176) vs. Eli Langford. Notice. Issued 5th day of March, 1842. W. H. Vining, Clerk D. C. R. R. Co.

"Came to hand and executed on Eli Langford by reading to him the within notice. Edward West, Sheriff."

"On April 28, 1842, said cause was continued, by agreement of the parties, to the next term of the court. That thereafter, on the 7th day of October, 1842, the said Eli Langford filed in said cause a deed from himself to the republic of Texas, which said deed conveyed to the republic of Texas, and to the people of said republic, in their political and national character and capacity, 'any and all grant or grants of land heretofore made or issued to me or to my wife, Mary Langford, under the colonization laws of Coahuila and Texas, heretofore in force, situated within the limits of Lavalla's Colony, so called, or elsewhere within the boundaries of said republic,' which said instrument was executed on the 7th day of October, 1842. That on October 14, 1842, the cause came on for trial before a jury, the judgment reciting that the plaintiff appeared by attorney, and also appeared the district attorney, and upon a verdict of the jury, finding the facts, the court rendered judgment that the plaintiff is not entitled to recover, and that the republic do recover of Eli Langford all costs in this behalf expended, and with execution, from which judgment the said Eli Langford appealed to the Supreme Court of the republic. On February 17, 1843, the said Eli Langford filed his appeal bond in said cause. On June 24, 1844, upon hearing said cause in the Supreme Court of the republic, it was ordered, adjudged, and decreed by that court that the judgment below be in all things affirmed, that the appellant pay the costs of this cause in this court expended, and that this decision be certified below for execution, upon which said judgment of affirmation, mandate of the Supreme Court was issued and filed in the district court of Red River county, July 22, 1844. The opinion and decision of the Supreme Court is published in Dallam, Dig. 588; the cause being styled 'Eli Langford v. The Republic.' It was proven that the original papers in said cause in the Supreme Court have been lost or mislaid, and cannot now be found.

"Eli Langford died about the year 1850. The defendants named in plaintiff's petition, with the exception of Mrs. Eliza Kempner and Eli and Levi Langford, are the only heirs of said Eli Langford. There was no evidence that any one of the defendants ever saw or had possession of the certificate for

a league and labor of land issued by the district court of Red River county to said Eli Langford, nor was there any evidence that any such certificate was issued, except such as is contained in the recitals in the petition for injunction and writ of injunction hereinaforesaid. The only testimony on this subject was as follows: One of the defendants (Asa Langford) testified by deposition with regard to the original certificate: 'From my own personal knowledge, I know nothing about it, but from common rumor and family history I understood there was one issued. In about September 29, 1874, J. J. Erwin and Wren & Co. came to my house, in Lampasas county, Texas, and represented to me that I was entitled to a league and labor of land, as heir of my father, Eli Langford, and wanted to know if I had the original certificate, and proposed to locate and perfect title to same for one-half of the land. We made search and did not find the original certificate. I understood that he was to procure a duplicate certificate, and locate and survey and perfect the title to the land, and, to that effect, I went into a written contract with him.' In 1874, J. J. Erwin, acting for himself and T. L. Wren, procured from the aforesaid heirs of Eli Langford a power of attorney authorizing them to procure a duplicate certificate in lieu of the original certificate said to have been issued by the district court to Eli Langford for one league and labor of land, and to locate the same, for which they were to receive, in consideration of their services and expenses, one-half of the land. Upon this, the said T. L. Wren, acting for the firm composed of T. L. Wren and J. J. Erwin, made application to the commissioner of the general land office of the state of Texas for the issuance of a duplicate certificate, advertised in a newspaper a notice of the loss of the original certificate and of the application for the issuance of the duplicate, the result of which action was that the commissioner of the general land office issued a duplicate certificate, and delivered the same to the firm of T. L. Wren & Co. T. L. Wren, acting for the heirs of Eli Langford, made the application and affidavit, and the firm of T. L. Wren & Co. paid the expenses, and the duplicate certificate was delivered to the said T. L. Wren, which was afterwards located in Hartley county by the said T. L. Wren and J. J. Erwin; said J. J. Erwin individually paying the expenses of locating the duplicate certificate; the amount being something over \$500. The fees for procuring the patent, advertising, etc., amounted to about \$65, in consideration of which the heirs of Eli Langford executed to said J. J. Erwin a deed to 2,302½ acres; being the west half of said league and labor of land. After the location of said certificate in Hartley county a patent was issued by the state of Texas, on the 14th day of June, 1875, to Eli Langford, his heirs and assigns, for said league and labor of land;

being patent No. 118, vol. 21, and being the land sued for and described in plaintiff's petition. By subsequent conveyances, constituting a regular chain of title by deeds of general warranty, this west half of said league and labor of land passed to Mrs. Ella Kempner, one of the defendants in this suit, who claims to be now the owner thereof under said conveyances. The east half of said league and labor of land is claimed by the other defendants in this suit (except Eli and Levi Langford) as the heirs of Eli Langford. It was proved that Mrs. Kempner, in consideration of said conveyance to her of the west half of said league and labor of land, paid the sum in cash of \$1,125 to the Ballinger National Bank, receiving a deed with general warranty, and that she had no actual knowledge of any wrong, fraud, or irregularity in or about the issuance of the original certificate, if any, or the duplicate thereof, and had no notice of any such, further than such constructive notice as might be conveyed to her by the records of the general land office, as herein stated, or by the records and proceedings of the district court of Red River county in the case of Eli Langford v. The Republic of Texas, as herein stated, or by the judgment of the Supreme Court of the republic as aforesaid, and the report of said case, as contained in Dallam's Reports of the Decisions of the Supreme Court of the Republic of said case, but that she relied upon the validity of the patent. Said duplicate certificate issued by the commissioner of the general land office is as follows:

"No. 33/4. Class First. Quantity. 1 League & 1 Labor. Duplicate Certificate. General Land Office. Austin, Texas, November 6th, 1874. This is to certify that satisfactory evidence having been introduced of the loss of district court certificate No. ——— Class First, issued by the district court of Red River county to Eli Langford for one league and one labor of land, dated at the fall term district court, 1841. This duplicate thereof will entitle the said Eli Langford to all the benefits granted in said original district court certificate. In testimony whereof, I hereunto set my hand and affix the impress of the seal of said office, the date first above written. J. J. Gross, Commissioner. [Seal.]

"Voucher file 2598. Indorsed: 'File 1625. Bexar First Class Dup. Cert. 33/4. Eli Langford. Filed December 17/74. J. J. Gross, C.'

"Across the face of said duplicate certificate is the following: '1 League and 1 Labor, patented June 14/15. J. J. Gross, Com'r.'

"It was proven that the original certificate referred to in said duplicate as having been issued by the district court of Red River county is the same as that referred to in the proceedings in said court in the case of Eli Langford v. The Republic of Texas, hereinbefore referred to.

"Plaintiff introduced in evidence certified copy from the records of the general land

office of a grant made by George Antonio Nixon to Mary Langford, given in the town of Nacogdoches on the 8th day of November, 1835; and it was proven that Mary Langford, the mother of the aforesaid defendants, heirs of Eli Langford, had issued to her a grant of a headright league of land in Texas as a colonist, and that she was at the time the wife of said Eli Langford."

Walton & Walton and A. S. Phelps, for appellants. C. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for the State.

KEY, J. (after stating the facts). 'The main ground for reversal is predicated upon the proposition that Mrs. Kempner was an innocent purchaser. As against the state, there can be no such thing as an innocent purchaser, when the officer who attempts to issue the title acts without authority of and contrary to law, because official action under such circumstances is absolutely void, and not merely voidable, and no one can claim protection of any kind by or through an official act that is absolutely void. "It is too firmly settled by the whole current of judicial decisions on the point to be now questioned that the issuance of a patent is a ministerial act, and must be performed according to law. If it is issued against the law, it is void." Day Co. v. State, 68 Tex. 541, 4 S. W. 865; Gunter & Munson v. Meade & Bomar, 78 Tex. 634, 14 S. W. 562; Stone v. U. S., 2 Wall. 525, 17 L. Ed. 765.

If the Governor and commissioner of the land office should issue patents upon surveys purporting to have been made under certificates for land, when in fact no such certificates ever existed, such patents would be absolutely void, and there could be no innocent purchaser of such void titles. In Gunter & Munson v. Meade & Bomar, supra, it was held that a duplicate certificate issued by the commissioner of the land office, when no original certificate had ever existed, conferred no right whatever. The duplicate certificate in the case at bar did not purport to, and, under the law, could not, confer any greater right than existed by virtue of what is termed in the duplicate "said original district court certificate." What was that certificate, and what right did it confer? Section 1 of the act of February 4, 1841, under which Langford brought his suit, provides that, "should the jury find in favor of the claimant, it shall be the duty of the clerk to make out a certificate to that effect, under the seal of the court and approved by the presiding judge, which certificate shall be handed over to the successful claimant." But additional sections of the same act read as follows:

"Sec. 2. That it shall be the duty of the clerks of the several district courts, within twenty days after adjournment of each and every term of said court, to transmit to the commissioner of the general land office, a list of all the individuals who may have been

successful in suits instituted under this act in his said county, specifying the amount of land to which they were declared, by the court and jury, to be entitled; which certificate shall be under the seal of said court, to which shall be appended the affidavit of the said district court clerk, of the correctness of said list; and it shall further be the duty of the chief justice of the county in the district court of which said suit was decided in favor of the claimant, to examine the records of said district court of his county, and if the list is found to be correct, it shall be his duty to certify to the same under the seal of the county court.

"Sec. 3. That upon the receipt of said lists from the district clerks by the commissioner of the general land office, and upon the claimant presenting his certificate as before provided for to said commissioner, it shall be the duty of said commissioner, forthwith, to issue a patent on said claim, in the same manner as if the said claim had been recommended as genuine and legal by the board of commissioners appointed under the act to which this is a supplement."

"Sec. 6. That upon good and sufficient cause shown, the court may grant a new trial, either to the claimant or to the republic; provided that not more than one new trial shall be granted to either party."

These sections make it manifest that the mere issuance and delivery of the certificate referred to in the first section did not empower the commissioner of the land office to grant land to the claimant. In addition to such certificate, it was necessary that the report required by the second section should be filed in the land office, and show that the claimant was entitled to land, before the commissioner was authorized to grant the land. As to Langford's claim, it is not shown that any such report was made; and it could not have been truthfully made, because at the time the law required the clerk to make up his report the verdict and judgment in Langford's favor had been set aside and annulled. Hence it would seem that as the certificate issued by the clerk, as authorized by the first section of the law, would have disclosed only partial compliance with that law, it would not have authorized the issuance of a patent, even before the verdict and judgment were set aside. But undoubtedly, after the verdict and judgment had been set aside, the certificate, which merely stated that they had been rendered, was no foundation for any claim to land, and conferred no power upon the commissioner of the land office, or any one else, to grant land to Langford or his heirs; and we therefore hold that the duplicate certificate, and patent issued thereon, were absolutely void.

While we do not regard the question of notice as material, on account of the fact that the patent was absolutely void, still we cannot sustain the contention that, because no motion for a new trial can now be found

among the file papers in Langford's suit in the district court of Red River county, therefore reasonable diligence would not have disclosed the fact that a new trial had been granted, and a verdict and judgment rendered against Langford. The file papers in that case contain a notice served on Langford, showing that a new trial had been granted, and an appeal bond given by him, which must have shown on its face that a verdict and judgment had been rendered against him.

No error has been shown, and the judgment is affirmed. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. HAIST.

(Supreme Court of Arkansas. Feb. 28, 1903.)

SUIT BY FOREIGN GUARDIAN—SUBSTITUTION OF GUARDIAN AD LITEM—ACTION FOR DEATH—ACCRUAL IN ANOTHER STATE—ENFORCEMENT—SUFFICIENCY OF COMPLAINT—INJURY—SERVANT—CONTRIBUTORY NEGLIGENCE OF VICE PRINCIPAL—INSTRUCTION ON DAMAGES—SUPPORT IN EVIDENCE.

1. Where the suit is brought for an infant by a foreign guardian, who is not qualified to sue in the state, it is proper to allow an amendment substituting another person as next friend.

2. Civ. Code La. art. 2315, provides that the right of action, in case of death, survives in favor of the minor children or widow, and in default of these in favor of the surviving father or mother, and also that the survivors thus mentioned can recover damages sustained by them by the death of the parent or child, or husband or wife, as the case may be. Sand. & H. Dig. § 5908, provides that for wrongs to person or property an action may be brought by the person injured, or, after his death, by his personal representatives. Section 5911 provides that for death by wrongful act the person causing the death shall be liable. Section 5912 authorizes an action for wrongful death by the personal representatives, and, if there be none, by the heirs at law; the amount recovered to be for the benefit of the widow and next of kin. *Held*, that the enforcement in Arkansas of a cause of action for wrongful death accruing in Louisiana was not contrary to public policy.

3. In suing in Arkansas for a death by wrongful act occurring in Louisiana, it is not necessary to set out the Louisiana Statute in *hæc verba*, but it is sufficient to set out its substance and effect.

4. When a freight train reached a station in Louisiana at which it should have side-tracked for a passenger train, the conductor was asleep; and the engineer, whose watch was slow, undertook to make the next station. In the collision with the passenger train, which ensued, a fellow servant of the engineer was killed. By the Louisiana law a principal is liable where the negligence of the vice principal contributes with that of a fellow servant to cause the injury. *Held*, that the conductor's negligence (he being vice principal) contributed with that of the engineer, so as to charge the company.

5. In an action by an infant for damages for the negligent killing of its father, the evidence showed that the father was an honest, hard-working man, who had well provided for the child's care after the mother's death. *Held*, that an instruction that the jury, in estimating damages, might consider such care, support, and sustenance, and such advantages. In the way of training and education, as might have been received if the father's death had not occurred, was supported by the evidence.

Appeal from Circuit Court, Saline County; Alexander M. Duffie, Judge.

Action by Anna E. Haist, by her next friend, T. N. Robertson, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dodge & Johnson, for appellant. Murphy & Mehaffy and Robertson & Martineau, for appellee.

HUGHES, J. In this case, Anna Elizabeth Haist, a minor, was the real plaintiff, and, by amendment to the complaint by leave of the court, T. N. Robertson was her next friend, who represented and cared for her interest in the suit, which had been brought for her. There was no error in the allowance of the amendment by the substitution of T. N. Robertson as next friend, instead of the foreign guardian, H. E. Burman. In discussing this question the Supreme Court of the United States, in *Morgan v. Potter*, 157 U. S. 195, 15 Sup. Ct. 590, 39 L. Ed. 670, said: "It is the infant, and not the next friend, who is the real and proper party. The next friend by whom the suit is brought on behalf of the infant is neither technically nor substantially the party, but resembles an attorney or guardian ad litem, by whom the suit is brought or defended in behalf of another." This is the doctrine of the more modern decisions on this question. *Whittem v. State*, 36 Ind. 214; *George v. High*, 85 N. C. 113. Though the suit was brought by a foreign guardian who was not qualified to sue in this state, the court ought not to have dismissed it—the infant being the real and proper plaintiff—but did right in appointing some one as next friend to look after her interest in the suit who was qualified to sue for her. *Hoskins v. White*, 13 Mont. 70, 32 Pac. 163; *Young v. Young*, 3 N. H. 345; *Johnson v. Blair*, 126 Pa. 426, 17 Atl. 663; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176.

Did the circuit court have jurisdiction of the subject-matter of this suit? The plaintiff Anna Elizabeth Haist was a minor, residing in the state of Nebraska, and brought this suit to recover damages alleged to have been caused by the negligence of the defendant in the state of Louisiana, by the killing of William Haist, her father. That William Haist, the father, was killed in the state of Louisiana, while acting as fireman on defendant's train, without any negligence upon his part, in a collision between a freight train and a passenger train on defendant's railway about four miles from Howcott, in Rapides parish, is clear from the evidence in the case. That that collision was caused by the negligence of the servant or servants of the defendant on the defendant's train is equally clear from the proof in the case. A right of action therefore accrued to the said Anna Elizabeth Haist. It was brought

in Hot Springs county, Ark. The action is transitory. *Chicago, St. Louis & New Orleans Co. v. Doyle*, 60 Miss. 977. Will the courts of Arkansas enforce such right of action as this, arising in the state of Louisiana, by virtue of her laws? It is not a question whether the laws of Arkansas have any extraterritorial force. Counsel for appellant contend that the acts of Arkansas and the act of Louisiana giving the right of action for the wrongful killing of a human being are so dissimilar that such right accruing under the Louisiana statute cannot be enforced in the courts of Arkansas. But it seems to us quite evident that the two statutes are of similar import. They are founded upon the same principles, are aimed at the same evil, construed the same kind of action, and given for the benefit of the same class of individuals. In both the utter failure of redress at common law, when the injury ended in death, was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out. *Stoeckman v. Terre Haute & I. R. Co.*, 15 Mo. App. 503; *Wooden v. W. N. Y. & P. R. R. Co.*, 26 N. E. 1050, 13 L. R. A. 461, 22 Am. St. Rep. 803; *Stewart v. B. & O. R. Co.*, 168 U. S. 448, 18 Sup. Ct. 105, 42 L. Ed. 537; *St. L. & S. F. Ry. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225. Public policy in this state is not vitiated by the enforcement of the Louisiana statute in our courts.

The laws of Louisiana read as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action survives, in case of death, in favor of the minor children, or widow, or deceased, or either of them, or in default of these, in favor of the surviving father or mother, or either of them, for the space of one year. The survivors above mentioned can also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be." Civ. Code, art. 2315.

The Arkansas statutes (Sand. & H. Dig.) read as follows:

"Sec. 5908. For wrongs done to the person or property of another an action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator against the wrongdoer, or after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts."

"Sec. 5911. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain

an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 5912. Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided every such action shall be commenced within two years after the death of such person."

Did the complaint state facts sufficient to constitute a cause of action? It was not necessary that it should set out the Louisiana statute in *hæc verba* in pleading the statute. To set out the substance and effect of the statute was sufficient. *Hanley v. Donoghue*, 116 U. S. 1-7, 6 Sup. Ct. 242, 20 L. Ed. 535; *L. N. A. & C. Ry. Co. v. Shires*, 108 Ill. 628; *Stacy v. Baker*, 1 Scam. 418; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 266, 35 N. E. 756, 39 Am. St. Rep. 181.

Is the verdict sustained by the evidence? The conductor, Farrar, was asleep or dozing when his train passed Howcott, where it ought to have been run onto the side track to let the approaching passenger train pass. The engineer of the freight disregarded his duty, and failed to side-track at Howcott. Consulting his watch, which was 50 or 60 minutes slow, he had concluded that he had time enough to reach Antoine, the next station ahead, before the passenger would reach it; and, disregarding his duty, under this mistake as to the time, he ran by Howcott without stopping, and without any signal from the conductor. This was evidently negligence on the part of the engineer, which contributed to the collision between the passenger train and the freight train, which collision caused the death of William Haist. But William Haist was a fellow servant with the engineer, and could not recover if the negligence of the engineer alone caused the injury. But did the negligence of the conductor, Farrar, contribute to the collision of the trains, and is the company liable for the combined negligence of the conductor and the engineer? It is held, under the decisions in Louisiana, that, if injury is caused

by the combined negligence of a fellow servant and a vice principal on a railroad, the railroad company is liable, and that a conductor personates the company, and is a vice principal. It was the duty of the conductor to see to it that all the employes under him understood and discharged their duties. He and the engineer both had time-tables, and knew when and where to stop. The trains were running on time. He (the conductor) had means of signaling the engineer, and of stopping the train by the brakes; the brakeman being at his command when necessary. He knew or ought to have known when the freight train passed Howcott, and knowing that the passenger was on time, and would soon be at Howcott, and that it was all-important that his train should be side-tracked there to prevent the fatal collision, which occurred a few miles further on, it was his duty to have his train side-tracked at Howcott to await the passing of the passenger. As he was asleep at Howcott, and made no effort to have the freight stop there, it does seem that there can be no question that he was not in the discharge of a plain and very important duty, and that his negligence contributed to the collision which deprived the fireman, William Haist, of his life; and, being a vice principal, the company is liable.

Was there error of law in the court's instructions to the jury? They are as follows: The court, on plaintiff's request, gave the following instructions: "(1) If you believe from the evidence that Wm. Haist was in the employ of defendant as fireman on a locomotive drawing one of its freight trains on one of its tracks or lines of railroad in the state of Louisiana on the 7th day of February, 1890; that while in such employ the locomotive or train on which he was serving came into collision with a passenger train of defendant, or an engine drawing it, and that he was thereby killed, or so badly injured that he died in a short time thereafter; (b) that the freight train on which he was serving should have been side-tracked at Howcott, so as to let the passenger pass it, and that, if it had been so side-tracked, the collision would not have occurred; (c) that the conductor knew that Howcott was the proper place to take the side track with his freight train, and let the passenger train pass it, but that he was negligently asleep, dozing, or inattentive when Howcott was reached, and so failed to know when it was reached, and thereby negligently permitted the freight train to go ahead on the main track, and thereby caused the collision; (d) that under the unwritten law of the state of Louisiana, as it is and then was, the conductor of a railroad train in that state represents or personates the railway company, and that the company is liable, under said law, for any damages or injury caused to its other employes on the train by or through such conductor's negligence or inattention in conducting the train; (e) that under and by pro-

vision of the statute law of the state of Louisiana, as it is and then was, any person who by any act whatever causes damages to another is bound to repair the damage, and that the right of action therefore survives, in case of death, in favor of the minor children or widow of deceased who survive him, and that such survivors have also the right to recover the damages sustained by them by the death of the deceased; (f) that said William Haist left no widow, but left the plaintiff Anna Elizabeth Haist as his only child and heir at law, whose mother was then dead; (g) that he contributed to plaintiff's support, and that plaintiff is a minor and was damaged by his death—you should find for the plaintiff. (2) If from the evidence you find the facts and the law of Louisiana as stated in the foregoing instruction, then it makes no difference whether the injury or death of William Haist was or was not contributed to by any negligence or mistake of the engineer. (3) If you find for the plaintiff, your verdict should be for such a sum of money as you believe from the evidence would be a just and fair compensation for all the pecuniary injury suffered by her by reason of the injury and death of the said William Haist, and in arriving at this sum you may take into consideration such care, support, and sustenance, and such advantages and benefits in the way of training and education, both moral and intellectual, if any, as you may believe, from the evidence, she would receive from or through him if his injury and death had not occurred. (4) If you find from the evidence that the conductor of the freight train personated or represented the defendant, as vice principal, under the law of Louisiana, then he was not a fellow servant of the fireman." Defendant excepted separately to the giving of each of paragraphs "a," "b," "c," "d," "e," "f," and "g" of plaintiff's instruction numbered 1. It also objected to the giving of instructions 2, 3, and 4, and, its separate objections being overruled, exceptions were saved. Defendant asked the following instructions, which were given: "(1) The court instructs the jury that the mere fact that the intestate, Haist, was killed in a collision on defendant's road while he was engaged in his duties as fireman, does not make the defendant liable to plaintiff in this suit for damages occasioned thereby; but the proof must show further, and show affirmatively, that the collision which caused his death was due to some negligence upon the part of the defendant." "(12) The court instructs the jury that they are not at liberty to take the aggregate of any such amounts for any such years, nor a sum which, at interest, would yield such amounts; but the true measure of damages is the present value of such sum, judged by the number of years that such contributions might be expected to continue, as shown by the proof. (13) The court instructs the jury that, in assessing damages

In a case of this kind, they are not assessed by way of penalty or punishment nor of sentiment, nor to compel the defendant to contribute to the support of a minor, but are allowed only upon the basis of such pecuniary loss as the proof shows the party in interest has sustained; and this is to be determined by the rules given you in the previous instructions." We are of the opinion that there is no reversible error in the instructions. Particular objection is urged to the instruction as to the measure of damages—that the jury might take into "consideration such care, support, and sustenance, and such advantages and benefits in the way of training and education, * * * as you may believe, from the evidence, she would receive from or through him if his injury and death had not occurred." It is said there is no evidence in the record to warrant this instruction. It is shown that Wm. Halst, the deceased, was an honest, hard-working, square man, and a good fellow. This, it seems, would warrant an inference that he would properly provide for his child; being governed by the material inclination of an honest, hard-working, and sober father, which the deceased was shown to be. He had provided for her care and keeping after her mother's death, and it was shown that she was treated by her parents as a child ought to have been treated. As was said in *Railway v. Sweet*, 60 Ark. 559, 31 S. W. 571, that was enough. "The attributes of such a character being shown in the father, the law would presume them of some value to his children, until the contrary was made to appear." *Ry. v. Maddy*, 57 Ark. 306, 21 S. W. 472; *McIntyre v. Ry.*, 37 N. Y. 287; 1 *Greenleaf on Ev.* 33. We think that the evidence shows that the verdict is not excessive.

Finding no reversible error, the judgment is affirmed.

RATCLIFF v. B. BAER & CO.

(Supreme Court of Arkansas. Feb. 28, 1908.)

RECEIVERS — ACTIONS AGAINST — LEAVE TO SUE—LIABILITY INCURRED BY CORPORATION.

1. An action against a receiver, brought in a court presided over by the same judge who appointed the receiver, and tried by such judge, will not be dismissed on appeal, because plaintiff did not first obtain leave from the court which appointed the receiver, to bring the suit.

2. An action will lie against the receiver of a railroad company for a wrongful appropriation by the company, previous to his appointment as receiver, of lands of plaintiff, acquired without condemnation proceedings or conveyance from plaintiff.

Appeal from Circuit Court, Sebastian County, Greenwood District; Styles T. Rowe, Judge.

Action by Eugene Adler and Julius Joel, doing business as B. Baer & Co., against Charles E. Ratcliff, as receiver of the Arkansas Central Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The complaint states, in substance, that the plaintiffs, Eugene Adler and Julius Joel, partners under the firm name of B. Baer & Co., were the owners of a certain tract of land in Greenwood district of Sebastian county, which is described in the complaint. It further alleges that "the said defendant, the Arkansas Central Railroad Company, being a railroad corporation authorized to construct and operate a railroad through the Greenwood district of Sebastian county, as such did, on the first day of January, 1898, enter upon and appropriate a right of way through said land, and did occupy the same and use it for its right of way without any proceedings for condemnation of same, and without any conveyance from the plaintiffs. * * * That the Arkansas Central Railroad Company was thereafter, by the circuit court of Sebastian county, placed in the hands of a receiver; that Charles E. Ratcliff is the duly appointed, qualified, and acting receiver of the Arkansas Central Railroad Company. That, by reason of the taking of the aforesaid right of way through the premises aforesaid, plaintiffs have been damaged in the sum of \$250, and that said amount is a sum due and owing, superior to all mortgages or other claims against said railroad company. Wherefore plaintiffs pray judgment against the said defendant and the aforesaid railroad company for said sum of \$250, together with the interest from Jan. 1, 1898, until judgment, and for further and other relief." The defendant filed a demurrer to the complaint on the following grounds: First. That the company was not made a party to the action. Second. That the complaint does not allege or show that permission to sue the defendant as receiver had been obtained. The court overruled the demurrer. The defendant excepted, and filed his answer as receiver, denying the allegations of the complaint. There was a verdict and judgment in favor of the plaintiff for the sum of \$100, from which the defendant appealed.

Oscar L. Miles, for appellant. Hill & Brinsolara, for appellees.

RIDDICK, J. (after stating the facts). This is an action against a receiver of a railroad company to recover damages for a right of way taken by a railroad company across lands owned by plaintiffs.

The first question presented is whether the court had the right to entertain this action against the receiver, when the court appointing the receiver had not given leave to the plaintiff to bring the action. It is, however, unnecessary for us to determine whether the failure to obtain such permission is a matter affecting the jurisdiction of the court in which the suit is brought; for, if we concede the general rule to be that a court will not entertain jurisdiction of a suit against a receiver appointed by another court until

the appointing court has given its consent that he be sued, still there are exceptions to the rule. "The rule rests on principles of comity, and is considered by those courts that enforce it to be essential for the protection of the receiver as an officer of the court appointing him against unnecessary and expensive litigation touching controversies wherein it may often be within the power of the appointing court to give ample relief to any person aggrieved." *Hupfeld v. Automation Plano Co. (C. C.) 66 Fed. 789.*

This rule has most frequently been applied in cases when the receiver has been sued in the courts of a different state from that in which he was appointed. The leading case where this rule was adopted by the Supreme Court of the United States was a case of that kind, and the court laid stress upon that fact by saying that "our decision upon this question will be limited to the facts in this case, which are that the receiver was appointed by a court in the state of Virginia, the property in course of administration was in that state, and the suit was brought in a court of the District of Columbia. *Barton v. Barbour*, 104 U. S. 126, 28 L. Ed. 672. Under this state of facts the Supreme Court held that the court of the District of Columbia had no jurisdiction. Now, when applied to cases of that kind, the reason of the rule can be readily seen, for the effect of permitting such suits against the receiver in foreign jurisdictions might be, as was said in that case, "to take the property of the trust from the receiver's hands and apply it to the payment of plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property." But it seems to us that these reasons do not apply to a case such as we have here, for the receiver in this case was appointed by the circuit court of Sebastian county, and the suit was brought in a circuit court of that county presided over by the same judge that presides in the court that appointed the receiver. The judge of the court appointing the receiver, being the judge also of the court in which the action against the receiver was brought, it is evident that he would permit no improper interference with the duties of his receiver. He had it in his power, if he had desired to do so, to dismiss this action and to summon the plaintiff to answer for contempt for bringing a suit against his receiver without his permission. As he did not do so, we know that he consented to the suit, and as he is also the judge of the court which appointed the receiver, we know that the judge of that court also consented to the action. It would seem, therefore, unreasonable and altogether unnecessary that we should dismiss this action and compel the plaintiff to obtain leave from this same judge to bring another suit for the same purpose. The reason for the rule failing, the rule itself fails, and the

72 S.W.—57

contention of appellant on this point must be overruled.

The next contention of appellant is that, as the complaint alleges that the railroad company took possession of the right of way across the land of plaintiffs and constructed its road across it before the appointment of the receiver, it therefore states a cause of action, not against the receiver, but against the company. But, the receiver having charge of the railroad and the other property of the railroad, he is not only an officer of the court, but he is also a representative of the corporation in respect to its property in his possession, and has the right to bring and defend actions in regard thereto. Now, although the complaint shows that the company took possession of this right of way before the appointment of the receiver, it shows, also, that this right of way has never been paid for, and it is still a subsisting charge against the corporation and its assets. The receiver has possession of the right of way as a part of the assets of the corporation, and he holds it without having paid for it, thus continuing the wrong of which plaintiffs complain; and we therefore think that the action for the recovery of damages was properly brought against him. *Frankel v. Johnson (C. C.) 80 Fed. 398; Smith on Receivers, § 23.*

Finding no error, the judgment is affirmed.

STATE v. SCOTT.

(Supreme Court of Missouri. March 4, 1903.)

RAPE — EVIDENCE — ADMISSIBILITY — ELECTION OF SPECIFIC OFFENSE — CONVICTION OF ATTEMPT.

1. In a prosecution for rape of a child 12 years of age, testimony by physicians that they made an examination of the prosecutrix about three months afterwards, and found the hymen destroyed and a laceration of the tensor vagina, was admissible.

2. Where an indictment for rape charged the commission of the offense on March 6th, and on the trial evidence was introduced tending to show previous attempts to commit the crime, the state was not required to elect, at the conclusion of the testimony, on which specific act it would rely.

3. In a prosecution for rape, it was competent to show that defendant had made previous attempts to commit the crime.

4. Under Rev. St. 1899, § 2361, providing that no person shall be convicted of an assault with intent to commit an offense, when it appears that the offense attempted was actually perpetrated in pursuance of such attempt, where the evidence, if credited, shows that the crime of rape has actually been committed, a conviction of assault with intent to commit rape cannot be sustained.

In Banc. Appeal from Circuit Court, Hickory County; Argus Cox, Judge.

Charles Scott was convicted of assault with intent to commit rape, and appeals. Reversed.

On the 26th day of August, 1901, the prosecuting attorney of Hickory county be-

gan this prosecution by filing in the office of the clerk of the circuit court an information, verified by his official oath, charging the defendant with rape upon Laura Huffman, a female child under the age of 14 years. The offense was alleged to have been committed on March 6, 1901. A plea of not guilty was entered upon his arraignment, and defendant put upon trial and found guilty of an assault with intent to commit rape, and his punishment assessed at two years in the penitentiary. The defendant and the father of the prosecutrix lived on adjoining farms in Hickory county, about one-half mile apart. The prosecutrix was about 12 years old, and was living in her father's family. The two families were related, and up to the time the complaint was first filed against defendant in this case the most friendly relations existed between them. The evidence discloses that on various occasions, when defendant intended to be absent on business or on hunting expeditions, which would keep him out late at night, he was in the habit of requesting the prosecutrix and her sisters to stay with his wife, with the consent of her parents. It further appears that defendant would not return from his hunting trips until midnight, and sometimes nearly daylight the next morning. The evidence tends to show that defendant began to take improper liberties with the prosecutrix on one of the occasions when she slept at his house, coming into her room next morning before she had arisen. In the latter part of the winter or the early spring of 1901, defendant came to Mr. Huffman's, the father of the prosecutrix, and said he was going on a turkey hunt that night, and wanted prosecutrix to go and stay with his wife, and she went with him and stayed that night. She slept in one bed, and defendant's wife in another in the same room. Defendant returned about midnight, and went to bed with his wife. Prosecutrix testifies that later in the night she was awakened by defendant again taking improper liberties with her person, and finally attempting to have intercourse with her, but on that occasion failed. She testified she knew this was all wrong, but she was ashamed to tell his wife or her parents. On the 6th of March, 1901, he went on another turkey hunt, and prosecutrix and her sister Beulah went to stay with his wife, and went to bed and slept. She was again aroused from her sleep by defendant feeling her person, and found him in bed with her. She made no outcry, and on that occasion he accomplished his purpose. On another occasion Minnie Huffman, an older sister, went with prosecutrix to the home of defendant, because her mother and father were absent on a visit, and her brother had gone to a lodge meeting at Cross Timbers. Defendant had gone hunting that night, and came in late, and when she waked up she found defendant in the bed with her and her sister, the prosecutrix. When her brother came

from the lodge, she went home with him. Two physicians testified to an examination of the prosecutrix, and found the hymen destroyed and her private parts lacerated. When defendant was arrested, he was placed, at his request, under guard till his examination before the justice. Bent Ihrig, a deputy constable, was the guard. At defendant's request Ihrig took defendant to his home on Monday. Ihrig testified that, soon after starting out of town on this trip, he said to defendant, "You have got yourself into a right smart little trouble, it seems like," to which defendant replied he did not think they could do anything with him; "they will just cause me a little trouble is about all; if I did, she was willing," or words to that effect. The guard expressed the opinion that the girl's age was what would hurt him, but defendant thought if she was willing it was all right. There was much controversy as to the exact date of the offense; the defendant introducing various witnesses to show it could not have occurred on the 6th of March, and the state a number to show that it occurred on the night of a party at a neighbor's (Mr. Smith), which several witnesses fixed quite definitely as March 6th. No effort was made to impeach the previous good character or general reputation of the prosecutrix for truth and veracity, to show any unfriendly feelings as the basis of the charge; but the defendant contradicted her evidence, and his wife testified that the act could not have occurred as detailed by prosecutrix without waking her, as she slept in the same room with the prosecutrix. An effort was made to impeach the witness Ihrig by showing his general reputation for truth and veracity was bad; but it appears to have been unsuccessful, as the weight of the evidence on that point tended to show it was good. A reversal is sought on various grounds which we now proceed to examine.

J. W. Montgomery, F. M. Wilson, and Rechow & Pufahl, for appellant. The Attorney General and Sam B. Jeffries, for the State.

GANTT, J. (after stating the facts). 1. The circuit court, over the objection of defendant, permitted the state to prove by two physicians, Drs. Curl and Harley, that they made an examination of the private parts of the prosecutrix about the 1st of July, 1901, and found the hymen destroyed and a laceration of the tensor vagina muscle, which had not yet entirely united. The objection is that this evidence was too remote, and counsel rely upon the decisions in *State v. Houx*, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686, and *State v. Evans*, 138 Mo. 125, 39 S. W. 462, 60 Am. St. Rep. 549, as sustaining their contention.

In *State v. Houx*, *supra*, the objectionable evidence in no way tended to prove the perpetration of the offense, but was in response

to an inquiry as to the condition of the girl's health after the commission of the offense, and the witness was allowed to state that his daughter "lingered for three months, and would take spells"; and in commenting on this evidence Judge Macfarlane, who wrote the opinion, said: "Its only effect could have been to show an aggravation of the offense, and excite abhorrence in the minds of the jury, and thereby increase the punishment." It is obvious that the evidence in this case had no such purpose in view, but was directed solely to the ascertainment of whether there had been in reality an outrage committed on the child Laura. Neither of the physicians was called upon to detail her probable suffering after the injury, save in response to inquiries propounded by defendant's counsel, who insisted on proving that it would have been so painful that she necessarily would have cried out, and thus aroused defendant's family. The medical witnesses were called simply to show the vagina had been penetrated and the parts lacerated, and they had no hesitancy in testifying such were the facts. It was simply a fact, but not a conclusive one, tending to prove that the child had been raped; and in the light of the medical evidence we think it was competent evidence, and its remoteness for the purpose it was offered was no ground for excluding it.

In *State v. Evans*, 138 Mo. 125, 39 S. W. 462, 60 Am. St. Rep. 549, the incompetency of the evidence rested, not merely on lapse of time, but upon a concurrence of the time and the age of the prosecutrix. In that case the question was whether the female was under 14 when the sexual commerce took place. The evidence showed that she was 14 on the 29th day of May, 1895, and the circuit court permitted the physician to testify to an examination made by him in September, 1895. The alleged rape was on August 3, 1894, and it was ruled that, as four months had elapsed since the female had reached the age of consent, the mere destruction of the hymen would not have proved copulation while she was under 14 years, any more than after that time, and, unless it tended to prove intercourse while under the age of consent, could not have sustained a conviction on the indictment in that case. Moreover, in that case the intercourse was shown to have taken place in July and August, 1894, and the examination was made in September, 1895, over 15 months after the alleged rape, and long after the female had reached the age of consent. That case is in no sense a parallel to this, or authority for the contention of counsel. In this case, the proof related entirely to a period when the female was under 14 years of age; and according to the evidence of the medical men, the evidence of the laceration was still apparent.

2. The motion of defendant to require the state, at the conclusion of the testimony, "to

elect as to which of the specific acts it will rely on in this case," was properly overruled. The indictment charged the offense to have been committed on March 6, 1901, and the proof of the other acts of defendant was competent to show, upon the question of his guilt, that he had made attempts to commit the same offense recently before the commission of the act for which he was on trial. *People v. Jones*, 30 N. Y. 667, 2 N. E. 49; *People v. O'Sullivan*, 104 N. Y. 483, 10 N. E. 880, 58 Am. Rep. 530. The charge in the indictment clearly referred, not to the previous ineffectual attempts of defendant to have carnal connection with the prosecutrix, but to the completed offense on March 6, 1901, and there was nothing requiring the state to elect.

3. In the divisional opinion it was ruled that defendant could not complain that he was convicted only of an assault to commit rape, even though the evidence disclosed he was guilty of the completed offense, and reference was had to section 2535, Rev. St. 1899, and various cases in other jurisdictions holding that, on an indictment for rape, a defendant may be convicted of an assault to commit a rape. But it was overlooked that in those states there was no statute like section 2361, Rev. St. 1899, of this state, which provides that "no person shall be convicted of an assault with an intent to commit a crime, or of any other attempt to commit any offense, when it shall appear that the crime intended, or the offense attempted, was perpetrated by such person at the time of such an assault or in pursuance of such attempt." This section unquestionably is a modification of the common law in criminal cases as announced by Wharton (1 Wharton's Crim. Law, § 641), in which he lays it down that on an indictment for a major offense there may be a conviction of a minor, for the reason that the state may elect to prosecute for the minor offense, provided, always, the minor is included in the major, and falls within the allegations of the indictment; and in many states it has been expressly ruled that an assault with intent to commit a rape is included in every rape, and a defendant may be convicted of an assault to commit rape, even though the proof established the offense of rape was complete. *People v. Miller*, 96 Mich. 119, 55 N. W. 675; *Hall v. People*, 47 Mich. 636, 11 N. W. 414; *State v. Shepard*, 7 Conn. 56; *Com. v. Cooper*, 15 Mass. 187; *Polson v. State* (Ind. Sup.) 35 N. E. 907.

The difficulty in reconciling this section with section 2535, Rev. St. 1899 (then section 3949, Rev. St. 1889) was encountered in *State v. Lacey*, 111 Mo. 513, 20 S. W. 238, and it was there said: "This section is not in conflict with section 3949, Rev. St. 1889 [now section 2535, Rev. St. 1899], of our Criminal Code, authorizing a conviction for any degree of the offense inferior to that charged in the indictment; nor with section 3950,

Rev. St. 1889 [now section 2370, Rev. St. 1899], authorizing a conviction for a less offense, where the charge is for an assault with intent to commit a felony, and authorizing the jury in all cases to find the accused guilty of any offense the commission of which is necessarily included in that charged against him." Judge Thomas concluded by saying: "In view of the two sections last cited, we see no reason for the existence of section 3941 [now section 2361]; but that is no reason why this court should nullify or ignore it." We followed in that case a previous decision of this court in *State v. White*, 35 Mo. 500, in which the same conclusion was reached in construing this same section, at that time Rev. St. 1855, p. 637, c. 50, art. 9, § 2.

We may add that this construction does not in any manner prevent the conviction of one, charged with murder in the first degree, of murder in the second degree, or of manslaughter in any degree which is supported by the evidence, or of grand larceny on an indictment for robbery; nor does it prevent a conviction of any completed offense on an indictment therefor, even though the indictment might have been for another and greater offense, and the evidence would have sustained such indictment, as was ruled in *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846. Neither does it change the generally accepted doctrine that, under an indictment for rape, the defendant may be convicted of an assault to commit a rape, if the evidence fails to show the offense of rape was consummated; but section 2361, Rev. St. 1899, is necessarily limited by its terms to those cases in which "it shall appear that the crime intended or the offense attempted was perpetrated," or fully consummated. If, therefore, under an indictment for rape or other felony, the evidence fails to show a perpetration of the offense charged, but does establish an assault necessarily included in the charge, the defendant may still be convicted under the charge for the major offense; and we may add that if the evidence is conflicting, and there is testimony to sustain the completed offense, and evidence tending to show that it was only an assault, it is the duty of the court by appropriate instructions to inform the jury that, if the evidence satisfies them beyond a reasonable doubt that the offense of rape or other felony was in fact perpetrated, then they must find him guilty of the offense charged, and are not authorized to find him guilty of an assault merely, but if, on the other hand, the jury are satisfied beyond a reasonable doubt that the offense was not perpetrated, but that an assault to commit the same was committed, then they should find him guilty of an assault. But if, as in this case, the only evidence of an assault to commit a rape is that which shows the crime was fully perpetrated, it falls within section 2361, Rev. St. 1899, and it is error to submit the

question of assault with intent to commit a rape.

This court has on more than one occasion ruled, not only that it was error to submit to the jury a grade of offense of which there was no evidence, but that it was beyond the power of the Legislature to compel the courts to submit to the jury an offense or grade of an offense which the evidence did not tend to establish. *State v. Hopper*, 71 Mo. 425. Now in this case, without the testimony of the prosecutrix there could have been no conviction, either of rape or assault to commit rape; but, if credit is to be given her evidence, then the crime of rape was fully consummated, and there was not merely an assault to commit the offense, and hence it follows that it was error, under section 2361, Rev. St. 1899, to have instructed on an assault to commit rape, and error to have permitted the verdict of guilty of an assault to stand.

It results that the judgment must be reversed, and the cause remanded for a new trial in accordance with the views herein expressed. All concur.

KLOCKENBRINK v. ST. LOUIS & M. R. R. CO.

(Supreme Court of Missouri, Division No. 2.
Feb. 24, 1903.)

STREET RAILWAYS—COLLISION WITH TEAM—
CONTRIBUTORY NEGLIGENCE—AVOIDABLE
INJURY—EVIDENCE—SUFFICIENCY—AP-
PEAL—DEMURRER TO EVIDENCE—WAIVER.

1. Defendant, by putting in evidence after its demurrer to plaintiff's evidence has been overruled, does not thereby waive its right to have the ruling of the court reviewed on appeal; but the appellate court will consider the whole evidence, whether offered by plaintiff or defendant.

2. Evidence in an action against a street railway company for injuries considered, and held sufficient to justify a finding that the motorman saw, or by the exercise of ordinary care could have seen, plaintiff's wagon on the track in time to have avoided the accident.

3. Contributory negligence of plaintiff, if it be such, in driving on the tracks of a street railway company at night, does not preclude his recovery, when defendant's servants saw, or by the exercise of reasonable care could have seen, plaintiff in time to avoid injury to him, and failed to do so.

4. A street railway has not an exclusive right to the use of its tracks laid in a public highway, nor are persons driving on its tracks trespassers.

5. The fact that plaintiff, in an action against a street railway company for injuries, did not count on the negligence of defendant in running its car at a high rate of speed and failing to ring the gong, did not entitle defendant to an instruction declaring evidence on such points immaterial, where it was admitted without objection, and defendant itself introduced evidence on the subject.

Appeal from St. Louis Circuit Court; P. R. Filcraft, Judge.

Action by E. F. Klockenbrink, Jr., against the St. Louis & Meramec River Railroad Company. From a judgment for plaintiff, de-

defendant appeals. Removed to Supreme Court from St. Louis Court of Appeals by reason of a division of opinion. Affirmed.

Action for personal injuries. Suit commenced November 19, 1898. Amended petition filed March 15, 1899. The petition, as amended, states that defendant is a railroad corporation organized under the laws of this state, and was on 19th of July, 1898, operating its railroad over and along the streets and highways of Webster Groves, a town in St. Louis county; that on that day plaintiff was driving a large staked wagon, to which was attached two horses, over and along a highway in St. Louis county, to wit, Lockwood avenue, in said town of Webster Groves, going in an easterly direction; that one of defendant's servants in charge of one of its cars, moving along and upon its track in Lockwood avenue in the same direction in which plaintiff was traveling, and at a high and unusual rate of speed, carelessly and negligently ran into and against plaintiff's wagon from the rear; that the said defendant, by its said servant, at the time saw said wagon, which plaintiff was driving, or in the exercise of reasonable care might have seen said wagon and plaintiff, in time to stop the said car before striking or running into said wagon; that the wagon was broken, torn to pieces, and one of the horses killed, and the other permanently disabled, and plaintiff was thrown to the ground, his finger broken, his back sprained, and he was otherwise maimed, bruised, and wounded in his body, and has suffered and will continue to suffer much pain in body and mind, and has been permanently injured and disabled, has been compelled to spend large sums of money for medicine and medical treatment, etc., to his damage in the sum of \$2,500 for which he prays judgment. The answer is a general denial, and a plea of contributory negligence on the part of plaintiff in driving upon the defendant's track on a dark night, when there was plenty of room on a well-improved street where he could have driven, and continued to drive on the tracks without looking or listening for an approaching car. The reply denied all new matter. There was a verdict and judgment for plaintiff for \$1,500, from which defendant appeals. Various errors are assigned, which we will consider in their order. The appeal is in this court by reason of a division of opinion in the St. Louis Court of Appeals.

McKelghan, Barclay & Watts and R. A. Holland, Jr., for appellant. R. P. Williams, for respondent.

GANTT, P. J. (after stating the facts). 1. Did the circuit court err in overruling the demurrer to the evidence? As the defendant did not stand on its demurrer at the close of plaintiff's evidence, this question must be answered in view of the whole evidence—that which was offered by defendant, as well

as plaintiff. *McPherson v. Ry. Co.*, 97 Mo. 253, 10 S. W. 846. The defendant, by putting in its evidence after its request for such an instruction had been made and overruled, took the chances of curing any defect in the plaintiff's evidence, but did not wholly waive its right to have the ruling of the court reviewed; but this court will look to the whole evidence, no matter by whom offered. This is the settled practice in this state. *Eswin v. Ry. Co.*, 96 Mo. 294, 9 S. W. 577; *Jennings v. Ry. Co.*, 112 Mo. 268, 20 S. W. 490.

The testimony established that plaintiff, on the 19th of July, 1898, was a teamster; that he drove two horses to a very large stake wagon, and on that day had taken a load of freight from St. Louis to Kirkwood, in St. Louis county, and was returning to the city in the night; that his route required him to come through Webster Groves, and when he reached that town, coming from the west, he entered upon Lockwood avenue, a street or highway on which defendant had its railroad tracks. From the top of the hill on which he came into Lockwood avenue there was a decline for about 1,800 feet, and then another elevation was reached. It was about midnight. Plaintiff drove safely down the first hill, and had gone about 200 feet up the second, when one of defendant's electric cars struck his wagon from the rear, and killed one of his horses, crippled the other, and threw plaintiff out of the wagon, severely injuring him. At the time the wagon was struck by defendant's car, one of the horses and the two left wheels were inside of the rails of defendant's track, and the other horse and the remainder of the wagon were outside, and between the south rail and the curb line, which was about 12 feet distant. Between the south rail and the curb line there were telephone poles at intervals of about 150 feet, so that plaintiff's wagon could not pass between the telephone poles and the south track without coming within the reach of a car, should one pass the wagon opposite the poles. There was also evidence that a buggy in which there were three men was traveling along the avenue that night, and near this wagon. The plaintiff's witnesses all place this buggy some 30 to 60 feet in the rear of the wagon, and following it. The defendant's witnesses testified that the buggy was in front of the wagon, some 35 to 50 feet ahead of the wagon, when the motorman first discovered it.

As usual, there was considerable discrepancy as to the rate of speed at which the car was moving. It was variously estimated from 15 to 18 or 20 to 25 miles an hour. The plaintiff neither observed or heard the approach of the car. The testimony of Rockwell, the electrician for the defendant, was that, if there was a mist or rain on the headlight, the motorman ought to see an object on the track 75 feet ahead of him. If there was no mist or rain on the headlight, he ought to see 150 feet ahead of him. *Greenhurst*,

the motorman, says he could stop the car, moving as it was at the time, within 100 feet, and Rockwell, as an expert, concurred in that statement. Both Greenhurst and McManus, who stood in the front door of the car talking to Greenhurst, say they saw the buggy about 35 to 40 feet ahead of the car when they first noticed it. Ralston, who was riding in the buggy, testified that when the car passed the buggy the motorman had not applied his brake, and his right hand was hanging at his side. He could not see the position of his left hand. Mr. John C. Berthold was a passenger on that car at the time, and says he heard no bell; that the effort to stop the car was not made over two seconds before the collision occurred.

The evidence for the plaintiff tended to show the buggy was not on the track, but was driven along by the side of it; but the defendant's evidence tended to prove the buggy had been on the track, and was driven off just before the collision, and that until that movement the wagon was obscured by the buggy. The evidence also tended to show that, when the car reached a point 40 or 50 feet west of or in the rear of the buggy, not only the buggy was plainly visible, but the rays of the headlight would also reach far enough to disclose the wagon to an ordinarily observant man. After striking the wagon the car ran on from 75 or 150 feet beyond the point of collision. From which it appears there was substantial evidence from which the jury might find that, granting that plaintiff was negligent in driving his wagon on the track of the railroad company when there was danger, owing to the late hour of night and the darkness, that he might not be seen by a motorman in time to avoid a collision, still the motorman in charge of defendant's car either saw, or by the exercise of ordinary care could have seen, plaintiff's wagon on the track, and by the exercise of ordinary care could have avoided the injury to plaintiff and his wagon and team; and, this being true, there was no error in refusing the peremptory instruction to find for defendant.

It was the province of the jury to weigh all the evidence, and it was their right to believe and find that the wagon of plaintiff was 50 feet ahead of the buggy, which the testimony of plaintiff's witnesses showed was following the wagon from 10 to 30 feet behind, and that the buggy was seen 50 feet ahead of the car, and there was ample evidence from which the jury could have found that it was not a misty night, and that the motorman could have seen, by a proper and careful look, an object as large as this wagon 150 feet ahead of him on his track, and there was evidence in the physical facts that the car not only knocked the heavy stake wagon off the track and wrecked it, but that it ran from 100 to 150 feet east after the collision; and, so finding, the jury were justified in drawing the inference and finding that the motorman failed to exercise ordinary

care, and the means at his hand to stop his car, after he became aware, or by the exercise of ordinary care could have known, of the danger in which plaintiff was placed by the approach of the car from the rear.

This is the settled law of this court. Thus in *Scoville v. Railroad*, 81 Mo. 434, it was ruled that, to make defendant liable where both parties are negligent, the negligence of defendant must occur after the defendant knew, or by the exercise of ordinary care might have known, of the danger of the deceased. In *Hilz v. Railroad*, 101 Mo. 36, 13 S. W. 946, it was said by this court: "If the failure to so discover him was the result of the omission of that measure of duty which the law requires, in view of the locality, circumstances, and dangers to be anticipated, and due observance thereof would have enabled the persons in control of dangerous agencies of this sort to have avoided the injury by the use of reasonable care, then and in such case such omission and want of reasonable care is, under the law, held the proximate cause of the injury, and liability for the resulting damage may then exist, notwithstanding the negligence of the person injured." The same doctrine was reasserted in *Fiedler v. Ry. Co.*, 107 Mo. 645, 18 S. W. 847. In that case the plaintiff was admittedly a trespasser, by a positive statute, and yet we held that, notwithstanding her contributory negligence, the company was liable, if its engineer discovered her peril in time to have avoided the injury by the exercise of ordinary care. See, also, *Bunyan v. Ry. Co.*, 127 Mo. 12, 29 S. W. 842. And as said in the *Hilz Case*, *supra*, ordinary care is to be measured "by the circumstances, locality, and dangers to be anticipated."

The jury in this case were authorized to believe that the motorman was rapidly descending an incline on a public street in a populous village without having his hand on his lever. While it may be conceded that the defendant has a superior right to its tracks, it must be remembered its tracks are laid in a public highway, where every citizen has a right to travel, and it often occurs that these tracks are necessarily occupied by other vehicles, and what would be ordinary care in the country on a fenced track, which the public do not frequent, would be gross negligence in a populous city. Its paramount right must be exercised in a reasonable and prudent manner. *Moore v. Ry. Co.*, 126 Mo. loc. cit. 274, 29 S. W. 9. And, while defendant argues that it was negligent for plaintiff at that hour of night to travel with his wheels inside of its rails, it is equally open to plaintiff to argue that it was reckless conduct on the part of the motorman to run his car at the rate of at least 15 miles an hour on a public street at night without having his motor and brakes well in hand, to prevent injury to those who might be lawfully compelled to use the street at that time.

Judge Bond, in his opinion in the *St. Louis*

Court of Appeals (81 Mo. App. 356) in this case, quotes with approval a statement of the rule as laid down by Shearman & Redfield in their work on Negligence (volume 1 [5th Ed.] § 99) as follows: "But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precaution as a prudent man would take under similar notice. This rule is almost universally accepted." We have seen it is the settled doctrine of this court. *Dunkman v. Ry. Co.*, 95 Mo. 244, 4 S. W. 670; *Kelny v. Railway*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Hanlon v. Ry.*, 104 Mo. 389, 16 S. W. 233; *Czezewska v. Ry.*, 121 Mo. 201, 25 S. W. 911; *Morgan v. Ry. Co.*, 60 S. W. 195, 159 Mo. 262. And the same doctrine is announced by the Supreme Court of the United States. *Inland & Seaboard Co. v. Tolson*, 139 U. S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270; *R. R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

Indeed, the learned counsel for defendant do not controvert this statement of the law, but complain bitterly that the court refused to submit to the jury whether plaintiff's negligence did not directly contribute to his injury. The defendant's answer specifically tendered this issue. It was submitted to the jury in the tenth instruction given by the court in the following terms: "The court instructs the jury that if you find from the evidence that, at the time the wagon was struck by the defendant's car, the plaintiff was not exercising ordinary or reasonable care, and that plaintiff's failure to exercise such care directly contributed to produce the injury of which plaintiff complains, then your verdict should be for defendant, unless you further find from the evidence that the motorman in charge of defendant's car saw, or by the exercise of ordinary care would have seen, that the wagon in which plaintiff was riding and driving was in danger of being struck by said car, in time to have prevented the accident complained of by the exercise of ordinary care." The court properly added the qualification upon which plaintiff's case was predicated. It has been so repeatedly ruled that it is not error to refuse an instruction when the same has already been given that it is deemed unnecessary to cite precedents to that effect.

This instruction is assailed because it is asserted that, if plaintiff's negligence directly contributed to his injury, he cannot recover at all. Clearly it is the law of this state

that mere negligence without any resulting damage does not bar a recovery by a plaintiff. It is only when the plaintiff's negligence directly contributes to his injury that it precludes his recovery. *Moore v. Ry.*, 126 Mo. 205, 29 S. W. 9. The contention of defendant, then, in effect is that, if plaintiff is guilty of contributory negligence, then he can never recover, even though defendant recklessly and wantonly injured him after discovering his peril, and when by the exercise of ordinary care it could have prevented harm to him. This is not the law of this state. When a defendant sees, or by the exercise of ordinary care can see, the peril of a plaintiff, caused by the latter's contributory negligence, in time to avoid injuring him, then plaintiff can recover notwithstanding his contributory negligence. This is now the accepted and settled exception to the general rule that plaintiff's own contributory negligence bars a recovery. It was so expressly ruled in *Kelny v. R. R.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, and the doctrine of that case has been so recently reviewed and reaffirmed in *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195, that it would be a waste of time to repeat what has been so pertinently said in those cases.

This case is much stronger than the *Morgan Case*, in that in this case the plaintiff was driving along a public highway on which he had a perfect right to drive by day or night, and in so doing was not guilty of any negligence. His driving along said track under the circumstances only took on the hue of negligence from the fact that defendant also had a right to run its cars on said street, and that, unless plaintiff should keep a watch out, one of defendant's cars might be run against him. As said by Judge Marshall in *Oates v. Ry. Co.*, 108 Mo. 544 et seq., 68 S. W. 908: "The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but that neither has an exclusive right. * * * Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where its agents act wantonly, maliciously, and heedlessly."

While it was plaintiff's duty to pull out of the way of the defendant's car when it reached him, and while it was true the defendant had a superior right on its own tracks, it did not have a license to run its cars at a reck-

less rate of speed along a public highway, regardless of the danger of collision with other travelers thereon. It is true plaintiff did not count on the excessive speed of the car as negligence, and hence it was not an issue in the case; but the court very properly refused to declare that there was no negligence on account of any rate of speed, and the same may be said as to the refusal to charge that defendant could not be held liable for a failure to ring its bell or gong that night. The plaintiff had not counted on such failure, and whatever testimony went in on that point was admitted without objection, and defendant got the full benefit of its own evidence on that point. Although not made the basis of a recovery by plaintiff, the ringing of a bell as testified to by defendant's witnesses, or a failure to do so, was material to the main issue whether defendant did all it could to avoid the injury after its motor-man discovered, or ought to have discovered, the plaintiff on the track. It was not entitled to an instruction declaring this evidence immaterial after introducing it, and after its failure to object to plaintiff's evidence that the gong was not sounded so as to apprise plaintiff of the approach of the car.

We think the case was fairly tried, and the judgment was for the right party, and it is accordingly affirmed. All concur.

CHAMBERS v. CHESTER et al.

(Supreme Court of Missouri. March 4, 1903.)

MASTER AND SERVANT—INJURIES TO MINER—PREMATURE EXPLOSION OF BLAST—USE OF HIGHER EXPLOSIVE—NOTICE TO MINER—QUESTION FOR JURY—MATERIALITY—AVOIDANCE OF DANGER—ASSUMPTION OF RISK—INSTRUCTIONS—EVIDENCE OF PLAINTIFF'S MARRIAGE—HARMLESS ERROR.

1. Evidence, in an action by a miner for injuries from the premature explosion of a blast he was loading, *held* to warrant submitting to the jury the question whether plaintiff had notice that a powder of higher explosive quality had been substituted for that previously used.

2. The testimony of a miner, injured by the premature explosion of a blast he was loading, that he was exercising care, does not render immaterial, and therefore improper for the jury, the question of notice to him that the powder furnished on this occasion was of a higher explosive power and more dangerous than that ordinarily used.

3. In an action for injuries to a miner from the premature explosion of a blast he was loading, his testimony that he had used powder of the explosive quality ordinarily furnished, and had also previously used, without injury, powder of the higher explosive power possessed by that used on the occasion in question, removes from the domain of conjecture a finding that, had plaintiff known of the more dangerous character of the powder employed, he would have been able by increased care to avoid the accident.

4. Evidence, in an action by a miner for injuries from the premature explosion of a blast he was loading, *held* to warrant submitting to the jury the question whether, had plaintiff known of the more dangerous character of the powder furnished on this occasion, he would

not, by increased care, have been able to avoid the accident.

5. A miner, employed in blasting with powder of a certain explosive quality, does not assume the risk incident to a substitution, without notice to him, of a powder of a higher explosive power and more dangerous character; he having a right to rely on the master's performance of the duty of notification.

6. In an action by a miner for injuries from the premature explosion of a blast, the court, at plaintiff's request, instructed that if plaintiff had been furnished with powder containing 27 per cent. of nitroglycerin, but on the day of the accident was furnished with powder containing 40 per cent., which was more dangerous, then it was defendants' duty to notify plaintiff, and if they negligently failed to do this, and plaintiff, not knowing of the change and while in the exercise of proper care, was injured from his want of knowledge, he could recover; also that, if defendants' foreman neglected to notify plaintiff, his negligence would be that of the defendants, and that if a higher grade of explosive was furnished plaintiff without notification, and he did not know of its character, he did not assume the risk. On defendants' behalf, the court instructed that unless the jury believed defendants changed the grade of powder without plaintiff's knowledge, and that he remained ignorant thereof, and that the substituted powder required a higher degree of care in handling, and that the change substantially increased plaintiff's danger and was the proximate cause of his injuries, and that he was free of contributory negligence, they should find for the defendants. *Held*, that any error in the instructions requested by plaintiff was cured by that given for defendants.

7. The instructions given for plaintiff were not erroneous, as requiring defendants to notify plaintiff, irrespective of his knowledge or opportunity therefor.

8. Neither were they erroneous, as assuming that he was ignorant of the character of the substituted powder, or that he was exercising ordinary care.

9. The instruction that the negligence of the foreman in failing to notify plaintiff was that of the defendants was not erroneous, as authorizing a recovery notwithstanding plaintiff knew of the change, if the foreman failed to notify him thereof.

10. The instruction that plaintiff did not assume the risk, when considered with the instruction given at defendants' request, was not erroneous, as permitting plaintiff to recover if he was guilty of contributory negligence.

11. Where, in an action by a miner for injuries, witnesses on both sides without objection have spoken of and referred to the fact that plaintiff was a married man, the fact that he was permitted to testify that he was a married man does not constitute reversible error.

Robinson, C. J., dissenting.

In Banc. Appeal from Circuit Court, Jasper County; Jos. D. Perkins, Judge.

Action by Samuel Chambers against V. L. Chester and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The following is the opinion in division:

MARSHALL, J. This is an action for damages for personal injuries sustained by the plaintiff, while in the employ of the defendants, in their mine in Jasper county, known as the "Hawkeye Mine," caused by an explosion of nitroglycerin, which the plaintiff was loading in a hole that had been drilled in a rock wall, preparatory to blasting, and in consequence of which the plaintiff lost his

eyesight. The petition contains three assignments of negligence, two of which the plaintiff offered no evidence to support and the court took them away from the jury, so that the case was tried solely upon the remaining charge which was as follows: "Plaintiff further states that he had, for a long time previous thereto, been in the employ of the defendants, and had been furnished by defendants and had been using giant powder with twenty-seven (27) per cent. only of nitroglycerin; that on the said 20th day of March, 1899, the defendants had carelessly and negligently furnished plaintiff with giant powder containing forty (40) per cent. of nitroglycerin, without notifying or in any wise informing plaintiff and those employed with him in the mine of the change of powder. Plaintiff states that the powder containing forty per cent. of nitroglycerin is much more easily exploded and will explode with much less force than powder containing only twenty-seven per cent., and requires a higher degree of care in the handling, lest the same prematurely explode, and powder containing forty per cent. of nitroglycerin is therefore rarely used in the mines; that while plaintiff, not knowing the dangerous character of the explosive furnished by the defendants for the charging of said drill hole, and believing that he was charging the same with giant powder containing only twenty-seven per cent. of nitroglycerin, and exercising due care while using the said iron bar, was with due care pushing the sticks of powder into place in said drill hole with said iron bar, in the manner that he had been accustomed to do while using powder containing only twenty-seven per cent. of nitroglycerin, the said giant powder, owing to its high explosive character as aforesaid, through the negligence and carelessness of defendants in not notifying plaintiff of the high grade of said explosive and of the necessity of greater care in its use, exploded while plaintiff was engaged in loading said drill hole, by which explosion, by means of the powder, and the pieces of gravel and rock which were thrown into plaintiff's face and eyes, plaintiff was seriously injured and wounded, and his eyesight of both eyes totally destroyed." The answer is a general denial, with special pleas of assumption of risk and contributory negligence. There was a verdict for the plaintiff for \$5,000, and the defendants appealed.

Three principal errors are assigned: First, refusal of the court to direct a verdict for the defendants at the close of the plaintiff's case; second, admission of incompetent evidence, to wit, that the plaintiff was a married man; and, third, erroneous instructions given for the plaintiff.

The first assignment of error necessitates a full statement of the evidence, and for this purpose the abstract of the evidence for the plaintiff made by counsel for the defendants is adopted. It is as follows:

"Abstract of the Evidence.

"Plaintiff testified that he was 44 years of age; (over the objection of defendants) that he was married; that he had been working in mines for the last few years, for the defendants about six months before he was injured, and was earning \$2.25 per day; that Mr. Sutton was the ground foreman; that he was engaged in cutting—i. e., drilling, exploding, and shooting, in flint ground—flint and jack; that he had been using 27 per cent. giant powder ever since he had been working there, with the exception of a day or two; on day in question was working under directions of Mr. Sutton, who told him he 'wanted us to load a hole and shoot it before noon.' He did not specify the amount of powder. The hole was five or six feet deep, in smooth, solid, and flint rock, and 'in loading our hole we wanted to get in a good shot, and we concluded we would take off part of the wrapper; that is, what we call "skinning it." We tore off the wrapper until we came to the bottom wrapper, and pushed the powder, then, with one thin wrapper on the powder, around it, and put them in the hole, and took the tamping bar, and slid this down to the back. The hole was almost horizontal; and when we got in quite a little powder, and getting the hole pretty well loaded, one stick seemed to hang on the side of the hole. Mr. Pearson, my buddy, unwrapped the powder and tore off the extra paper we did not want to use, and handed me the powder. I was pushing that one stick which seemed to hang, as carefully as I could, when the explosion occurred. Not informed what grade of powder was furnished me. I knew of no change. I supposed we were using 27 per cent. We had been using it ever since I worked for them, with the exception of a day or two. One time, six or seven weeks before this happened, when Geo. Bartholomew was ground boss, they sent down a higher grade of powder two days, but we did not like it, and we went back to the 27 per cent. powder; but after Mr. Sutton came, a week or so, he brought down two or three boxes of a higher grade of powder of the same brand, 40 per cent. as he stated, and he said he wanted us to test it. This was two weeks before I got hurt, and we used it one day, and went back to the low grade powder. The accident happened March 20th; my face was shot into a kind of jelly. It has gotten well, but I have never got so I could see any since. I suffered for three or four months, and do yet. Was in bed five or six weeks.'

"Cross-examination: 'Mr. Sutton simply told us to load and shoot the hole. We used our own discretion about the number of sticks we put in, and the way we should load the hole. I used the ordinary tamping rod, or gas pipe with a wooden plug in the end. The hole was about 2 inches at the start and ran back to perhaps 1½ inches. It went back about 4

feet, and then ran back into the pocket. The stick of powder was $\frac{3}{8}$ inch in diameter. We took all the paper off but the last strip, so it would not fill up the pocket so fast. The powder is easier to break than where it remains on. We did this until we got a number of sticks in, and the last I put in stuck on the side of the smooth hole and broke. The powder is nitroglycerin. It is gummy, so in pushing the sticks in the pocket it left some sticking to the side of the hole. I wanted to clean it off, and in order to get it off I put the end of my bar against it, where I could feel the powder, and pushed. Was just careful where the powder was sticking on the side of the hole. Did it two or three times. I suppose I put the bar against the top or bottom of the hole. Do not know how much pressure I put on; not very much. I simply pushed; did not strike. That necessarily put the outside of the iron of the gas pipe against the gummed powder. Just about that time they called dinner. The explosion occurred about two minutes later. Have always understood high grade powder was easier exploded. You can explode powder with a blow. I remember Mr. Spencer coming to my house after the accident and signing a statement which was read to me. I don't know what was in it. I did not say that we were using 40 per cent. powder, and that it was all right to use.'

"Re-direct: 'I think the force necessary to explode powder containing 27 per cent. glycerin and that containing 40 per cent. would be about three to two.'

"J. H. Pearson: 'Am a miner. Have had about seven years' experience with giant powder. The higher the grade of powder the easier it is exploded. I was working right by the side of Chambers when he was hurt. B. Sutton was ground boss. Nothing was said to me of any change of powder. Was with Chambers all that morning. Nothing was said to him in my presence. 40 per cent. powder was given us. I was cutting the powder, and Chambers was putting it in the hole. I prepared it and handed it to him. He used a gas-pipe tamping bar. We were taking most of the wrapper off the powder, all but just enough to cover the powder, and putting it down in the hole, and pushing it down with the tamping bar. It just went off; that is all I knew. We had miner's lamps fastened in our hats. I never paid any attention to the grade of powder we were using until after the accident, in the afternoon. Found it was 40 per cent. Saw Mr. Sutton. He stated he did not see any difference in the powder.'

"Cross-examination: 'I found out it was 40 per cent. powder by looking at it; by looking at the sticks. It stated 40 per cent. powder, branded on each stick in good size letters; plain, only necessary to look at it in order to understand what it was. The light we had was like all miners use in working in the mines. Just before the accident Mr.

Chambers said something about his hole choking up. I think the powder caught in the hole. He was pushing like he was trying to remove some obstruction. Metal where you are working it up and down on flint rock, is liable to strike a spark, and the spark is liable to explode the powder. It takes a pretty hard blow to explode powder. They do use as high as 65 per cent. powder in that district. Most of the companies in on the Center Valley and Oronogo use 40 per cent. powder. It is almost impossible to tell what causes powder explosions. Powder is dangerous and uncertain.'

"Alfred Emery: 'Have been mining about eight years. Was working in mine with Chambers about two months before accident. We had been furnished with 27 per cent. powder. On the morning Chambers was hurt we were furnished with 40 per cent. I discovered this about five minutes before he was hurt. I was loading a hole, and noticed the difference in the grade of powder myself. Had not been informed of it. Mr. Sutton was ground boss. He told me that evening we were using 40 per cent. powder. He did not state where he got it. I just happened to discover it there in the dark.'

"Cross-examination: 'Am brother-in-law of Mr. Chambers. I found out it was 40 per cent. powder by the print on it. Printed 40 per cent. It is not plain letters. A man ain't use to powder, and had some experience, ain't apt to notice it. There is a trademark on the 40 per cent. I don't remember what it says.'

"T. N. Brock: 'Had been working in the Hawkeye Mine about six or eight weeks. We had been furnished 27 per cent. powder. On the morning of the accident we were furnished with 40 per cent. Had not been notified by anybody of the change in the powder. B. Sutton was ground boss. Late that evening, after taking Chambers home, he said he should have notified the men of the change of powder, but had forgotten it. He seemed to feel very sorry about it. 40 per cent. powder will explode easier than 27 per cent.'

"Jos. Higenbotham: 'Was at work 50 or 60 feet from Chambers at the time of the accident. I went to work some time in January. This accident happened in March. We had been using 27 per cent. powder, I think, previous to the accident.'

"Cross-examination: 'Do not know when they commenced using 40 per cent. powder. I found out this was 40 per cent. powder by looking at the powder. I believe the grade was on the stick; if not, it was on the box. Sometimes it is on the box; sometimes on the stick. 40 per cent. takes less of a blow to explode it than 27 per cent. From what I have seen the grade used around there runs from 27 to 40 per cent. I have seen 65 per cent. used.'

"George Bartholomew: 'Was ground boss in the mine in December, January, and part of February previous to the accident to

Chambers. We used a low grade of powder, anything below 40 per cent., excepting five boxes. Chambers was working there then. A short time before I quit we used five boxes of Columbian powder, then changed back to the low grade powder. The Columbian powder was an experiment. The higher the grade of powder the more dangerous it is.'

"Mrs. Belle Emery describes condition of Chambers after accident; plaintiff's sister-in-law.

"Fred. Richardson: Examined as an expert. Nothing developed.

"Richard Johnson: Working near Chambers. We used two or three different kinds of powder before the accident. We used *Ætna*, 27 per cent., and Columbian. I don't think any directions or notice was given when we changed to Columbia. When the change to 40 per cent. was made there had been notice given to that effect a few days before the accident. I could not say as to whether it was given on the day of the accident. I had been used to handling 40 per cent. powder. Used it all my life. All the mining I ever did, almost, was with 40 per cent. powder. I don't know that I handled it any carefuller than 27 per cent. powder. I think they went back to a low grade powder before the accident.'

"Cross-examination: 'There was a notice, five or six days before the accident, of the change from 27 per cent. to 40 per cent. We used this higher grade four or five days before the accident. 40 per cent. powder is generally used. It is considered a generally safe powder. We used the same method in handling one as the other. Have to be careful with all. All are dangerous and apt to explode. If I was using 75 per cent. powder, which I have used, I would be careful. 40 per cent. is considered a perfectly safe grade. I have handled it with as much safety as 27 per cent. I think the first time we made the change to 40 per cent. we all knew about it. That was five or six days before. We were all notified. We used 40 per cent. on down to the time of the accident. I don't know whether the percentage is branded on it or not. We noticed an animal on one, and did not see it on the other. I remember several of us were looking at the brands on the label, and couldn't distinguish which was 40 per cent. I don't remember the brand on the *Ætna*; only this high grade.'

"Dr. D. V. Wale, examined as to plaintiff's condition, testifies eyesight destroyed.

"Enoch Purcell (expert): 'Giant powder containing 40 per cent. nitroglycerin is more sensitive to force than that containing 27 per cent.; a difference of one-third to one-half. I have seen this powder burn. Have picked up stick that was blazing, and threw it over the dump. It is force that explodes powder. It is the jar.'

"Cross-examination: 'Chambers and I married cousins. The powder I burned and

threw was 50 per cent.; American forcite powder. Never had any experience with powder and fire, where powder was confined.'

Inasmuch as other questions in the case necessitate a reference to the whole case, the abstract of the evidence for the defendants, made by defendants' counsel, is also adopted, which is as follows:

"Defendants' Testimony.

"V. L. Chester: 'One of defendants. I saw Chambers after the accident; something like two weeks after the accident. I was inquiring of him how he accounted for the accident, and he says: "Well, Doc; that is something I can't account for." He says: "It was dinner time, and I guess I must have got in a little too big a hurry and punched the powder too hard. That is the only way I can account for it." Afterwards, about ten days or two weeks, I saw him again, and he referred to the matter again, and said the same thing. He said there wasn't anybody to blame about the matter only himself.'

"Dr. Olive: 'One of defendants. Saw Chambers at his house next morning, right after the accident. I stepped up and shook hands with him. He was in bed, and I told him I felt sorry for him, and asked him how the accident occurred. He said that it occurred through his own carelessness. He said that he had loaded a hole, and put in 55 sticks of powder, and was putting in the last stick. He said that it was just at noon, and he got in a little too big a hurry, he thought, and in shoving the stick in the hole he said that he thought there was a little piece of rock got down between the hole and the stick. He also said that he had stripped the powder, and he thought that rock grating on the bare powder caused the explosion. He said he would never strip another stick of powder as long as he lived. I never said anything to him about a change of powder. I never knew anything about that; have nothing to do with the practical operation of the mine.'

"Cross-examination: 'Never told Chambers anything about change of powder. Had a talk with Bartholomew about Columbian powder. He said he considered it dangerous. I wanted to reduce the amount of the powder bill. I did not know anything about the grade. We dropped the Columbian powder because we considered it dangerous.'

"J. E. Bell: 'One of defendants. Was superintendent of the mine at time in question. I bought the powder. We last commenced to use 40 per cent. powder on the 13th of March. I have the invoice here the day the powder was bought. This was No. 2, 40 per cent. We used this from March 13th down, and no other. I had a talk with Chambers about a week after the accident at his house. He said it was one of those accidents that happen; wasn't any one to

blame for it; couldn't tell how it happened; said that dinner had been called. He didn't know he was loading any different from what he always had. He might have given a little harder push than he was thinking for.'

"Earl Peebles: 'Business, mining. The powder I have seen used most in this district is powder marked 40 per cent. nitroglycerin. There is no difference in the method used in cleaning and loading and shooting holes with 40 per cent. powder and with lower grades. I never found any difference in the degree of danger in using them. I think sometimes the 27 per cent. is more liable to explode than the 40 per cent., because it is poorer mixed.'

"Cross-examination: 'Never had any practical experience as a miner. My experience is principally overseeing mines.'

"John Dermott: 'Been mining last five or six years. Believe there is more 40 per cent. powder used in this district than any other. Where the ground is not hard, a lower grade is used. I would say that 40 per cent. is perhaps most commonly used.'

"Cross-examination: 'Have always had a mine boss. Never loaded a hole myself.'

"A. E. Spencer: 'Attorney. On April 1, 1899, I visited Mr. Chambers, the plaintiff, at his house. I asked him, or told him, I wanted to get a statement of how the accident occurred. I sat down at a little table in the room. He sat, I think, on the bed. We talked it over, and he told me how it occurred, and I wrote down as he talked until I thought I had covered the field. I then read to him very distinctly and very plainly and carefully what I had written. He said that that was right; then affixed his signature to it. I being a notary public, he swore to it before me. I attached my signature as a notary public. I still have that document and produce it here now. (Exhibit A.) Mr. Chamber's name was signed there in my presence. What I wrote there is what he told me.'

"Cross-examination: 'Q. At whose instance did you go there, Mr. Spencer? (Objected to as immaterial and incompetent; objection overruled; exception noted.) A. A company operating in this district, known as the Union Casualty & Surety Co. Plaintiff could not see at the time he signed this. I told him I came at the request of the insurance company. There were one or two ladies there when I went in. As we talked my recollection is the ladies left the room. My object was not to get a favorable or an unfavorable statement, but the facts concerning the accident. It did not make a particle of difference to me whether they were good or bad. He did not tell me that he learned, after the accident, that they were using 40 per cent. powder. I asked him what kind of powder they were using, and he said, "40 per cent. powder." I took Mr. Pearson's statement the same day.

"Exhibit A—Plaintiff's Statement.

"State of Missouri, County of Jasper—ss.: S. E. Chambers, being duly sworn, on his oath says: On Monday March 20, 1899, I was in the employ of the Hawkeye Mining Company, at Center Valley, Jasper Co., Mo., as a cutter in the ground. About ten-thirty o'clock in the forenoon of March 20, 1899, John H. Pearson and I went to the face of one of the drifts to load a hole there. D. Sutton, the ground boss, told us to load the two holes already drilled, so we could shoot before we went out to dinner. These two holes were right next to the face of the drift, in the top of the stope. He did not give us any further orders about the work. We loaded one hole, and about half-past eleven o'clock we commenced to load the second hole. This latter hole was drilled straight in the face of the stope; almost level. It was about five and one-half (5½) to six (6) feet deep. It had been drilled a day or two before, and had been squibbed. We squibbed it once with about 10 or 11 sticks of powder, about ten (10) or ten-thirty (10:30) o'clock, the morning of March 20. Then Pearson cleaned it out, and I went and loaded another hole up in the face. It was tolerable hard ground; real hard flint ground. We commenced to load the last hole about half-past eleven o'clock that morning. They called for dinner just about the time the powder exploded. I did not think, till then, it was dinner time, and was not rushing my work. I thought I had plenty of time. It was a nice smooth hole. I loaded the hole, and Pearson handed me the powder. We stripped the powder, leaving just one wrap of paper, and the hole was nice and smooth, and sloped down a little, and the powder went down easy. We [were] loading with whole sticks of powder. Would start a stick in with my hands, and then push it down with the tamping bar. The tamping bar was all gas pipe, about ¾ or ¾, with a wooden plug driven in the end that went in the hole. The plug did not stick out past the pipe any. The usual way to fix these bars is to drive a wooden plug in and cut it off even with the end of pipe. These plugs are safer than iron tamping bars. They are lighter, and have less metal at end. We were using 40 per cent. Aetna powder. It is all right to use. The sticks all went down easily—there was a pocket at end of hole—except the last stick, about the fifty-fifth stick, and it stuck in the hole just above the pocket. It did not stick bad. I just pushed a little and it went in; but the powder was rather gummy, and some of it was left sticking on the sides of the hole. The hole was open, for the bar went down in the pocket, but with the bar I could feel some of the powder from the last stick gummed to sides of the hole, where it would interfere with the next stick. Then I stooped over with my face in front of the hole.

trying to see in, and took the bar and scraped up and down the sides of the hole to get the gummed powder off. Think I had the hole about cleaned when the powder exploded, injuring me. The shot was not in the hole yet. Pearson handed me the powder when I squibbed this hole. We did not squib the other hole in the stoep. The hole had plenty of time to cool, I thought. We never did wait on a hole in that ground over 10 or 15 minutes. I can't hardly imagine what caused the explosion. The only theory that looks reasonable to me is that, in scraping the powder off the hole, the bar struck a spark and set off the powder. I was not hitting the powder at all when it went off. Once in a great many times a spark will set off the powder. It seemed like it just took a notion and went off; but, of course, there was some cause.

"S. E. Chambers.

"Subscribed and sworn to before me this first day of April, 1899. Witness my hand and official seal in said county on said day. My commission expires January 14, 1903.

"[Seal.] Arthur E. Spencer,
"Notary Public."

"Read to affiant.

"Defendant rested."

The abstract of the evidence for the plaintiff in rebuttal, made by counsel for defendants, is also adopted, which is as follows:

"Plaintiff's Rebuttal.

"Mrs. Emery: 'Recollect circumstance of Dr. Olive being at Chambers' and asking how he got hurt. Mr. Chambers did not say to him that he did not know how it occurred, unless it was through his carelessness; that he had about 55 sticks of powder in, and that it was near noon, and he was in a hurry; was shoving a stick in the hole, and that a little piece of rock grated down between the bar and the powder and caused the explosion; and that he would never strip another stick of powder as long as he lived. Chambers made the remark he was careful, and he didn't see how he could be more careful than what he was. He said he didn't think it was carelessness on his part.'

"Cross-examination: 'I was in and out, working about. I don't know what was said when I was out.'

"S. E. Chambers: 'I did not say to Dr. Olive, or Mr. Bell, or Mr. Chester, that I did not know how the accident occurred, unless it was my own carelessness, nor to anybody. I never said a word about a stone getting fastened in the hole, because no stone ever got fast or in the way of the powder. In the statement read by Mr. Spencer I did not understand that there was anything in it about 40 per cent. powder being used, and that it was all right to be used. There was not a word about powder in what he read to me. Powder was never mentioned. I stated what questions he asked me. I did not undertake to state anything; only answering

the questions he asked me. I learned about five minutes after the accident that it was 40 per cent. powder. Some one said it, don't know who.'

The instructions complained of will be considered in the course of the opinion.

1. The first question presented for decision is the refusal of the court to direct a verdict for the defendants at the close of the plaintiff's case. In support of this contention the defendants assign four reasons, to wit: "(1) Notice of grade of powder, both general and special, by printed notice on each stick of powder supplied, was given. (2) If not, it was immaterial, as the plaintiff does not pretend that he would have proceeded in any different manner than he did, or that he could have used any greater care than he did. (3) There is no evidence that the same accident would not have occurred, had plaintiff been using 27 per cent. nitroglycerin, instead of 40 per cent. A verdict must not be based on a mere conjecture. (4) The injury was one of the risks of the hazardous occupation in which he was engaged, which was assumed by the plaintiff."

The plaintiff testified that he had used 27 per cent. giant powder all the time he worked for the defendants, except on three days, to wit, six or seven weeks before the accident, when a higher grade was used for two days, and they did not like it, and went back to the 27 per cent., and again about two weeks before the accident, when 40 per cent. powder was used for one day, and they then returned to the use of 27 per cent. powder, and that at the time of the accident he supposed they were using 27 per cent. powder. He also testified that, the higher the grade of powder, the easier it is to explode, and that the force necessary to explode 27 per cent. and 40 per cent. powder would be about three to two. There was evidence for the plaintiff that the men were not notified that a change was made, and that the powder which was being furnished was 40 per cent. powder, and not 27 per cent. powder. Some of the men discovered, just before the plaintiff was hurt, that the powder was 40 per cent. powder; but it is nowhere shown that the plaintiff knew that fact, or that any one told him. The sticks of dynamite had labels on them showing their strength; but the evidence is conflicting as to whether those labels were plain and prominent enough to attract attention, or were only sufficient to disclose their strength when the labels were closely examined. It does not appear that the plaintiff ever saw the labels; but it does appear that his helper took off all but the inside wrapper from the sticks of powder, and handed them to the plaintiff, who put them in the hole, and that even the helper did not know until after the accident that they were using 40 per cent. powder. So that it was a question of fact, for the jury to decide, whether the plaintiff had general notice of the change in the character of the powder that was be-

ing used, and also whether the labels on the powder were of such size and character as to be so easily discerned by the plaintiff that a failure to do so constituted negligence on the plaintiff's part. In this connection it was the province of the jury, in determining this question, to consider the manner in which the plaintiff was doing the work; that is, the fact that he did not handle the powder until his helper had removed the outer wrapper, to which the labels were attached, and therefore, when the powder reached the plaintiff's hands, there was no label on it, and also to consider whether the defendants did or did not know that this was the manner in which the work was done. These facts certainly furnished some substantial evidence that the plaintiff did not know that 40 per cent. powder was being used, and afforded sufficient basis for the jury to find that, whether the 40 per cent. powder had been in use for a week before the accident, as the defendants claimed, or not, the plaintiff had no knowledge or notice, express or implied, of any such change. This being true, the trial court could not, for this reason, take the case from the jury.

The second subcontention under this assignment of error, that it is immaterial whether or not the plaintiff had express or implied notice of such change in the strength of the powder, inasmuch as he does not pretend that, if he had known it, he would have proceeded differently from the way he did, or that he could have used any greater care, is also untenable. The testimony shows that the plaintiff knew that higher grades of powder explode more easily than lower grades, and that he had used higher grades without injury when he knew that he was using the higher grade, and therefore knew how much care was necessary to employ to prevent an explosion. It is true that the plaintiff says he was exercising care, and not using unnecessary force; but it must be observed that his testimony in this respect must be taken and understood as referring to such care as he believed, and from long experience had a right to believe, was sufficient to avoid an explosion when 27 per cent. powder was being used, and cannot fairly be treated as having any reference to the care necessary and proper to be employed when 40 per cent. powder was being used.

The third subcontention under this assignment of error is that there is no evidence that the explosion would not have occurred if 27 per cent. powder had been used, instead of 40 per cent. powder. But when it is remembered that the plaintiff's evidence showed that he had used both kinds without injury, when he knew what he was using, it cannot be said, in the absence of any counter showing (and there is none in this case), that this is not of itself a sufficient circumstance from which the jury would be justified in deducing the fact that, if the plaintiff had known he was dealing with a

more dangerous agency, he would not have even attempted to scrape the dynamite from off the sides of the hole, where it had stuck, and therefore the explosion would not have occurred. This is not mere conjecture. It is an inference that may fairly be drawn from the given facts and experiences and conduct and acts of the parties in the past. Aside from all this, does not this contention rest as much upon conjecture as the defendants' assertion that the plaintiff's case does? Is it not more of a conjecture to say that a smaller charge of giant powder or a lower grade of such powder will explode as easily as a higher grade. Such is the logic of this contention, and it is not such as to carry conviction, even to the mind of a layman. Prima facie, the converse is true; and the testimony shows that the converse is true. At any rate, the plaintiff was entitled to know that the old method of doing business was changed, and that he was thereafter to deal with a more dangerous instrument. When the prior changes had been made, he had been notified of them. For what purpose, if the same risks were incident to the use of the lesser strength of the powder that attended the use of the stronger powder? These considerations naturally lead to the conclusion that there was some substantial evidence from which the jury would be justified in inferring that the explosion would not have occurred, if the plaintiff had had notice that 40 per cent. powder had been substituted for 27 per cent. powder; and, this being true, the court could not, for this reason, take the case away from the jury.

The fourth subcontention under this assignment of error is that the injury was caused by one of the risks of the hazardous occupations the plaintiff was engaged in, and was assumed by the plaintiff when he entered the employment. It is true that the business was a hazardous one, but for this very reason all persons engaged in it owed a duty to all other persons to be careful. The servant, in entering upon such a business, assumed all the risks that are ordinarily and necessarily incident to the business; but, on the other hand, he did not assume and agree to bear all the extraordinary and unusual risks that might be caused by the misconduct and negligence of the master, or, as in this case, of the master's alter ego. Because a higher grade of powder is more dangerous than a lower grade, and therefore requires more care in handling it, and because on every prior occasion when a higher grade was used the servants were given timely notice thereof, the master owed the servant the duty to notify him that a higher grade was then being furnished him to use, and the servant had a right to rely upon it that the master would so notify him. The evidence shows that powder of 40, 50, and even 65 per cent. has been used in other mines without resulting in injury to any one; but this fact is not a determining factor in

this case, because it is not shown, and *prima facie* is not the fact, that it was used without notice to the servants of its character. For it is idle to expect any one to believe that masters generally would be so negligent and indifferent to the lives of their servants.

However, in support of the contention in this regard, the defendants cite only the case of *King v. Morgan*, 48 O. C. A. 507, 109 Fed. 448, wherein the United States Circuit Court of Appeals, where the opinion was written by Adams, District Judge, and concurred in by Sanborn, Circuit Judge; Caldwell, Circuit Judge, dissenting. It requires only a statement of the facts in judgment in that case to demonstrate that it affords no basis for the contention of the defendants in this case. In that case the sole ground of negligence charged and relied on by the plaintiff was that the defendants furnished him unsuitable appliances with which to do their work, to wit, a tamping bar, made of inch gas pipe, with the end plugged up with wood or clay. The plaintiff in this case assigned similar negligence, but abandoned it on the trial, and the court took that charge away from the jury in this case. In the *King Case* the learned judge who delivered the opinion pointed out the facts that the plaintiff in that case was intelligent, well educated, and experienced, and that he knew what appliances were necessary and safe, and had abundant opportunity, if he did not think the tamping bar that the master furnished him was safe or proper, to object to its use, and, if it was patently unsafe, to quit the service if, after notice, the master persisted in using it; and for these reasons it was held in that case that the plaintiff was not entitled to recover. That case is very different from this case. There the servant saw and knew exactly the nature and character of the tamping bar, while here the plaintiff did not know that he was using a more dangerous instrument than he had been using, and such an instrument as, when used on prior occasions, he had been specially notified was to be used. But it would be an injustice to the great learning of the judge who wrote the opinion in the *King Case* to believe that under the facts in this case he would have thought that the principles of law so ably announced in that case would cut off the plaintiff's recovery in this case.

This case finds a close parallel in the case of *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467, 36 Am. Rep. 535. There, too, the plaintiff, a miner, lost his eyes by an explosion of giant powder. There the negligence charged was introducing a new explosive without notice to the servant of the fact, without instructing him as to its use or advising him fully of its dangerous character. There, too, the plaintiff recovered in the lower court, and the case came before the Supreme Court. After a very exhaustive review of the cases bearing upon the duty of masters to their servants to furnish them safe and suitable

appliances, the court concluded as follows: "While the master is not held as guarantying the absolute safety of machinery or appliances provided for his employes, or the fitness of co-servants, he is bound to observe such care as the exigencies of the situation reasonably require in selecting them. Any injury resulting to a co-servant from the failure of the company positively to perform this duty is actionable. When the plaintiff engaged in the service of the defendant, the ordinary blasting powder was used, and, under his contract with the company to labor as a miner, he assumed the risk of personal injury in blasting with the ordinary agency for that purpose. He did not agree to subject himself to the hazard attending the use of an unusual and highly explosive substance, of the dangerous quality of which, as well as of the proper manner of applying it, he was wholly ignorant. It appears that Selden T. Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, in April, 1874, introduced the use of a giant powder. It is clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known to the plaintiff, although printed instructions were in the possession of the company. Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it, either to the plaintiff himself or those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded was taken, and to impart to the subordinate full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer. This obligation resting on the company itself, the president could not shift their liability by referring the matter to one of his subordinates. The effect of such a rule would be to substantially absolve a corporation from all liability. There was a clear failure on the part of the president to use the care which, under the circumstances of the case, the law exacted from the defendant, and his neglect must be imputed to the company." In that case the plaintiff had been using ordinary blasting powder, and the master introduced a new kind of an explosive (giant powder), without notice to the servant of the change,

while here the same kind of an explosive was used, but of a more dangerous character. In both instances the employé supposed he was using the kind he had theretofore used with safety. The difference between that case and this is a slight difference of fact only, the legal principles there decided apply with full force to this case as well as they did to that, and lead to the same conclusion.

2. The defendants next assign as error the first, second, and third instructions given for the plaintiff, which were as follows:

"(1) The court instructs the jury that if they find, from the evidence, that on the 20th day of March, 1899, the defendants were partners engaged in operating a mine under the firm name of the Hawkeye Mine, and that plaintiff was in defendants' employ in said mine as a cutter in the drift of defendants' mine, and that the plaintiff had previously been furnished by defendants with giant powder containing 27 per cent. only of nitroglycerin, and that on said day, while plaintiff was so in defendants' employ, the defendants furnished to plaintiff giant powder containing 40 per cent. of nitroglycerin, and if you find, from the evidence, that giant powder containing 40 per cent. of nitroglycerin requires greater care in its use, and was more easily exploded, and was more dangerous to handle in blasting than powder containing only 27 per cent. of nitroglycerin, then it was the duty of the defendants, on changing said powder, to notify plaintiff of the increased hazard he was taking in the use of said higher grade of giant powder; and if the jury find that the defendants negligently failed to notify plaintiff of said increased hazard, and plaintiff, not knowing of said change in the powder so furnished and which he was then using, while attempting to charge said drill hole and placing said giant powder in said drill hole with a gas pipe, furnished by defendants for plaintiff's use for that purpose, and while plaintiff was in the exercise of that degree of care and prudence which an ordinarily prudent man engaged in the same line of business would ordinarily exercise in charging said drill hole with giant powder containing 27 per cent. of nitroglycerin, the said giant powder was exploded, and the said explosion was occasioned on account of the use of the said higher grade of explosive, and on account of the want of knowledge on behalf of the plaintiff of the high character of said explosive, and the want of knowledge on his part of the increased degree of care required of him to prevent such explosion, and that plaintiff was injured by said explosion, then you will find the issues in favor of the plaintiff.

"(2) The court instructs the jury that if they find, from the evidence, that B. Sutton was defendants' ground foreman, and had charge of defendants' employés working underground in defendants' mine, and had direction of the work underground, and that

said foreman, while so in charge of said employés and said work for defendants, failed and neglected to notify plaintiff of the change of the grade of powder furnished him, if you find, from the evidence, that the grade of powder was changed, and that said ground boss failed to notify plaintiff thereof, then the negligence of said foreman in so failing would be the negligence of the defendants.

"(3) The court instructs the jury that if they find, from the evidence, that previous to the injury of plaintiff the defendants had furnished for his use in blasting powder containing only 27 per cent. of nitroglycerin, and that on the day of said injury defendants furnished to him giant powder containing 40 per cent. of nitroglycerin, and if you find that powder containing said increased per cent. of nitroglycerin was more hazardous and required greater care in its use, and that the same was furnished to plaintiff by defendants without informing plaintiff of the higher grade of explosive, and that plaintiff did not know that a higher grade of explosive was furnished and being used by him, but supposed that the explosive furnished contained only 27 per cent. of nitroglycerin, then plaintiff, as the servant of defendants, did not assume, in entering into defendant's employ, the increased risk attending upon such change of the grade of the explosive, unless he was first notified or knew of such change."

To properly appreciate the force of the criticisms leveled at these instructions, it is necessary to set out the following instruction, which was asked by the defendants and modified by the court by striking out the words in brackets and in italics, as to which the defendants make no point, and then given by the court: "Unless you believe, from the evidence, that defendants changed the grade of powder used by plaintiff in their mine from 27 per cent. powder to 40 per cent. powder without plaintiff's knowledge, and he remained ignorant thereof, and that said 40 per cent. powder will explode from a lighter blow or use of substantially less force than 27 per cent. powder, and requires a higher degree of care in the handling, [*and that said 40 per cent. powder is rarely used in the mines of the district where plaintiff was working,*] and that said change substantially increased the danger to plaintiff in working in said mine, and that the change of said powder from 27 per cent. to 40 per cent. was the direct and proximate cause of plaintiff's injuries, and that no negligence or want of ordinary care on the part of the plaintiff in any way contributed thereto, your verdict must be for defendants." The court, at defendants' request, further instructed the jury that the defendants had a right to use any grade of powder they saw fit, and that, if the plaintiff knew he was using 40 per cent. powder, he could not recover, and, further, that if the plaintiff was

using dangerous agencies it was his duty to use reasonable care to avoid injury, and if he failed to do so he could not recover.

These instructions, taken as a whole, show the theory upon which both parties tried the case in the lower court, and that theory is in strict conformity to the principles of law hereinbefore declared to be applicable to and decisive of a case of this character. The criticisms of these instructions are that the first instruction makes it the duty of the defendant to inform the plaintiff of the increased hazards, irrespective of his knowledge or opportunity of knowledge; that it assumes a controverted fact, i. e., plaintiff's ignorance of the grade of powder he was using; that it assumes plaintiff was exercising ordinary care; that it contains misstatements of facts, and has meaningless and confusing clauses, and is not predicated upon the evidence; that the second instruction entitles the plaintiff to recover if Sutton, the foreman, did not notify the plaintiff of the change in the dynamite, notwithstanding the plaintiff might have known that fact or have been informed by some other officer or agent of the company; and that the third instruction authorizes a recovery by the plaintiff if he was ignorant of the grade of the powder, notwithstanding that ignorance may have been due to his own negligence.

Without a critical analysis of all these objections, and even if it be conceded, which could not properly be done, that all the criticisms are well founded, nevertheless the defendants' instruction above set out covered the whole case and cured whatever, if any, objections could be raised to the plaintiff's instructions criticised, and under the defendants' instruction, and in truth under the instructions taken as a whole, the law was properly declared, and the plaintiff was entitled to recover, if the jury believed the case as made for the plaintiff. But the criticisms of the plaintiff's instructions are not well founded. They do not require the defendants to notify the plaintiff, irrespective of his knowledge or opportunity of knowledge; nor do they assume that plaintiff was ignorant of the character of the powder, nor that he was exercising ordinary care; nor are they devoid of fact upon which to rest; nor do they misstate the facts as shown by the plaintiff; nor does the second instruction authorize a recovery by the plaintiff, notwithstanding he knew of the change of dynamite, if Sutton failed to notify him, but that instruction simply tells the jury that the failure of the alter ego to do his duty is negligence of the defendants, which will, of course, be conceded by every one to be correct law; nor does the third instruction permit plaintiff to recover notwithstanding he was guilty of contributory negligence, but this instruction, taken in connection with defendants' instruction quoted, which told the jury, "and that no negli-

gence or want of ordinary care on the part of the plaintiff in any way contributed thereto," sufficiently instructed the jury on the question covered by these instructions and upon the question of contributory negligence.

3. Permitting the plaintiff to testify that he was a married man is next assigned as error. If this be true, then the record is full of similar errors, some of them clearly invited by the defendants; for all through the case the witnesses on both sides, without objection, spoke of and referred to the fact that the plaintiff was a married man. So that, if the court erred in this regard, the fact appeared elsewhere in the testimony and was not objected to by either party. The ruling, therefore, does not constitute reversible error, even if it be error, which it is unnecessary now to decide.

For these reasons the judgment of the circuit court is affirmed. All concur, except ROBINSON, J., who dissents.

Percy Werner and Galen & A. E. Spencer, for appellants. Thomas & Hackney, for respondent.

MARSHALL, J. The foregoing opinion, heretofore rendered in division No. 1 of this court, is hereby adopted as the opinion of the court in banc. BRACE, GANTT, BURGESS, VALLIANT, and FOX, JJ., concur. ROBINSON, C. J., dissents.

McELROY v. KANSAS CITY & L. AIR LINE.

(Supreme Court of Missouri, Division No. 2.
Feb. 3, 1903.)

RAILROADS—RIGHT OF WAY—CONTRACT—CONSTRUCTION—ABANDONING PART OF CASE.

1. Although a petition in an action to recover payment for land taken by a railroad company for right of way also alleged damages to the remainder of the tract, yet, if plaintiff failed to introduce proof of such damages, he thereby waived that part of his case.

2. A railroad company contracted with a property owner that on payment of a bonus the company was to have license to continue the construction of its road over his premises in advance of acquiring title, which was to be done either by a subsequent agreement or by condemnation proceedings, and that in such condemnation the property owner was to be paid "the value of the bridge abutments on his land, as well as for the land taken," and the bonus paid was not to be considered in any manner. *Held*, that under this contract the owner of the land was entitled to recover the value of the land taken irrespective of any special benefits to the rest by reason of the construction of the road; no damages therefor being sought.

3. A railroad company had entered on the land of another and commenced to construct its road, when work was stopped by an injunction. Thereupon the company and the property owner entered into a contract whereby the company obtained license to continue the construction of the road, and agreed to pay

¶ 3. See *Eminent Domain*, vol. 12, Cent. Dig. §§ 333, 340.

for the land taken; the compensation to be determined on at a future date. This was never done, and the property owner brought suit to recover the land. *Held*, that the value of the land was to be ascertained as of the date of the company's entry thereon.

Appeal from Circuit Court, Jackson County.

Action by Hugh L. McElroy against the Kansas City & Independence Air Line. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action bottomed on a contract for the value of a strip of plaintiff's land taken by defendant for railroad purposes, and also the value of certain stone abutments, situated on the land taken, and used by defendant in the construction of its railroad. In December, 1891, the defendant company, without the consent of plaintiff, entered upon the strip of land in question and began the construction of its road across it, whereupon plaintiff began suit by injunction against defendant to prevent it from proceeding with the work. Thereafter, on December 31, 1891, plaintiff and defendant entered into a written contract, which is as follows:

"It is agreed between Hugh L. McElroy and the Kansas City & Independence Air Line, a railroad corporation, that:

"First. In consideration of a bonus of seven hundred and fifty dollars (\$750) to said McElroy paid by said corporation, the receipt of which is hereby acknowledged, said McElroy hereby waives the right to sue said railroad company, its agents, servants, or contractors, for trespass in entering upon and constructing its railroad across and over the lands belonging to said McElroy, mentioned and specified in suit No. 13,055 in division No. 1 of the circuit court of Jackson county, Missouri, and further hereby gives license to said railroad company, its agents, servants, or contractors, to enter upon his (the said McElroy's) land in Jackson county, Missouri, on which said corporation's railroad has been located, and to construct, maintain, and operate its railroad thereon, in advance of acquiring title to said lands for that purpose, either by agreement with the said McElroy or by condemnation proceedings; but no title to said lands shall pass to said corporation until the same shall be so acquired, either by agreement or condemnation, as aforesaid.

"Second. Said McElroy shall dismiss his injunction suit now pending against said railroad, and said corporation shall waive all damages and right of action on the injunction bond, and shall dismiss its suit for condemnation now pending against said McElroy, and shall commence no new suit for condemnation of right of way until after the 15th day of April, A. D. 1892, without further attempt to agree with the said McElroy, his heirs or assigns, as to compensation as aforesaid, and not then within that period

if the said McElroy shall not before the 15th day of April return to Jackson county, Missouri, so as to give the matter his personal attention; but, should no agreement be had between the parties before the said 15th day of April, then the said railroad corporation may at any time after the said date, or after the said McElroy returns and the said parties cannot agree as to compensation, bring suit for a condemnation of right of way across the lands of said McElroy, and the said McElroy hereby agrees to enter his appearance in said suit without further service of notice of said condemnation proceedings, and the said suit shall then proceed, whether or not the said McElroy is present. It is hereby further agreed that no allowance shall be made in favor of said corporation by reason of said bonus, nor shall it be brought to the attention of any commissioners or jury which may have the matter of condemnation of right of way across said lands before them. It is further agreed that in such condemnation proceedings said McElroy shall be allowed and paid the value of the bridge abutments on his said land as well as for the land taken.

"Third. It is hereby further agreed between the parties hereto that the two hundred dollars (\$200) previously agreed upon by them shall be paid for the strip of land heretofore sought to be acquired by the Missouri Pacific Railroad Company from said McElroy, and that said corporation shall acquire said strip of land by paying therefor the said sum of two hundred dollars (\$200) within fifteen days from this date; but the price to be so paid for the last-mentioned strip shall in no way be brought to the attention of the commissioners or jury that may be selected to assess the damages caused the said McElroy by said railroad company's condemning and appropriating so much of the remainder of his land as may be necessary for its right of way.

"In witness whereof, the parties have hereunto set their hands this 30th day of December, 1891.

"Done in duplicate.

"Kansas City & Independence Air Line,

"A. A. Mosher, President.

"Hugh L. McElroy,

"By C. H. R. McElroy,

"His Attorney in Fact."

The petition alleges that in accordance with the provisions of said contract the defendant did enter upon the tracts of land sued for and construct a line of railway, and, though frequently requested, has failed and refused to institute the condemnation proceeding so agreed to be brought, or to pay to the plaintiff the fair and reasonable value of the land so taken by defendant, the damage done to the remainder of the tract, and the value of the bridge abutments; that in December, 1891, and January, 1892, the fair and reasonable market value of the tracts of land in question was, and ever since has been,

the sum of \$8,000, and the value of the bridge abutments on said land was \$2,000; and that the remainder of one of the tracts of land in question was damaged in the sum of \$5,000.

Defendant by its answer admits that it is a corporation, admits the execution of the contract sued on, admits that the defendant did construct on the land a line of railway, and alleges that said railway was constructed by permission of and pursuant to said contract. The answer then denies all other allegations in the petition.

On the trial of the case, evidence was introduced by plaintiff tending to show the value of the land taken in December, 1891; and, although the petition asked for damages to the remainder of the tract not taken, the plaintiff introduced no evidence as to such damages, and did not attempt to recover therefor. On the trial of the case the court refused to permit defendant to show any "special" or "peculiar" benefits accruing from the building of the railroad to the remainder of plaintiff's tract not taken. The court also confined the time of the determination of the value of the plaintiff's land taken to December, 1891. Defendant excepted to the ruling of the court in both of these particulars. Both sides introduced evidence as to the value of the land. The defendant by the ruling of the court was confined to its value in December, 1891.

Over the objection and exception of defendant, the court instructed the jury, at the instance of plaintiff, as follows:

"(1) The court instructs the jury that under the pleadings and evidence in this case your verdict must be for the plaintiff, and in assessing his damages you should allow him the value of his land taken by the defendant for right of way for its railroad at the time the same was so taken, and in addition thereto the value of the bridge abutments on said land at said time, all at the market value as shown by the evidence; and on the amounts so found you may allow and add interest at the rate of 6 per cent. per annum from the time said land and abutments were so taken to the present time, in all not exceeding the sum of \$15,000. Your verdict should be in the following form: 'We, the jury, find for the plaintiff, and assess his damages at the sum of — dollars.'

"(2) The court instructs the jury that neither the \$750 nor the \$200 mentioned in the contract read in evidence were paid to the plaintiff in any respect as or on account of compensation for the land or stone abutments of plaintiff taken by defendant for its railroad, and in arriving at the amount of your verdict for plaintiff you are instructed not to give the defendant any credit whatever for either of said payments."

Thereupon the defendant requested the court to give the jury the following instructions:

"(1) The court instructs the jury that the plaintiff or those under whom he claims derived title to the land appropriated by the defendant from the United States government, and that said land was granted by the government and was held by the plaintiff subject to the condition that the state of Missouri, either actually, or indirectly through others duly authorized by it, might take any part of the land for public use upon the payment of just compensation, and that Kansas City & Independence Air Line is duly authorized and empowered by the state of Missouri to take the strips of land mentioned in plaintiff's petition for a right of way for its railroad, which is a public use; that defendant entered upon the land by permission of the plaintiff; that there was nothing unlawful in the taking; that the taking was lawful and proper, and the only thing for the jury to determine is the just compensation that the plaintiff should receive, to be measured and ascertained as directed in other instructions.

"(2) The court instructs the jury that, in estimating the plaintiff's damages, if any, they should estimate the same as done to the market value of the land taken, and that the phrase 'market value,' as used in these instructions, does not mean what the plaintiff held the land at, nor what he asked for it, nor does it mean what the land may have been worth to any particular person or corporation for any particular purpose; but said phrase does mean the fair selling value of the land in the market, to be used for any of the purposes to which it was susceptible of being put, either in its then condition or any condition to which it was reasonably susceptible of being changed.

"(2a) The court instructs the jury that they should not put down the amount each juror believes should be assessed, and add these amounts up and divide by 12 to arrive at a verdict; and all verdicts arrived at in such manner are illegal.

"(3) The court instructs the jury that, in estimating the damages to plaintiff's land, they should assess the same as of the date of the filing of plaintiff's petition.

"(4) The courts instructs the jury that you should not take into consideration the evidence of the witness — Cunningham, offered by the plaintiff as to values of land in question.

"(5) The court withdraws from the jury all evidence as to the value of the land in question in the month of December, 1891.

"(6) The court instructs the jury that, in assessing the plaintiff's damages, they should assess the same as they would have been in April, 1892.

"(7) The court instructs the jury that you shall return a verdict for the defendant, except as to the costs that were made and incurred in this suit up to the time of the filing of the condemnation suit of Kansas City & Independence Air Line against Hugh

L. McElroy, which suit was filed in accordance with contract mentioned in the petition.

"(8) The court instructs the jury that from the amount of the market value of the land and the abutments taken by the defendant, as shown by the pleadings and the evidence, you shall deduct therefrom the sum of \$750.00 heretofore paid by the defendant to Hugh L. McElroy, with interest thereon from the — day of — 189—.

"(9) The court instructs the jury that, in estimating the damages of the plaintiff, if any, they should deduct therefrom the amount of peculiar benefits, if any, that may have accrued to the market value of the land of the plaintiff not taken, and of which the strip taken forms a part, by means of the operation of the railroad as the same is located across said land; and by the term 'peculiar benefits' is meant such as are peculiar to the land described in plaintiff's petition, and such as are not common to other lands in the same vicinity.

"(10) The court instructs the jury that, because a railroad could not get into Kansas City so conveniently by any other route than over plaintiff's land, if they should believe such to be the fact, yet this does not constitute an element of value for which the plaintiff is entitled to receive compensation.

"(11) The court instructs the jury that if they believe from the evidence that plaintiff's land was especially valuable for manufactories, and that it would have been more valuable for such purpose by reason of having a suburban line of railroad located on it, then such facilities would constitute a peculiar benefit."

Which instructions numbered 1, 2, and 2a the court gave, and which instructions numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11 the court refused to give, to the jury, to which action of the court in refusing to give said instructions numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11 the defendant at the time excepted. The trial resulted in a verdict and judgment for plaintiff in the sum of \$4,750, from which defendant, after unsuccessful motions for new trial and in arrest, appeals.

Lathrop, Morrow, Fox & Moore and Cyrus Crane, for appellant. Holmes & Perry, for respondent.

BURGESS, J. (after stating the facts). It is said in behalf of defendant that the court erred in refusing to permit defendant to prove "special" or "peculiar" benefits to that part of plaintiff's tract of land not taken by defendant for railroad purposes. It is well settled in this state that the measure of damages for the taking of private lands by a railroad corporation for a right of way is the value of the land taken, and the damage, if any, to the tract of which it forms a part, from which must be deducted the benefits, if any, peculiar to such tract arising from running the road through it. This is the

rule, whether the land be taken in condemnation proceedings, or without license or other right. *McReynolds v. The Kansas City, C. & S. Ry. Co.*, 110 Mo. 484, 19 S. W. 824; *Ragan v. The Kansas City & S. E. Ry. Co.*, 111 Mo. 456, 20 S. W. 234; *Lingo v. Burford*, 112 Mo. 149, 20 S. W. 459; *Doyle v. Kansas City & S. Ry. Co.*, 113 Mo. 280, 20 S. W. 970; *Kansas City v. Morton*, 117 Mo. 446, 23 S. W. 127; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Bennett v. Woody*, 137 Mo. 377, 38 S. W. 972. The same rule applies where the land of the citizen has been appropriated for like purposes and without compensation, and without having the same legally condemned, in a suit by him for the land taken and damages to the remainder of the tract. *Combs v. Smith*, 78 Mo. 32; *Allen v. Railroad*, 84 Mo. 646; *McReynolds v. Railroad Co.*, supra.

But the case in hand is based upon a contract by the terms of which defendant's unlawful entry upon the land theretofore made was, for the consideration of \$750, paid plaintiff by defendant, waived, and defendant allowed to proceed with the construction of its railroad in pursuance to an express provision in the second paragraph of the contract, by which it is provided that "said McElroy shall be allowed and paid the value of the bridge abutments on his said land, as well as for the land taken." This provision in the contract is susceptible of no other construction than that of a promise by defendant to pay plaintiff the value of the land taken by it, as well, also, as the value of the stone abutments situated on said land. If this was not the intention of the parties, and is not the proper construction to be placed on the contract, why the necessity of it, when the same result could have been reached in a proceeding by defendant to condemn the land? Clearly, to obviate the necessity of a proceeding for that purpose. That defendant had the right to contract with McElroy that he should be allowed and paid for the land and bridge abutments thereon will not be questioned, and this seems to us to be the legal effect of this contract: The price of the land and stone abutments to be thereafter agreed upon, defendant, however, to take immediate possession, but the title to remain in plaintiff until payment should be made. In order that these values might be ascertained at an early date, it was part of the contract that defendant was to institute condemnation proceedings for that purpose not later than April 15, 1892; and, that plaintiff might be certain to be allowed and paid such values, it was specially provided in the contract that, notwithstanding the rule obtaining in such proceedings allowing special benefits to be considered, the plaintiff should be "allowed and paid the value" both of the land and of the bridge abutments thereon; and, to the end that their values should not in any event be reduced, it was further provided in the contract that defendant should not be allowed

anything for the bonus of \$750, and it should not be brought to the attention of any commissioners that might be appointed or jury that might be selected to assess the damages. Defendant failed and refused to have these values ascertained as provided in the contract, so that there was no other alternative by which plaintiff could have them ascertained, except the institution of this suit upon the contract.

While it is true that the petition alleges that defendant fails and refuses either to institute the condemnation proceedings so agreed to be brought, or to pay to the plaintiff the fair and reasonable value of the land so taken by the defendant, the damage done to the remainder of the tract, and the value of the bridge abutments, and that the remainder of the land not taken for railroad purposes was damaged in the sum of \$5,000, plaintiff had a perfect right, at any time before the case was finally submitted to the jury, to abandon any and all claims for damages to the remainder of the tract not taken for railroad purposes; and this was the effect of his failure to introduce any evidence upon that feature of the case. We are at a loss, however, to see how defendant was or could have been in any event prejudiced by the failure of plaintiff to introduce evidence as to damages to the remainder of the tract not taken for railroad purposes; for it matters not how much greater the benefits may have been than the damages, defendant could not have had the excess set off against the value of the land actually taken, for that would be paying for the land taken with benefits to the remainder not taken, while the land taken could only be paid for in money. Section 21, art. 2, State Constitution. Moreover, defendant could only have the benefits to the land not taken deducted from the amount of damages to that portion by reason of the construction of the road through the tract. Authorities supra. And, as it was not shown by plaintiff that the land was damaged, there was nothing from which to deduct any benefits; hence the result was practically the same, in so far as defendant is concerned, as if the question as to damages and benefits had been submitted to and passed upon by the jury, and they had found that the benefits were in excess of the damages to the land.

Nor do we think the court erred in fixing the time at which the value of the land was to be determined as of the defendant's entry thereon. The contract sued on was entered into on December 30, 1891. Defendant had theretofore taken possession of the strip of land and bridge abutments, and had partially constructed its roadbed, and a temporary injunction was then pending restraining defendant from proceeding with the work. By the terms of the contract the restraining order was removed, and defendant's possession, which was theretofore unlawful, legalized. So that the rule to the effect that the time for

fixing the value of the land taken is the date of its appropriation as in condemnation cases is not applicable to a case where possession is taken under contract. In *C. M. & St. Paul Ry. Co. v. Randolph Townsite Co.*, 103 Mo. 451, 15 S. W. 437, it is said: "It is very clear from the terms of the constitution, from reason and authority, that no appropriation of the land or permanent right to its use could be effected, except either by condemnation or contract. * * * There is nothing in the evidence tending in the remotest degree to prove that plaintiff entered upon the land in the fall of 1886 under any agreement with the owners that the right to the easement should vest at that date, or that the payment of compensation should be postponed to a subsequent day. There was no agreement of any kind shown. Then plaintiff acquired no right to the land in 1886 under any contract. The evidence did not show that the owners of the land ever gave permission to enter thereon. * * * The question does not arise in this case whether plaintiff could deny a taking at any time between the entry and assessment, and is not considered or determined." *Ragan v. Kansas City & S. E. R. Co.*, 111 Mo. 456, 20 S. W. 234, was an action for damages for the appropriation by the defendant of a strip of plaintiff's land for the right of way for a railroad, and it was held that the value of the land should be assessed as of the time when the defendant entered upon the land, graded the railroad, and laid its tracks: The defendant took possession and laid its track through the premises in 1887. The court instructed the jury as follows: "You are instructed that the damages are to be fixed as of the date that the defendant, the Kansas City & Southeastern Railroad Company, took possession of the lots in controversy, in 1887, and not of any other date." The court, in speaking of this instruction, through Gantt, J., said: "This instruction properly required the damages to be assessed as of the time of taking and appropriating the land. In this case, that time was when defendant entered and graded the roadbed and laid its tracks, and it should be held for the damages it then caused. It must follow that the trial court did not err in confining the testimony as to the value of the land taken to the time indicated, nor in likewise instructing the jury."

For these considerations, the judgment should be affirmed, and it is so ordered. All of this division concur.

On Rehearing.

Defendant presents motion for rehearing in this case, assigning several grounds therefor. Among others, it is said counsel for appellant submitted the proposition that, either in a condemnation case or in a suit by the owner for the value of his land taken for railroad purposes, the value of the land can be paid for either in money or in benefits to the remainder of the land not taken, but

that this court overlooked the authorities presented on that proposition, and holds that under the constitution the land can only be paid for in money. It requires but an impartial glance at the opinion to show that we did not overlook the authorities presented. Nor does the opinion announce that as a rule the value of lands taken or condemned for railroad purposes may not in such a proceeding, or in an action by the owner of the land for the value of the land taken and damages to the remainder of the tract, the benefits to the land, including that taken, cannot, be deducted from the damages allowed, but especially recognized it, and differentiates the case at bar from that line of cases, in that in this case the land was appropriated by defendant under an agreement in writing with plaintiff by the terms of which he was to be "allowed and paid the value of the bridge abutments on his said land, as well as for the land taken," which means paid in money, and nothing else; and if it was otherwise intended by the parties to the contract, and that the benefit to the tract by reason of the construction of the road was to be deducted from the value of the land actually taken, and damages to the remainder of the tract, whether such damages were claimed or not, it is defendant's misfortune that it is not so specified in the contract, in the absence of which it must be presumed that no such agreement was made. When defendant appropriated the land to railroad purposes by and with the written consent of plaintiff, the law implied a promise by it that it would pay plaintiff therefor its reasonable value; and, while plaintiff in this action not only sued for the value of the land taken, but also for damages by reason thereof to the entire tract, he abandoned the claim for damages at the trial, as he had the right to do, and offered no evidence on that feature of the case, and we are at a loss to know how benefits could be deducted from damages not claimed. Suppose, instead of leaving the question as to the value of the land taken to be thereafter agreed upon between the parties, they had agreed upon the price to be paid for it, and in default of its payment plaintiff had sued defendant for the purchase price; would it be contended that defendant in such suit could have had deducted any benefits that the entire tract may have sustained by reason of the construction of the road from the amount of the purchase money? We apprehend not. There is no difference in principle between the supposed case and the one at bar. The one is an implied promise to pay the reasonable value of the land taken under contract, while the other is an express promise to do so; and in either case to allow benefits to the land not taken to be deducted from the value of the land taken, when no damages are claimed by reason of the construction of the road, would in effect be paying for the land taken in benefits, while under the contract it is to be paid for in money,

and in violation of section 21, art. 2, of the Constitution. Of all the decisions of this court cited by defendant as sustaining its contention, not one of them is bottomed upon a contract for the taking and appropriation of land for railroad or other public purposes as is this case, and therefore do not cover the question under consideration.

It is said by counsel for defendant that the contract is no stronger than the Constitution, which cannot be held to require the payment in money for land taken for public use. Our answer to this contention is that the law of the land guarantees every citizen the right to contract, and that is just what plaintiff and defendant did in this case, and nothing more.

It is true that it was incorrectly stated in the opinion that the defendant was to institute condemnation proceedings for the purpose of condemning the land not later than April 15, 1892, instead of not before that time, and in that respect the opinion will be modified. The contract does not, however, provide, as asserted by defendant, that the condemnation proceedings should not be begun until after the 15th day of April, 1892, but does provide that such condemnation proceedings should not be begun until after that date without further effort to agree with the plaintiff as to the value of his land and bridge abutments. It was contemplated by the contract that the condemnation proceedings should be begun immediately after April 15, 1892, in any event, and, further, that they should be begun forthwith after making of the contract, provided the plaintiff should have returned to Jackson county, Mo., so as to be able to give the matter his personal attention. The defendant could have instituted these condemnation proceedings, as provided by the contract, at any time after April 15, 1892, and without even making any further effort to agree with the plaintiff as to compensation; but it steadily declined and refused to do so until the plaintiff was finally compelled, after waiting more than six years, to file this suit on September 13, 1898.

The motion for rehearing is overruled. All of this division concur.

STATE v. MAY.

(Supreme Court of Missouri, Division No. 2
Feb. 3, 1903.)

CRIMINAL LAW — HOMICIDE — CHANGE OF VENUE—LOCAL PREJUDICE—JURORS—PANEL—COMPLETION BY JUDGE—STATUTES—APPLICATION — SPECIAL JURY — EVIDENCE — WITNESS—CROSS-EXAMINATION — INSTRUCTIONS — MANSLAUGHTER — REASONABLE DOUBT — DRUNKENNESS — VERDICT — DISQUALIFICATION OF JURORS—REVIEW—HARMLESS ERROR.

1. Where an application for a change of venue for local prejudice was supported and opposed by an equal number of witnesses, the discretion of the trial court in overruling the application will not be disturbed on appeal.

2. Rev. St. § 3795, provides for the drawing

of a jury panel from the wheel, and section 3797 declares that, when a jury for the trial of a case cannot be made up from the regular panel, the judge may deliver to the proper officer a list of jurors sufficient to complete the panel. *Held*, that where a panel of 47 jurors had been drawn from the wheel for a criminal case, and from such panel only 10 competent jurors were secured, the court was justified in making out a list of jurors sufficient to complete the panel, without drawing more names from the wheel.

3. That a jury summoned to try a criminal case was a special jury, as distinguished from a regular one, did not render Rev. St. § 3797, authorizing the judge before whom the case is pending to deliver to the proper officer a list of jurors sufficient to complete the panel, when the jury could not be obtained from the regular panel, inapplicable to the proceeding.

4. Rev. St. 1896, § 3795, providing for the drawing of jurors by the clerk of the county court in the presence of a judge, by drawing the names of jurors from the jury wheel or box, etc., is directory only.

5. Where a witness for the prosecution stated on cross-examination that she did not feel very friendly toward defendant, it was not error to sustain an objection to a question as to whether it was not witness' desire to see defendant convicted.

6. In a prosecution for homicide, it was not error for the court, in ruling on an objection to a question, to announce from the bench, in the presence of the jury, that the question was in respect to an immaterial matter.

7. Where deceased was unarmed when shot, and was making no demonstration evincing a purpose to assault defendant, and the only provocation defendant had for shooting him was that deceased, a short time previous, had said, in relation to an epithet applied to him by defendant, that defendant was "a damned liar," etc., and there was no evidence that the homicide was the result of a sudden quarrel, the court did not err in refusing to instruct on manslaughter.

8. In a prosecution for homicide, a requested instruction that if the jury believed defendant guilty of murder, but entertained "a doubt" as to the degree, they should give the defendant the benefit of that doubt, and find him guilty of murder in the second degree, was properly refused, for failure to limit the "doubt" to a "reasonable" doubt.

9. The punishment for murder in the first degree being fixed by statute, it was proper for the court to instruct that, if the jury found defendant guilty of murder in that degree, they would simply so state, as they were charged with no responsibility with respect to the punishment.

10. In a prosecution for homicide, an instruction that it was immaterial whether defendant was drinking or intoxicated at the time, as drunkenness neither excuses nor affects the crime, was not prejudicial, as justifying the jury in inferring that defendant was attempting to excuse or palliate his crime by pretending drunkenness, though there was no evidence on which to base the instruction.

11. In a prosecution for homicide, a finding on conflicting evidence that charges of prejudice against jurors had not been proven will not be disturbed on appeal.

12. In a prosecution for homicide, evidence *held* to justify a conviction of murder in the first degree.

Appeal from Criminal Court, Buchanan County; Benj. J. Casteel, Judge.

Charles May was convicted of murder, and he appeals. Affirmed.

From a conviction of murder in the first degree for having shot to death with a pis-

tol, at Buchanan county, on the 27th day of December, 1900, one John R. Martin, defendant appeals. The cause was here on a former appeal. 168 Mo. 122, 87 S. W. 566. The shooting occurred at the house of Peter Jones, at night, when there was a dance in progress there. Jones was a farmer, and the grown sons and daughters of himself and wife, of whom there were several, together with a number of neighboring young people, were in attendance upon the occasion. Defendant was in the service of Jones as a farm hand at that time. Whisky seems to have been freely used, but no one was intoxicated. May, the defendant, was acting as floor manager, and about 11 o'clock a square dance with six or eight couples on the floor was in progress. Engaged in the dance was the deceased, John Robert Martin, who was dancing with a Miss Bettie Simmons as his partner. A certain figure in the dance was called, in which Martin and his partner should have taken part, but did not do so, but remained standing in their place upon the floor. No notice apparently was taken of it, and no disturbance made by Martin. Very soon thereafter May, who had been calling the dance, walked over to Martin and said something to him. Miss Simmons testified that she did not hear exactly what deceased said, but that deceased replied to defendant that he did not say that May had slighted him in any way in the dance, but that he (deceased) had slighted himself by not dancing at the proper time. When the defendant turned and started away from deceased, he was heard to say, if Martin said he (defendant) had slighted him, he was a "damned liar." The deceased, in reply to this remark, said that defendant was a liar. The defendant, at this remark by deceased, became angry, if not already so, and signaled the music to stop, which was done. He then at once started toward deceased, at the same time remarking he "did not allow any damned man to call him a liar." Two of the Jones boys and a man named Gantt ran and grabbed May, and Babe Martin, a brother of Robert Martin, stepped over by the side of and in front of the deceased, and said to him to be quiet and not have any trouble. The evidence shows the deceased stood there by his brother, and did not try to assault the defendant, but did make some offensive remarks directed to the defendant. The deceased was unarmed, and stood most of the time just where he had been standing when the trouble commenced. The Jones boys and others attempted to hold the defendant, and Mrs. Jones came in and asked him to desist, and she testifies he said he would. Just about this time the defendant, being eight or ten feet from the deceased, said to the deceased that he would get him (meaning the deceased) in the morning. Mrs. Jones about this time left the room, and, while her sons were still trying to hold the

defendant, he pulled a pistol from his right hip pocket, and, placing it under the arm of one of the Jones boys, who was in front of and between the defendant and the deceased, fired at John Robert Martin; the ball striking him in the front of the forehead, above the eye, and entering the brain. The deceased fell unconscious, and never afterwards spoke, dying the next day about 3 o'clock. When the shot was fired, the Jones boys released May and sought safety for themselves. Babe Martin, a brother of John Robert Martin, the deceased, stood by the side of him when he was shot. The evidence is somewhat conflicting as to who fired the second shot, whether Babe Martin fired it at May, or the defendant fired it at Babe Martin; but the preponderance of the testimony shows that there was a little pause between the first and second shots. Several witnesses testify that May fired the second shot at Babe Martin. One or two testify that Babe Martin fired the second shot at the defendant. But, anyway, the firing began again, and Babe Martin and the defendant fired six or eight shots at each other, resulting in the defendant being wounded in the left shoulder and one of his hands, and one McGee, a looker-on, being shot through the ear, and slightly, but not seriously, wounded. While the firing was going on, the defendant backed into an adjoining room, and soon passed into a hall and out of the house, and, as far as the evidence discloses, was not seen again until the next evening, about sunset, when he returned to Jones' house, and old Mr. Jones and one of his sons took the defendant to St. Joseph, where he was delivered to the authorities and his wounds were dressed.

The court, over the objection and exception of defendant, instructed the jury as follows:

"(X) The court instructs the jury that the indictment in this case was filed on the 5th day of March, 1901, and charges the defendant with murder in the first degree. Under the evidence adduced, however, it will be necessary for you to determine, in the event you find the defendant guilty of any offense, whether he should be convicted of the specific offense charged in the indictment, or for murder in the second degree. Murder in the first degree is the killing of a human being willfully, deliberately, premeditatedly, and with malice aforethought. Murder in the second degree has all the elements of murder in the first degree except that of deliberation. 'Willfully,' as used in these instructions, means intentionally; that is, not accidentally. Therefore, if the defendant intended to kill, such killing is willful. In the absence of qualifying facts and circumstances, the law presumes that a person intends the ordinary and probable result of his acts. If you believe from the evidence beyond a reasonable doubt that the defendant with a pistol shot John Robert

Martin in a vital part and killed him, you will find that the defendant intended to kill him, unless the facts and circumstances given in evidence show to the contrary. 'Deliberately,' means in a cool state of the blood; that is, not in a heated state of the blood, caused by a lawful provocation. It does not mean brooded over, considered, or reflected upon for a week, a day, or an hour; but it means an intent to kill, executed by a party not under the influence of violent passion suddenly aroused by some lawful provocation, but in the furtherance of a formed design, to gratify a feeling of revenge, or to accomplish some other unlawful purpose. 'Premeditatedly' means thought of beforehand for any length of time, however short. 'Malice,' as used in these instructions, does not mean mere spite, ill will, or dislike, as it is ordinarily understood; but it means that condition of the mind which prompts one person to take the life of another without just cause or justification, and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief. 'Malice aforethought' means that the act was done with malice and premeditation. Keeping in view the foregoing definitions as a basis, the court submits to you the further following instructions, to wit:

"(1) The court instructs the jury that the defendant is presumed to be innocent of any offense, and this presumption continues throughout the case, until overcome by evidence showing him guilty beyond a reasonable doubt, and, if you have a reasonable doubt of the defendant's guilt, you must acquit him; but such doubt, to justify an acquittal, must be a substantial doubt founded on the evidence, and not a mere possibility of defendant's innocence.

"(2) If you believe and find from the evidence that, at the county of Buchanan and state of Missouri, at any time prior to the day on which the indictment was filed, the defendant, Charles May, in the manner and by the means specified in the indictment, shot and wounded the deceased, John Robert Martin, and shall further believe and find from the evidence that such shooting was done willfully, deliberately, premeditatedly, and with malice aforethought, and shall further believe and find from the evidence that within one year and a day thereafter, and before the filing of the indictment in this case, the deceased, John Robert Martin, at the county of Buchanan aforesaid, died in consequence of such shooting and wounding done by the defendant, you will find the defendant guilty of murder in the first degree.

"(3) He who willfully—that is, intentionally—uses upon another at some vital part a deadly weapon, as a loaded firearm, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend death, which is the probable and

ordinary consequences of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly or from a bad heart. If, therefore, the jury believe that defendant took the life of John Robert Martin by shooting him in a vital part, with a revolver loaded with gunpowder and leaden bullets, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, or cause, or extenuation, then such killing is murder in the first degree; and, while it devolves upon the state to prove willfulness, deliberation, premeditation, and malice aforethought (all of which are necessary to constitute murder in the first degree), yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and, if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree.

"(4) If you believe and find from the evidence that, within the time and at the place specified in the preceding instruction No. 2, the defendant, in the manner and by the means specified in the indictment, shot and wounded the deceased, John Robert Martin, and shall further believe that such shooting and wounding was done willfully, premeditatedly, and with malice aforethought, but without deliberation, and you shall further believe and find from the evidence that, within one year and a day thereafter, and before the filing of the indictment, the deceased, John Robert Martin, died from the effects of such shooting and wounding at the county aforesaid, you will find the defendant guilty of murder in the second degree.

"(5) If the jury believe from the evidence that the defendant, Charles May, intentionally killed John Robert Martin by shooting him in the head with a pistol, and that such pistol was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of evidence to the contrary.

"(6) Although you may believe from the evidence that the defendant, Charles May, assaulted and killed John Robert Martin, yet, if you shall further believe from the evidence that such killing was done in self-defense, as hereinafter defined, then you will acquit the defendant. On the question of self-defense, you are instructed that if, at the time the defendant, Charles May, assaulted and killed John Robert Martin, he, the defendant, Charles May, had reasonable cause to apprehend a design on the part of John Robert Martin, or his brother, Babe Martin, to take his life, or to do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that, to avert such apprehended

danger, he shot John Robert Martin, and that, at the time of shooting, he had reasonable cause to believe and did believe that it was necessary for him to shoot to protect himself from such apprehended danger, you will acquit the defendant on the ground of self-defense. It is not necessary that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that the defendant, Charles May, had cause to believe and did believe those facts. On the other hand, it is not enough that the defendant, Charles May, should have so believed. He must have had reasonable cause for so believing. Whether or not he had reasonable cause for so believing is for you to determine, under all the facts and circumstances given in evidence. If you shall believe from the evidence that the defendant, Charles May, did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defense, although you may believe that the defendant really thought he was in danger.

"(7) The court instructs the jury that the indictment in this case is a mere formal charge, and is no evidence whatever of defendant's guilt.

"(8) The court instructs the jury that the defendant is a competent witness in his own behalf, and you should consider his testimony in connection with the other evidence given on the trial. In determining what weight you will give to defendant's testimony, you may take into consideration the fact that he is the defendant on trial, and interested in the result of the prosecution.

"(9) The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and in determining such credibility and weight you will take into consideration the character of the witness, his or her manner on the witness stand, his or her relation to or feeling toward the defendant or the prosecuting witness, the probability or improbability of the witness' statements, the opportunity that the witness had for ascertaining the facts to which he or she has testified, together with all the other facts and circumstances detailed in evidence; and, if you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to reject any portion or all of such witness' testimony.

"(10) If you find the defendant guilty of murder in the first degree, you will simply so state in your verdict, as you are charged with no responsibility with respect to the punishment for murder in the first degree. If you find the defendant guilty of murder in the second degree, you will state in your verdict and assess his punishment at imprisonment in the state penitentiary for any term not less than ten years.

"(11) It is immaterial in this case whether the defendant was drinking or intoxicated at

the time of the homicide spoken of in the evidence, as drunkenness neither excuses, palliates, nor affects a crime."

The record discloses that defendant then asked the court to instruct for manslaughter, which it declined to do. He then asked the court to give the following instruction: "If the jury believe, from the evidence, the defendant to be guilty of either degree of murder, but entertain a doubt as to the degree, you should give the defendant the benefit of the doubt, and find him guilty of murder in the second degree." The defendant also requested the court to instruct the jury upon all the law of the case; and, the court refusing to further instruct, the defendant excepted to its refusal to instruct for manslaughter, to give the instruction asked by him, and to the refusal of the court to further instruct the jury upon the law of the case.

Jas. M. Wilson and Thos. B. Allen, for appellant. The Attorney General, Sam B. Jeffries, and Jerry M. Jeffries, for the State.

BURGESS, J. (after stating the facts). 1. The first question presented for our consideration on this appeal is with respect to the action of the trial court in overruling defendant's application for a change of venue, which he claims was error. The application was bottomed upon the ground of the prejudice of the inhabitants of the counties of Buchanan and Platte to such an extent that defendant could not have a fair trial in either of said counties, and was supported by the affidavit of the defendant and two credible witnesses. Besides, a number of witnesses testified without objection, in support of the motion, to facts which tended to sustain it, while equally as many, if not more, including several witnesses introduced by the defendant, testified to the contrary, and to facts which tended to show that defendant could get a fair trial in the county of Buchanan. Whether or not a change of venue shall be granted rests so much in the discretion of the trial court that the Supreme Court will not interfere, in the absence of a showing that such discretion was universally exercised. *State v. Thompson*, 141 Mo. 408, 42 S. W. 949; *State v. Albright*, 144 Mo. 638, 46 S. W. 620. And, the court having found as a fact that defendant could get a fair trial in the county of Buchanan, that finding will not, under the circumstances, be disturbed. *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743.

2. It appears from the record that on the 8th day of July, 1902, the court, on the motion of defendant, ordered a special venire returnable July 14th, and 47 names were by the county clerk, under the supervision of the judge of the court, drawn from the wheel, and said jurors, or so many of them as could be found by the sheriff, were examined upon their *voir dire*, and only 10 of them were found to be qualified, whereupon the court

announced that he would select the names of the remaining jurors to be summoned, when the defendant requested the court to procure the remaining number of the 47 jurors by drawing them from the wheel until the entire number should be found qualified, and protested against the court selecting the names in any other manner. The said request of defendant was refused, and defendant saved his exceptions. Thereupon the court made out a list of names of persons to be summoned as jurors, making his own selection of names without drawing the same from the wheel, and gave the list so made up to the sheriff to be returned into court. The panel of 47 jurors being completed from the list summoned by the sheriff as aforesaid, the list was presented to defendant's attorneys on July 15th, in order that they might complete their challenge; and thereupon defendant filed his motion to quash the panel, for the reason "that said jurors, all but ten thereof, have not been selected by their names having been drawn from the wheel by the county clerk in the presence of the court, as the law provides, but their names have been selected by the court and handed to the sheriff, and by him summoned." Said motion to quash was overruled, and defendant again excepted.

Defendant claims that the panel of 47 jurors was improperly selected by the court, and that their names should have been drawn from the wheel, as provided by section 3792, 3793, 3794, and 3795, Rev. St. 1899. Section 3795, *supra*, reads as follows: "Whenever any circuit court or court having jurisdiction of felony cases desires a panel of jurors, or any part thereof, said court, or in vacation, the judge thereof, shall, except as hereinafter provided, so order, and shall designate in said order the number of jurors desired, whereupon the clerk of the county court, so situated as to be unable to see the names on such card, and in the presence of the judge of any court to which this article may apply, shall draw that number of cards from the wheel or box; a list of the names so drawn shall be made and preserved by the clerk of the county court, and a certified copy of the same shall by said clerk of the county court be delivered to the clerk of the court for which the jurors were drawn, who shall issue a venire for said jurors and deliver the same to the sheriff or other proper officer of the court." Section 3797 provides that, "when a jury for the trial of a cause cannot be made up from the regular panel, the judge of the court before whom the cause is pending may make out and deliver to the proper officer a list of jurors sufficient to complete the panel, but such extra jurors shall be summoned only for the trial of that particular case." Now, when it was ascertained that there were only 10 competent jurors of the 47 whose names were drawn from the wheel, the court did just what he was authorized to do by section 3797, *supra*.

in case a jury for the trial of a cause could not be made up from the regular panel; that is, he made out and delivered to the proper officer a list of jurors sufficient to complete the panel of 47. The fact that the jury ordered was a special jury, as contradistinguished from a regular one, does not, we think, render that section of the statute inapplicable in the case at bar; but it should be given a more liberal construction, and held to apply alike to both regular and special juries, for such was the evident purpose of the Legislature. There is no reason why it should be otherwise, because such is the spirit of the statute and in accordance with the practice in the circuit and criminal courts of this state. Moreover "the statute regulating the summoning of jurors has always been construed merely as directory." *State v. Albright*, 144 Mo. 638, 46 S. W. 620; *Samuels v. State*, 3 Mo. 68; *State v. Pitts*, 58 Mo. 556; *State v. Jones*, 61 Mo. 232; *State v. Knight*, 61 Mo. 373; *State v. Williams*, 136 Mo. 307, 38 S. W. 75, and cases cited.

3. It is insisted that error was committed in the refusal by the court to allow defendant to fully cross-examine Mrs. Kate Brown, a witness for the state, as to her desire to see defendant convicted, and ruling in the hearing of the jury that such an investigation was an immaterial matter. This witness had already stated on her cross-examination that she did not feel very friendly toward defendant, and as to whether she had been or was then anxious to see him punished could have added nothing to the force of that expression. It is not practicable by any general rule to fix an exact limit which should govern the admission of such evidence, and necessarily it must be left in a large measure to the discretion of the trial court. In this instance we are not prepared to say that the court went beyond the legitimate margin in its ruling under discussion. The testimony of the witness showed that she was prejudiced against the defendant, and whether or not she desired to see him punished was immaterial. But in any event the court was not guilty of any impropriety in announcing from the bench and in the presence of the jury that the interrogatory propounded to the witness was with respect to an immaterial matter; for it would be utterly impracticable for a trial court to have the jury retire whenever it should become necessary to rule upon a question as to the admission or exclusion of evidence.

4. Nor do we think the court erred in refusing to instruct upon manslaughter in the fourth or any other degree. There was no evidence to warrant such an instruction. As holding otherwise, however, defendant relies upon the case of *State v. Berkley*, 92 Mo. 41, 4 S. W. 24, in which it is said that the evidence tends to show that the killing was the result of a sudden quarrel, which furnished a basis for an instruction for a lower grade of homicide than murder in the second

degree. But the facts connected with the homicide in that case are not stated in the opinion, and we must conclude that the evidence adduced justified such an instruction. But in the case at bar the evidence does not show that the homicide was the result of a sudden quarrel, or that there was any reasonable or lawful provocation therefor. Deceased was unarmed when shot, and was making no demonstration whatever evincing a purpose to assault defendant, but was standing still; and the only provocation that defendant had for shooting him was that deceased had, a short time before he was killed, said, in relation to an epithet applied to him by defendant, that "you are a damned liar," that "you are another one," which was neither reasonable nor lawful provocation for the homicide. In *State v. Wilson*, 98 Mo. 440, 11 S. W. 985, it is said: In homicide, an intent to kill is an essential element to make the offense murder in the first or second degree, and so the court instructed the jury in this case. *State v. Gassert*, 65 Mo. 352; *State v. Peak*, 85 Mo. 191. Murder in the second degree, however, includes not only homicides with intent to kill in the heat of passion caused by a provocation short of lawful provocation, but that would naturally excite such heat, but also all those cases of murder at common law not declared by statute to be murder in the first degree or manslaughter, in which class is included cases where the act done is malicious and manifestly dangerous to human life, and does produce death, although the intent may have been only to do great bodily harm. In such cases the law presumes the intent to kill. *State v. O'Hara*, 92 Mo. 59, 4 S. W. 422; *State v. Wieners*, 66 Mo. 13; *Wharton's Crim. Law* (8th Ed.) § 388. The heat of passion that will take away the malice from the act thus manifestly dangerous to human life, and reduce the offense to manslaughter, must be caused by lawful provocation; and, as we have seen, there was no such provocation in this case.

5. Defendant claims that the court erred in refusing to instruct the jury that if they believed the defendant guilty of murder, but entertained a doubt as to the degree, they should give the defendant the benefit of the doubt, and find him guilty of murder in the second degree. This contention is substantially in the language of the instruction asked by defendant upon this theory of the case. It will be observed that the contention is that the instruction, although omitting the word "reasonable" before the word "doubt," should have been given. 19 Am. & Eng. Ency. of Law, 1079, is relied upon in support of this position. But the rule which is, in effect, announced in that work, is that such a doubt, in order that a defendant may have the benefit of it and be convicted of the lower of two grades of the same offense, must be a reasonable doubt, and not simply a "doubt" which applies as well to one kind of doubt as another. The same rule is announced in

Blashfield on Instructions to Juries, § 306; that is, to entitle the defendant to the benefit of a doubt as to the lower of the grades of the offense charged in the indictment, the doubt must be a reasonable doubt in the minds of the jury as to the degree of the offense which the defendant has committed. *Stout v. State*, 90 Ind. 12, is another authority relied upon by defendant, in which the same rule is announced; that is, that when there is a doubt in which of two or more degrees of an offense of which the defendant on trial is guilty, in order to entitle him to a conviction of the lower degree, the doubt must be a reasonable one—that is, a substantial doubt. *State v. Anderson*, 86 Mo. 309, is another case relied upon by defendant. In that case an instruction was given on the part of the state which told the jury: "If you believe, from all the evidence in the case, beyond a reasonable doubt, that the defendants are guilty of murder in the first degree or second degree, as these offenses have been defined in these instructions, but have a doubt as to the degree of offense of which the defendants are guilty," the jury will give them the benefit of such doubt, and find them guilty of the less offense, was held not to be erroneous. In speaking of this instruction the court said: "It is objected to the first of the above instructions that it permitted a conviction for murder in the second degree, if the jury, believing them guilty of murder, had a doubt as to the degree of murder of which they were guilty. If the evidence satisfied the jury, beyond a reasonable doubt, the defendants intentionally and maliciously killed Rea, and the only doubt they had was whether it was done with the deliberation necessary to constitute the homicide murder in the first degree; but, having none whatever that it was committed with the premeditation, which made the crime murder in the second degree, it was their duty, as the court instructed, to find them guilty of the latter crime. Can it be that it was the duty of the jury, so believing from the evidence, to acquit the defendants? Certainly not." In *Humbree v. State*, 81 Ala. 67, 1 South. 548, the only exception raised by the record was the refusal of the court to instruct the jury that, if there was "any doubt" as to whether the offense was committed within 12 months before the commencement of the prosecution, they must acquit. The court observed: "A doubt which demands an acquittal must be a reasonable doubt. * * * A possible or speculative doubt is not sufficient. The charge is misleading by reason of failing to distinguish the degree of doubt, and was properly refused." So, in the case of *Watson v. State*, 83 Ala. 60, 3 South. 441, the trial court at the request of the defendant charged the jury in effect that any doubt arising out of the evidence requires the jury to acquit. The Supreme Court said: "It is only a reasonable doubt of a defendant's guilt which entitles him to an acquittal, not a pos-

sible, speculative, or imaginary doubt, as implied by this charge, which for this reason was misleading." So, with respect to the word "doubt," used in the instruction under consideration, it has such a variety of meanings, speculative and imaginary, that it was misleading, and by no means a substitute for the words "substantial doubt," which have a well-understood meaning, and which must exist in the minds of the jury as to the guilt of the defendant on trial in any criminal case before they can find him not guilty. The instruction was misleading, and properly refused.

But the instruction was properly refused, we think, for the further reasons that the court instructed the jury very fully upon murder in the first and second degrees, self-defense, and reasonable doubt as to defendant's guilt; and the conclusion is irresistible from their verdict that they found from the evidence, and that beyond a reasonable doubt, that the killing was done willfully, deliberately, premeditatedly, and with malice aforethought, and therefore defendant guilty of murder in the first degree, otherwise they could but have found him guilty, if at all, of murder in the second degree. It is illogical to say that a person may be guilty of two grades of an offense in the same case, where the ingredients of the grades are so different as in murder in the first and second degree, in the first of which the killing must be done with deliberation, in the other without deliberation, but with malice and premeditation. Then if the jury believe him guilty beyond a reasonable doubt, and are authorized under the instructions to find him guilty of either degree of which the evidence shows him to be guilty (and they cannot convict unless they so find), it does seem to us that there is no reason why an instruction telling them that, if they have a reasonable doubt as to which of two degrees of the offense the defendant is guilty, they will give him the benefit of the doubt, and find him guilty of the lower grade, for the very obvious reason that, if they have a reasonable doubt as to his guilt of either grade of the offense, they are bound to find him not guilty of that grade, and to find him guilty of the other grade, if satisfied of his guilt as to that. A verdict of guilty upon one grade of the offense is in effect a finding that he is not guilty of the other. In short, a person cannot be guilty beyond a reasonable doubt of two grades of the same offense—for instance, murder in the first and second degrees—for the line of demarcation between the two grades is well defined, as by the instructions in this case; that is, the homicide, in order to constitute murder in the first degree, must be committed with deliberation, in the second degree without deliberation, but with malice and premeditation. There is, therefore, under such circumstances, no necessity for an instruction, and no error in the refusal of one, to the effect that if the

jury believe the defendant guilty, but entertain a reasonable doubt as to which of the grades of the offense he is guilty, they will give him the benefit of the doubt and find him guilty of the lower grade of the offense; for they can only convict him of that grade, if either, of which they may believe him guilty beyond a reasonable doubt, which is inconsistent with the idea of the existence in the minds of the jury of a reasonable doubt with respect to the grade of offense of which defendant is guilty, for it must follow that, if the defendant is guilty of one grade of the offense, he is not of the other, and, if they entertain a reasonable doubt of his guilt of either grade, they cannot convict of that grade.

6. It is contended that instruction No. 10 is erroneous, in that it told the jury that, "if you find the defendant guilty of murder in the first degree, you will simply so state, as you are charged with no responsibility with respect to the punishment for murder in the first degree"; but this court has upon several occasions ruled otherwise. Thus, in *State v. Avery*, 113 Mo. 501, 21 S. W. 193, it is said: "In cases of murder in the first degree, the punishment is fixed by statute, and the jury trying the case has nothing whatever to do with it, and we see no impropriety in the court so stating in an instruction to them." See, also, *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Inks*, 135 Mo. 678, 37 S. W. 942; *Blashfield*, Instructions to Jurors, § 186.

7. Instruction No. 11 is complained of on the ground that it told the jury that "it is immaterial in this case whether defendant was drinking or intoxicated at the time of the homicide, spoken of in the evidence, as drunkenness neither excuses, palliates, nor affects crime." It is said, in the first place, that there was no evidence upon which to bottom it, and, in the second place, that it was prejudicial to defendant, because from it the jury inferred that defendant was attempting to excuse or palliate his crime by pretending drunkenness. Conceding that there was not evidence upon which to base the instruction, we are unable to see how defendant could have been prejudiced by it, or how the jury could have inferred from it that defendant was attempting to excuse or palliate his crime by pretending drunkenness; nor do we believe that defendant was prejudiced by it, or the jury misled, and unless they were misled, and by reason thereof convicted the defendant on less or weaker evidence than they otherwise would have done, we cannot say there was prejudicial error.

8. The verdict of the jury is assailed upon the ground that two of the jurors, viz., Rogers and Stallard, had prejudged the case at the time they qualified as jurors. The evidence in support of these charges against either of said jurors and in rebuttal thereto was heard and considered by the court, and

it held that the charges against them were not proven. Under such circumstances the finding of the trial court will not be disturbed (*State v. Gonce*, 87 Mo. 627; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007), especially, unless a stronger case than the one here presented comes before this court.

9. A final contention is that the verdict of the jury is not supported by the evidence. To this position we cannot agree, for the reason that the evidence made out a clear case of murder in the first degree, and fully justified the jury in so finding.

Finding no reversible error in the record, we affirm the judgment, and direct that the sentence pronounced by the law be executed. All concur.

CITIZENS' NAT. BANK OF KANSAS CITY, MO., v. DONNELL.

(Supreme Court of Missouri. March 4, 1903.)

NATIONAL BANKING ACT—COMPOUNDING INTEREST—USURIOUS INTEREST—RENEWAL NOTES—APPLICATION OF PAYMENTS—LOCUS PENITENTIA—FORFEITURES.

1. In renewing an indebtedness, interest on an old note was compounded every six months and included in the new note. *Held* a violation of Rev. St. 1899, § 5977 (Rev. St. 1899, § 3711), providing that interest shall not be compounded oftener than once a year, and the section of the national banking act (Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493]), which provides that a national bank may charge interest at the rate allowed by the laws of the state in which it is located, and no more.

2. In renewing an indebtedness, interest at the rate of 7 per cent. was charged on the interest due on an old note, and at the rate of 12 per cent. on an overdraft of defendant; the total amount being included in the new note. *Held*, that there having been no written agreement between the parties as to the rate, which in Missouri is 6 per cent. in the absence of such agreement, the transaction was usurious under Rev. St. 1899, § 3706, providing that parties may agree in writing for the payment of interest not exceeding 8 per cent. per annum, and under the section of the national banking act (Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493]) providing that a bank created under the act may charge interest at the rate allowed by the laws of the state where the bank is located, and no more.

3. Where usurious interest on an old debt is included in a renewal note, the fact that such note bears interest at a legal rate does not purge the transaction of usury.

4. The fact that the amount of defendant's existing overdrafts on plaintiff, together with the interest charged thereon, were from time to time more than equaled by the money received by him from plaintiff at the time his loans were increased, furnished no justification or excuse for charges of interest on such overdrafts in excess of the rate allowed by the laws of this state.

5. Where a general payment is made on a renewal note, which includes usurious interest on an old note, it must be applied on the principal debt, and cannot be applied on such usurious interest.

6. The rule that there is a locus penitentia for a creditor, and that at any time before entry of final judgment it may consider excessive

interest paid as paid on account of the loan, and so apply it, and lessen the principal, does not apply where the statute declares that such taking of usurious interest forfeits the entire interest, as provided in the national banking act (Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493]).

7. Where a renewal note included the principal of a former note, with usurious interest thereon, and also unlawful interest charges on certain overdrafts, and the long account between the parties was one continuous transaction, the entire transaction was affected with usury from the time that any item thereof became tainted, and subjected the payee to a forfeiture of the entire interest on the former note and on the overdrafts, under the section of the national banking act (Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493]) providing that the charging of such excessive interest shall be deemed a forfeiture of the entire interest which the note carries with it.

In Banc. Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Action by the Citizens' National Bank of Kansas City, Mo., against M. S. C. Donnell. Judgment for plaintiff, and defendant appeals. Reversed.

After the issues in this case were made up, the court, in pursuance of an agreement between the parties, did on the 15th day of January, 1898, make an order referring the cause and all issues therein to R. E. Ball, Esq., an attorney of the Kansas City bar, as referee, to hear and decide all the issues therein, who, in pursuance of said order, heard the evidence, made a finding of facts, and recommended judgment according to that finding. He found the facts to be as follows:

"This action is on a promissory note for \$20,000, given by the defendant to the plaintiff, dated April 29, 1896, payable on demand, and bearing interest at the rate of 8 per cent. per annum from date until paid. At the same time another note for the sum of \$2,000 was given by the defendant to the plaintiff, payable on demand, bearing 8 per cent. interest from date. A suit on this second note of \$2,000 is now pending in the circuit court of Carroll county, Mo. The defense asserted in this suit is that of usury; the execution and delivery of the note being admitted. As collateral security to the note here sued on, and to the \$2,000 note mentioned, the defendant pledged with the plaintiff three other notes, secured by real estate, one for \$12,000, one for \$6,000, and one for \$10,000. Nothing has been paid or realized on the securities on account of his indebtedness, except the sum of \$5,000, received by the plaintiff on January 26, 1898, from the sale of certain collateral property. The history of the indebtedness, for which the note in suit and the \$2,000 note mentioned were given, is as follows: On the 29th day of October, 1892, the plaintiff, at the request of the defendant, purchased a note made by the defendant and Catherine Donnell, spoken of in the testimony as the 'Mason Note,' paying therefor the face of the note and accrued in-

terest up to that date, and the defendant paying to the plaintiff the amount of the interest then due, leaving the defendant indebted to the plaintiff on account of said note, at that date, in the sum of \$15,000. This note was overdue, and had coupon interest notes attached to it covering the interest that accrued before maturity. By its terms it bore 7 per cent. from maturity. It was intended by the parties, at the time of its purchase, that the bank should only take and hold the note temporarily for the accommodation of the defendant; but time went on, and he was not able to pay the note. In the meantime he carried a bank account with the plaintiff, and on July 12, 1895, his bank account was, and had for some time prior thereto been, overdrawn several hundred dollars. At that time defendant, not being able to pay either his overdraft or the Mason note, and several payments of interest on the latter being in arrears, arranged with the plaintiff to give a new note, covering all of this indebtedness and securing a small additional loan. On that date he executed and delivered to the plaintiff his note for \$17,500, payable on demand and bearing interest at the rate of 7 per cent. per annum; the overdraft and all charges for interest on that and on the note being embodied in the new note. On October 1, 1895, he borrowed the sum of \$2,500 from the plaintiff, for which he gave his note, payable on demand, and bearing 7 per cent. interest from date until paid. Nothing further was done between the parties until April 29, 1896, when the defendant, being overdrawn at the bank and not having paid either of the notes mentioned, or any interest thereon, made a new arrangement with the officers of the plaintiff bank to give new notes covering the various debts then owing by him, as evidenced by the former notes and his overdrawn bank account.

"According to the computation of these debts and the interest as made at the time, the amount of the new notes given on April 29, 1896, was as stated: One note for \$20,000, being the one here sued on, and another, for \$2,000, being the note sued on in the action now pending in the circuit court of Carroll county. The reason for taking two separate notes was that the amount of the defendant's indebtedness, as claimed by the plaintiff, exceeded the amount for which, under the national banking act, the plaintiff was permitted to become creditor to any one individual, and the desire was to dispose of the surplus \$2,000 of claimed indebtedness separately. At the time of the making of these two notes, the defendant received credit on his individual account, which left a small balance over and above the amount of his overdraft. At the time of the making of the \$17,500 note, July 12, 1895, there was included in this note the original Mason note of \$15,000, three semiannual interest charges of \$525 each, and interest on the overdue interest from the time it was due to the date

of the note, and also an overdraft charge of \$596.74, and an additional advance credited to the defendant on his individual account at the bank of \$230.50. In making this computation it was agreed that the semiannual interest due and unpaid on the Mason note should bear interest from the date it was due, and it was so computed. This had been agreed to between the plaintiff and defendant at or about the time that the interest was due, and was agreed to by them at the time of making and signing of the \$17,500 note. The overdraft included in this note of \$596.74 contained charges on the actual amount overdrawn by the defendant of about 1 per cent. a month for the whole time of the continuance of the overdraft preceding the making of the note. These charges were evidenced by interest checks made out from time to time, and charged to the defendant's account, and returned to him on the balancing of his pass book, with other checks drawn by him. At the time of the making of the note sued on and the \$2,000 note mentioned, to wit, April 29, 1896, these amounts were arrived at by computing the amount at that date of the \$17,500 note of July 12, 1895, and \$2,500 note of October 1, 1895, and an overdraft of the defendant on April 29, 1896, of \$919.90, together with a balance on his pass book of \$2.42, which made in all \$22,000. The overdraft item in this computation contained charges for some months previous of about 1 per cent. a month on the actual amount overdrawn. In both of these settlements of July 12, 1895, and April 29, 1896, the parties intended to, and did, merge into the notes then made, respectively, all of the indebtedness of the defendant to the plaintiff. On July 12, 1895, the item of overdraft, as stated, was \$596.74. Of this amount \$569.74 was the actual overdraft, and the balance consisted of charges made monthly on account thereof. On April 29, 1896, the item of overdraft was \$919.90. Of this amount the actual overdraft was \$876.36, and the balance consisted of the monthly charges. In each instance the whole amount of the note and the items of indebtedness which went into it was figured between the plaintiff and the defendant, and agreed to, and the notes accordingly executed. The defendant in each instance agreed to the interest charges and on overdue interest, and also knew of and agreed to the charges made on his overdrafts. At the date of the two settlements made, on which the new notes were given, all the items of the then existing indebtedness of the defendant to the plaintiff were by agreement merged together. Taking them altogether, and charging interest per annum, without compounding, the rate is less than 8 per cent."

Conclusions of Law.

"Although the evidence taken and returned is voluminous, there is really no dispute in regard to the essential facts of the case.

The controversy all arises in regard to the inferences that ought to be drawn from the undisputed facts and the conclusions of law that must result therefrom. The Mason note only drew 7 per cent. according to its face. The defendant and the plaintiff agreed, when the semiannual interest on that note was not paid, that the overdue interest should bear interest, and this agreement was consummated by the giving of the subsequent \$17,500 note. This was done, it should be remarked, in connection with the settlement of the overdraft of the defendant then due. I hold that it was competent for these parties to make and consummate that agreement without violation of the usury law, so long as the amount of interest computed fell within the maximum legal limit of 8 per cent. The same thing is true of the agreement made by the parties at the time of the execution of the note sued on in this case, and of the \$2,000 note on which suit is pending in another court.

"Counsel for both parties have furnished me with able and exhaustive briefs, and have argued the question arising with a great deal of ability and ingenuity. It is contended by plaintiff's counsel that, both in the making of the \$17,500 note and of the two notes bearing date of April 29, 1896, the plaintiff made a new loan to the defendant, and that these notes were not a renewal simply of the pre-existing indebtedness. I do not concur in this view. I do not doubt that the officers of the plaintiff attempted to put the transaction on that basis, and did so in perfect good faith; but under the authorities I am satisfied that the notes in question were, as a matter of law, simply renewals, on new terms then agreed upon between the parties, of the pre-existing indebtedness.

"Counsel for plaintiff also contend that the charges made on the overdrafts of about 1 per cent. a month were not interest charges, within the meaning of the usury law, but were penalties imposed on the customer of the bank for overdrawing his account. I do not agree to this contention. I think that these charges were essentially interest charges, and, if this action were solely for a debt evidenced by that overdraft, I should have no doubt that the making of these charges would preclude the plaintiff from collecting anything but the actual original overdraft. But the defendant, at each of the times in question, was indebted to the plaintiff in several forms, by different notes and by his bank account, and in my judgment the merging of these different debts into one, the agreement to the charges of interest made, one with reference to the other, all had the effect in law of mingling the debts and charges, so that the real inquiry should properly be whether, on the whole indebtedness, the defendant had agreed by the note in suit to pay a greater amount of interest than it was lawful for the plaintiff to charge. This he did not do. The agreement of the defendant

to pay interest on the overdue interest on the several notes made, preceding the making of the one in suit, was lawful, and when that was consummated by the signing of a new note it was a good consideration for the new indulgence thereby obtained.

"It seems to me that the only question in this case is the effect on the note in suit of the charge made by the defendant of a usurious rate of interest on the overdraft which formed an item of both the \$17,500 note and of the computation of the debt for which this suit is brought. I think, beyond any doubt, that those charges, taken in and of themselves, were usurious; but the overdraft in each instance formed a very small part of the consideration of the note. The law of forfeiture, according to all of the authorities, should be strictly construed; and when these parties, by mutual agreement, merged all these debts into one, and when the total effect of that merger fails to show in toto an illegal agreement under the usury act, my opinion is that the law has not been violated, and that the grave result of imposing a penalty of forfeiting all interest on all the items that entered into that note should not be visited on the plaintiff. It seems clear to me, from all the authorities, by reason of the merger of these debts in the way stated, that there should be no forfeiture at all; but, if any forfeiture should be had, it should only be of all interest charges on the overdrafts that entered into the note in suit.

"The point is made that defendant's answer does not adequately plead usury, in that it does specifically aver the amount of usury charged and that entered into this specific note, and that the proof also fails to disclose definitely the amount alleged to be usurious. I think there is a great deal of force in this objection, but I have preferred to base my conclusion on the broader grounds stated. I find the issues in the case for the plaintiff, and recommend judgment on the note for \$20,000, with 8 per cent. interest from April 29, 1896, to the date of the rendition of the judgment, after crediting the payment of \$5,000 on January 25, 1898."

And thereafter, within four days from the time of the filing of said report and testimony, to wit, on May 18, 1898, the defendant filed his motion to re-refer said cause to the referee, which was overruled. In due time defendant filed exceptions to the referee's report, assigning numerous grounds therefor which are unnecessary to set forth. And thereafter, to wit, on July 2, 1898, the same being during the April term of said court, A. D. 1898, the court overruled the motion of defendant to re-refer said cause, and also overruled defendant's exceptions to the report of the referee and entered a judgment in favor of plaintiff, to which action, orders, and rulings of the court the defendant at the time excepted and still excepts. And thereupon a judgment was given and entered herein, as follows, to wit:

"Now on this day comes plaintiff herein—the Citizens' National Bank of Kansas City, Missouri, by its attorneys, Warner, Dean, Gibson & McLeod, and comes also defendant, M. S. C. Donnell, by his attorneys, R. B. Garnett and W. C. Forsee, and the motion of said defendant to re-refer this case, heretofore filed herein, coming on for hearing—the same is by the court taken up, heard, and duly considered; and after argument of counsel and due deliberation the court overrules said motion to re-refer this cause. And the exceptions heretofore filed herein by said defendant to the report of the referee, Hon. R. E. Ball, coming on regularly for hearing, said exceptions are by the court taken up, heard, and duly considered, and after argument of counsel thereon, and after due deliberation the court overrules said exceptions to the report of the referee, and each and every one thereof, and the report of said referee heretofore filed herein is by the court taken up, heard, and duly considered, and said report of the referee in this cause is by the court duly and regularly confirmed in all respects; and the court, upon said report of said referee, doth find all the issues herein for plaintiff and against defendant, and doth further find that on April 29, 1896, said defendant, M. S. C. Donnell, for value received, made, executed, and delivered his negotiable promissory note of that date to plaintiff herein for the sum of twenty thousand dollars (\$20,000), with interest thereon from said last-named date until paid at the rate of eight (8) per cent. per annum; and the court doth further find that on January 25, 1898, after the commencement of this suit, said defendant paid the plaintiff the sum of five thousand dollars (\$5,000) on said note, leaving on said last-named date a balance on said note from defendant to plaintiff the sum of seventeen thousand, seven hundred and eighty-two $\frac{4}{100}$ dollars (\$17,782.04), which last-named sum, with interest thereon at the rate of eight (8) per cent. per annum from January 25, 1898, is due and owing from said defendant to said plaintiff, together with its costs herein expended and incurred; and the court doth further find that said referee, Hon. R. E. Ball, was engaged for the period of ten days in the trial and consideration of this cause, and that he incurred an expense of seventy-four dollars and twenty-five cents (\$74.25) for his stenographer to take the testimony before him as such referee. Wherefore it is ordered, adjudged, and decreed by the court that plaintiff herein, the Citizens' National Bank of Kansas City, Missouri, have and recover of and from defendant herein, M. S. C. Donnell, the sum of eighteen thousand, four hundred and six $\frac{79}{100}$ dollars (\$18,406.79), together with interest thereon from this date at the rate of eight (8) per cent. per annum until paid, together with its costs herein incurred and expended; and the court doth further order, adjudge, and decree that said R. E.

Ball, as referee herein, be, and is hereby, allowed the sum of one hundred dollars (\$100) as compensation for his services herein, and that A. P. Batnett, the stenographer who took the testimony in the cause before said referee, be, and is hereby, allowed for his services as stenographer the sum of \$74.25; and the clerk of this court be, and is hereby, ordered and directed to enter up and charge as costs in this cause the allowances herein made to said referee and stenographer, for all which execution shall issue herein."

After unavailing motion for a new trial, defendant appeals.

John G. Park, Rozzelle & Walsh, and Edward P. Garnett, for appellant. Warner, Dean, McLeod & Holden, for respondent.

BURGESS, J. (after stating the facts). Sections 5197, 5198, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3493], a part of the national bank act, are as follows:

"Sec. 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the state, territory or district where the bank is located, and no more; except where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. Where no rate is fixed by the laws of the state, territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, or other evidence of debt, has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Sec. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

Section 3706, Revised Statutes of 1899 of this state, provides that creditors shall be allowed to receive interest at the rate of 6 per cent. per annum, when no other rate

is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made.

Section 3708 provides that parties may agree in writing for the payment of interest, not exceeding 8 per cent. per annum, on money due or to become due upon any contract.

Section 3711 provides that parties may contract in writing for the payment of interest upon interest, but the interest shall not be compounded oftener than once in a year.

Some criticisms are made by defendant on the report of the referee with respect to his finding of facts; but this court has always treated such a report as a special verdict, and refused to interfere unless there was no substantial evidence to support it. *Berthold v. O'Hara*, 121 Mo. 88, 25 S. W. 845; *Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; *Smith v. Baer*, 166 Mo. 392, 66 S. W. 166. That this court may, if so inclined, review the finding of facts by the referee in cases of this character, and approve or disapprove it in whole or in part, is well settled; but it does not follow that it will do so. It is not so, however, with respect to the circuit court, which has the power, and whose duty it is, to review the finding of facts by a referee. *Smith v. Baer*; *Utley v. Hill*, supra. But, in order to a better understanding of the facts out of which this litigation grew, it will not be inappropriate to state them more in detail than did the referee:

On October 29, 1892, defendant owed plaintiff bank \$15,000 on the Mason note. On that day defendant paid \$175 interest on said note, at the rate of 7 per cent. per annum. This changed the semiannual interest periods. On June 29, 1893, he paid \$525 more, interest to that date. Defendant was unable to pay the next semiannual interest, due December 29, 1893, and the then president of plaintiff, Mr. Seeger, to avoid charging off the Mason note as bad paper, on June 30, 1894, put in the cash drawer a sight draft on defendant for \$525, in favor of S. W. Campbell, cashier, and this draft was carried as a cash item until February 18, 1895, when defendant, having funds, gave plaintiff a check for it. In the meantime, on or about June 1, 1893, defendant's account with plaintiff began to be overdrawn. He says in his testimony that the bank consented to the overdraft, and this is not denied. On June 1st he was overdrawn \$514.52, and on the 13th he reduced the overdraft to \$473.52, and on the 22d paid it. But for interest on this overdraft for this time plaintiff inserted among defendant's checks a charge slip, or check, for \$3.14, payable to "Int. or bearer," and signed, "Chg. M. S. C. Donnell." This charge was at the rate of about 1 per cent. per month, and was the beginning of a series of transactions of a similar nature. From June 30, 1893, until July 13, 1895, de-

defendant's account was overdrawn in amounts ranging from \$435.46 on the first-named day to \$596.74 on the last. At the end of each month the plaintiff charged defendant 1 per cent. or more on his overdraft, and put an interest charge slip among his checks, and added this charge to the overdraft. This is shown clearly by the general account kept by plaintiff, introduced in evidence by it. The interest charges on June 29, 1895, had amounted to \$122.50. The principal of the overdraft at that time was \$474.24, and the defendant had been overdrawn from July, 1893, until July, 1895, only from \$435.46 to \$474.24; and the \$122.50 represents the interest charged by plaintiff on \$435.46 two years, or slightly over 12 per cent. per annum. No demand was shown to have been made for payment of the overdraft. These interest charge checks were returned to defendant as vouchers. On July 12, 1895, this indebtedness was renewed. Plaintiff's president, Mr. Seeger, computed defendant's debt on that day to be as follows:

Note, \$15,000, and interest 7 per cent. from December 29, 1893.	
Semiannual Int. due June 29, 1894.....	\$ 525 00
Int. to December 29, 1894.....	18 37
Semiannual Int. due December 29, '95.....	525 00
Int. to June 29, 1895.....	37 39
Semiannual Int. due June 29, 1895.....	525 00
	<hr/>
Note	\$ 1,630 76
	15,000 00
	<hr/>
Amt. due June 29, 1895.....	\$16,630 76
Int. to July 12, 1895.....	42 00
	<hr/>
	\$16,672 76
Overdraft	596 74
	<hr/>
	\$17,269 50
Bal. credit acct.....	230 50
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Amt. new notes.....	\$17,500 00

This computation was by defendant introduced in evidence. It shows a compounding of interest every six months, in violation of Rev. St. 1889, § 5977 (Rev. St. 1899, § 3711), and the charge of interest upon interest amounting to \$59.93. To the total amount of principal and compound interest claimed to be due on the Mason note, \$16,672.76, was added the overdraft, consisting of principal, \$474.24, and 1 per cent. per month interest thereon, amounting to \$122.50, and to this was added a credit on general account of \$827.24, which eliminated the overdraft and left \$230.50 to be checked against. These items aggregated \$17,500, and for this defendant gave his note, due on demand, with 7 per cent. interest from that date. Plaintiff retained the Mason note as "collateral security." The \$17,500 note was introduced in evidence, being attached to the papers in the Carroll county case. Thus on July 12, 1895, the \$17,500 note was executed, and it was composed of:

The principal of the Mason note.....	\$15,000 00
The usurious interest calculated therein....	1,672 76
The principal of the overdraft.....	475 24
The usury charged therein.....	122 50
And a small credit account of.....	230 50
	<hr/>
	\$17,500 00

So that, deducting the interest, \$1,672.76 and \$122.50, in all \$1,795.26, we have left \$15,704.74, the amount of the principal on July 12, 1895. On or about September 14, 1895, defendant made three additional notes for \$12,000, \$6,000, and \$10,000, respectively, due five years from date, with interest at 6 per cent. per annum, in favor of W. H. Seeger, secured by deeds of trust on real estate. Seeger indorsed and transferred these notes to plaintiff, and it is now holding them also as "collateral security." On October 1, 1895, defendant made another note for \$2,500, due on demand, with 7 per cent. interest from date, and it was credited to defendant on the books of the bank. At this time defendant's account was overdrawn \$267.30, including the usurious interest on the same, calculated at the rate of 1 per cent. per month, compounded monthly; and, while defendant was given credit on plaintiff's books for \$2,500, his net credit was only that amount, less the amount of overdraft and usury calculated therein; and, as this usurious charge was taken out of the \$2,500 note, it infected the same with usury from its inception. Defendant so testified, and it is not disputed. The \$2,500 note of October 1, 1895, was calculated in this way:

Defendant testified before the referee as follows: "Mr. Seeger and I sat down to make this note. We calculated among ourselves the amount of money needed to pay taxes with, and such things, and figured it up, and went to the book to see how much I was overdrawn, and figured the thing up, and wrote out a note for \$2,500, and paid my overdraft out of it, and gave me credit of the balance of the money, which I used in the payment of taxes on the property on which they held the mortgage. My overdraft on the 1st of October was \$909.87. On September 30, 1895, I was overdrawn then sufficient for them to charge me \$1.55 on my overdraft. They carried it down and calculated it in the \$909.87. And September 1st my account was overdrawn \$167.30. This was figured in at a little better than 12 per cent. per annum."

The referee then observed: "I think the answers heretofore have been that the interest checks that were put into these various notes were all those that preceded in date the making of the note, and when the next note was made they included those which were between the date of the former note and that note. For instance, they make a note of \$2,500, and up to that time certain interest checks have been returned, and, as I understand his answers, that \$2,500 note includes the amount of the original overdraft and the interest checks that up to that time had been made."

The witness: "Yes, sir."

Again, Mr. Fitzhugh, president of plaintiff bank, testifies on cross-examination: "The indebtedness represented in the deposits was put into the notes. I want to say, further,

that there was deposits made by Donnell that took care of the overdrafts independent of any money loaned by the bank. If we placed to the credit of Mr. Donnell a note of \$2,500 on October 1st, on an account which stood overdrawn \$909.67, Donnell would receive credit for just what he received. The net credit would be the balance. He had overdrawn at that time only \$268. The checks offered in evidence might have been paid after the \$2,500 note went to his credit."

Mr. Seeger, the former president, testified: "No overdraft or penalty entered into the \$2,500 note." He explains himself, and shows that this penalty did enter into the note. Continuing, he says: "I loaned him \$2,500, and put the whole \$2,500 to his credit to take up his indebtedness." The indebtedness referred to, as shown by the record, is in part these usury charges.

Defendant was obliged to overdraw again, and from November 2, 1895, until after the execution of the note sued on, his account was overdrawn. The bank, on November 30th, charged him \$1.70 interest, and thereafter on the last business day of each month charged him 1 per cent. or more upon his overdraft, and added it to the overdraft as before. On April 29, 1896, this overdraft, including excessive interest, was \$910.10. The officers of the bank computed the \$17,500 note and \$2,700 note from their respective dates, with 7 per cent. interest, and added in the overdraft, with its accumulated compounded interest, making the total \$21,997.58. Defendant executed two notes, payable on demand, one for \$20,000 and the other for \$2,000, with 8 per cent. interest from date. The \$20,000 note is the instrument in suit. Plaintiff eliminated the overdraft and credited to defendant on its books \$2.42 net. On January 25, 1898, certain of the real property described in the deed of trust securing in part the payment of the \$6,000 "collateral" note was sold, and \$5,500 was the net proceeds, and the defendant notified the plaintiff to apply the fund to the payment of the said collateral notes for \$6,000; but plaintiff applied it instead to payment of interest on the notes for \$22,000, and the balance on the principal of those notes.

By agreement of parties a transcript of the general account of M. S. C. Donnell, as shown by the books of plaintiff, from October 14, 1892, to May 1, 1896, was introduced in evidence and attached to the report of the referee. It shows a continuous account and transaction between plaintiff and defendant between said dates, and that the note in suit and its antecedents are all a part of said continuous transaction. Every month defendant was charged interest at the rate of 1 per cent. per month, compounded monthly, on the overdrafts, beginning in June, 1893, and culminating April 29, 1896, in the \$20,000 note in suit and in the \$2,000 note in the Carroll county case. These transactions show the following:

The Mason note upon which the interest was paid to December 29, 1893.....	\$15,000 00
July 12, 1896, overdraft, less interest figured in the note of \$17,500.....	474 24
July 12, 1896, net credit on bank account...	230 50
October 1, 1896, credit by note of that date	2,500 00
April 29, 1896, principal of overdraft.....	874 81
April 29, 1896, credit on account.....	2 42
	<hr/> \$19,081 97
January 25, 1898, credit by proceeds of col..	5,500 00
	<hr/> \$13,581 97

The balance of the note is interest. There can be no question, we think, as to the correctness of defendant's contention that in charging him 1 per cent. a month upon the overdraft of June, 1893, to July, 1895, in compounding semi-annually the interest in the Mason note, and in again charging defendant 1 per cent. a month on the overdraft from November, 1895, to April 29, 1896, plaintiff was guilty of exacting and reserving usurious interest, entitling him under the national bank act to plead as a bar to plaintiff's recovery all interest carried by the \$22,000 of notes, unless, as was held by the referee, that the agreement of the defendant (although verbal) to pay interest on the overdue interest on the several notes made, preceding the making of the one in suit, was lawful, and, when that was consummated by the signing of a new note, it was a good consideration for the new indulgence thereby obtained.

It is, however, said for plaintiff that prior to the execution of the note for \$17,500 the plaintiff did not take, receive, reserve, or charge on the Mason note interest at a greater rate than that allowed by the laws of the state of Missouri; that, this being true, the question whether it compounded the interest on the Mason note is wholly beside the case. It is conceded that, "if this were a contract governed by this state statute, such might be the case; but we are concerned now with the restrictions placed upon this bank's powers by the national act, and that law contains no prohibition upon the agreement made by Donnell and the bank for the computation of this interest. The law in question made no contract for interest usurious, unless it exceeded 8 per cent. per annum. The Mason note, figured at 8 per cent. from December 29, 1893, to July 12, 1896, would equal \$16,843.29, or \$170.63 more than the amount claimed by the bank." But we are not inclined to agree to this contention, and think the position unsound. The legal rate of interest in this state, by whose laws in this respect the case is governed, is, in the absence of an agreement in writing to pay a higher rate, 6 per cent. (section 3708, supra); and the fact that the definition of usury and the penalties imposed must be determined by the national bank act, and not by the law of this state, as held in the case of *Haseltine v. Central Bank of Springfield*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118, is immaterial, for, whatever the unlawful interest charged by plaintiff may be called, there is no escape from the conclusion that, when plaintiff computed the interest on the Mason

note, which only bore interest at 7 per cent., with rests on December 29, 1894, June 29, 1895, and July 12, 1895—three rests in seven months—it was guilty of taking, receiving, reserving, or charging a greater rate of interest than is allowed by the national banking act. And therefore the entire interest which the Mason note "carries with it" was forfeited, at the time it was computed into the note of \$17,500. The bank had no right to charge any interest not allowed by the laws of Missouri. The banking act says so in plain words. The laws of Missouri did not permit the compounding of the interest on the Mason note oftener than once a year. Therefore, when the bank compounded the interest on the Mason note oftener than once a year, it did that which it was not allowed to do by the laws of Missouri, and in so doing violated the national banking act and subjected itself to the penalties therein provided.

The record shows that the \$15,000 note bore interest at 7 per cent. per annum, and that, notwithstanding this fact, the interest was computed semiannually, and that on the 29th day of June, 1894, there was computed six months' interest due thereon, amounting to \$525, and that interest was computed on the interest then due, at the same rate, to December 29, 1894, amounting to \$18.37; that on the day last named there was computed another six months' installment of interest, amounting to \$525, upon which there was computed interest at the same rate to June 29, 1895, amounting to \$37.50, and at the time last named there was another installment of interest due on said note, amounting to \$525, all of which, then amounting to \$1,630.76, was added to the principal note of \$15,000, making the aggregate amount due on the day last named \$16,630.76, which, including interest at the same rate for 13 days, amounting to \$42, overdraft for \$596.74, and balance credit account of \$230.50, amounting to \$17,500, was the amount of the new notes. There was no written agreement that interest upon interest or upon overdrafts was to bear any rate of interest at all; hence no higher rate than 6 per cent. could have been charged, and anything in excess of that was usurious under section 3706.

Section 5197, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3493], provides that "any association may take, receive and charge * * * interest at the rate allowed by the laws of the state * * * where the bank is located and no more," and we must look to its statutes to see what rate of interest may be charged; for it is only by statutory enactment that interest can in any event be charged and collected. The national banking act restricts national banks in charging interest to the maximum amount allowed by the state, and provides that they shall charge "no more." The referee, in his conclusions of the law of the case, said "that those charges, taken by themselves, were usurious,

but the overdraft in each instance formed a very small part of the consideration of the notes; that the law of forfeiture should be strictly construed, and when these parties by mutual agreement merged all these debts into one, and when the total effect of that merger fails to show in toto an illegal agreement under the usury act, the law has not been violated; and that the grave result of imposing a penalty of forfeiting all interest on all the items that entered into that note should not be visited on the plaintiff." With respect to the interest charged against defendant on overdue interest he held that the agreement of the defendant to pay interest on the overdue interest on the several notes made preceding the making of the one in suit was lawful, and when that was consummated by the signing of a new note it was a good consideration for the new indulgence thereby obtained. But this position is not sound, for it is well settled that a debtor may, at or before the time of payment, direct its application, and that the creditor must apply it as directed; but, if the debtor fails to make such direction when he might, the creditor may apply it as he pleases. It must, however, be made to a debt that is due, in preference to one that is not due. There is an exception, however, to these general rules, and that is, where the debt, or part of it, is usurious, the creditor cannot, in the absence of special directions so to do from the debtor, apply the payment to usurious interest, or to any debt which the debtor is not bound to pay. Now, in the case at bar, the usurious interest was not paid, but was carried along by way of renewal notes.

Defendant challenges the correctness of the conclusions of the referee from a legal standpoint, and insists that it is not sustained by authority. He contends that the referee was in error in holding that sections 5197 and 5198, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3493], are not to be construed strictly, but liberally. In *National Bank v. Dearing*, 91 U. S., loc. cit. 35, 23 L. Ed. 196, in construing section 5198, it was said: "The thirtieth section is remedial, as well as penal, and is to be liberally construed to effect the object Congress had in view in enacting it. *Ordway et al. v. Central National Bank of Baltimore*, 47 Md. 217, 28 Am. Rep. 455." In *Brown's Ex'rs v. National Bank*, 3 U. S. App. 7, 1 C. O. A. 62, 48 Fed. 271, it was said: "The legislative intent, we think, was to utterly destroy the interest-bearing capacity of the instrument. The interdiction of a recovery of interest by the transgressing bank is salutary, and full effect should be given it." And in *Bletz v. National Bank*, 87 Pa. 87, 30 Am. Rep. 343, in speaking of the term "forfeiture," it was said: "It will be noticed that the word 'forfeiture' is used, yet the uniform practice has treated this not as pure penalty, but as a defense, which may be set up to the recovery of interest. The word 'forfeiture' viewed simply as confer-

ring a right which may be asserted by the defendant."

It is admitted by the referee that the charges made by the plaintiff of a usurious rate of interest on the overdraft which formed an item of the \$17,500 note, taken by themselves, were usurious. But he says that "when these parties by mutual agreement merged all these debts into one, and when the total effect of that merger fails to show in toto an illegal agreement, * * * the law has not been violated." In arriving at that conclusion the referee must have proceeded upon the theory that, because the \$17,500 note bore 7 per cent. only, that purged the transaction of usury; but it is well settled that interest included in a renewal note, and for which a separate note is executed, does not thereby cease to be interest within Rev. St. U. S. § 5197 [U. S. Comp. St. 1901, p. 3493]. In *Brown v. National Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801, it was held that "when a bank, which violates section 5198, supra, sues upon a note, the debtor may insist that the entire interest, legal and usurious, included in the note and agreed to be paid, but which has not been actually paid, shall be either credited to the note or eliminated from it, and judgment given only for the original debt, with interest at the legal rate from the commencement of the suit. * * * The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note bears or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid. It is said that, within the meaning of the statute, interest is paid when included in the renewal note, and, when suit is brought upon the last note, calling for interest from its date, only the interest accruing on the apparent principal of that note is subject to forfeiture. We think the statute cannot be so construed. If, within the meaning of the statute, interest is 'paid' simply by including it in the renewal note, it would follow that, as soon as the usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee, and recover back * * * 'twice the amount of the interest thus paid,' when he had not in fact paid the debt, nor any part of the interest as such. This cannot be a sound interpretation of the statute. The words 'in case the greater rate of interest has been paid,' in section 5198, refer to in-

terest actually paid, as distinguished from interest included in the note and only 'agreed to be paid.' If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at 10 per cent. interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower, each renewal note including past interest, legal and usurious, the sum included in the last note, in excess of the sum originally loaned, would be interest which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid." To the same effect are *Overholt v. National Bank*, 82 Pa. 490, and *Farmers' & Mechanics' Bank v. Hoagland* (C. C.) 7 Fed. 159. The taint of usury in the first instance continued down the entire line. *Cake v. First National Bank*, 86 Pa. 303.

The note for \$17,500 of July 12, 1895, being illegal in part, the question is, did it lose its interest-carrying power? In *Danforth v. Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622, it was held that the forfeiture provided for by section 5198, supra, attaches to the instrument itself, and the consequence adheres to it, and, as it carries no interest, no interest thereon can be recovered; that the clause operates directly upon the bank, and affects its power; that its power to collect interest under its statutory franchise is lost by the commission of the illegal act. The contract entered into between plaintiff and defendant in conformity with the law of this state was valid; but all charges of interest against defendant in excess of that which is allowed by the laws of this state, and in compounding interest upon usurious interest agreed to be paid by defendant, was unlawful, and operated as a forfeiture by plaintiff to recover any interest on the note sued on.

But plaintiff says: "Between June, 1893, and April 30, 1896, defendant's account with plaintiff was frequently overdrawn, and the bank from time to time made small charges against his account in the nature of penalties, as it understood it, for the overdraft. The amount of these charges, together with the existing overdrafts, were, from time to time, more than equalled by the money received by defendant from the bank at the time his loans were increased, and by a deposit of \$1,750, February 18, 1895, and \$35, October 1, 1895." And it intimates that these matters might be equitably adjusted upon the principle that the equities are about equal. This, however, furnishes no justification or excuse for the admission that the bank made charges against defendant on his overdrawn account in the nature of "penalties," which was simply another name for interest, and in excess of the rate allowed by law of this state.

On January 25, 1896, certain of the real property described in the deed of trust se-

curing in part the payment of the \$6,000 "collateral" note was sold, and \$5,500 was the net proceeds; and the defendant notified the plaintiff to apply the fund to the payment of the said collateral notes for \$6,000; but defendant applied it instead to payment of interest on the notes for \$22,000, and the balance on the principal of those notes. The note being in part usurious, it must be applied upon the principal debt, rather than the unlawful interest; and the burden of showing that a partial payment was made was upon the bank, and, in the absence of any finding by the referee upon this question, it must be regarded as having been a general payment, and, being such, the bank was without authority to apply it, or any part of it, to forfeited interest—to a claim that had no legal existence. *Danforth v. Bank*, supra; *Adams v. Mahnken*, 41 N. J. Eq. 332, 7 Atl. 435; *Greene v. Tyler*, 39 Pa. 361.

It is said by counsel for plaintiff, in his additional citation of authorities, that "if, by compounding, the limit prescribed by law is not exceeded, there is no violation of law, but if, by compounding, the limit is exceeded, it is a violation of the law. *Watson v. Mins*, 56 Tex. 451. The form of the contract is immaterial. No device to evade the law will be upheld by the courts. *Mitchell v. Napier*, 22 Tex. 121; *Crozier v. Stephens*, 2 Willson, Civ. Cas. Ct. App. § 802." If this position is correct, and we think it is, it follows inevitably that the computation of interest upon interest at 7 per cent., in the absence of a written agreement authorizing it, was in plain violation of the statute, which under such circumstances only allow 6 per cent. It is shown by the record that, at the time the \$2,500 note was executed, defendant's account with the bank was overdrawn, and had been for some months prior thereto; and plaintiff charged defendant 1 per cent. per month on the overdrafts, which is admitted to be usury, and included it in that note. It appears that, while defendant was credited ostensibly for this note, the statement of the account shows that he only received credit for a net balance after deducting the overdrafts, with usurious interest thereon. It thus appears that usurious interest was taken and reserved out of this note, and that it was usurious at the time of its execution.

While we have considered these notes which entered into the general account of the parties, in order to show that each and every one of them constituting it since June, 1893, was tainted with usury, we might as well have disposed of the case from a different standpoint; that is, that the long account is one continuous transaction, one running account, and that, when any item of the account became tainted with usury, it infected the entire transaction from that time. This view was taken of a similar case in *Pickett v. Merchants' National Bank*, 32 Ark. 346, in which it was said: "True, there is

evidence that the accounts were stated monthly, and a balance struck; but whether the usurious interest was, or not, paid is not shown. Nor can we, upon a fair consideration of the transactions between the parties, admit these monthly estimates to be separate and distinct settlements, or, indeed, settlements at all, but, indeed, to show how the accounts stood between the parties. It was, in fact, a running account between the bank and its customers, Wormly, Joy & Co., commenced in 1866 and continued to 1868, the time when the account was closed by note, and in fact constituted but one transaction.

* * * The usurious interest, in this instance, having been carried into the general account and made part of the sum found due upon final settlement, taints the whole contract with usury. The fact that the account was closed by note amounts to nothing. It matters not whether the usury was charged and taken by any tacit assent of the firm by the bank in stating the monthly account, or by note substituted for the one first given. The question is, not how was the contract closed or renewed, but whether any part of the sum charged, and for which the note was executed, was for the use or forbearance of money at a greater rate of interest than allowed by the law to be taken. Such is clearly the rule as laid down by the elementary writers, and accords with numerous decisions, to some of which we will refer." A similar view was taken in *National Bank v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484, in which it was said: "In the case at bar the entire line or series of notes discounted, which are stated at length in the sixth defense, constitute one connected continuous transaction, and under such circumstances the taint of usury affects the whole; and where the bank sues to recover on the last series, or renewal notes, the forfeiture of the entire interest follows as a necessary result, and credit must be given for all the interest which has been paid from beginning of the loan."

Plaintiff asserts that the note finally given by defendant to the bank constituted a written agreement to pay a higher rate of interest than 6 per cent.; but, even if this be true, it did not purge the note of the usurious interest, which had not been paid, and which went to make up the sum for which the note was executed. "The forfeiture declared by the statute is not waived or avoided by giving a separate note, in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note bears or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill,

or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid." *Brown v. National Bank*, supra.

Plaintiff further contends that there is a locus penitentia for it, and that, any time before entry of final judgment, it may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal; that up to that time it may make its election. In support of this contention plaintiff relies chiefly upon *Duncan v. First National Bank of Mt. Pleasant*, Fed. Cas. No. 4,135, approved in *McBroom v. Scottish Investment Co.*, 153 U. S. 328, 14 Sup. Ct. 852, 38 L. Ed. 729; *Stevens v. Lincoln*, 7 Metc. 528; *Wright v. Laing*, 3 B. & C. 169; and *Saunders v. Lambert*, 7 Gray, 484. The case first cited was an action under the laws of New Mexico to recover double the amount alleged to have been collected and received by the defendant in excess of the legal rate of interest. The statutes of that territory make void a contract of loan providing for usurious interest only as to the interest in excess of what the statute allows, while section 5198 of the national banking act [U. S. Comp. St. 1901, p. 8498] expressly provides "that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." *Duncan v. First National Bank of Mt. Pleasant*, supra, was an action under the national banking act to recover twice the amount of usurious interest paid upon loans from the bank, and it was held that, where a national bank has taken usurious interest on a loan or discount, it may elect to apply the excess of interest on the principal at any time before the loan is paid in full, or before the judgment is entered for the full amount. But no allusion is made in that case to the provision of the national banking act above quoted, which declares that the taking of usurious interest forfeits the entire interest. *Stephens v. Lincoln*, 7 Metc. 525, was also an action to recover back usurious interest, and it was held that while the usurious interest is unpaid there remains the locus penitentia, and that the party may relinquish it, and recover the balance of his debt; the contract not being rendered void by the statute. To the same effect is *Saunders v. Lambert*, 7 Gray, 484.

It is apparent from a casual reading of these adjudications that they have no bearing upon the case in hand; nor has any case or authority been called to our attention where any such rule is announced in an action by a national bank to recover upon a note executed to it containing usurious interest, where the forfeiture clause of the statute was relied upon as a defense and the matter brought to the attention of the court. Any such ruling would be in the face of the ex-

press provisions of its very purposes. I to national banks est, and when com per containing usu pleaded, simply say credit the amount paid by you on the and thereby escape Certainly no such c ed by it.

Something has b plaintiff with resp they admit to hav tions from those no from our view of th ed, the entire trans is tainted with usu

Our conclusion is be reversed, with d to enter up judge following basis:

December 29, 1893.....
Principal of overdraft ..
Net credit on bank acc ..
Credit by note of Octo ..
Principal of overdraft ..
Credit on account that ..

Total amount loaned..
Credit by proceeds of ..
25, 1898

All concur.

SMITH v. MUTUAL
(Supreme Court of A
INSURANCE—NONPA
FECT—PREMIUM F
ANCE—DEDUCTION
VALUE — COMPUT
SURRENDER VALU
CONDITIONAL COM
EXPERT TESTIMON

1. Rev. St. 1889, § insurance policy shall of two annual premium by computing the net the premiums became perience Table of M interest per annum, three-fourths of the n count of past premium en as a single premium Section 5859 provides apply if the policy sh an unconditional cas equal to the net sing insurance provided in policy which authoriz from the amount con the policy, indebtedne than for loans advance does not comply with more favorable to the ing the net value of t a 4½ per cent. basis.

2. A provision in a will, on surrender of "within three months value thereof, is not a tional cash surrender by section 5859 to provisions of section 5

3. A provision in a will apply premiums thereof to the compan

*Rehearing denied Ma

the purchase of a nonparticipating paid-up policy, is not a provision for the "unconditional commutation of the policy to nonforfeitable paid-up insurance," specified in Rev. St. 1889, § 5859, to exclude the policy from the provisions of section 5856.

4. Rev. St. 1889, § 5856, provides that no insurance policy shall be forfeited after payment of two annual premiums, but shall be commuted by computing the net value of the policy when the premiums became due, on the American Experience Table of Mortality, with $4\frac{1}{2}$ per cent. interest per annum, and, after deducting, from three-fourths of the net value, indebtedness on account of past premiums, the balance shall be taken as a single premium for temporary insurance. *Held* that, in computing the amount to be appropriated for temporary insurance, the company cannot deduct loans advanced to the insured, on the security of the policy, for purposes other than the payment of premiums, even though such loans and unpaid premiums exceed the full amount of the net value of the policy.

5. Testimony by an insurance expert that, in his opinion, all loans advanced by the company to a policy holder were on account of past premiums, cannot outweigh the established fact that part of the loans was cash advanced for other purposes.

Robinson, C. J., and Marshall and Fox, JJ., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; C. O. Tichenor, Special Judge.

Action by Mary F. Smith against the Mutual Benefit Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed.

The following is the opinion by VALLIANT, J., in Division No. 1:

This is a suit on a policy of life insurance issued by the defendant, which is a New Jersey corporation, on the life of Samuel I. Smith, for the benefit of his wife, the plaintiff, for \$10,000. Smith and wife were residents of this state. The application was made to an agent of defendant in St. Louis, and the policy issued there. It is therefore a Missouri contract. There is no dispute on that point. The policy was issued June 10, 1884. The premiums were to be paid semi-annually, and were so paid up to and including the one due December 10, 1896, which continued the policy in full force up to June 10, 1897, when default in payment of the premium was made. Samuel I. Smith, the assured, died July 1, 1898. Plaintiff claims that, by force of the statute (section 5856, Rev. St. 1889), the net value of the policy, applied, as in the statute required, to temporary insurance, carried it, for its full amount, to a date beyond that of the death of the assured; and that is unquestionably so, unless the facts relied on by defendant are sufficient to take the case out of the operation of the statute, or unless, in estimating the net value of the policy as called for by the statute, the defendant is entitled to deduct the whole amount of indebtedness owing by Smith to it. There is little, if any, dispute as to the facts, and the differences as to the law come down at last to the question of whether or not the defendant is entitled to deduct from the net value of the

policy, before investing it in extended temporary insurance, the cash loan made by it to Smith.

Defendant's position is that the nonforfeiture provision of the statute above mentioned does not apply to this case, for three reasons: First, that the policy contains an agreement for an unconditional cash surrender value greater than the net value called for in section 5856; second, that it contains an agreement for the unconditional commutation of the policy for nonforfeitable paid-up insurance of a larger value than that required by section 5857; third, that the laws of New Jersey, the home of defendant corporation, prescribe in such case a surrender value or paid-up or temporary insurance, and the policy sued on contains an agreement for such, in conformity to the laws of New Jersey. A reference to the several sections of our statutes on this subject is here necessary. Section 5856, Rev. St. 1889, provides that no life insurance policy shall, after the payment of two full annual premiums, be forfeited for the nonpayment of a further premium thereon, but shall be commuted as follows: "The net value of the policy where the premium becomes due and is not paid, shall be computed upon the American Experience Table of Mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium," etc. Section 5857 provides that, in the contingency referred to in the foregoing section the policy holder may, within 60 days, demand a paid-up policy for an amount that the net value, as above computed, would buy at the usual rates of the company. Section 5858 provides that, when the death of the insured occurs within the period of the extended insurance called for in section 5856 (no other condition of the original policy being broken, except the nonpayment of premium), the company shall pay the full amount that would have been due on the policy if no default in the payment of the premium had been made, "anything in the policy to the contrary notwithstanding." Section 5859 provides that the three preceding sections shall not apply "if the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore or for the unconditional commutation of the policy to non-forfeitable paid up insurance for which the net value shall be equal to that provided for in section 5857, or if the legal

holder of the policy shall within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof."

From the beginning, by agreement, the assured borrowed of defendant 30 per cent. of the premium each year, which loans bore 6 per cent. interest. The balance of the premium he paid in cash, and received at each payment a renewal receipt, which showed the amount of the premium loan to date. When the premium due December 10, 1895, was required, the assured applied to the company for a loan of the whole amount thereof. This application resulted in an agreement, of date January 28, 1895, between the assured and the beneficiary, on the one part, and the company, on the other, whereby the company was released from the nonforfeiture clause in the original policy, and in lieu thereof the parties agreed that certain other nonforfeiture provisions (which will be hereafter shown) should be incorporated in the policy. Thereupon the company loaned the assured the full amount of the premium due at the time, \$144.40, which carried the policy paid up to June 10, 1896. This transaction brought the amount of the assured's indebtedness for loans on account of past premiums up to \$915.10. Then, on May 8, 1896, the assured applied to the company for a loan of cash, and the company agreed to lend him \$672.10, out of which it would deduct interest on the previous loan up to December 10, 1896, interest on the increased loan to same date, and the premium due December 10, 1896, leaving \$485.14 to be delivered to the assured in cash, all of which was done. This raised the amount of the indebtedness of the assured to the company to \$1,587.20, which, up to the date of the failure to pay the premium, was by interest increased to \$1,634.92. This includes the \$485.14 cash loaned the assured. Now, if, in estimating the net value of the policy as required in section 5856, the defendant is entitled to deduct that \$485.14 and interest, and if that section of the statute governs the case, then the net value was sufficient to carry the policy, as extended temporary insurance, only to September 7, 1897; but if the statute governs, and if the defendant was not entitled to so deduct the cash loan, then the net value of the policy was sufficient to carry it, as extended temporary insurance, to a date beyond July 1, 1898, which was the date of the death of the assured. There is no necessity for arraying the figures here which are given by the actuaries and presented in the briefs of counsel, because, whether we adopt the calculation of the one or the other, the result is as above stated. Does section 5856 apply to this case? Defendant says it does not, because, first, the policy, as amended under the agreement of January, 1896, contains

a provision for an surrender value at least equal to the premium required by the policy, and that it contains a provision for a partial commutation of the policy for a value less than that calculated, and, third, that it was issued in New Jersey in respect of a nonparticipation, and commutation of the amended policy. The contention is as follows:

"When after two years the policy shall have been paid up, it shall cease or become void, and the payment of any premium shall be at the service by the American Insurance Company and interest at four per cent. provided there be no loan. The premium shall be applied by the company to the premium at the company in force at this date, and the purchase of nonparticipation shall be the full amount insured. Second, upon the written order of the owner of this policy, the company shall pay to the company a sum of money within six months from such date as the policy was issued to the purchase of a new policy payable at the option of the insured, to be payable if continuous of insurance aforesaid on the same conditions, except that the premiums, as those of the policy, preferred, the company shall pay, fully reduced three months, pay as its entire net reserve experience Mortality and one-half per cent. year charge equal to one per cent. of the premium insured by the policy.

"If there be any loan, the indebtedness shall be paid up to the surrender value, and the cash by the company; and the cash allowed by the company shall be the amount of the cash or paid-up insurance, and the amount to be applied to the purchase of such insurance being in the ratio of the cash surrender value.

"If death shall occur, the nonpayment of the term of extended insurance shall be deducted from the amount of the premium that would have been paid if it had continued to the amount of any loan at the time of surrender of the premium.

"The company will pay the cash surrender value of the policy in full, and the cash surrender value of the policy shall be paid by the company as collateral security.

From this it appears that the value of the policy is at least 4 per cent. basis, ins

basis, as our statute calls for, and in that respect is more favorable to the policy holder, yet it authorizes the company to deduct from the amount so computed all indebtedness of the assured to the company, which, if the plaintiff's interpretation of the statute is correct, is very much less favorable to the policy holder. Besides, the surrender value is payable only on condition that it be applied for within three months, and the policy then surrendered and canceled. That is not a provision for an unconditional cash surrender, as required in section 5859. *Cravens v. N. Y. Life Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628. A like condition is attached to the right of the policy holder to a paid-up commuted policy. The requirement of a surrender of the original on the issuance of the new commuted policy would not be regarded as such a condition as would prevent the case falling within the provision of section 5859, because the surrender of the old would be the natural result of the issuance of the new policy; but the limitation to three months is a serious condition, and does take the case out of that section.

Defendant's third ground for holding that the Missouri statute does not apply is based on the amendment of section 5859 by the act of 1895 (Acts 1895, p. 197). That amendment, in so far as it is claimed to affect this case, is, "If the policy shall have been issued by any company authorized to do business in this state, and organized under the laws of another state of the United States, which prescribes a surrender value or paid up or temporary insurance, in case of default of payment of premiums, and shall contain an agreement for such surrender value, temporary or paid up insurance as prescribed by such other state as a part of said policy," then the Missouri statute is not to apply. Plaintiff contends that this amendment would not affect this case, even if the facts brought it within its terms, because the policy was issued in 1884, and could not be affected by a statute passed after that date, whilst defendant insists that, as the amendment was passed in 1895, it was in force when the change of the policy was made, in 1896, and governs the case. The question of the application of that amendment to this case is really not before us, because the counsel for defendant, in their brief, virtually concede that the policy, as amended, does not conform to the New Jersey law on this point, but they say, "We make the point, as it presents an interesting question, upon which other cases may turn." We are satisfied that the Missouri statute (section 5856, Rev. St. 1889) governs in this case, and this brings us to the consideration of the point on which the defendant seems chiefly to rely, and on which the case turned in the mind of the learned trial judge; that is, as defendant contends, that, in estimating the net value of the policy for extended temporary insur-

ance, section 5856 authorizes the insurance company to deduct not only the amount of loans made to the assured for payment or part payment of premiums to keep the policy alive, but also cash loaned him to be otherwise used as he might see fit. The argument is made for defendant that, unless the company be allowed to so deduct the amount, it would have no security for the loan. The defendant has the policy transferred to it as collateral security for the loan, and in this instance, at least, the policy is ample security, because the defendant will be allowed to deduct the whole amount of the debt due it from the amount due the plaintiff on the policy. Of course, if the assured should live beyond the period of the temporary insurance, the policy would become extinct, and the defendant would have only the personal liability of the estate of the assured to depend on. But as the assured might die within the extended period of the policy, we cannot say that there was no security at all. Such policies doubtless have some commercial value, available in the market as collateral securities—varying, of course, according to the circumstances of the case. But we have nothing to do with that. Such considerations can have no influence in construing this statute. If the defendant advanced the \$485.14 to the assured, believing that it would have the right to deduct it from the net value of the policy in case of nonpayment of premium, before applying it to the payment of extended temporary insurance, whether because it so interpreted our statute, or because it considered that the terms of the policy, as amended, superseded the provisions of the statute, it did so under a mistaken view of the law. Our law deems the subject of life insurance one that requires especial protection, and in this particular it has provided that the policy holder shall have the benefit of the extended temporary insurance specified in section 5856, "anything in the policy to the contrary notwithstanding." Therefore, though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply, still they would apply. And if the parties could not in the beginning place themselves outside the policy of the law, they could not by an amendment to the contract do so. There is a great deal of technical learning on the subject of life insurance, and our law-makers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality of that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them cannot avoid. We hold, therefore, that the provisions of our statute could no more have been avoided by the amendment to the policy in 1896 than by the original

policy. And we hold, also, that the statute declaring that, in ascertaining the net value of the policy, it "shall be computed upon the American Experience Table of Mortality with four and a half per cent. interest per annum, and after deducting from three fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy," it does not mean that indebtedness incurred by the assured for money borrowed from the company may also be deducted. The statute means only what it says—that indebtedness on account of past premium payments shall be deducted.

It is insisted by the learned counsel for the defendant that this plaintiff and her husband in his lifetime have already drawn from the company the full amount of the cash surrender value of the policy, and more, and that it would be unjust to allow her now to have the benefit of it applied as a premium for temporary insurance. True, the plaintiff's husband did obtain that amount of money from the company, but not after default in the payment of the premium, not after the provisions of the statute under discussion took effect, not as in payment to him of the cash surrender value of the policy, but he obtained it as a loan, for which he executed his note and gave collateral security, and for which his estate is liable to the defendant, and for which, also, the defendant holds the policy in suit as security. This statute does not undertake to regulate all business transactions that may occur between the life insurance company and a policy holder. It only puts its hand into the contract of life insurance. It deals only with the subject of insurance and premium, and, if the parties choose to assume toward each the relation of borrower and lender of money, other than to pay the premium, this statute has no concern with that relation.

One of the expert witnesses for the defendant stated that, in his opinion, all the indebtedness was on account of past premiums, but he did not make his theory clear. The opinion cannot outweigh the fact that part of it was for cash loaned for another purpose.

Again, it is insisted that the defendant had the right to deduct the whole indebtedness out of the net value of the policy before applying it to the payment of temporary insurance, because the assured and the plaintiff had assigned the policy to defendant as collateral security for the loan. The borrowing of the money for a purpose other than the payment of a premium, and the assignment of the policy as collateral security for the loan, put the parties, as to that item, in a new relation to each other. By virtue

of the policy and the premium, the parties stood in the relation of insurer and insured, and the law of insurance governed them in that relation; but when the assured borrowed money of the insurer, and assigned the policy as collateral security, the law governing their rights in that respect is the same as if he had borrowed the money from a bank, and given it the same collateral. In such case the bank would have been entitled to a lien on the proceeds of the policy, but not to appropriate to itself the premium which was to keep the policy alive.

At the close of the transaction of May 8, 1896, the assured was indebted to the defendant in the sum of \$1,587.20. That sum included interest up to December 10, 1896. On July 1, 1898, when the assured died, that sum had increased by interest at 6 per cent. to \$1,735.59, which amount deducted from \$10,000, the amount due plaintiff on the policy, leaves \$8,264.41, which sum, with interest at 6 per cent. per annum from July 1, 1898, is the amount, with costs, for which plaintiff should have recovered judgment in the circuit court. As we have all the facts before us, justice will be best served by entering judgment here, without remanding the cause.

The judgment of the circuit court is reversed, and judgment for the plaintiff is entered here for \$8,264.41, with interest at 6 per cent. per annum from July 1, 1898, to date, and costs in both courts. All concur.

James H. Austin, for plaintiff in error. J. Hugo Grimm, Dodd & Dodd, Charlton T. Lewis, Edward Lyman Short, James L. Blair, and F. N. Judson, for defendant in error.

PER CURIAM. Upon a hearing of this cause by the court in banc, the foregoing opinion by VALLIANT, J., in Division No. 1, is adopted as the opinion of the court. BRACE, GANTT, and BURGESS, JJ., concur. ROBINSON, C. J., and MARSHALL and FOX, JJ., dissent.

MARSHALL, J. (dissenting). I am unable to agree with the majority opinion in this case, and because a simple dissent will not adequately express my opinion, and because of the grave consequences that will necessarily result from the rules of law as enunciated in the majority opinion, I herewith, as briefly as possible, state my views:

The decision in this case depends upon the proper construction to be placed upon section 5856, Rev. St. 1889 (being section 7897, Rev. St. 1899). That section is as follows: "Sec. 7897. No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by

reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the Actuaries' or Combined Experience Table of Mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at the date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment. If the insured shall then be alive."

In this case the assured did not pay all of the premiums in cash, but 30 per cent. thereof was evidenced by a note given to the company, and the sum of such notes was due on June 10, 1896. The assured also owed the company at that time other sums of money that he had borrowed from the company, and to secure which he had pledged the policy to the company. On June 10, 1896, the net value of the policy amounted to \$1,769.30. The assured then owed the company, on account of the 30 per cent. of premiums paid by notes as aforesaid, and on account of money loaned on the security of the policy, the sum of \$915.10. He was unable to pay the premium that fell due June 10, 1896, and thereupon he applied to the company for a loan of \$672.10, out of which the premium due June 10th was to be deducted. This was accorded by the company. This brought his indebtedness to the company, with interest thereon, up to \$1,634.92. The company deducted this sum from the three-fourths of the premiums, with interest thereon, and a dividend due on that day added, and applied the balance to the purchase of extended insurance, which balance was sufficient to carry the policy only to September 7, 1897. If only the 30 per cent. premiums that were evidenced by the notes had been deducted from the said net value of the policy, the balance would have

carried the policy beyond July 1, 1898, the day on which the assured died.

When the arrangement of June 10, 1896, was perfected, the assured and his wife, the plaintiff herein, assigned the policy to the company as security. That assignment was as follows:

"This is to certify that we have this day borrowed from the Mutual Benefit Life Insurance Company the sum of fifteen hundred eighty-seven and $\frac{20}{100}$ dollars, to secure the payment of which we hereby assign, transfer and set over to the said company policy No. 119,009, issued by said company, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise or become due by virtue thereof; to have and to hold unto the said company, its successors and assigns forever, as collateral security for the payment of said loan, with interest thereon from the date hereof at the rate of six per cent. per annum, payable as the premiums on said policy become due.

"It is understood and agreed that if the interest shall not be paid when due, either in cash or by dividend, it shall be added to the principal of the loan, and that if, owing to the nonpayment of interest, the principal of the loan shall ever equal or exceed the then cash surrender value of the policy, the policy shall thereupon become null, void, and be surrendered to the company, in consideration of the cancellation of the loan.

"In witness whereof, we have hereunto set our hands and seals, this 8th day of May, eighteen hundred and ninety-six.

"[Signed] Sam I. Smith.

"[Signed] Mary F. Smith."

The crucial question, therefore, is whether the company was entitled to deduct from three-fourths of the net value of the policy the total sum due it by the assured for notes given for the thirty per cent. of premiums paid in notes, and for loans made to the assured on the security of the policy, or whether said section of the statute prohibits anything from being deducted from such three-fourths of such net value, except "any notes or other indebtedness to the company, given on account of past premium payments on said policy." Or, in other words, whether the statute was intended to prohibit the assured from borrowing money on the policy, and agreeing that, if the premiums were not paid, the loan should be deducted from the three-fourths of the said net value, in addition to the indebtedness for premiums, before the balance should be applied to the purchase of extended insurance.

The majority opinion concedes that the assured has a right to borrow money, and to pledge or assign the policy as security for the loan; but it denies that, under statute, the assured could legally agree that the amount of such loan should be deducted from the three-fourths of the net value of the policy aforesaid. And right here is where

It is a mathematical axiom that the whole embraces all its parts, and all the incidents thereto belonging. So the policy embraces all the parts, and all the incidents, rights, and benefits belonging thereto. Hence it is wholly illogical to say the policy can be pledged or assigned, but that the incident to the policy—the three-fourths of the net value at the time of default in the payment of a premium—cannot be assigned. Either it ought to be held that a policy could not be pledged or assigned at all, or else it ought to be held that anything of value belonging to the policy—whether it be the whole, or only a component part thereof—can be pledged or assigned. There can be no middle ground. It will not do to say that the statute permits the one, but prohibits the other. There is nothing in the letter, context, spirit and meaning, or object and purpose, of the statute, that affords support for such a construction of that section of the statute. The words of the statute contain no such prohibition against the pledge of the policy, or any of its incidents or parts, to secure a loan, nor against the assured agreeing that the total amount of the loans shall be deducted from the net value and only the balance remaining be applied to the purchase of extended insurance. The object and purpose that caused the enactment of this statute was to cure the evil that theretofore prevailed, of an insurance company declaring a policy forfeited if any premium was not paid promptly, and thereby getting the benefit of all premiums that had been previously paid. The lawbooks are full of cases where insurance companies had been guilty of such practices. It had become a matter of common information that, as long as the assured was in good health, the company would take the premium, even if it was not promptly paid, but if his health failed, and there appeared a probability of a loss, the agents of the company were instructed to "watch them like a hawk" (*James v. Ins. Co.*, 148 Mo., loc. cit. 9, 49 S. W. 978), and, if the premium was not promptly paid, to forfeit the policy. It is also a matter of common knowledge that the premiums charged are average premiums; that is, the amount charged when the assured is young, and when the policy is first taken out, is in excess of the risk run, while the premium paid when the assured grows old is not as much as the risk would require if the policy was taken out at that age. Therefore, by as much as the excess charged when the policy is young exceeds the risk run (that is, the cost of carrying the risk), there is an equitable interest properly belonging to the assured in such excess. (Since writing this opinion, my attention has been called to the case of *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, which fully sustains what is here said.) Recognizing this, and in order to cut out the evils of

interest in such excess, our lawmakers have declared that any insurance company that desires to do business in this state shall do so on the terms prescribed; that is, that after the payment of three annual premiums the policy shall not be forfeitable, but if the assured fails to pay a premium the net value of the policy shall be ascertained in the manner prescribed by the section quoted, and that three-fourths thereof shall be ascertained, and from that sum anything the assured owes the company for past premiums shall be deducted, and the balance shall be used to purchase extended insurance. Thus the Legislature annihilated the evil, and created a trust estate in the premiums paid in favor of the assured. And this law was held valid by the Supreme Court of the United States. *Equitable Life Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497. This was absolutely all the lawmakers intended to do when they enacted this law. It is perfectly plain that the Legislature never intended to prohibit the assured from selling, pledging, or assigning either the whole of his policy, or his equitable interest in such net value of the policy. That this is true is conclusively shown by the following considerations: Prior to the adoption of this statute there was no such thing known as an assured being able to borrow money upon the security of a policy on his life. Creditors often took life policies as security for past-due debts, knowing they had to keep up the premiums, if the assured did not do so, and to wait for his death for their money. But the assured could not borrow money on his policy. This law gave an actual, cash, ascertainable value to the policy, which it did not theretofore possess. It made it a thing of value in the market. It enabled the assured to borrow money upon the policy as security. It offered substantial and safe security to the company or person lending the money, which neither the assured nor any one else could take away. No failure to pay a premium could take this security away, for after three premiums had been paid the policy was nonforfeitable. But what was the value thus given to the policy? Manifestly, it was not the amount written in the face of the policy. The assured could not borrow that amount any more after this law was passed than he could have done before. It was the net value—the surrender value. It was the sum that could be obtained and applied to the payment of the money borrowed, from the equitable interest in the premiums paid. It was, under our statute, three-fourths of the net value, after deducting any sum due for unpaid premiums. This was the thing of value that the lender had in his reach whenever the assured failed to keep the premiums paid up. If this sum be not available to pay such loans, at such times—if the balance of such net value, after

deducting what is due for unpaid premiums, must be applied, as the majority opinion holds is the law, to the purchase of extended insurance, and the extended policy only is security for the loan—then it will be impossible for any assured to borrow any money on his policy; and in this way a thing of commercial value to the assured, that has tided many a man over financial shoals and saved him from bankruptcy, will be struck down and utterly destroyed, and the assured will be the only loser. That the Legislature never intended such a thing seems to my mind absolutely clear. This right—this thing of value—was unknown when this act was passed. Therefore the Legislature could not have intended to prohibit a practice—to cut off a right—that they never heard of, and that at that time had no existence. I concede that in creating this new thing of value the lawmakers had a right to throw around it any restriction they saw fit, even to the extent of saying, if they chose, exactly how it should be invested, and of prohibiting even the insured from using it or enjoying it in any manner contrary to the statute which created it. But I do not think the Legislature ever intended, in passing this statute, to do anything more than to preserve this portion of the premiums to the insured, and did not intend to prohibit the insured from making any other kind of a contract for his own benefit with reference thereto, except such a contract as would waive those benefits and turn them over to the company.

In construing this section of our statute (as also sections 5857, 5858, and 5859, which relate to the same subject), the Supreme Court of the United States, speaking through Mr. Justice Gray, in *Equitable Life Society v. Clements*, 140 U. S., loc. cit. 231, 11 Sup. Ct. 822, 35 L. Ed. 497, said: "The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory, only, or subject to be set aside by the company with the consent of the assured, but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in section 5983, Rev. St. 1879, 'no policy of insurance' issued by any life insurance company authorized to do business in this state 'shall, after the payment of two full annual premiums, be forfeited or become void, by reason of the non-payment of premium thereon; but it shall be subject to the following rules of commutation'; and, in section 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the con-

trary notwithstanding.' The construction is put beyond doubt by section 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy. Of the cases so specified, the only ones in which the terms of the policy are permitted to differ from the plan of the statute are the first and second, which allow the policy to stipulate for the holder's receiving the full benefit, either in cash or by a new paid-up policy, of the three-fourths of the net value, as determined by sections 5983 and 5984. The other two cases specified do not contemplate or authorize any provision in the contract itself inconsistent with the statute, but only permit the holder to surrender the policy, either in lieu of a new policy, or for a consideration adequate, in his judgment. In defining each of these two cases, the statute, while allowing the holder to make a new bargain with the company at the time of surrendering the policy, and upon such terms as, on the facts then appearing, are satisfactory to him, yet, significantly, and, it must be presumed, designedly, contains nothing having the least tendency to show an intention on the part of the Legislature that the company might require the assured to agree in advance that he would at any future time surrender the policy, or lose the benefit thereof, upon any terms but those prescribed in the statute. It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state, or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

This statute was intended as a benefit to the assured. It was not intended to prohibit the assured from making any contract he chose for his own benefit, as to the net value so preserved to him. It was not even intended to absolutely command that such net value, after the amount due for past premiums is deducted, should be used solely for the purchase of extended insurance. For, if this had been the intention of the law, the lawmakers would never have enacted sections 5857 and 5859. Those sections clearly confer upon the assured a right to use this net value in some other manner than for the purchase of extended insurance. Thus, instead of using such net value to purchase extended insurance for the sum written in the policy, for such a time as that net value would carry a policy for such a sum, section 5857 allows the insured to demand that such net value shall be used to buy a paid-up

further provides: "The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided, hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5857, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration, adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable." From which it clearly appears that, under the law, after two (now three) annual premiums have been paid, the policy shall not be forfeited, but that the company shall employ three-fourths of the net value of the policy, after deducting any sum due for unpaid premiums, to the purchase of extended insurance, without the assured being required to do or say anything. But the assured may have other arrangements made for his benefit; that is, under section 5857, he may demand a paid-up policy in such sum as that much money will buy, or, under section 5859, he may, in the policy, provide that, instead of such extended insurance or such paid-up policy, he shall be entitled to such net value in cash, or he may provide for the surrender of such policy and the issuance of a new policy, or he may surrender the policy to the company for a consideration adequate in his judgment. And this right last mentioned is not required to be reserved in the policy. It is reserved to him by the law. It is a recognition of the right of the assured to deal with this fund as he sees fit. It cannot, therefore, be properly said that section 5856 absolutely requires the net value to be invested in extended insurance, nor that it prohibits the assured from dealing with it as specified in sections 5857 and 5859. It would be very hurtful to the insured to hold that section 5856 only permitted the net value to be used to buy extended insurance. For, if this was the law, the company could not thereafter be required to accept any other premiums on the policy, and the policy would cease when the extended term expired. In other words, it amounts to the purchase of that much insurance for that length of time. If the assured died before the expiration of the extended insurance, of course, his representative or the named beneficiary would get the amount of the policy. But if the assured did not die during the period of extended insurance, the policy would cease with the expiration of the extended period, and then the lately insured person would have to take out

tion, he could get no insurance. In addition, no man would lend a dime on a policy of insurance, if that was the law, because all the insured would have to do, to cut off the security of the lender, would be to stop paying premiums, require the company to use the net value to purchase extended insurance, and then, if he lived beyond the extended period, the policy would cease, and the security be lost. Such a rule would not make it certain that the lender would get his money, even at the death of the insured, unless he died within a certain time, which would be before the end of his life expectancy.

But it is said that these laws were not made for the benefit of money lenders. That is true. They were made for the benefit of the assured. The right to borrow money on the policy is for the benefit of the assured. Without this law the company would lend its money to others who had other security to offer, but without this law, construed as I construe it, the assured could borrow no money on the policy.

It is said, however, that, if the insured is permitted to borrow money on the policy, the lender could come in at any time, surrender the policy, and collect the net value of the policy in cash, and thus cut out the very life of the policy. This is a total misapprehension of the law. The assured could always prevent such a thing from happening by keeping the premiums paid up. As long as the premiums were kept paid up, the company could not and would not accept a surrender of the policy, and pay the net value in cash. But it is said that, by allowing the insured to borrow money on the policy, the benefit of extended insurance or a paid-up policy is taken away from the insured. Be it so. If such is the result, it is a result that can only be brought about by the act and contract of the insured himself; and this law was intended to protect him against the company, not against himself.

Moreover, even if all that is thus said against allowing the insured to borrow money on the policy be true, it does not cover the case. For section 5859 expressly permits the insured, at any time within 60 days after he has made default in payment of a premium, to surrender the policy for any consideration he deems adequate. This right exists by virtue of the law, and, whether the policy contains a reference to it or not, it exists, and cannot be taken away from the insured by any one. It is therefore a thing of value. It is property. If it is something the insured can do for himself, it is something he can authorize an agent to do for him. If this is true, it is wholly immaterial at what time he gives the power to his agent—whether before or after the failure to pay the premium. If he may delegate this power

he may do by an assignment of the policy, a pledge of the policy, or an express power of attorney to collect the money, and an express direction how the money shall be applied. It follows inexorably that the law-makers never intended to prohibit an insured from borrowing money on a policy, nor did they absolutely require the net value of the policy to be used to buy extended insurance, but they directly gave the assured the right, instead of taking extended insurance for a limited time, to demand a paid-up policy for such sum as such net value would buy, or, instead of any such arrangement, it gave the assured the right to contract in the policy that he should be entitled to take the net value in cash, and also, without its being so nominated in the policy, it gave him a right to surrender the policy to the company for a consideration deemed adequate by him. And all these rights which he might exercise he had a right to authorize another to exercise for him.

For these hastily thrown together reasons, I am constrained, very reluctantly, to dissent in this case.

ROBINSON, C. J., and FOX, J., concur in the within.

SOUTH HIGHLAND LAND & IMPROVEMENT CO. v. KANSAS CITY et al.

(Supreme Court of Missouri. March 4, 1903.)

MUNICIPAL CORPORATION — ASSESSMENTS — SEWERS—DISTRICTS—CHARTER PROVISIONS—CONSTRUCTION.

1. An ordinance creating a joint sewer district out of 105 districts, in order to complete the drainage system of such districts, several of which had formerly been combined into smaller joint districts and the property assessed for sewers, does not violate charter provisions forbidding the changing of subdivisions of a district or joint district after a sewer shall have been constructed therein.

2. A sewer exclusively reserved for the drainage of an area embracing one-fourth of a city included within a natural drainage area is a joint district, not a public, sewer, and the cost thereof can be assessed on the property drained, under a city charter providing for the construction of joint district sewers, to be paid by special tax bills against property within the districts.

3. The fact that the common council of a city had by ordinance designated a sewer as public, and paid for the same out of the general funds of the city and the proceeds of the sale of bonds, does not make the sewer a public one, when it was in fact confined to the drainage of particular sewer districts, and a subsequent ordinance assessing the cost of completion of the sewer on property within a joint sewer district created by such ordinance is not invalid.

4. The fact that an outlet to a proposed sewer is obstructed by filling in the river into which it drains by a company claiming and in possession of such reclaimed land does not invalidate an ordinance ordering the construction of the sewer and creating a joint sewer

in Lane. Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Suit by the South Highland Land & Improvement Company against Kansas City and others. From a judgment for defendants. Plaintiff appeals. Affirmed.

This is a suit in equity to enjoin the defendant city and its officers from letting a contract to construct a joint district sewer. The cause was submitted to the court upon an agreed statement of facts in substance as follows:

The common council of the city passed an ordinance (No. 16,253), entitled "An ordinance to establish a joint sewer district composed of the following sewer districts: [specifying 105 in number], and to construct a joint district sewer therein." The ordinance describes the district by metes and bounds. It embraces 4,200 acres, which is shown to be one-fourth of the area of the city. The whole 4,200 acres are embraced in the same natural drainage area of the valley and water course in which the proposed joint district sewer is to be built. In many of the 105 sewer districts named sewers have been constructed and paid for through special tax bills, and 35 of these are embraced in joint sewer districts composed of two or more districts, all of which are to drain into the joint district sewer proposed to be constructed under the ordinance in question. The outlet of the proposed sewer is the outlet of what is designated in the record as the "Santa Fé Street Sewer," whose outlet is, or was when constructed, the Missouri river; but since its construction the river at that point has "been partially filled by a land reclamation company for some considerable distance beyond the mouth of the sewer, and such filled land is claimed by and in possession of such company." The Santa Fé street sewer has been emptying into the river at the foot of that street for many years, and the city has never given its consent to have the river filled in at that point. In 1889 an ordinance was passed submitting to the vote of the people a proposition to issue city bonds to the amount of \$500,000, three-fifths of the proceeds of which were to be used in building a city hall, and the balance in "the construction of a public sewer in said city along or near O. K. creek." The proposition carried, the bonds were issued, and two-fifths of the proceeds were used in 1893 in the construction of such sewer for a considerable distance; but it was left unfinished for the rest of the route, and the purpose of the ordinance now in question is to complete that sewer. Since 1893, when that portion of the sewer was built with the proceeds of the bonds mentioned, there have been constructed and paid for out of the general city revenue two other sections of this sewer under ordinances of the city designating it as a public sewer. The sewer, as far

will drain territory only within those limits.

The charter of the city (art. 9) provides for the construction of a sewer system composed of public, district, joint district, and private sewers.

"Sec. 9. Public sewers shall be established and constructed at such times, to such extent, of such dimensions and materials, as may be approved by the board of public works, and under such regulations as may be provided by ordinance and there may be extensions or branches of sewers already constructed or to be constructed, or entirely new throughout, as may be deemed expedient. Public sewers shall be paid for out of the general fund of the city: provided," etc.

"Sec. 10. District sewers shall be constructed within the limits of districts heretofore or hereafter established by ordinance, as each case may be," etc. That section also provides that district sewers shall be paid for in special tax bills against the land in the district.

"Sec. 11. Joint district sewers may be constructed by the city as follows: Whenever the city may deem it necessary that a sewer should be constructed in any part of the city containing two or more sewer districts, it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be constructed therein in a like manner in all respects as is provided in section 10 of this article in cases of district sewers, except in cases of joint district sewers the city may, if deemed proper, provide in the ordinance creating such joint district sewer, that the city shall pay a certain sum to be specified in said ordinance towards the payment of the cost of such joint district sewer." That section further provides that the cost of constructing the joint district sewer, except the sum, if any, specified in the ordinance to be paid by the city, is to be paid in special tax bills against property in the joint district. It also provides that the action of the common council creating the joint sewer district shall be conclusive, and no special tax bills shall be held invalid or be affected on account of the included drainage area thereof, or the size, character, or purpose of such sewer, provided, it shall not include any district not contained in its natural drainage area or water course.

The estimated cost of the proposed joint district sewer is \$100,000. Plaintiff owns about 100 acres of the 4,200 acres embraced in the proposed joint district. The city had advertised for bids, and was about to enter into a contract for the construction of the joint district sewer, when this suit was begun, and a temporary injunction was issued as prayed. It was conceded that, if the city had no right to have this sewer constructed and paid for in special tax bills, the construction of the sewer and the issuance of the

would be entitled to the relief prayed.

On the agreed statement the court rendered judgment for defendants, dissolving the temporary injunction and dismissing plaintiff's bill. Plaintiff filed a motion for new trial, which was overruled, whereupon this appeal was taken.

Cook & Gossett, for appellant. R. J. Ingraham and Clarence S. Palmer, for respondents.

VALLIANT, J. (after stating the facts). The authority of the city to make sewer districts and construct sewers therein, the cost to be paid in special tax bills against the land in the respective districts, is not questioned; and the authority to group any number of such sewer districts into a joint sewer district and to construct a joint district sewer therein, the cost to be paid in special tax bills against the property in such joint district, is also undisputed. But it is contended that when such authority has once been exercised, to the extent of grouping two or three districts into a joint district, and a joint district sewer is therein constructed, and the cost thereof levied on the land in that joint district, the authority of the city is exhausted. If that is the law, then the authority is very inadequate to meet the necessities of a growing city. In such case, if there was in the outskirts of the city a thinly settled area of considerable size having a common natural drainage, if the city should construct a system of district and joint district sewers sufficient only to meet the necessities of the time, it would thereby render itself impotent to provide for the necessities of that portion of its domain when it should afterwards become densely inhabited; and in such case the city must either anticipate the development in that direction, and construct a sewer system equal to all possible future demands, or else make no sewers at all until the development has taken place.

The charter does not limit the city government in the matter of the number of sewer districts it may embrace in a joint sewer district, provided they are all in one natural drainage area. That is left as a matter of policy to the law-making department of the city government, and its reasonable discretion in that respect is not the subject of review by the courts. We do not understand appellant to question that the city might lawfully have embraced all these 105 districts in one joint district, if it had not previously united some of them in smaller joint districts. If the city had the power in the first place to embrace them all in one joint district, it had the power to prescribe the plan or system by which they could all be so united; and if, in so doing, its engineer had deemed it best to first group a number of districts in-

dictate to the city that it should plan the system differently. As the cost of district sewers may be taxed against the land in the district, because that land alone is drained through such sewer, so may the cost of the small joint district sewer be taxed against the land embraced in its area, because the land alone is drained by it; and the cost of the main joint district sewer, for the same reason, may be taxed against the land which is drained by it. The lands in this proposed joint sewer district have never been taxed to pay the cost of a sewer that performs the function that this sewer is designed to perform, nor are the small joint district sewers that have already been paid for to be abandoned or superseded by the one in question; but they are to drain into it, and will be thereby afforded an outlet without which they would not accomplish the purpose for which they were designed. The duty of the city in respect of its sewers is not performed until it has given them an outlet, and as long as they retain the character of either district or joint district sewers, as distinguished from public sewers, their cost may be taxed against the lands exclusively drained by them.

Section 10, art. 9, of the city charter, in reference to district sewers, above quoted, also declares that "no such district shall be subdivided or changed after a district sewer shall have been constructed therein"; and section 11, in reference to joint district sewers, says they shall be constructed "in like manner in all respects as is provided in section 10 of this article in cases of district sewers." From this it is argued that, a joint district sewer once constructed, there can be no change, and the land, once taxed for a district and joint district sewer, cannot be taxed in any other district or joint district. Those provisions of the charter mean that land that has once been taxed to build a district or joint district sewer cannot be taken out of such district or joint district and deprived of the use of the same, nor can it be placed in another similar district or joint district and subjected a second time to a like burden; nor can land which was not in the district or joint district when the sewers were built be added to the district or joint district and have a benefit for which it paid nothing. But they do not mean that land which has been taxed for the sewer system, as far as the system has gone, may not be taxed for the extension of the system, when extension, in the opinion of the law-making department of the city, is necessary. In all that we have said up to this time, we have assumed that this is a joint district sewer which the city is intending to build; and our conclusion is that, if it is a joint district sewer, the city is acting within its charter powers, and the plaintiff has no cause to complain.

the ordinance a joint district sewer, and that as a public sewer it should be paid for out of the city treasury, and not in special tax bills. If it is in fact a public sewer, the common council could not, by merely giving it a name, change the fact; and no more could the common council, if it is in fact a joint district sewer, make it a public sewer by calling it by that name. In *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114, a similar clause in the charter of the city of St. Louis was under discussion, and it was therein said: "And the difference between a public and a district sewer is not a mere difference in name, but is a physical fact, so that the municipal assembly cannot, by ordinance or otherwise, authorize the construction of what is in fact a public sewer, and, by merely denominating it a district sewer, tax the cost of its construction on the lots in a district named." At that time the charter of St. Louis called for only three classes of sewers, public, district, and private, providing that public sewers were to be paid out of the city treasury, district sewers by special tax on the land in the district, and private sewers by the individuals building them. There was then in that charter no definitions prescribed of the words "public" and "district," and they were left to their natural meanings. But since then the charter of that city has been amended, as was pointed out in *Prior v. Construction Co.* (Mo. Sup.) 71 S. W. 205. The amendment adds a new class, to wit, joint district sewers, to those before provided for, and very clearly defines the meanings of the words "public," "district," and "joint district," as applied to sewers thereafter constructed in that city. So that what was said in the quotation from *Hill v. Swingley*, supra, would not apply to sewers in St. Louis constructed after the charter amendments discussed in *Prior v. Construction Co.*, supra.

When lawmakers use a word, they have a right to say, in the same act, what they mean by it; and in construing the act that definition is to be taken as the correct meaning as there used, although it may be a purely arbitrary definition. But, of course, definitions in the charter of the city of St. Louis cannot aid us in finding out the meaning of a word in the charter of Kansas City. The terms "public," "district," and "joint district," applied to sewers, are used in the charter of Kansas City without definition, and are therefore to be construed in their natural or common meaning; there being no suggestion that there is any different known technical meaning. The learned counsel for appellant in their brief say: "As the charter does not define what is a public sewer, the court must do so, and determine whether this is such a sewer or not. It serves one-fourth in area of the entire city. Its need is imperative for the public health. It is over a mile

together necessarily constitute one great public sewer."

As the counsel well say, the court must decide whether or not this is a public sewer. What does the word "public," as applied to a sewer, mean? We know what is meant by the term "public road." Bouvier defines the word "public" to mean "the whole body politic, or all the citizens of the state; the inhabitants of a particular place." The Century Dictionary gives it: "Open to all the people; shared in or to be shared or participated in or enjoyed by people at large; not limited or restricted to any particular class of the community." We can find no fault with those definitions, and, bearing them in mind, we have no difficulty in understanding what the framers of the Kansas City charter meant by the term "public sewer." It is a sewer open and available to the whole city, and not limited to any particular part. In a sense, a sewer that drains one-fourth of a large city is of benefit to the whole city. But that is true in the same sense of a small district sewer, or even of a private sewer; for if a small district, or even an inhabited private house, becomes in an unsanitary condition, its injurious influence is extended beyond its own limits. If a sewer is available as a means of drainage to an area less than the whole city, especially if it is exclusively reserved for the drainage of an area less than the whole, even if it were physically possible to drain the whole into it, it is not a public sewer; and this is so regardless of its dimensions. We therefore hold that the contemplated sewer is a joint district, and not a public, sewer.

It is argued, however, that the common council has in its ordinance, under which the part of the contemplated sewer that was built in 1893 with proceeds of the bonds above mentioned was built, denominated it a "public sewer," as it so did in two other ordinances, under which two other parts of it were subsequently built and paid for out of the general treasury of the city. But if the common council cannot convert a public sewer into a joint district sewer by giving it a name, neither can it convert a joint district sewer into a public sewer by giving it a name; and if the common council, under a misapprehension of the facts, has appropriated money out of the city treasury to pay for work that was chargeable alone on property in a district, the owners of property in that district have no cause to complain.

It is further urged that the outlet of this proposed sewer is closed or impaired by filling in the river at that point by a company that has taken possession of it. We are not prepared to say that, if that outlet was at the foot of Santa Fé street, the company referred to had the right to take possession and make accretions at that point that would result in

ample power under its charter to open a way to the river. Article 7, Kansas City Charter.

The circuit court took the correct view of the law as applicable to the agreed facts of the case, and its judgment is therefore affirmed. All concur.

SINBERG v. FALK CO.

(Court of Appeals at Kansas City, Mo. March 2, 1903.)

INJURY TO EMPLOYÉ—ASSUMPTION OF RISK—SAFE PLACE TO WORK.

1. Whether an employé has assumed the risk, and so is barred from recovery, is a question for the jury; the evidence being conflicting as to whether the work requiring the cover to be off the hole into which he stepped had been completed, and it was time for covering it.

2. An employer is only required to provide a place as reasonably safe as the proper carrying on of the work will reasonably permit.

Appeal from Circuit Court, Jackson County; J. V. C. Karnes, Special Judge.

Action by Clem Sinberg against the Falk Company. Judgment for plaintiff. Defendant appeals. Reversed.

Harkless, O'Grady & Crysler, for appellant. Ward & Hadley and Kimbrell & Kimbrell, for respondent.

BROADDUS, J. The plaintiff seeks to recover damages for personal injuries alleged to have been received in consequence of defendant's negligence while in its employ. The answer was a general denial, that plaintiff's injuries were caused by his own negligence, and that he assumed the risk. The evidence in the case discloses the following state of facts: The Falk Company, a corporation of Milwaukee, Wis., the appellant herein, was on the 9th day of May, 1900, and prior thereto, engaged in the reconstruction of the double tracks of the Metropolitan Street Railway Company at the intersection of Eighth street and Grand avenue, Kansas City, Mo.; Eighth street extending east and west, and Grand avenue north and south. Said street railway was operated by means of an underground cable, and at the points where said tracks turn, "or curve," around from Eighth street into Grand avenue, the cable is held in place by pulleys of iron placed underneath the street surface of the tracks between the rails. This series of iron pulleys extends around the curves of each track for a distance of about 40 feet, and they revolve very rapidly when the cable is in motion. In the center of the tracks is an iron slot rail, through which the grip from the car extends down to the underground cable. The pulleys are covered by a series of metal plates about 16

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 173.

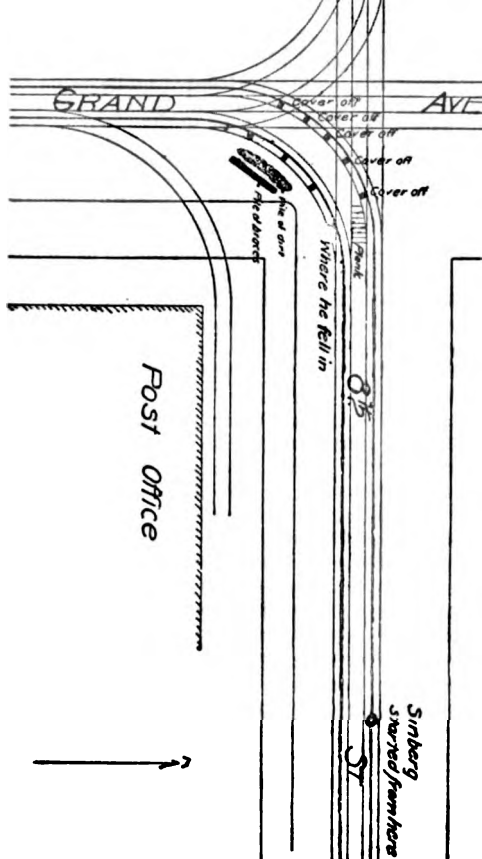
rails of the tracks. The streets were paved with asphalt at this point, except over the pulleys at the curve, where the metal plates were so placed as to constitute a part of the street pavement, and persons would walk over them in passing along the streets. Appellant's work of reconstruction, in so far as these curves were concerned, consisted of shortening them, by forcing them over to the southeast, near to the sidewalk at the southeast corner of Eighth street and Grand avenue. Plaintiff, Clem Sinberg, was employed by defendant as a common laborer, and on the afternoon of May 8, 1900, he and other laborers were finishing up the work at the south curve under the immediate supervision and direction of appellant's foreman. They had moved the track over to the southeast, and it was nearly, if not quite, secured in place. The cable was running, the pulleys revolving, and the cars were passing over said track during the process of reconstruction as aforesaid. While they were finishing up the curve, plaintiff was ordered by the Falk Company's foreman to return at midnight to work on the night shift. When he returned at midnight he was directed by said foreman to saw an iron track rail of the north track on Eighth street at a point about 50 feet east of the east line of Grand avenue. He had almost severed said rail when said foreman commanded him to "hurry up" and "get a brace" to put under the nearly severed rail, so that an approaching car might safely pass over the track. The braces were on or near a pile of dirt south of the south curve, which plaintiff was engaged in finishing up the previous day. In order to reach said braces, by the most direct and convenient route, in order to obey the order of appellant's vice principal aforesaid, it was reasonably proper for plaintiff to pass along and over the metal plates covering the pulleys of the south curve. The metal plates had all been replaced, except one, and defendant's foreman and workmen and the street railway's inspector had been walking along and over said curve, and using the same for a regular pathway, for at least two hours before plaintiff returned to his work. They were so using it at the time of plaintiff's injury. An electric light was northeast of said curve, and one of defendant's foremen, Mr. Krebs, was passing along, between it and the south curve, in such a position that his shadow fell across said south curve, at the point where the single metal plate was out of place, and as plaintiff walked along said south curve, looking for the brace, he stepped into the hole made by the missing plate and was injured. About 50 men were working around under said light, and their shadows frequently fell across said south curve.

ley hole was not on at the time of the accident. Plaintiff stated that he could have seen the exposed opening, if he had been looking for it, and had not the shadow of the foreman, Krebs, who was near at the time, prevented the light from disclosing it; that he noticed it looked dark, but did not think it was uncovered. It was shown that in the work of reconstruction and moving the track it was necessary to excavate the dirt from under and between the tracks, and to take off the metal plates covering the pulley holes; that, while the work was progressing, the rails over which the cars were passing were supported by iron braces; and that, when the tracks were replaced, the covers were also replaced over the pulley holes, and the excavations then refilled with dirt. There was also evidence tending to show that the track in question, at the time and place of plaintiff's injury, had been moved and properly replaced, and all the pulley holes covered, except the one in question. But there was also evidence tending to show that the work of replacing the said track was not fully completed, and that the condition of the work required said pulleys to remain uncovered. Krebs, defendant's foreman, in regard to this matter, made the following statement: "We had to have them off to do a lot of work around them. We could not do the work with them on."

The following diagram, used at the trial, will assist materially in an understanding of the case: [See next page.]

The verdict and judgment were for the plaintiff, from which defendant appealed.

The defendant asked no instructions, except a demurrer to the evidence. The defendant contends that the risk that attended plaintiff's employment was a result of, and brought about by the necessities of, the work itself, and for that reason the rule of law requiring the master to provide a reasonably safe place for the servant while in the performance of his labor has no application. As we understand it, this is only equivalent to saying that the servant assumed the risk of his employment. But as there was evidence tending to show, at least, that the course plaintiff followed, when he undertook to obey the direction of his foreman, was the one most available, and which had been used as such by defendant's employes, it became the duty of defendant to have exercised the necessary care to have rendered it as reasonably safe as the condition of the work at the time would permit. If the replacing of the track had been completed, it became the duty of the defendant, under the evidence, to have covered said pulleys in order to secure the safety of its employes; but if the replacing of the track had not been completed, and the time had not arrived for the said



covers to be replaced, and the necessities of the work required that they should be kept open, then defendant was not guilty of negligence in that respect.

We do not, therefore, agree with defendant that plaintiff was not entitled to recover under the proof. But it follows that, if we are correct in the foregoing conclusion as to the issue raised by the evidence, its objection to plaintiff's first instruction should have been sustained. Said instruction is as follows: "The court instructs the jury that if you find and believe, from the evidence, that on the 9th day of May, 1900, the plaintiff was employed by defendant as a common laborer in and about the reconstruction of certain street railway tracks at Eighth street and Grand avenue, in Kansas City, Mo., and that while in the performance of his said work for said defendant at said place he was directed by a representative of said defendant, in charge of said work of reconstruction and of this plaintiff, to do a certain work which made it reasonably proper for this plaintiff to pass over and be upon a certain portion of said street occupied by said street car tracks, and that in so doing plaintiff, while in the exercise of ordinary care on his part, was injured by reason of the unsafe

and revolving pulleys therein of said street railway tracks at said place, in case you find and believe that the absence of said plate rendered said opening unsafe, and if you further find that said defendant had caused said condition to exist, or knew, or by the exercise of ordinary care might have known, of it in time to have remedied the same before plaintiff claimed to have been injured, then your verdict will be for the plaintiff." The vice of said instruction consists in assuming that the knowledge of defendant that the pulley hole in question was left uncovered was negligence. It may or may not have been negligence. If the work of relaying the track at the point of injury had been completed, as has been said, it then became the duty of defendant to have had them covered; but if the relaying of the track had not been completed, and it was necessary to the work to have them uncovered, the defendant was not guilty of negligence. It was a question for the jury, and not for the court. It was not a question of law upon undisputed facts, but a question of both law and fact.

Instruction No. 2, given for plaintiff, should have been modified to suit the case. We think it was error to tell the jury without qualification it was the duty of the defendant "to exercise ordinary and reasonable care to provide a reasonably safe place for the plaintiff to do the work he was directed to perform." In requiring the defendant to provide a reasonably safe place to do his work, the instruction required too much. The defendant might have performed its whole duty, and still the place where plaintiff was required to do his work would not be reasonably safe. The principle of law embodied in said instruction has exceptions and qualifications, and when such exceptions exist they should be applied to the facts as proved. *Bradley v. Railway*, 138 Mo. 293, 39 S. W. 763. The jury should have been instructed that it was the duty of the defendant to have provided a place as reasonably safe as the proper carrying on of the work would reasonably admit. *Hurst v. Railway*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539.

Plaintiff's other instructions seem to be unexceptionable. For the reason given, the cause is reversed and remanded. All concur.

TOWN OF McMINNVILLE v. STROUD et al.

(Supreme Court of Tennessee. March 18, 1903.)

MUNICIPAL CORPORATIONS—VIOLATION OF CRIMINAL STATUTES—RIGHT TO SUE—JUDGMENT BY DEFAULT—WARRANT TO SUPPORT.

1. A municipal corporation cannot maintain a suit for the violation of one of the criminal statutes of the state.

showing the existence of the ordinance, a default taken therein could not furnish the basis for a judgment against the defendant.

Error to Circuit Court, Warren County; M. D. Smallman, Judge.

Suit by the town of McMinnville against Louis and Jane Stroud. Judgment for plaintiff, motion in arrest overruled, and defendants bring error. Reversed, and suit dismissed.

Whitson & Mercer, for plaintiffs in error.
John L. Willis, for defendant in error.

NEIL, J. This was argued at the bar as a suit by the town of McMinnville against the defendants, for the violation of a corporation ordinance; but upon opening and reading the record, we find that the warrant makes no mention of a corporation ordinance, but requires the defendants to answer the town of McMinnville for the violation of one of the criminal statutes of the state—the one commonly known under the designation of the "Four Mile Law." Of course no town or city can maintain such a suit. Crimes under the public statutes of the state must be punished by indictment or presentment, as provided by law, and not by a civil suit, instituted by any of the municipalities of the state. *State v. Haynes*, 104 Tenn. 406, 58 S. W. 120. We do not intend to say that the same act may not be an offense both against the state and one of its municipalities, but before the latter can sue it must have and show an ordinance covering the ground. No ordinance was referred to in the warrant in this case, and it does not in any wise appear therein, or otherwise in the record, that any such ordinance was or is in existence. Hence it follows that no violation of a town ordinance was charged in the warrant, and, from this, that no cause of action was alleged therein, and from this it necessarily follows that the default taken was without any legal result, and could not furnish any foundation for the judgment which was rendered against the defendants. It follows that the motion in arrest of judgment, made in the court below, should have been sustained. That motion is now sustained, and the suit dismissed, at the cost of the plaintiff, town of McMinnville.

This being decisive of the case, it is unnecessary to notice other questions made in the briefs and argued at the bar.

CROCKETT v. McLANAHAN.

(Supreme Court of Tennessee. Feb. 14, 1903.)

LIBEL—PRIVILEGED COMMUNICATIONS— DEMURRER.

1. Plaintiff, in an action for libel, claimed that, in a bill filed to enjoin the issuance of bonds authorized at an election of the voters in a city, defendant had alleged that plaintiff

was guilty of libel, and that the question of the legality of plaintiff's vote was pertinent to the issues in the bond suit, and hence the allegation was absolutely privileged.

2. It was a question of law for the court to determine whether the alleged defamatory matter in the bill was pertinent to the issues in the suit.

3. In a declaration in an action for libel, on account of alleged defamatory matter contained in a pleading filed by defendant, it was alleged that defendant had no probable cause for making the statements, nor could he have reasonably supposed it necessary in his case to include the libelous matter in his pleading. *Held*, that a demurrer to the declaration did not admit these allegations to be true.

4. By the question whether alleged defamatory matter contained in a pleading was pertinent to the issues in the case is meant whether there was probable cause for including the matter in the pleading.

5. Defamatory matter in a pleading, which is pertinent to the issues in the suit, is absolutely privileged, even though it be concerning a stranger.

Wilkes, J., dissenting.

Appeal from Circuit Court, Davidson County; Jno. W. Childress, Judge.

Action to recover damages for libel brought by John A. Crockett against J. Craig McLanahan. A demurrer to the declaration was sustained, and plaintiff appeals. Affirmed.

J. C. Bradford and Jno. J. Vertrees, for appellant. Gen. Washington and J. M. Head, for appellee.

McALISTER, J. The question presented for our determination upon this record is whether a party to a judicial proceeding is liable in damages to a stranger to the record for defamatory matter alleged in the pleading concerning him, or whether said matter, being pertinent and relative to the issue, is not absolutely privileged. The allegations of the declaration are that on June 2, 1902, the defendant, J. Craig McLanahan, filed a bill in the United States Circuit Court for the Middle District of Tennessee, in which it was averred that on the 8th of August, 1901, an election was held in the city of Nashville to determine whether the city should subscribe \$1,000,000 of the capital stock of the Nashville & Clarksville Railroad Company, and that at said election the plaintiff (Crockett) was an illegal voter, for the reason that, after being registered in the Twentieth Ward, he had changed his residence, and had not again registered 20 days before said election, as required by law, and yet cast his vote at said railroad election. It is alleged that defendant (McLanahan) in said bill meant to charge that plaintiff (Crockett) was an illegal voter in said election, and guilty of a high misdemeanor and a violation of the criminal laws of Tennessee. It is alleged in the second count

¶ 5. See Libel and Slander, vol. 22, Cent. Dig. §§ 117, 120.

made without probable cause, and not under such circumstances as reasonably created a belief in the mind of defendant (McLanahan) that they were true. It is further alleged that plaintiff was not a party to said suit in the federal court and had no interest in it. A demurrer was interposed to this declaration, which assigned the following causes, to wit: "(1) It shows on its face that the alleged libelous publication is an averment in a bill filed by this defendant and others, as complainants, in the Circuit Court of the United States for the Middle District of Tennessee, against the Tennessee Central Railroad et al., to enjoin the issuance of bonds by the mayor and city council of Nashville in payment of a subscription to the capital stock of said railway, upon the ground, among others, that said subscription did not receive the requisite three-fourths of the votes cast at the election held with respect thereto, and that plaintiff's vote and the votes of others were counted for said proposition when they were illegal and void, for that said voters were not duly registered and voted in wards in which they did not reside. Defendant says that the alleged illegal, libelous statement is a pleading in a judicial proceeding in said court, which does not assail the plaintiff's character, and therefore is absolutely privileged, and that this suit cannot, for that reason, be maintained against him. (2) The declaration does not show that said suit is still pending, undetermined, and that therefore this suit is premature, and cannot now be prosecuted against this defendant." At the September term, 1902, of the circuit court of Davidson county, Hon. John W. Childress, presiding, the demurrer was sustained and the suit dismissed. Plaintiff appealed, and has assigned as error the action of the circuit court in sustaining the demurrer.

The determinative question of law arising upon the pleadings is whether the alleged defamatory matter was absolutely, or only conditionally, privileged. The rule on this subject at common law was thus stated by Mr. Townshend in his work on Slander and Libel (4th Ed., § 221), viz.: "In a civil action, whatever the complainant may allege in his pleading in connection with his grounds of complaint can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading by way of defense to the charge brought against him, or by way of countercharge, counterclaim, or set-off, can never give a right of action." This rule was adopted in this state at an early day, but it was coupled with the qualification that the alleged defamatory matter must be pertinent or material to the subject of inquiry in the particular litigation. In *Lea*

facie, or, as the books have it, 'conditionally,' privileged—that is, they do not amount to defamation (actionable) until it appears that the communication had its origin in actual malice in fact. In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, malice in fact and that the occasion was seized upon as a mere pretext. Illustrations of this class of communications are statements in respect of the character of servants, official communications, reports of judicial proceedings, etc. But," continues the court, "there is another class of cases which are absolutely privileged and depend in no respect for their protection upon their bona fides. The occasion is an absolute privilege; and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good, the law holds that nothing which may therein be said with probable cause, whether with or without malice, can be slander, and in like manner that nothing written with probable cause under the sanction of such an occasion can be a libel. The pertinency of the matter to the occasion is that which is meant by probable cause, and probable cause is in this class of absolutely privileged communications what bona fides is to the class of conditionally privileged communications, which are protected unless there is malice in fact."

It will be observed that the cardinal inquiry is whether the alleged defamatory matter is pertinent to the issue involved. As said by this court in *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 604, 6 Am. St. Rep. 821, "where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have entertained sentiments of malice to the adverse party." It is, moreover, the rule that the question of pertinency or relevancy is a question of law for the court. *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602, 6 Am. St. Rep. 821; *Jones v. Brownlee* (Mo.), 61 S. W. 795, 53 L. R. A. 448. It cannot be seriously controverted that the allegations of the bill in the United States Circuit Court with respect to the disqualifications of the plaintiff as an elector in the election of August 8, 1901, were pertinent and relevant to the matter of inquiry in that suit. The legality of the election was challenged in that proceeding upon the ground that the municipal aid subscription had not been carried by a three-fourths majority of the voters, as required by law. It was necessary that the bill should specifically recite the names of the disqualified voters, in order that an

issue might be made in respect of their qualifications. *Moore v. Sharp*, 98 Tenn. 493, 41 S. W. 587; *Blackburn v. Vick*, 2 Helsk. 383. The name of the plaintiff was included in a list of about 50 citizens of the Twentieth Ward, who were alleged to have been disqualified to vote in said election on account of a failure to re-register after changing their residence in said ward 20 days before the election. The matter alleged being pertinent to the issue, it was absolutely privileged, and it is wholly immaterial whether the element of malice entered into the charge. As said in *Lea v. White*, supra: "It certainly cannot be maintained that, because a person is malicious in his statements toward the adverse party, he will not be permitted to set up in his defense any matter that he may reasonably suppose would be available."

It is alleged in the declaration there was no probable cause, or that defendant could not have reasonably supposed it necessary in his case, to have alleged the libelous matter. It is said the demurrer admits this allegation. It is well settled that "a demurrer does not admit inferences from facts, nor conclusions of law averred." 6 Ency. Plead. & Prac. 336; *Park v. Kelly Axe Co.*, 1 C. C. A. 395; 49 Fed. 618; *Kent v. Lake Sup. Ship Canal Co.*, 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; *Foster's Fed. Practice*, § 106; *Hopper v. Town of Covington*, 118 U. S. 148, 151, 6 Sup. Ct. 1025, 30 L. Ed. 190; *Greiff v. Society (N. Y.)* 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659. "Averments in a declaration as to the meaning and interpretation of a writing attached thereto, or exhibited, are not admitted by a demurrer." *National Park Bank v. Halle*, 30 Ill. App. 17; 6 Ency. Plead. & Prac. 337, 397; *Foster's Fed. Practice*, § 106. "Neither does a demurrer admit matters averred in the declaration contrary to law." *L. & N. R. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; 6 Ency. Plead. & Prac. 338, 398; *Foster's Fed. Practice*, § 106; *Hooper v. Town of Covington*, 118 U. S. 148, 151, 6 Sup. Ct. 1025, 30 L. Ed. 190. As already seen, the pertinency of the matter to the occasion is that which is meant by probable cause. The pertinency of the matter to the issue presented is a matter for the court, and the demurrer does not admit the want of probable cause, or any other conclusion of law which must be drawn by the court. We think, as matter of law, the alleged defamatory matter was absolutely and unqualifiedly privileged.

But it is insisted on behalf of plaintiff in error that the present case falls within an exception to the general rule which was recognized and established by this court in *Ruohs v. Backer*, 6 Helsk. 395, 19 Am. Rep. 598. In that case it was held that the rule as to parties does not apply to strangers to the record, and such statements, although pertinent, are only conditionally privileged. The facts of that case were that Ruohs, as

next friend of two young girls, filed a petition in the county court of Hamilton county, in which he asked the removal of their guardian upon the ground (alleged) that "the guardian has had in his family a girl who is now probably over 16 years of age, who came to live with him about the age of 13 years, and has remained in his family ever since. Her reputation is ruined, and she is now an example of shame and prostitution." The court said, viz.: "Having the undoubted right to present the petition, the question recurs, was the reason assigned by the plaintiff in error to the county court for the removal of the guardian such a reason as he might lawfully assign, and his petition a privileged communication within the meaning of the law? Although there are authorities which would, perhaps, sustain the petition to the county court as falling within the definition of absolutely privileged communications, this court is of opinion that a distinction should be taken between statements made in the course of judicial proceedings relative to the parties thereto and those which relate to strangers to the record, and that the protection of private character, as well as the peace of society, require that imputations against persons having no connection with the judicial proceeding should, even when properly relating to such proceeding, be considered as falling within the class of conditionally privileged communications."

The case of *Ruohs v. Backer* was decided in 1871 in an opinion delivered by Judge Nelson. It has not been reaffirmed, as erroneously stated by counsel, nor has it been distinctly overruled. In the recent opinion of this court in the case of *Cooley v. Galyon* (decided at Knoxville September term, 1902) 70 S. W. 607, a rule antagonistic to that laid down in *Ruohs v. Backer* was announced. It was held in that case that slanderous words spoken by a witness in a judicial proceeding, which are relevant and pertinent to the subject of inquiry or responsive to questions, are absolutely privileged. The court said, viz.: "It is immaterial that neither the plaintiff nor defendant were parties to the cause in which the defendant was called to testify. The majority of witnesses are not parties to the cause in which they are examined, and facts in relation to other strangers to the litigation often become the subject of necessary inquiry. If the privilege was confined to the parties, it would be reduced to narrow limits, and the proper administration of justice would be greatly embarrassed and made difficult." It was held in *Henderson v. Broomhead*, 4 Hurl. & N. (English Exchequer) 569, that no action lies against a party who in the course of a cause makes an affidavit which is scandalous, false, and malicious, though the person scandalized and who complains is not a party to the cause.

This question was under consideration in the recent case of *Jones v. Brownlee*, 61 S.

395, 19 Am. Rep. 598, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained." Again, in the case of *Johnson v. Brown et al.*, 13 W. Va. 136, the court wrote as follows: "The English and American courts, as will be seen by reference to many of the authorities before cited, in laying down the rule which is to determine whether libelous matter appearing in the conduct or proceedings of a cause is or is not to be considered as absolutely privileged, appears to assume that it in no manner depends upon whether it relates to or was uttered about a stranger to the suit or otherwise. While in many cases, as we have seen, qualifications are added in stating the rule which exempts from libel or slander suits utterances in the prosecution regularly of a suit, yet the qualification that they must not be uttered in reference to a stranger to the suit is never added. There is, nevertheless, one American case that decides that if a libelous statement, made in the course of judicial proceedings, is made in regard to a third person, such statement is not an absolutely privileged publication, but is only conditionally privileged, and is actionable if made with malice, without probable cause, and under such circumstances as would not reasonably create the belief that they were true"—citing *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598.

Judge Nelson in his opinion states, viz.: "If a guardian may be removed because his domestic associations are such as tend to the corruption and contamination of his ward, upon what principle is it that the person seeking his removal may not even name his associates and cause their character to be inquired into? There are many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry; and the right in this case," continues Judge Nelson, "is unquestionable." If, then, the right to make the inquiry is material and pertinent, why should not the rule of exemption from liability, grounded on reasons of public policy, which favors a free and untrammelled investigation in courts of judicature, not apply when the allegation is made concerning a stranger, as if made against a party to

founded. It is not supported by any authority, but is contrary to the rule announced in all the cases, and should not be adhered to as a precedent. The fact that cases of hardship may arise, and persons who have been defamed in the course of judicial proceedings may be left remediless, is no reason why a wholesome legal principle, founded upon reasons of public policy, should be overthrown. A multitude of instances might be cited where the rights of the individual are required to be sacrificed for the public good.

Without further elaboration, we are of opinion the judgment of the circuit court on the demurrer was correct, and the same is affirmed.

WILKES, J. (dissenting). I cannot concur in the view taken by the majority. I concede that the holding of the court in *Ruohs v. Backer*, 6 Heisk. 395, 19 Am. Rep. 598, is contrary to the great weight of authority, though I must insist the reasoning and justice of that holding are unassailable and unanswerable. Accepting as law, however, the principle that statements made in the course of judicial proceedings by parties in their defense and by witnesses on examination are absolutely privileged, when they are pertinent and relevant, even though maliciously made, I think the present suit does not upon demurrer present such case. Parties in their defense and witnesses in their examination should be privileged in making responses to pertinent charges and questions, because they are before the court upon compulsion and not upon their own motion, and they have nothing whatever to do with framing the issues or questions, but must meet them as made by others. But I cannot agree that a plaintiff may go into court upon his own motion, and frame pleadings and present issues to suit himself, and under the issues thus presented libel a stranger to the record, and then defend himself from liability upon the plea that such libelous charges are pertinent to the issues which he has formulated.

To illustrate: I cannot agree that the purest, most innocent woman, of the highest standing, may with impunity be libeled as co-respondent in a divorce suit upon grounds of adultery, simply because such a baseless charge is pertinent to the charge made. Other illustrations can be given, and if this is the rule no man or woman in the community can be free from malicious and unwarranted attacks upon character under the guise of judicial proceedings. To make a practical application of the present case: Mr. McLanahan brings a suit against the city. He charges Mr. Crockett, a stranger to the record, with the crime of illegal voting. Whether he did vote illegally could be ascertained by an investigation of the regis-

tration record. There is no allegation that this was done. The charge is made without regard to its truth, recklessly, but, so far as we can see, without actual malice. But, if done through malice, the result would be the same; that is, because he had charged Mr. Crockett with matter pertinent to the issue with the city, he was privileged to make it, even though made ignorantly, recklessly, or with express malice. In such case, when the libellant makes the issue himself, he should be required to show good faith and probable cause in charging a stranger with crime, even though pertinent and relevant to the issue. He should be required to answer, and show that in making the libelous charge he acted after investigation and upon well-grounded information which he believed to be true.

In other words, the gist of my dissent and protest is that no man or woman shall be maligned and traduced in even judicial proceedings, unless the charges are made in good faith and upon reasonable ground to believe they are true. Especially is this true when the party traduced is a stranger to the records, the means of information as to the truth of the charge are open and matters of record, and the issues presented are made by the same party who makes the charges. Under the facts disclosed in this declaration the defendant should be required to answer and show that his charges were made in good faith and with probable cause. Nor can I agree that the question of pertinency or relevance is a question of law in all cases. The majority cite to support this proposition *Lea v. White*, 4 Sneed, 111; *Shadden v. McElwee*, 86 Tenn. 152, 5 S. W. 602, 6 Am. St. Rep. 821; *Jones v. Brownlee* (Mo.) 61 S. W. 792, 53 L. R. A. 448. In both the Tennessee cases it is expressly said that pertinency and probable cause mean the same thing, and the question of probable cause or pertinency may be for the jury or not, according to the circumstances of the case. See, also, 13 Ency. Pl. & Pr. 107; 18 Am. & Eng. Ency. Law (2d Ed.) 1050.

LOUISVILLE & N. TERMINAL CO. v. JACOBS.

(Supreme Court of Tennessee. March 7, 1903.)

NUISANCE—LIABILITY OF LANDLORD—USE OF PREMISES—USE NECESSARILY CONSTITUTING NUISANCE—EVIDENCE—INJURY TO PROPERTY—CORPORATIONS—CHARTER RIGHTS—LOCATION OF ROUNDHOUSE.

1. Where a landlord lets premises the occupation and use of which subsequently constitutes a nuisance, the landlord is not liable unless the nuisance complained of arose necessarily from the use of such premises.

2. Where a corporation constructed a terminal railroad station, containing a roundhouse, and the owner of neighboring property sued the

lessor on the ground that the occupation and use of the roundhouse was a nuisance, it was a question for the jury whether the nuisance arose necessarily from the ordinary use of the premises.

3. In an action against the owner of a railroad roundhouse on the ground that the same was a nuisance, it was error to withdraw from the jury testimony that the roundhouse was being used as such by a tenant of the defendant.

4. In an action against the owner of a railroad roundhouse on the ground that the use of the same was a nuisance, the defense being that the roundhouse was occupied by a tenant of defendant, it was error to permit plaintiff to state that the engines which it was alleged committed the nuisance through their noise and smoke by general reputation were the property of defendant.

5. In an action by the owner and occupant of premises for damages from a nuisance consisting of a neighboring railroad roundhouse, evidence as to the effect of the nuisance on the value of the property or of the fee was erroneously admitted, but the court charged that the jury might look to such things as affected the use of her property as her residence and home, considering discomforts, etc. *Held*, that the instruction rendered the admission of the testimony harmless.

6. In an action by the owner and occupant of property for damages from a nuisance consisting of a neighboring railroad roundhouse, the jury could consider discomfort, annoyances, and such things as occurred to plaintiff in the use of her home.

7. Where the charter of a corporation gives it authority to acquire and hold at such places as it shall find expedient all necessary property on which to construct and maintain terminal railroad facilities and accommodations, such charter right is no defense in an action against it for damages from a nuisance consisting of a roundhouse erected by it.

Appeal from Circuit Court, Davidson County; J. A. Cartwright, Judge.

Action by Belle Jacobs against the Louisville & Nashville Terminal Company. From a judgment for plaintiff, defendant appeals. Reversed.

Smith & Maddin, for appellant. Anderson & Grisham and A. G. Ewing, Jr., for appellee.

BEARD, C. J. This action was instituted by the defendant in error, who owned and was in possession of a house and lot on Magazine street, in Nashville, to recover damage claimed to have been done to her property by the plaintiff in error by the alleged improper location of its roundhouse, and in its operation or management, in that the locomotives housed in it from day to day greatly annoyed her by their incessant noise, and also cast off dense volumes of smoke and great quantities of gases, cinders, and soot, which were blown into and upon the premises of the defendant in error, inflicting serious injury upon her household furniture, destroying vegetation in her yard, and impregnating the atmosphere, so as to make her property practically uninhabitable. The trial resulted in a verdict and judgment for the plaintiff below, and the case is now before us on various assignments of error.

In order to a proper understanding of these

¶ 1. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 685.

charter of incorporation by the state of Tennessee, by which it was authorized "to acquire and hold in this or any other state, at such place or places as shall be found by it expedient," all necessary real estate, "on which to construct, operate and maintain passenger stations, * * * office buildings, sheds and storage yards, * * * round-houses and machine shops, * * * main and side tracks, * * * and other terminal railroad facilities, appurtenances and accommodations suitable" to enable the company to perform promptly the work of receiving, delivering, and transferring all passenger and freight traffic and otherwise discharging the duties and exercising the powers contemplated or given in the charter. Among the powers so granted was that to "lease to any railroad company or railroad companies its freight and passenger depot or station and its other terminal facilities at any place where the line or lines of said railroad company or companies may terminate or through which they may pass."

Acting within its charter, the plaintiff in error proceeded to acquire real estate in the city of Nashville, and to construct upon it a terminal station, including a roundhouse of large capacity for the storage and safe-keeping of locomotive engines, and afterwards, on the 15th of June, 1896, it executed a lease for the term of 999 years of all of its terminal property to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, reserving to itself an annual rent therefor, and at once turned over its entire holdings to the possession and use of the lessees. Since the time of said lease, so far as the record shows, the plaintiff in error has exercised no control over the roundhouse, or any other part of the terminal property. On the contrary, it affirmatively appears that the whole has been under the control of the two railroads, and their engines have occupied the roundhouse; and whatever nuisance may have been committed, so far as defendant in error is actively concerned, has been by them.

Without going into detail as to the evidence, it may be assumed that the verdict of the jury settled conclusively that by reason of the proximity of the roundhouse to the dwelling of the defendant in error she suffered great discomfort from the noise made in the incoming and outgoing of the engines of these railroad companies, and loss as well as inconvenience from the smoke, soot, cinders, and gases emitted by these engines. The fact is the trial judge withdrew by his charge from the consideration of the jury every issue of fact save this: was the operation of the roundhouse a nuisance? By their verdict the jury have answered that it was.

It was not insisted in the court below, nor is it here, that the roundhouse was per se a

nuisance, and that, having erected this building for the very use to which it was applied, and such use having proved to be a nuisance, the Louisville & Nashville Terminal Company is liable for the resulting damage to the property of the defendant in error, notwithstanding the lease. In other words, the insistence is that the erection of this building for the very use to which it was subsequently applied makes the terminal company liable for the alleged subsequent wrong of the lessees upon the ground that its leasing was an implied warrant or consent on its part to these lessees to appropriate it to such wrongful use. This was the view taken by the trial judge. As to this he said to the jury: "If the proof shows that such construction and leasing of the roundhouse of the defendant was for the very purpose for which it was operated, * * * and if the proof further shows that in its operation a nuisance was committed, and that plaintiff had thereby suffered hurt, worry, and discomfort, inconvenience, and damage, so as to injure the use of her property, then the defendant is liable." This view of the law is emphasized by being repeated at least in two other paragraphs of the charge. There is no doubt that, should a landowner erect or create a nuisance upon his land, he cannot rid himself of liability arising therefrom by a grant of the property to another. This was laid down as early as *Rosewell v. Prior*, 2 Salk. 459, S. C. 12 Mod. 639, where it is said that: "Before his assignment over he was liable to all consequential damages, and it is not in his power to discharge himself by granting it over, more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance may continue and has a recompense, viz., the rent for the same." This rule has been applied in the case of the owner of a pier, who leased it in a dangerous condition (*Swords v. Edgar*, 59 N. Y. 29, 17 Am. Rep. 295), and of a landowner who let out his premises to be used as a bawdy house, and of one who constructs upon his lot vaults, the necessary use of which creates a nuisance (*Rex v. Pedly*, 1 Ad. & El. 822; *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170), or if one who, by the negligence of his contractor, leaves a dangerous excavation near a highway (*Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603), or in a sidewalk in a city (*Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298). In such cases the liability of the landowner rests upon the ground that the very existence of the thing constitutes a nuisance, the responsibility for which cannot be drifted by a mere letting to or contracting with another.

But on principle it would seem to be otherwise where the structure or work, whatever it may be, was not of itself a nuisance, and where the letting was general in its character. In such case, if the use of such struc-

ture or work does not ex necessitate make a nuisance, but after the letting it is used by the tenant so as to create one, then the tenant alone should be liable. This limitation upon the general rule, which fixes liability upon the landlord for a nuisance on his premises has been presented in many cases, but in none with more force than in the leading case of *Rich v. Basterfield*, 4 C. B. 783, which went far in overturning the authority of *The King v. Pelly*, 1 Ad. & El. 822. This latter case held that if a landlord erect a building of which the occupation is likely to produce a nuisance, or if he let a building which requires particular care to prevent the occupation from becoming a nuisance, and the nuisance occurs for want of such care on the part of the tenant, then the landlord is responsible. But in *Rich v. Basterfield*, supra, the previous cases involving this question were reviewed, and the sound conclusion was announced that, if the landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option so to use them or not, and the landlord receives the same rent whether they are so used or not, the landlord cannot be made responsible for the act of his tenant.

In the present case, while the roundhouse was erected near the house of the defendant in error for the housing of engines, yet it was not in itself a nuisance. Whether it became one depended alone upon the will of the lessees. It was not incumbent upon them to use it for storing their engines. In addition, the record tends to show that, even if the lessees saw proper to appropriate this building to that purpose, they might have moved their engines in and out of it by employing wood and hard coal, which would have reduced the injury to defendant in error, if any, to an inappreciable extent.

What has been said may be here repeated: If the roundhouse was a nuisance at the date of the lease, then the landlord, by his contract of leasing, could not have avoided liability. But inasmuch as it was not then a nuisance, and only became one upon its use by the tenant, we think the liability of the landlord would depend upon the fact, to be passed on by the jury under proper instructions, whether the nuisance complained of arose necessarily from its ordinary use, or from its improper use by the tenants. In the first instance he would be liable, and in the second the tenant alone would be chargeable. 2 Wood on Nuisance (3d Ed.) § 827. This author, in the same section of the valuable work just cited, says: "The rule may be stated as the result of the authorities to be that, in order to charge the landlord, the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by

the tenant, or, in other words, where the use of the premises may or not become a nuisance according as the tenant exercises reasonable care or uses the premises negligently, the tenant alone is chargeable for damages arising therefrom." To the same effect is *Taylor on Landlord and Tenant*, vol. 1, § 175. The trial judge failed in the clause above given, as well as in other portions of his charge, already referred to, to make this essential distinction, the effect of which was to say to the jury that the plaintiff in error was responsible for the nuisance which the record tended to show its tenants committed, whether such nuisance resulted from a proper or improper use of the roundhouse by these tenants.

In another view it is apparent this instruction was hurtful to plaintiff in error. As has already been stated, the trial judge greatly narrowed the scope of the jury's investigation. He said to them: "The question for you to determine is one of fact, namely, was the operation of the roundhouse, as carried on, a nuisance? If not, the defendant is not liable, but if in its operation * * * the plaintiff has suffered hurt, annoyance, discomfort, inconvenience, and damage, * * * then the defendant is liable." Abounding as the record did in evidence that the defendant in error had suffered hurt, annoyance, etc., from the occupation and use of the roundhouse, under this instruction the jury could not do otherwise than return a verdict for the defendant in error, and this in spite of the fact that under a proper direction, as indicated above, they might have found that such operation was not the necessary result of the construction of the roundhouse, and that plaintiff in error in no way gave its consent to this method of use or occupation.

There are some other assignments of error which will be briefly disposed of.

First. The trial judge was in error in withdrawing from the jury so much of the testimony of E. C. Lewis as went to show that the plaintiff in error did not control or operate the roundhouse in question; and also in declining to let go to the jury the lease made by the terminal company to the Louisville & Nashville Railroad and to the Nashville, Chattanooga & St. Louis Railway; for, as has already been shown, if the nuisance created by the railroad companies was not the necessary result of the construction of the roundhouse, and it was committed by these companies, it was essential to the proper defense of the plaintiff in error that the jury should understand the exact relationship of the terminal company to those companies. *Rich v. Basterfield*, supra.

Second. It was also error in the trial judge to permit the witness Mrs. Jacobs, over the objection of the plaintiff in error, to state that the engines which it is alleged committed the nuisance complained of by general reputation belong to the terminal company.

Third. The trial judge improperly let to the jury certain testimony as to the effect of the alleged nuisance upon the value of the property or of the fee; but this testimony was practically excluded from the consideration of the jury by his charge when he told them that in the assessment of damages, should they find for the plaintiff, they might look, among other things, to such as occurred to the use of her property as her residence or home, etc., taking into consideration in such assessment the discomfort, annoyance, etc., which she may have suffered from smoke, etc. There was no error in this instruction. *Baltimore & P. R. R. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

Fourth. It is assigned for error that the court below declined to give the following request: "That, if the proof shows that the defendant built the terminal roundhouse and yards for the purposes for which the proof shows they have since been operated, and that in the operation of them the defendant or its lessees employed the best and most skillful locomotive engineers, and had them instructed, by a person skilled in the operation of such engines, as to how to use them so as to produce as little smoke as possible, using such fuel as is ordinarily used for such purposes by the best railroads in the country, and that under the circumstances above set out, in operating said engines, damage resulted to the plaintiff from smoke or soot, etc., necessarily issuing from the engines, or noises necessarily resulting from the operation of its engines, then in that case neither the defendant nor its lessees would be liable in this action." It will be observed in the excerpts from the charter made in an early part of this opinion that no location is fixed for the property to be acquired for terminal purposes. The state thus left not only the selection of the property to be so used to the will of the corporation, but the fixing of the site of the roundhouse within the limits of the property. This being so, there is no warrant for the contention that a reasonable use of this roundhouse would protect the company, if otherwise liable, against a claim for compensation made by one whose property had been injured by such use. In such a case its charter would give it no right to enjoy its property at the expense of another's, and to it would be applied, as to an individual, the maxim, "*Sic utere tuo alienum non lædas.*" To a claim for exemption from liability rested on a charter right the answer may be properly made that the state has not authorized the wrong complained of, and in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner it did so at its peril.

Even in England, though the general rule is that, when Parliament has authorized the

be claimed in respect to injury to private rights, apart from a negligent use, unless provided for in the act. To avoid liability it is held that statutory sanction sufficient to justify the creation of a nuisance must be express, or must arise by necessary implication. *Hill v. Managers of the Metropolitan Asylum Dist.*, L. R. 4 Queen's Bench Div. 433, was an action brought by adjacent property owners to recover damages "in respect of and to obtain an injunction against the recurrence of what the plaintiffs alleged to be a nuisance affecting their rights by the erection and maintenance" of an asylum for the reception of smallpox patients. One of the defenses of the managers to the action was that the erection and maintenance of the asylum was under the direction of the local government board, which derived its authority from an act of Parliament. To this defense Pollock, B., said: "There are no provisions in that act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on," and, this being so, "it cannot be supposed that the Legislature armed them with an option so to perform their duty as to create or not to create a nuisance affecting the rights of others." This case went by appeal to the House of Lords, and is reported in L. R. 6 Appeal Cases, 193. There separate opinions were delivered by Lord Chancellor Selborne, Lord Blackburn, and Lord Watson, concurring, however, in sustaining the rule announced by Pollock, B. In the course of the opinion of Lord Watson this strong language is used: "Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose." The case of *Truman v. London, B. & S. C. Ry. Co.*, L. R. 25 Ch. Div. 423, is of like import.

But, over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use. This is the view taken in *Beseman v. Penn R. R. Co.* (N. J. Sup.) 13 Atl. 167. It is there said: "A railroad, in selecting a place for repair shops and engine house, acts altogether in its private capacity. Such location is a matter of indifference to the public. Consequently, with respect to such act, the corporation stood on the footing of an individual, and was entitled to no superior rights of

rights of others. Grants of power to corporate bodies like these can have no license to use them in disregard of the rights of others, and with immunity for their invasion." To the like effect is the leading case of *B. & P. R. R. v. Fifth Baptist Church*, supra; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701.

Other errors are assigned, but we think that they may all be resolved into those which have been disposed of. For those already indicated, the cause is reversed and remanded.

BROWN v. TIMMONS et ux.

(Supreme Court of Tennessee. March 21, 1903.)

JUDICIAL SALES—SALE OF LANDS—TAXES—PAYMENT FROM PURCHASE PRICE—CONFIRMATION OF SALE—APPEALS—COURT OF CHANCERY APPEALS—FINDINGS—CONCLUSIVENESS—STATUTES.

1. On a sale of lands under judicial decree taxes should be paid from the purchase price.

2. Where, on a sale of lands under judicial decree, the taxes thereon are not paid from the purchase price before confirmation, the same may be done after confirmation, while the funds are under the control of the court.

3. Acts 1895, p. 116, c. 76, § 11, provides that the findings of fact made by the Court of Chancery Appeals shall be conclusive, and the jurisdiction of the Supreme Court shall not extend thereto. *Held*, that the Supreme Court is bound by the finding of facts made by the Court of Chancery Appeals, and also by its inferences of fact from the evidentiary facts found.

Appeal from Chancery Court, Davidson County; H. H. Cook, Chancellor.

Suit by B. F. Brown against W. H. Timmons and wife. A decree for defendants was affirmed by the Court of Chancery Appeals, and plaintiff appeals. *Affirmed*.

Grafton Green, for appellant. W. R. Chambers, for appellees.

WILKES, J. Complainant sued the defendants on three notes given for real estate, and sought to enforce a lien for their payment by a sale of the real estate. Mrs. Timmons, by next friend, filed an answer as a cross-bill, alleging that she had overpaid the notes out of her means, and that Brown was indebted to her on settlement. To this cross-bill the husband, as well as Brown, was made a party. A set-off, counterclaim, accounting, and judgment, with general relief, were prayed for. The cross-bill was answered, and an issue was made as to the status of payments and accounts, a reference was ordered, account was stated, and report made, which was confirmed by the chancellor, and resulted in a judgment in favor of

The main contention of the parties is over a sum of about \$4,400, which was paid out of the rents of Mrs. Timmons' real estate. She insists that she was entitled to have this fund applied to her notes, but that Brown applied it, in part at least, to payment of other debts due him by Timmons, which were not a lien upon Mrs. Timmons' property.

The facts of the case as found by the Court of Chancery Appeals, and so far as necessary to be stated, are that Timmons, the husband, was originally indebted to Brown in the sum of \$6,476, which was a vendor's lien upon two storehouses and lots on Market street, in Nashville. Brown had obtained a judgment against Timmons, and decree for the sale of the lots to enforce the lien. An agreement at this juncture was entered into, by which the lots were to be sold under the decree, and bought by Mrs. Timmons for about \$4,000, and for this she was to give her notes, with a lien on the lots. For the balance due Brown of his judgment against Timmons, Timmons was to execute a mortgage on land in Marshall county. The purchase-money notes for the Nashville property were handed over by the clerk and master to Brown, and the costs of that cause were paid by Mrs. Timmons after the sale was confirmed to her and title vested in her to her sole and separate use. Mrs. Timmons was not bound upon her husband's notes secured by the Marshall county land, nor on two other individual notes of her husband held by Brown. Timmons was insolvent, which fact was known to Brown. Mrs. Timmons owned other real estate in Nashville besides the two storehouses, which she held under the will of her father, Madison W. Jones. Caldwell & Chapman, real estate agents, had charge of this property, as well as the Market street houses, and rented the same under the supervision of Mr. Timmons as agent and attorney in fact for his wife. On April 1, 1895, W. H. Timmons, the agent and husband, by the consent and approval of his wife, gave Brown an order on Caldwell & Chapman in the following words: "Messrs. Caldwell & Chapman: Please pay to B. F. Brown, out of each month's rent, one hundred dollars, taking his receipt therefor, as long as you have any rents in your hands, and until further orders." This order does not specify out of the rents of what property it was to be paid, but it was known and understood that it was to be out of Mrs. Timmons' property. On this order Brown received \$4,400, which he applied in part to Timmons' individual debts. Mrs. Timmons' insistence is that the whole of her rents was by agreement to be applied upon her debt for the Market street lots, and that what was applied to Timmons' individual debts

¶ 1. See *Judicial Sales*, vol. 31, Cent. Dig. §§ 93, 124.

had a right to apply them as he did. The Court of Chancery Appeals finds as a fact that Brown knew that Timmons had no property from which rents could be derived, that he was insolvent, and that the rents were to be derived from Mrs. Timmons' property, and he recognized the fact that the rents should be applied to Mrs. Timmons' notes, about which they were speaking.

Upon a petition for further and more explicit findings that court reports: "The conclusion is irresistible that the order on Caldwell & Chapman was given with the understanding and agreement that the money so received should be applied to the payment of Mrs. Timmons' notes. We are satisfied that the complainant, Brown, so understood it, and that he accepted the order with this understanding, and was to so credit said notes." This finding of fact is necessarily conclusive of the main contention in this case—that is, as to how the rents were to be applied—and it is useless to inquire out of what property these rents were derived, and how the property from which they were derived was held. The fact being that they were rents of Mrs. Timmons' property, and were agreed to be paid upon her debts, is absolutely conclusive of the question of their application; and, if they were applied to other debts of Timmons, such application was wrongfully made as to Mrs. Timmons, and Brown is liable to her for all amounts applied otherwise than to the notes of Mrs. Timmons as was agreed upon. It was upon this basis and theory that the decrees of the chancellor and of the Court of Chancery Appeals were based, and those decrees are correct in this respect.

A very able and ingenious argument is made upon the question as to the manner in which and the title by which the real estate owned by Mrs. Timmons was held, and the right of the husband and his creditors to appropriate the rents; but all this is cut off, as to the present case, by the finding of the Court of Chancery Appeals that there was an agreement that the rents received should be applied to the notes of Mrs. Timmons for the Market street property.

This disposes of the principal contention in the case. There is, in addition, a question of taxes, which is the subject-matter of difference. It appears that when Mrs. Timmons became the purchaser of the Market street property there were taxes unpaid upon it for the years 1893-04, which were a lien upon it. A portion of them Mrs. Timmons paid, leaving a portion unpaid. Her contention is that she, as purchaser, has a right to the property unincumbered of taxes, and that they must be paid out of the proceeds of sale. The amount of unpaid taxes was reported to the court below, and the report was confirmed without exception. It

it was so directed by the chancellor and Court of Chancery Appeals, and their amount entered into the account between complainant, Brown, and Mrs. Timmons. We think there was no error in this. Mrs. Timmons was entitled to have the property relieved of all incumbrance for unpaid taxes under her purchase, and, as her notes were turned over to Brown by the clerk and master, and he alone was entitled to the proceeds, she was entitled to have the purchase money abated and notes credited to the amount of such taxes in settlement with him. *Williams v. Whitmore*, 9 Lea, 262; *Childress v. Vance*, 1 Baxt. 406.

Quite an ingenious argument is made that the finding of the Court of Chancery Appeals should not be treated as final and conclusive in this case, inasmuch as it is an inference, rather than a direct and specific finding of facts. The argument is that, when the Court of Chancery Appeals sets out the testimony or evidentiary findings in its opinion, this court will draw its own conclusion of both law and fact, and in such case the inference or conclusion of the Court of Chancery Appeals will not be held binding on this court. This argument is based upon a misconception of the holding of this court in *Bond v. Montague*, 97 Tenn. 727, 37 S. W. 699. It was not intended by that case to vary or overturn the rule so often announced by this court that the Supreme Court is bound by the finding of facts made by the Court of Chancery Appeals, and also by its inferences of fact from the evidentiary facts found and reported by them. Indeed, in its final analysis, it is the inference or conclusion of fact from the testimony in the record, and the evidentiary facts deduced therefrom by the Court of Chancery Appeals, that is binding and conclusive in this court. This court is bound by the findings of the Court of Chancery Appeals in its final deductions and conclusions of fact to the same, or even greater, extent than to its finding of detached or evidentiary facts (see Acts 1895, p. 116, c. 76, § 11; *Bank v. Evans*, 95 Tenn. 705, 34 S. W. 2; *Hughes v. Powers*, 99 Tenn. 486, 42 S. W. 1; *Ellis v. Ins. Co.*, 100 Tenn. 181, 43 S. W. 766; *McQuade v. Williams*, 101 Tenn. 334, 47 S. W. 427; *Bristol Trust Co. v. Jonesboro Trust Co.*, 101 Tenn. 545, 48 S. W. 228; *Sawyers v. Sawyers*, 106 Tenn. 597, 61 S. W. 1022), and no doctrine different from this is laid down or intended to be laid down in *Bond v. Montague*, 97 Tenn. 727, 37 S. W. 699, when that case is properly analyzed and understood.

This does not, of course, limit or abridge the right, duty, and jurisdiction of this court to review all questions of law involved in the findings and opinion of the Court of Chancery Appeals, and whether that finding be strictly of law alone or of law and fact combined.

It is argued that, as a matter of law, this

these rents were derived, and determine whether these rents were properly applicable alone to her debts, or generally to debts held by Brown against her and her husband; and this would no doubt be correct but for the finding of the fact by the Court of Chancery Appeals that it was agreed that this rental fund should be applied to the notes of Mrs. Timmons given for the Market street property. This agreement cuts off all inquiry into the source from which the rents were derived, and measures the rights of the parties, and is determinative of the question of the application of the rents, without regard to the source from which they were derived.

We see no error in the decree of the Court of Chancery Appeals, and it is affirmed.

HENSON v. STATE.

(Supreme Court of Tennessee. March 7, 1903.)

CRIMINAL LAW—TAKING LAW BOOK INTO A JURY ROOM.

1. An examination of the Code by a juror after retirement of the jury, after which he agreed to a verdict of murder, though previously he had been in favor of a verdict of manslaughter, is ground for reversal.

Appeal from Circuit Court, Jackson County; W. T. Smith, Judge.

William Henson was convicted of murder, and appeals. Reversed.

D. B. Johnson and W. W. Draper, for appellant. Attorney General Oates, for the State.

NEIL, J. The plaintiff in error was indicted in the circuit court of Jackson county for the murder of one Henry McBride, and was convicted of murder in the second degree. He has appealed and assigned errors.

The only error which we shall notice is the following: After the jury had been charged by the court, and had retired to consider of their verdict, one of the jurors—E. W. Jackson—called for the Code of Tennessee, and it was brought to him by the officer in charge. He thereupon examined it, and after such examination declared that he was ready to agree to a verdict of murder in the second degree. Prior to this time he had been in favor of returning a verdict of voluntary manslaughter. This conduct on the part of the juror was offered in the court below as ground for new trial, but the motion was overruled. We think his honor committed error in overruling the motion. We reaffirm the rule upon this subject as laid down in *Dale v. The State*, 10 Yerg. 555, and approved in *Harris v. The State*, 7 Lea, 538, 554, viz.: "The jury are the judges of the law as it applies to the facts. They are the exclu-

the law. In other words, they are the judges of the law as well as the facts, under the direction of the court." This is the true rule in criminal cases. In the present case it appears that the juror Jackson, instead of taking the law from the court as given to the jury in his honor's charge, undertook to ascertain it for himself by an examination of the Code. This he had no legal right to do, and the refusal of the court below to set aside the verdict on this ground was error.

Reverse the judgment, and remand the cause for a new trial.

HARTFORD LIFE INS. CO. v. STALLING et al.

(Supreme Court of Tennessee. March 7, 1903.)

LIFE INSURANCE—REPRESENTATIONS—WARRANTIES—REMEDIAL STATUTE—CONSTRUCTION.

1. Acts 1895, p. 332, c. 160, § 22 (Shannon's Code, § 3306), provides that "no written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss." Held, that as the statute was intended to relieve against the hardships arising from the enforcement of the common law as to warranties in insurance policies, and as the intention of the Legislature, as shown in the introductory clause, was confessedly to put "representations" and "warranties" on the same footing, the section must be construed as if the word "warranty" was included in the last clause thereof.

Appeal from Circuit Court, Maury County: Sam Holding, Judge.

Action by George W. Stalling and others against the Hartford Life Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. P. Figures, for appellant. E. H. Hatcher and J. H. Dinning, for appellees.

BEARD, C. J. This is a suit upon a policy of insurance for \$5,000 issued on the — day of December, 1899, by plaintiff in error, upon the life of J. C. Stallings, and payable on his death to his children, the defendants in error. The declaration made all proper averments as to the payment of the premium, the death of the assured during the life of the policy, the submission of proof of loss to the company, and its refusal to pay. A number of pleas were filed, some of which were purely formal. Those which were most earnestly relied upon to defeat a recovery averred that the assured, in his application for the policy, made false answers as to his habits, physical condition, and with regard to the attendance

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 2067.

true," with an agreement on his part that "the exact literal truth of each" should be a "condition precedent to any binding contract of insurance," and, further, that the policy was issued in consideration of this agreement and upon the faith that these answers were true.

There being material evidence to support the verdict in favor of the plaintiffs below, the only questions open for our consideration are those of law raised on the action of the trial judge. While a number of errors are assigned, the one most earnestly pressed is that he gave in charge to the jury, as pertinent to the determination of the case, section 22, c. 160, p. 332, of the Acts of 1893, the same being section 3306 of Shannon's Code, which is as follows: "No written or oral misrepresentation or warranty therein, made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material, or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

This statute is in phraseology very similar to legislation enacted within the last few years in many of the states which was intended "to relieve against the hardships arising from the enforcement of the common law as to warranties in insurance policies, which was often invoked by companies which had issued them to defeat recoveries, when the matters covered by these warranties had no real or proximate relation to the risk assured. By the aid of such warranties and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no legal merit and of the purest technicality." *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*, 19 C. C. A. 316, 73 Fed. 653, 38 L. R. A. 33. This is a remedial statute, and the unshaken rule in the construction of such a statute is that its manifest intention will prevail over the literal sense of the terms, and therefore, "when the expression is special or particular, but the sense is general, the expression shall be deemed general." *Brown v. Prendergast*, 7 Allen, 427. In other words, "the rule in construing such a statute, though it may be in derogation of the common law, is that everything is to be done in advancement of the remedy that can be done consistently with any fair interpretation of it." *Chicago, B. & Q. R. R. v. Dunn*, 52 Ill. 200, 4 Am. Rep. 606. Being remedial, its manifest purpose to redress the wrong and advance the remedy should not be frittered away by any technical criticism; nor will the courts permit it to be thwarted by the insurer in converting, by however carefully chosen, but formal, terms, an imma-

would avoid the policy. Whatever the form of the agreement in the application may be, yet this statute incorporates itself in every policy issued (*Herman v. Fidelity Mut. Life Ass'n*, 151 Pa. 17, 24 Atl. 1064; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Dugger v. Ins. Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796), after it becomes operative, and serves as an effectual bar to the destruction of the rights of the beneficiaries, where innocent mistakes of fact which are not material to the risk have been made. In every case the questions reserved by this statute in the interest of the policy holder will be, when made, determined upon judicial investigation, the result of which will be conclusive on the parties.

But it is insisted by plaintiff in error that the construction adopted by the circuit judge, and now approved by this court, is not sound, because of the omission of the word "warranty" from the last clause of the section in question. Confessedly the intention of the Legislature, as shown in the introductory clause, was to put "representations" and "warranties" upon the same footing, and make them harmless in the destruction of the policy, when as affirmances of facts they were made in good faith and were immaterial. To hold, from the failure to repeat the word "warranty" in the concluding clause of the section, that it was not covered by the provision, would be to reverse the rule of liberal construction already announced, and narrow this legislation, so that it would not accomplish any practical good to the policy holder. For, if it be true, as here argued, that the section keeps up the common-law distinction between "warranties" and "representations," and serves only the purpose of bringing within its saving effect the latter, then its passage was an idle legislative ceremony. For the law was, without the aid of the statute, that, only when a representation was made of and concerning a fact material to the risk, could its falsity be asserted to defeat recovery in a matured policy. *Southern Life Ins. Co. v. Booker*, 9 Helsk. 624, 24 Am. Rep. 344; *Kerr on Insurance*, pp. 319, 320; *Billis on Insurance*, § 36. The statute cannot be so curtailed in its effect. It was directed to every misrepresentation, whether in the form of a "representation" or "warranty," and as against every such "misrepresentation," when innocently made and immaterial in character, the right of the policy holder will prevail.

Such has been the construction of similar statutes by other courts. In *Herman v. Fidelity Life Association*, supra, the court said: "This act effected a change in life insurance contracts, a much-needed change so far as some companies are concerned. The questions of materiality and good faith are ordi-

non was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice, and it is as much the duty of courts to enforce such rules as it is to administer the statutes of fraud and perjuries." To like effect are *Schuermann v. Ins. Co.*, 165 Mo. 641, 65 S. W. 723; *Fidelity Life Association v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197. This was also the view of this court in *Light v. Insurance Co.*, 105 Tenn. 480, 58 S. W. 851.

Other errors are assigned, which are disposed of orally. Upon the whole we see no reason why the judgment of the court below should be reversed. It is therefore affirmed.

DEERING HARVESTER CO. v. WHITE.
(Supreme Court of Tennessee. Feb. 21, 1903.)

CONTRACTS—ALTERATIONS—SPOILIATION BY STRANGER—DEFECT.

1. Where an agent for the seller of a machine, without any authority from the seller, changes the contract between the seller and purchaser so as to make it call for a greater consideration, his act does not impair the validity of the contract as it originally stood.

Appeal from Chancery Court, Stewart County; L. T. Cobbs, Special Judge.

Suit by the Deering Harvester Company against Mrs. Wille V. White, as executrix. A decree of the Court of Chancery Appeals in favor of plaintiff, and defendant appeals. Affirmed.

J. W. Stout, for appellant. W. M. Brandon, for appellee.

WILKES, J. The bill in this case is to recover the price of a corn harvester. The testator of defendant gave an order to the harvester company for a machine, for which he was to pay, if he approved it, \$120 in three annual installments of \$40 each. The machine was delivered and examined, and conceded to be as represented, but the testator refused to pay for the same, or to execute his notes, as he had agreed to do, for the installments, giving as a reason that he had sold his farm to his sons, and did not need it. When the first installment fell due, suit was brought before a justice of the peace, but after suit began the testator died, and the suit was allowed to abate. Subsequently this suit was brought. In the meantime the complainants were informed that the original order, as given to their agent, had been changed by the agent, so as to make the last installment \$45, instead of \$40, as agreed on. This the agent did without authority from

the Court of Chancery Appeals report from the proof that complainants never intended to charge the testator but \$120, and when notes were demanded they were only demanded three for \$40 each. The original suit brought before the justice of the peace was upon the instrument in its changed condition, calling for the last installment of \$45 instead of \$40. When complainants were informed of the change made by their agent they allowed that suit to abate, and then corrected the instrument to conform to the agreement, and brought the present suit upon it in its corrected form.

It was insisted in the court below and in the Court of Chancery Appeals that the change made in the written contract was a material alteration of its terms, and rendered it void, and it could not be restored and validated by correcting the change and erasing the alteration, but the instrument must be treated as void for all purposes. The Court of Chancery Appeals was of opinion that the change must be treated as a mere spoliation of the instrument by a stranger, and not an alteration by a party beneficially interested. In the latter case the instrument would have been rendered void on grounds of public policy, even after correction made. *Crockett v. Thomason*, 5 Sneed, 342; *McDaniel v. Whitsett*, 96 Tenn. 12, 33 S. W. 567; 1 *Greenleaf's Evidence*, 565-6; *Addison on Contracts*, 1084. But a mere spoliation of an instrument by a stranger, or one who stands as a stranger, does not have such effect. That court finds that the change was made by the agent without authority from his principal; that the latter did not authorize, consent to, or know of it, and when informed of it repudiated the change, and did not thereafter attempt to enforce it; and that the change was not made with a view to defrauding the testator of defendant, but for another purpose, unknown to and unauthorized by the principal. That court further finds that the machine was received by the testator, is now in possession of defendant, as his executrix, and has not been paid for, and is confessedly up to representations; and under these facts the estate should be made to pay for the same. We concur in the opinion of the Court of Chancery Appeals, and think complainant is entitled to recover, and defendant, as executrix, is under obligation to pay, and the decree of the Court of Chancery Appeals is affirmed.

The rule is thus stated in 2d Vol. Am. & Eng. Ency. Law, p. 216: "In the United States the effect of an alteration by an agent of the grantee depends on whether the act is or is not within his express or implied authority. If the agent acts within the line of his authority in making the alteration, it will have the same effect in invalidating the instrument as if made by the party claiming thereunder himself. But if, on the other

¶ 1. See *Alteration of Instruments*, vol. 2, Cent. Dig. §§ 66, 193, 198.

hand, the agent has no authority whatever, either express or implied, to make the alteration, it is simply a spoliation by a stranger to the contract, and does not impair the validity of the instrument as it originally stood"—citing many authorities.

CITIZENS' RAPID TRANSIT CO. v. DOZIER.

(Supreme Court of Tennessee. March 7, 1903.)

NEW TRIAL—BILL OF EXCEPTIONS—APPEAL—REVIEW.

1. Acts 1875, p. 189, c. 106, provides that a party may except to the granting of a new trial and reduce to writing the reasons therefor, with the evidence and the decision of the court, and that it shall be the duty of the judge granting the same to allow and sign such bill of exceptions, which shall be a part of the appeal record; and on appeal the Supreme Court shall have power to grant a new trial or correct any errors of the circuit court in granting the same. *Held*, that where a new trial was granted for error in the charge, but the judge refused to specify the portion conceived to be incorrect, the Supreme Court was required to examine all the grounds assigned for a new trial, and affirm the order, if any of the grounds were well taken.

Appeal from Circuit Court, Davidson County; Jno. W. Childress, Judge.

Action by A. P. Dozier against the Citizens' Rapid Transit Company. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, defendant appeals. Reversed.

R. F. Jackson and J. M. Anderson, for appellant. Jas. Trimble and R. L. Kennedy, for appellee.

NEIL, J. This is an action brought by A. P. Dozier, administrator, against the Citizens' Rapid Transit Company, to recover damages for the death of Dennis Dozier, which resulted from a collision between two street cars near Thirteenth street, West Nashville, on the line of plaintiff in error's railway leading to the State Penitentiary.

There were three trials of the case in the court below, the first and second trials resulting in verdicts in favor of the defendant, and the third in a verdict and judgment in favor of the plaintiff below. At the termination of the first trial, and also of the second trial, the plaintiff below moved for a new trial, which was granted in each instance. To the action of the court in granting a new trial upon the second verdict, defendant excepted, and filed a bill of exceptions. The trial judge, in setting aside the second verdict, did so on what he conceived to be error in his charge to the jury, but he declined to specify, in the order granting the new trial, the special portion of the charge which he thought was erroneous. Defendant below excepted to this aspect of the court's action, and filed a bill of exceptions thereon, also for other alleged errors.

After the third verdict, defendant moved

for a new trial, which was refused, whereupon a second bill of exceptions was made, and an appeal was prayed and granted. When the case reached this court the plaintiff in error filed assignments of error upon both bills of exceptions, and all of the questions arising thereon have already been disposed of in a memorandum opinion filed with the record, except the one now to be considered, none of the others presenting questions of sufficient novelty to require presentation in an opinion prepared for publication. As the error which is to be considered in this opinion arose upon the second trial, it is proper, before directing our attention specially to its disposition, to recall that, under the course of practice applicable in this state to cases wherein a bill of exceptions is taken for the purpose of testing the correctness of an order granting a new trial before final judgment, and the case subsequently comes to this court on appeal from the final judgment, the action of the circuit judge in granting the new trial must be examined as if a separate case were thereby presented. *Railroad Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47.

Pursuing this course, it is necessary to determine the practice applicable, under the statute, to the special state of facts we have before us in this record. The statute reads: "Where a motion for a new trial shall be granted or refused, either party may except to the decision of the court, and may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case; also the decision of the court on said motion; and it shall be the duty of the judge before whom such motion is made to allow and sign the same; and such bill of exceptions shall be a part of the record in the case. It shall be lawful for the appellant in such cases to assign for error that the judge in the court below improperly granted or refused a new trial therein; and the Supreme Court shall have power to grant a new trial or to correct any errors of the circuit court in granting or refusing the same." Acts 1875, p. 189, c. 106.

It is insisted by the appellant, the plaintiff in error, that the circuit judge should have specified the portion of his charge which he conceived to be incorrect, and that, not having done so, this court can look no further into the matter, but should declare his action in granting the new trial erroneous. On the other hand, it is insisted by the defendant in error that, notwithstanding the above-mentioned failure of the circuit judge, this court should look into the grounds assigned for new trial, and affirm the order granting it, if any of the grounds aforesaid are well taken.

We are of the opinion that the contention of the defendant in error represents the sounder view. While it is the duty of the circuit judge, in granting the new trial, to specifically point out the ground upon which

his action in so doing rests, still his failure to discharge this duty should not result in injury to the party in whose favor the new trial is granted, when the latter has in the court below fully complied with the requirements of law in setting out specifically and accurately the grounds on which the new trial is asked, and is otherwise without fault or negligence in the matter. In the present case, it appears that the defendant in error did set out fully and specifically in the court below the several grounds on which he asked for a new trial. In such a case the party is entitled to have considered in this court all of his grounds assigned below, and, if any one of them is found sufficient to justify the action of the circuit judge in granting the new trial, that action should be affirmed, although the judge erroneously based his decision upon some other ground. We have accordingly examined all of the grounds assigned in the court below, and are of opinion that the circuit judge rightly granted the new trial, not for error in his charge as actually given to the jury, but in his failure to give in charge one of the requests of the defendant in error.

No error was therefore committed in granting the new trial on the second verdict, but for errors committed on the third trial, which are considered and disposed of in the memorandum opinion, the judgment in favor of the defendant in error must be reversed, and the cause remanded for a new trial.

MATTHEWS et al. v. CAPSHAW et al.

(Supreme Court of Tennessee. Jan. 10, 1903.)

WILLS—POWER OF SALE—DISCRETION—EXERCISE—DEED—FAILURE TO STATE EXERCISE OF POWER.

1. Where a will gave all testator's property to his widow for life, and provided that in case of necessity she might sell any of it for the benefit of the family, the widow was the sole judge as to the necessity of selling property, and a sale of realty by her was valid, though no actual necessity existed.

2. Where a will gave all testator's property to his widow for life, and provided that in case of necessity she might sell any property for the benefit of the family, a deed by the widow, purporting to convey a fee with general warranty, was not invalid because failing to state that it was under the power in the will.

Appeal from Chancery Court, Putnam County; T. J. Fisher, Chancellor.

Suit by one Matthews and others against one Capshaw and others. From a judgment for defendants, complainants appeal. Affirmed.

Bryant & McBroom and F. T. Faucher, for appellants. Algood & Finley and R. B. Capshaw, for appellees.

SHIELDS, J. Complainants, children and devisees of Lawrence Matthews, deceased, bring this bill to assert their title in re-

mainder upon the falling in of the estate of their mother, Mrs. Agnes Matthews, for her own life, now outstanding, in certain valuable lots in Cookeville, Tenn., and to have declared void and inoperative a deed made by Mrs. Matthews, purporting to convey the property in fee to Simeon Hynds.

Lawrence Matthews made his will in 1850, and died in 1874, the owner of real and personal property including that in question, and leaving Agnes Matthews, his widow, and complainants (12 in number), his children, surviving. His will was duly admitted to probate, and John F. Matthews and Mrs. Agnes Matthews, the executor and executrix therein named, were qualified.

The first clause of the will is in these words: "First. If my wife, Agnes, should live longer than I do, I want, at my death, all of my just debts to be paid, and then I want my wife, Agnes, to have all my lands and negroes and effects during her life or widowhood. and that in case of necessity, I authorize my wife, Agnes, to sell any properties or lands or negroes, as same as I could for myself, for the benefit of the family." The other clauses contain some small bequests to certain of his children, and a special provision that all of his children shall be made equal in the distribution of his estate.

On November 5, 1877, Mrs. Agnes Matthews conveyed the property in controversy, for a valuable consideration in hand paid, to Simeon Hynds, in fee, with formal covenants of seisin, good right to convey, and general warranty; and through several intermediate conveyances, purporting to convey in fee, made for valuable considerations paid, and without notice of the claim now attempted to be asserted, the several defendants now have possession and claim title to the property. The deed to Simeon Hynds contains no reference to the will of Lawrence Matthews, or the power of disposition of his property therein given to his wife. At the time this conveyance was made, Mrs. Matthews was in possession of some five or six hundred acres of land, and had some money and other personal property; but the condition of the estate of the testator and of the several complainants does not fully appear, save that the personal estate was evidently small, and the children had not been advanced equally. Mrs. Matthews, who is now about 90 years of age, was examined as a witness, and testified that she sold the property because she thought she had the right to do so, and that she accounted for the proceeds in a settlement she made as executrix some 9 years afterwards. There is no charge of fraud or unfairness in connection with the sale and conveyance of the lots.

The complainants insist that the power of sale vested in Mrs. Matthews was a limited power, to be exercised only upon the happening of a certain contingency, and that she was not authorized to convey the property of

no such necessity existed when the sale was made to Simeon Hynds, and, further, if a necessity did exist, the power given her was not exercised, since the deed contains no express recital that it was her intention to execute it, and the presumption is that she only intended to convey her estate for life, and for these reasons her conveyance was only effective to pass her life estate; that they are the rightful owners in the remainder of the fee to the property; and they bring their bill to have this adjudged, and the conveyance of Mrs Matthews, so far as it purports to convey the fee, declared a cloud on their title, and removed.

The general rule of law, unquestionably, is that, where a special power of sale is given, to be exercised only upon the happening of a certain event, made a condition precedent, it can be executed only in the mode, at the time, and upon the conditions prescribed in the instrument creating it, and the purchaser must, at his peril, ascertain whether the contingency upon which the sale is authorized exists. This rule is recognized and adhered to by this court in all cases proper for its application, and it is not necessary to cite authorities to sustain it. But the rule only applies where the condition upon which the power is to be exercised is upon the happening of a certain event or independent fact, such as majority or marriage of some one named, which may be ascertained by any one with equal certainty. It does not apply and is not the law where the condition is such that the determination whether it has been fulfilled, or not, requires the exercise of judgment and discretion, as to which there may be an honest difference of opinion; and in cases of this character the decision of the donee of the power is conclusive of the question, and a sale made in pursuance of the power, in good faith or without notice to innocent purchasers, will not be set aside, although it may afterwards appear that the judgment of the donee was erroneous. This distinction is well established by the authorities. Chief Justice McIver, of the Supreme Court of South Carolina, in a well-reasoned opinion in a case involving this question, said: "It is quite clear that the power of sale was a conditional one, and it is equally clear that the condition was, in its nature, precedent, and not subsequent, and that, such being the case, until the condition was performed, or the contingency upon which the power was conferred happened, the power could not be lawfully exercised. So that the real question in this case is whether the contingency upon which the power to sell was given had happened at the time the sale was made, and, as subsidiary to this, who was to determine whether the contingency had happened. To solve these questions, it will be necessary to inquire what was the nature of the condition.

judgment or discretion for the determination of whether it had happened, and about which, therefore, there might well be, as there was in this very case, honest difference of opinion. It certainly was not a distinct and independent fact, as if the testator had provided that the executor should sell when a certain person should attain to a certain age, but it was a condition, the happening of which could only be determined by an exercise of judgment. When the value of property should recover from a depression caused by war or any other special circumstance must necessarily be a question to be determined by the exercise of judgment—one about which persons might, and probably would, honestly differ. What was to be the extent of the recovery which would authorize a sale? Somebody must judge of this, and, if the executor is not permitted to do so, then it is difficult to suggest who could. If the executor commits an error of judgment in determining such a question, that certainly ought not to invalidate a sale made by him in the honest exercise of his judgment. If it did, then it will be impossible to tell, until after it was tested by a judicial proceeding, whether any sale made under such a power was valid; and, if such a rule be established, it would destroy all chances of making such a sale, for certainly no one would buy with the prospect of having his title inquired into and assailed years after upon the ground that the executor had committed an error of judgment in determining a question which was left to his discretion. When, therefore, as in this case, a power of sale is given to an executor upon the happening of a contingency which can only be ascertained by the exercise of judgment and discretion, and the executor, in the honest exercise of his judgment, determines that such contingency has happened, and accordingly makes the sale, such sale cannot be invalidated, even though it should be made to appear, in the light of subsequent events, that the executor had committed an error of judgment in determining whether the contingency had happened upon which he was authorized to sell. If, however, it should appear that the executor erred willfully, or from such gross negligence as would imply willfulness, then it would be different, and the question whether the sale should be allowed to stand would depend largely upon whether the purchaser had notice of such conduct on the part of the executor." *Jennings v. Teague*, 14 S. C. 238-240. Other authorities are in accord. When the power of sale is conferred, to be exercised if a necessity for so doing arises, the judgment of the donee as to the necessity is conclusive, in the absence of fraud. *Bunner v. Storm*, 1 Sandf. Ch. 357. If the trustees exercise their discretionary power in good faith, and without fraud or collusion,

the court cannot control or review this discretion. Perry on Trusts, § 511. When a limited power of disposition is given, and the discretion of judging of the contingency is also conferred, and there is no fraud or collusion, the sales made by the donee cannot be impeached. *McGavock v. Pugsley*, 1 Tenn. Ch. 418. Whatever liability might attach to the executor on its being made to appear that the exercise of his judgment was not made in good faith, the title of the purchaser would not be affected thereby, unless collusion or guilty knowledge can be traced to him. 2 Wms. on Ex'rs, 841.

The power of sale vested in Mrs. Matthews by the will of her husband is clearly a limited power, which she could exercise only upon the happening of the condition stated in the will—a necessity for so doing arising, a condition precedent—and she had no right to dispose of any of the property of the estate until this contingency was determined to exist. But by whom was the fulfillment of the condition to be determined? It did not depend upon the occurring of an independent or substantive fact, such as the majority or death of some particular person, of which there would be, in all probability, record evidence, and which could be inquired into by a stranger or probable purchaser, and ascertained with as much certainty as it could by the donee of the power. It was a matter of which Mrs. Matthews—and here attention is called to the fact that this power is not given to her and John Matthews as executrix and executor, but to her alone, as an individual, as the widow of the donor and the head of his family, as well as one of the personal representatives of his estate—was expected to and would know and understand better than any one else. The property was to be sold in case of necessity, and for the benefit of the family, which covered and included the individual wants and necessities of the widow and every one of the 12 children, as well as their collective interests in the proper management and protection of the estate of the testator. Who would have more accurate knowledge of all these matters than Mrs. Matthews? Who would be in a better position to determine the necessity of a sale of the property for the benefit of the entire family, and more interested in a correct determination of the question? And how was it possible for a stranger to ascertain the ever-changing and constantly increasing demands of this large family of children, almost yearly maturing, and requiring advancement to aid them in starting in life—a matter evidently contemplated by the testator? The occasion for the sale of the property might have been caused by a family necessity—one which it was not desired to make public, imperatively demanding ready money, and just such a contingency as the testator desired to provide for above all things. There could have been a necessity—

an imperative and absolute one—requiring the sale of the property, which the public did not know and could not ascertain. It is therefore clear that the condition upon which the power was to be exercised was not upon the occurrence of any certain event which could be ascertained by all persons alike, but the existence of a state of affairs the ascertainment of which called for accurate knowledge of the inside condition of the estate of the testator and that of the numerous members of his family, and the exercise of judgment and discretion in determining, upon this knowledge, whether the necessity did in fact exist, as to which different persons might, in good faith, arrive at different conclusions. We think it is evident that it was the intention of the testator which must control; that the existence of the necessity of a sale of his property should be determined by Mrs. Matthews, in whom he most confided, in accordance with her best judgment and discretion; and that any disposition of the property made by her in good faith, although others might differ with her as to the necessity, was valid, and vested in the purchaser a good title.

Powers of sale given in wills should receive a liberal construction, in order to carry into effect the purpose and intent of the testator. To place any other construction upon this will than that which we have given it would clearly defeat the plain intent of the testator. It is clear that, by vesting this power of sale in his widow, he intended to provide not only a cheap and expeditious mode of sale of property for the purposes for which the law allows it to be sold, such as the payment of debts and for distribution among his children, but also for a prompt means of raising money whenever, in an emergency, the necessities of his family should require it. If the necessity of a sale was not to be determined by Mrs. Matthews, then it could only be ascertained by a resort to the courts, with attendant expense and delay, which it was intended to provide against. If the testator had intended that the power should only be exercised when a necessity should be judicially determined to exist, he would have so said, and such provision would also have been useless, as a sale would have been decreed without any such power whenever a necessity recognized by law was found to exist; and, if Mrs. Matthews' determination of the existence of the necessity for the sale was not conclusive, the power would be abortive and futile, for no one would purchase the property if any one of those interested, long afterwards, as is here attempted, could have the matter opened, and her judgment as to the necessity of a sale reviewed and possibly held erroneous, and thus the construction contended for would defeat and destroy the power itself.

But if it were doubtful whether the exercise of the power conferred was left to the

judgment and discretion of Mrs. Matthews, we would resolve the doubt in favor of such discretion, for the protection of the present owners of the property—they being innocent purchasers—since the complainants, who are in possession of all the facts, have not fully disclosed the extent of the estate of the testator, its indebtedness, and the financial condition of the several members of the family when the sale was made. In a late case similar to this, this court said: "The purchasers of the lot, as well as the present owners, appear to be innocent purchasers, and to have bought in good faith; and in their interest the rule will be enforced that where it is doubtful whether a power has been exercised legally or illegally, in favor of innocent purchasers and meritorious claimants, a legal execution will be presumed." *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294.

The other position of the complainants is equally unsound. While the conveyance made by Mrs. Matthews to Simeon Hynds purports upon its face to be made by her as an individual, and contains no reference to the will of Lawrence Matthews, nor to the power of sale contained therein, it does describe and convey in fee certain property of the testator, and contains full covenants of warranty. It is now well settled in this state that, when a conveyance is made of property which the conveyer is vested with a power to sell and convey, if the property be referred to in the conveyance, or the instrument would be inoperative except as an execution of the power, its exercise will be presumed, and no express recital of the power is required. In the case of *Hall v. Preble*, 68 Me. 100, quoted approvingly by this court, it is said: "It is not necessary that there should be an express declaration in the deed that it is made in execution of the power. It is sufficient if the deed purports to convey the fee. When a person conveys land for a valuable consideration, he must be, and is, engaging with the grantee to make the deed as effective as he had the power to make it." *Young v. Ins. Co.*, 101 Tenn. 316, 47 S. W. 428. It is sufficient if the intention to execute the power appears by words or deed indicating the intention. *Pate v. Pierce*, 4 Cold. 113. If the deed purports to convey the fee, which would be impossible without the execution of the power, no recital of it is necessary, and the intention to exercise it is presumed. *Guarantee & Trust Co. v. Jones*, 103 Tenn. 254, 255, 58 S. W. 219. This deed does purport to convey the fee and warrant a perfect title, which the conveyer could not do or make good without the execution of the power, and without which the deed would be ineffectual to pass the estate contracted; and we hold that the conveyer is presumed to have intended to, and did, execute the power conferred upon her, and that the deed was and is operative to vest the fee to the property conveyed in

her vendee, and the defendants claiming under him.

Affirmed, with costs.

DAVIDSON BENEDICT CO. v. SEVERSON.

(Supreme Court of Tennessee. March 14, 1903.)

ACTION FOR WRONGFUL DEATH—MEASURE OF DAMAGES—STATUTORY CONSTRUCTION.

1. Shannon's Code, § 4026, provided that an action for wrongful death might be instituted by deceased's personal representative, but, if he declined it, the widow and children, without his consent, might use his name in suing. Section 4028 provided that the damages should go to the widow or next of kin, to be distributed as personal property. Acts 1871, p. 70, c. 78, amending Shannon's Code, § 4026, provided that the right of action which a person dying from injuries received from another, would have had against the wrongdoer had death not ensued, shall not abate, but shall pass to the widow, or, if there is no widow, to the children, or personal representatives, for the benefit of the widow or next of kin. It also provided, amending section 4028, that the widow, or, if no widow, the children, should be allowed to sue; the remedy being additional to that provided by section 4026. Acts 1883, p. 259, c. 186, provides that the parties suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased, and also the damages resulting to the parties for whose use the right of action survives from the death consequent upon the injuries received. *Held*, that the statute but preserved the right of action accruing to the deceased, and did not create a new cause of action in the widow, or child, or personal representative; and that in the prosecution of that cause of action damages were recoverable for the physical and mental suffering, loss of time, etc., to the deceased in consequence of his injuries, and accruing up to the time of his death, and also damages to compensate the widow or next of kin for the pecuniary loss sustained by them by the death of the deceased, which latter are equivalent to those accruing for loss of earning capacity to one totally disabled; and that hence an instruction permitting a recovery for deceased's loss of earning capacity and also for pecuniary damages sustained by his widow and child was erroneous.

Error to Circuit Court, Lewis County; Sam Holding, Judge.

Action by J. S. Severson, as administrator of W. A. Hollister, deceased, against the Davidson Benedict Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Williamson, Jas. W. Byrus, and J. A. Bates, for plaintiff in error. H. P. Figures, Salmon & Turner, and J. S. Severson, for defendant in error.

NEIL, J. This action was brought in the circuit court of Lewis county by the defendant in error, as the administrator of W. A. Hollister, deceased, to recover \$20,000 as damages for the death of said Hollister, alleged to have been caused by the negligence of the plaintiff in error.

The declaration, among other things, not

necessary to mention, alleged that on or about February 1, 1902, the plaintiffs in error owned and were operating a sawmill in Lewis county; that the said Hollister was employed by them in the capacity of sawyer, and while in the discharge of his duties as such, and without any negligence on his part, was killed by the explosion of the boiler attached to the engine, by means of which the sawmill was operated; that the boiler was old, defective, and unsafe, and wholly unfit for the work to which it was put; and that its condition was unknown to Hollister, but was known to the plaintiffs in error, or could have been ascertained by the exercise of proper diligence and care. The suit was brought for the benefit of the widow and child of the deceased. The plaintiffs in error, who were defendants below, entered a plea of not guilty. There was evidence tending to sustain the allegations of the declaration, and the jury rendered a verdict of \$9,000 in favor of the plaintiff below, and judgment was rendered thereon by the court, after a motion for a new trial had been overruled. From this judgment the plaintiffs in error prayed and obtained an appeal, and have assigned errors.

The first error that claims our attention is the charge of his honor upon the measure of damages. After stating to the jury the substance of chapter 186, p. 259, Acts 1883, he told them that there were two classes of damages assessable thereunder: First, such damages as the deceased himself could have recovered "had he been permanently disabled for life," and he himself were prosecuting the suit, and that in estimating this class they should take into consideration the mental and physical suffering of the deceased, his earning capacity, and the probability of his continuance in life; secondly, that, in addition to the foregoing damages, the plaintiff would be entitled to recover also such pecuniary damages as had been sustained by the widow and child, consequent upon the death of the husband and father, the said W. A. Hollister, and that in estimating this latter class of damages they should look to the ability of Hollister to furnish his wife and child a support, and the nature and extent of the support he did give them, and to the probability of the continuance of that support, and his ability to provide, and to the probability of a continuance of their dependence upon him, for support. Error is assigned upon this portion of the charge, and the questions presented thereby were fully argued at the bar, and, in addition, we have been furnished with briefs upon both sides—not only briefs prepared in this case, but also in another case pending before the court, involving similar questions. All of these briefs we have read, and attentively considered. The questions made, and argued with great ability, go to the foundation of the rules for measuring damages recognized in this state in the class of cases we have before us, and we have de-

cided to undertake and present a review of the whole matter. We are the more moved to undertake such an inquiry, although the labor it imposes is very great, because of the frequent misapprehensions of these rules that appear in the charges of able and learned circuit judges, indicating some uncertainty, real or apparent, in our reported decisions, which are the source of authority to which they must resort when instructing juries brought before them.

The provisions of the Code are:

"2291 (Shannon's Code, § 4025). The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his personal representative, for the benefit of his widow or next of kin, free from the claim of creditors.

"2292 (Shannon's Code, § 4026). The action may be instituted by the personal representative of the deceased, but if he declines it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution bond.

"2293 (Shannon's Code, § 4028). If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claim of the creditors of the deceased, to be distributed as personal property."

On December 14, 1871, p. 70, c. 78, of the Acts of that year, the following amendment was passed:

"Section 1. That section 2291 of the Code of Tennessee be so amended as to provide, that the right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

"Sec. 2. That section 2292 be so amended as to allow the widow, or if there be no widow, the children, to prosecute suit, and that this remedy is provided in addition to that now allowed by law in the class of cases provided for by that section, and 2291 of the Code, which this act is intended to amend."

Another statute was passed in 1883—page 259, c. 186, of the Acts of that year. This act will be stated later in connection with certain decisions of this court, so as to present it in its historical connection.

the measure of damages applicable thereunder, it is necessary that we should review their history after enactment, as they appear in our judicial decisions. The first reported decision bearing upon the matter is *Railway Co. v. Burke*, 6 Cold. 45, decided at the December term, 1868. At that time there were in force only sections 2291 (Shannon's Code, § 4025), 2292 (Shannon's Code, § 4026), and 2293 (Shannon's Code, § 4028). Burke was killed upon the line of the railway company, and the latter was sued for damages. The circuit judge charged the jury that the damages recoverable were those suffered by the widow and children by reason of the killing of Burke, the husband and father. In passing upon this point, and speaking through Smith, J., this court said: "The damages recoverable are those suffered by Burke, and which he could have recovered had he lived; and not those suffered by his widow and children in consequence of his being killed. Such is the proper construction to be put on Code, §§ 2291, 2292, and 2293. The cause of action is the injury done to Burke, and the right of action of the personal representative is for that cause of action and is that right of action Burke had and could have prosecuted had he lived, and the damages recoverable are for that cause of action." Again: "The killing of a man is not of itself a cause of civil action. The damages recoverable are for what was incurred or suffered while the person lived. If the killing be absolutely instantaneous, damages are not recoverable, for that would be giving damages for the mere act of killing." The charge of the circuit judge was, therefore, held to be erroneous, and the judgment in favor of the administrator below was reversed, and the cause remanded for a new trial.

The next case was *Railway v. Prince*, 2 Helsk. 580, decided in January, 1871. In this case it appeared that the husband of the plaintiff below, Nancy Prince, had been killed, as was stated in the opinion, instantaneously, upon the track of the railway company. The widow, having qualified as administratrix, sued the company, and in her declaration pleaded her right to recover upon "such damages as she and her children may have sustained by reason of defendant below having deprived of his life the husband of the plaintiff, Nancy, and the father of the children." No other claim for damages was made in the declaration. During the progress of the trial the railway company offered to prove by several witnesses that Prince was a drunken, worthless man; that he provided nothing for his family, and consumed what his family supplied. This testimony was objected to, and the objection sustained, and the evidence rejected, and error was assigned upon the action of the court. This court, speaking through Nicholson, C. J., said that it was manifest that this

injury which she and her children had sustained by the death of the husband and father. The circuit judge excluded the testimony on the ground that such damages could not be recovered, but this court said upon this point that it was obvious, if the plaintiff below could not recover damages for the loss of her husband, she could recover none whatever in the suit, because she claimed none other in her declaration. "This raises the important question," the opinion proceeds, "whether damages sustained by a wife and children in consequence of the killing of the husband and father can be recovered in an action instituted under Code, § 2291." Then, after quoting that section, it was observed that one object of the section was to prevent the abatement of the right of action which one has who has received personal injuries from which such person subsequently dies; that it was not material whether the person injured had commenced his action before his death or not; that in either case the section referred to would prevent the abatement of the right of action, and transmit it to his personal representative for the benefit of his widow and next of kin. "Looking to the obvious purpose of the Legislature in thus altering the common law," continues the chief justice, "we are satisfied it was intended that the representative of a person who had died from personal injuries should have the right to recover damages not only for the mental and bodily sufferings, loss of time, and necessary expenses resulting immediately to the deceased from the personal injuries, but also for the damages resulting to the parties from the death consequent upon the injuries received." Then, after discussing the question whether the section of the Code referred to preserved the right of action in case of instantaneous death, the final result of the court's deliberations is thus stated: "It follows that the representative of the deceased has a right to recover damages sustained by his widow and children in consequence of his death, whether the death resulted instantaneously from the injuries or not. It would have been absurd to give the right of action for damages for the mental and bodily sufferings of a person whose death was instantaneous. Yet a right of action is given for the benefit of the widow or next of kin. It follows that the damages intended to be provided for was the loss of husband and father. Such, we are satisfied, was the intention of the Legislature, and we think their intention is manifested with sufficient distinctness in the language employed. This court, in the case of *Louisville & Nashville Railroad Company v. Burke*, 6 Cold. 45, put a different construction on the section of the Code under consideration. But, as we cannot concur in the construction placed in that case upon the section as to the point under examination, we are constrained to overrule

so much of the decision as relates to the particular question here discussed." It was accordingly held in that case that the testimony offered by the company was competent to the effect that the husband and father for whose death the suit was brought was a drunken and worthless man, and made no provision for his family.

The next case was *Railroad Company v. Stevens*, 9 Heisk. 12, decided in December, 1871. This was an action to recover damages for the death of a fireman who was killed by the explosion of a boiler. Upon the subject of the recovery of damages the court, speaking through McFarland, J., said: "Under this statute the damages which the deceased could have recovered had he lived, and his mental and bodily suffering, loss of time, expense, etc., are clearly embraced, and in fact it has been supposed this was all. There is no express provision that the jury may consider the loss to the widow and children or next of kin; but in the case of the *N. & C. R. Co. v. Prince*, 2 Heisk. 580, this court held that under this statute it was intended the representative of a person who had died from personal injuries should have the right to recover damages, not only for the mental and bodily suffering, loss of time, and necessary expenses immediately resulting to the deceased from the personal injuries, but also for damages resulting to the parties for whose benefit the right of action survives from the death consequent upon the injuries received. * * * The result of this decision was to make our statute embrace, in addition to the damages for the suffering of the deceased, his loss of time, etc., had he lived, also the pecuniary loss his death caused to his widow and children or next of kin; and in this latter respect the subject-matter of damages is similar to the statutes of New York and Pennsylvania; and, as we have seen, they are confined to pecuniary damages, and do not allow damages for the grief of the widow or children. We think this is safest. In fact, as remarked by counsel, it is somewhat incongruous to undertake to give compensation to the widow for her grief. We do not see how we could extend our statutes further than the New York and Pennsylvania statutes. We do not doubt the construction given in the *Prince* Case, but we can carry it no farther."

The next case was *Railroad v. Mitchell*, 11 Heisk. 400, 407, decided at the September term, 1872. In this case the opinion in the *Prince* Case was again referred to and reaffirmed.

The next case was *Collins v. Railroad*, 9 Heisk. 841, decided, as shown by the reporter's note, at the September term, 1874. That suit was brought by a widow for the killing of her husband, under the act of December 14, 1871, p. 70, c. 78 (which we have set out supra), amending sections 2291 and 2292 of the Code. The plaintiff below obtained verdict and judgment, and the railroad com-

pany appealed. The first question was that, inasmuch as the killing of the plaintiff had not occurred prior to the passage of the act, the suit could not be maintained by the widow, but should have been brought by the administrator. This construction was held to be unsound. It was next insisted that there was error in the charge of the court "to the effect that in this action 'the jury could award the damages of the children as well as the widow, when the declaration is only on behalf of the widow.'" Upon this point the court, speaking through Sneed, J., said: "It will be seen from section 2293 of the Code that the law itself gives direction to the recovery in such cases. The widow and children are the beneficiaries of the action; and this section stands unrepealed and unaffected by any subsequent legislation. The recovery in this case, there being several children, inures to the benefit of the widow and the children, to be distributed as personal property, in the language of the statute. The courts will see to the disposition of the recovery. We have held at the present term, in the case of *Sample v. Smith* [1 Tenn. Cas. 284], that, when the action is brought under the Code in the name of the administrator, by the widow, the children are not necessary parties to the action; and we can see no reason for varying the rule in a case like this. In any case when there are children, and the action is brought by the widow or the administrator, the law itself disposes of the recovery to the use and benefit of the widow and children. We see no error in the charge on this subject. We are asked to reconsider and revoke the doctrine announced in the *Case of Prince*, 2 Heisk. 580, which has been adhered to in several subsequent cases, that 'damage may be awarded not only for the mental and bodily suffering, loss of time, and necessary expenses resulting to the deceased from personal injuries, but also for the deprivation resulting to the parties for whose benefit the right of action survives.' * * * The word 'damages,' in legal parlance, means the indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights through the act or default of another. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with the loss. The loss must be the natural and proximate consequence of the wrong. 1 Bouv. L. D. 422. If the plaintiffs have a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they may recover for it; but, the greater the value of the life to them, in a pecuniary point of view, the more perfect the right of recovery. Sh. & Redf. Neg. § 612. Now, it is argued that it is only the right of action which the deceased would have had had he lived that passes to the widow, and that this does not include the incidental injuries to his family

he had lived, and had been disabled for life or a series of years, or even seriously injured, he would have been entitled to compensatory damages. If he had a wife and children, whom he had supported by his industry, to whom he was now unable to render any assistance on account of his injuries, this privation of himself and family would necessarily constitute an element in the computation of damages. And, if his life is lost to them, why may not the privation to them of the aid and maintenance he had given them still enter into the computation of actual damage sustained by them? The widow has lost a husband, the child a father, and both have lost the food and raiment which his industry provided. Had he lived, he could have indemnified the last privation by his action against the wrongdoer; and, having died, the same right of indemnity passes to them. This is the sense of the law as we understand it, and we see no reason to depart from the doctrine of our adjudged cases upon the subject. *N. & C. R. R. Co. v. Mary Stevens*, 9 Heisk. 12." The case of *Collins v. Railroad Co.* although appearing in 9 Heisk. 841, among the decisions of April term, 1872, was, as previously stated, not decided until the September term, 1874. The reporter states in the note previously referred to that he was directed by the court to publish it in 9 Heisk. That volume was not published until August, 1877.

So the cases stood until January term, 1876, when the case of *Fowlkes v. Railroad Co.* was decided. This case is also reported in 9 Heisk. 829-841. As to date of decision, see reporter's note on page 829. In this note it is stated that the case was decided at the January term, 1876, and was ordered by the court to be reported in 9 Heisk. The case is also reported in 5 Baxt., on page 633 et seq. In this case the question for determination was when the statute of limitations would begin to run. In order to determine this, the court found it necessary to consider the nature of the cause of action. In reaching a conclusion upon the point, the court, speaking through McFarland, J., said: "The purpose [of Code, § 2291] seems simply to have been to repeal that rule of the common law that action for personal injuries dies with the person in those cases where the injured party dies of the injury; but, whether the action be brought by the party himself, or his representative after his death, the cause of action is the same, and is governed by the same laws. * * * The argument against this view is that the action allowed by this statute is a new action, given to the personal representative—an action which the injured party could not have maintained; that the action is given to the personal representative on account of the death of the injured party; that his death is the cause of action, and this, of course, could not occur to the injured

appointment. This argument, though plausible, is not sound. As we have seen, the statute is equally applicable to cases where the injured party lives a time and to cases where death is instantaneous. When the injured lives a time after the injury, he has a cause of action without the statute. If an action be brought by the party himself, and he then dies of the injury, before judgment, the effect of the statute is to prevent an abatement, and to allow the cause to proceed notwithstanding the death, but not on account of the death. The cause of action was the injury. And in such cases the action after the death is prosecuted for the same cause for which it was brought, and is the same action. In cases where no action is brought by the injured party himself, the statute allows the action to be brought by the representative. This could not have been done at the common law, and it is, therefore, in this sense, a new and statutory action. But it is brought for the same cause as if the injured party had himself brought the action. * * * It is true that some of the cases seem to have introduced a new element of damages in cases where the action is brought by the representative—that is, damages for the loss of the society, etc., of the husband, father, or relative to the widow or next of kin; that in such cases damages might be allowed beyond what would be proper when the action is brought by the party himself. Some of these cases stand upon doubtful grounds; but even when the action is brought by the party himself damages might, in a proper case, be given, to the same extent as if death had ensued—i. e., when the injury disables the party for life. In such a case the injury, in a pecuniary sense, would be the same as if death had ensued." It was accordingly held that the statute of limitations begins to run from the date of the injury to the deceased, and not from the date of the appointment of the personal representative. Two of the judges dissented. Previously, at the April term, 1874, a decision had been rendered (*Haley v. Mobile & Ohio R. R. Co.*, 7 Baxt. 239), in which the same views which are set forth in the *Fowlkes* Case had been briefly and incidentally indicated in considering the question of punitive damages.

The next case after the *Fowlkes* Case was *Trafford v. Adams Express Co.*, 8 Lea, 96, decided at the December term, 1881. In this case the court, speaking through Cooper, J., said: "Upon a careful examination of the question, and a review of the authorities and the law bearing on the subject, I concur with the majority of the court in the opinion delivered in *Fowlkes v. N. & D. R. R. Co.*, not only in the conclusion reached, but in the reasoning on which the conclusion is based. It seems to be clear that the Legislature, by the statutory provisions under consideration, intended to abolish the rule of the

during life, should survive to his widow and children, or personal representative, as the case may be; and that the only damages which can be recovered in any action under the statute are the damages which the deceased was entitled to recover if he had sued. In this view the statutory provisions are simply those of the abatement and revivor of the particular class of actions; the recovery, in the event of the death of the person injured, without a different valid disposition on his part, being distributable as other personal property of the deceased, free from the claim of creditors. The provisions dovetail exactly into our general system of laws regulating the right of action of deceased persons. There is no anomaly either in the character of the recovery or in its distribution."

The next case was *Railroad Co. v. Smith*, 9 Lea, 470, decided at the September term, 1882. This case is in strict accord with *Fowkes v. Railroad Co.* and with *Trafford v. Adams Express Co.*, supra. The court said: "The damages to be recovered are those sustained by the injured party. The action is not for wrongs to the husband or next of kin. The damages are such as the injured party could have recovered if, instead of being killed, he had been disabled for life; if not the same amount, at least for the same element of damages."

The next case is *Railroad v. Toppins*, 10 Lea, 58, decided at the same term of the court as the preceding case. Speaking to the same subject, the court said: "The charge contains one positive error; that is to say, the jury were instructed that, in addition to the damages which the deceased himself ought to have received if he had lived, damages might also be allowed for the deprivation resulting to the parties for whose use the suit is brought—that is, the widow and children. This charge was justified by several expressions in the published opinion of this court, but there has always been conflict of opinion upon the question, and we have more recently held the true rule to be that the action is the same in its character and as to the element of damages as if death had not resulted, and the action had been brought by the injured party himself; and hence damages to the widow or next of kin in their own right are not to be considered."

The next case was *Railroad v. Conley*, 10 Lea, 531, 534, which was decided at the December term, 1882. In this case the court said: "In giving instruction as to the measure of damages the court told the jury that they might estimate what the life of the deceased was worth to his widow and children in a pecuniary sense, and might also consider the loss of his assistance in maintaining the family, educating and taking care of the children, and allow such sum in their

Next in the order of time comes the act of March 26, 1883, being chapter 186, p. 259, of the Acts of that year. The statute reads as follows:

"A bill, to be entitled an act to define the measure of damages recoverable in case of the death of a person caused by the wrongful act, fault, or omissions of others.

"Section 1. Be it enacted by the General Assembly of the state of Tennessee, that when a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages as provided for by sections 2291 and 2292 of the Code of Tennessee, and as provided for by the act approved December 14, 1871, chapter 78, entitled, 'An act to amend sections 2291, 2292, of the Code of Tennessee,' the party suing shall, if entitled to damages, have the right to recover damages for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and, also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

"Sec. 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

There were several cases decided by the court, and opinions published in them, after this act was passed, but in which it appeared that the injuries were inflicted prior to this statute, and consequently the measure of damages applied, assuming them to be really different, was that one which was established in *Railroad v. Smith*, 9 Lea, 685, and other cases on that list. These subsequent cases were *Railroad v. Pounds*, 11 Lea, 127, *Railroad v. Gurley*, 12 Lea, 46, and *Railroad v. Gower*, 85 Tenn. 405, 3 S. W. 824. Those cases need not be more particularly mentioned at this time.

The first reported case decided under the statute was *Railroad Company v. Stacker*, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840, decided at the December term, 1887. It appeared that the deceased was injured on the 19th of April, 1883, from which injuries he subsequently died. It also appeared that he was 57 years old, and was a paralytic. The jury rendered a verdict for \$12,000 damages, and the railway company appealed. The chief question discussed was whether the verdict was so large as to evince passion and prejudice, in view of the feeble condition and small earning capacity of the deceased at the time he was injured; and it was so held. In deciding this question, after stating that both the negligence of the railway company and of the deceased should be considered in estimating the amount, the court, speaking through Snodgrass, J., said: "In the ad-

are sometimes called 'cold calculations,' because they require a dispassionate estimate of the real conditions and expectations of life at the time of the injury. By whatever term, however, they may be designated, they are just, and, so far as it is practicable to do so in so delicate and difficult a question, are intended to arrive at justice. The age, condition, capacity of earning money, and expectation of life, are all to be considered; and not only considered, but given due weight in arriving at what is a fair and just result."

The next case was *Railway Company v. Howard*, 90 Tenn. 145, 19 S. W. 116, decided at the April term, 1891. This case, however, contains nothing concerning the special measure of damages provided by the act of 1883. It merely restates the rule that it is competent to show the ability and capacity to labor of the deceased, as well as his skill in any particular art or profession, in order to show his earning capacity, with the qualification that his earnings for any special year could not be shown.

The next case was *Loague v. Railroad*, 91 Tenn. 458, 19 S. W. 430, decided at the April term, 1892. In the opinion in that case the court, speaking through Lurton, J., said of the act of 1883: "This act in no way changes the mode of suing. The suit must still be prosecuted by the widow, or the children if there is no widow, or by the personal representative of the deceased. It does not confer upon the widow any independent right to sue exclusively for the damages resulting to herself or the children. One action is given. In it all the damages resulting either to the deceased or to those for whose benefit the action may be prosecuted are to be recovered. The only effect of the act is to enlarge the right of the person suing so as to permit the recovery of the damages peculiar to the widow and children, together with the damages which the deceased might have recovered for his own benefit, and on account of his own suffering and loss. * * * The right of action is still the right of the deceased, although the recovery may include as an element such damages as were sustained by the persons to whom the statute gives the recovery." This was said in determining the question whether the widow's right of action could be revived in the name of her personal representative when she died pending the suit which she had instituted to recover damages for the death of her husband.

The next case was *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907, decided at the April term, 1893. In that case it appeared that the deceased was killed in a collision on the line of the railway company. Upon the subject of the measure of damages the court, speaking through McAlister, J., said: "The next assignment of er-

life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof * * * decide what he would have earned during this expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death.' This charge was erroneous. It was perfectly competent for the plaintiff to prove the expectancy of life of the deceased, his capacity for earning money, his habits, age, and condition. But it was erroneous for the court to charge that they must 'decide what he [the deceased] would have earned during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death.' The assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The courts refuse to lay down any 'cast-iron rules or mathematical formulæ by which such damages are to be ciphered out by juries. It is the duty of the court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, when the future earnings of the deceased and his expectation of life are mere probabilities. * * * The amount the deceased would have earned during his expectation of life was purely a matter of speculation, and his expectation of life was a mere probability. This instruction ignores the fact that plaintiff's intestate was engaged in a most hazardous occupation, and that his expectation of life while it was exposed to the perils of railroad service was more precarious than if he had been engaged in some less dangerous employment. The wages he would have earned were contingent upon his enjoyment of this precarious expectation of life, upon the constancy of his employment, and upon the performance of his duties with regularity and satisfaction to his employer. The objection to the charge is that both the elements of damages are treated as assured facts, and the jury were invited to calculate the damages by this uncertain standard, instead of leaving the assessment of the damages to their sound discretion, upon a consideration of all the elements of damages admitted as evidence."

The next case was *Bamberger v. Citizens' Street Railway*, 95 Tenn. 18, 35, 36, 31 S. W. 163, 23 L. R. A. 486, 49 Am. St. Rep. 909, decided at the April term, 1895. In that case

the court said, speaking through Wilkes, J.: "In the unreported case of *Andrews v. L. & N. R. R. Co.* (decided by the court at the December term, 1893, at Nashville) it was held that the elements of damages recoverable under section 3134 [Act 1883] embraced not only all that the administrator might be entitled to recover, but also all that might be recovered by the father in his own right; and, a recovery having been had as administrator, it was a bar to any further action by the father in his own right for loss of his son's services. It is said the right to recover by the administrator is the same right that the deceased had if he had lived; but this is not (construing the statutes together) strictly accurate, for the right is not only as administrator, but as father, and the damages are given in view of both aspects of the case, and embrace both rights. The right is not strictly a descendible or heritable right, but one arising out of the special statute, and as to its scope is governed by the statute." That suit was an action for personal injuries resulting in the death of Samuel Bamberger, a child about three years of age. The suit was brought by the father of the child or next of kin of the deceased. There was a verdict—also judgment—in the court below in favor of the defendant company. There was evidence tending to show that the father had been negligent in the care of the child, and that the injury had been occasioned thereby. Speaking to this phase of the case, the court said: "The underlying principle of the whole matter is that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would be to defeat this underlying principle by a mere change of form, when the entire recovery in either event goes to him alone. Upon principle we think that, no matter how the suit is brought, whether as administrator or as father, it can be defeated by the father's contributory negligence when he is sole beneficiary."

The next case was *Holston v. Coal & Iron Co.*, 95 Tenn. 521, 32 S. W. 486, decided at the September term, 1895. This case, however, merely decided a point of practice in connection with the class of cases we have before us, and we need not note it further.

The next case was *Railroad v. Johnson*, 97 Tenn. 667, 37 S. W. 557, 34 L. R. A. 442, decided at the September term, 1896. That was a suit instituted by the administrator of Mrs. Johnson to recover damages for the alleged wrongful killing of the intestate by the railway company. The point decided was that the right of action which the husband and wife had at common law for an injury to the wife survived, under Code, § 2291, to the husband, and that he took the recovery *juri mariti*, to the exclusion of the next of kin, and that, therefore, the child of the deceased

wife and mother took no part of the judgment. Speaking of the measure of damages under the act of 1883, the present chief justice said: "It is evident that the passage of this act was not to create a new class of beneficiaries, but to extend the scope of recovery by allowing not only damages which the deceased might have recovered for his or her own benefit, but also such as resulted from the death to the parties for whose use and benefit the right of action survived. With this single modification, it left the law of this state, so far as the rights of the surviving husband in such cases are concerned, as was announced in *Trafford v. Adams Express Co.*"

The next case was *Railroad v. Wyrick*, 99 Tenn. 500, 42 S. W. 434, decided at the September term, 1897. That was an action brought by a widow for the negligent killing of her husband. In that case it appeared that the circuit judge had charged the jury "that they could look to the mental and physical suffering of the plaintiff [widow] in connection with the loss of her husband." After quoting the act of 1883, and noting that the statute expressly authorized a recovery for the mental and physical suffering endured by the deceased, and that, without enumerating any special elements, it allowed a recovery for the damages resulting to the parties for whose use and benefit the right of action survives, the court, speaking through McAllister, J., said: "The question then presented for adjudication is whether the word 'damages,' used in this statute, was intended to embrace the mental and physical suffering resulting to the widow or next of kin. The act of 1883 is almost a literal transcript of the rule for the admeasurement of damages laid down in the case of *Nashville & Chattanooga Railroad Co. v. Nancy Prince*, 2 Heisk. 585. * * * In the case of *Nashville & Chattanooga Railroad Co. v. Mary Stevens, Adm.*, 9 Heisk. 12, decided in 1871, it appeared that the trial judge had instructed the jury that they might allow damages 'for the shock to the feelings of the wife and children resulting from the sudden death of the deceased.' Judge McFarland, in reviewing the *Prince* Case, said, viz.: 'The result of the decision was to make our statute (Shannon's Code, § 4025) involve, in addition to the damages for the suffering of deceased, his loss of time, etc., had he lived; also the pecuniary loss his death caused to his widow and children or next of kin; and in this latter respect the subject-matter of damages is similar to the statutes of New York and Pennsylvania, and, as we have seen, they are confined to pecuniary damages, and do not allow damages for the grief of the widow and children. We think this is safest. In fact, as remarked by counsel, 'it is somewhat incongruous to undertake to give compensation to the widow for her grief.' We do not see how we could extend our statutes further than the New York and

assessment of damages recovered in the Prince Case was re-enacted by the act of 1883, it was adopted as it was understood and interpreted by the courts, and was not intended further to enlarge the elements of damages. The damages allowed to the widow and next of kin, resulting to them, laid down in the Prince Case, was construed by this court in the Stevens Case to mean pecuniary loss, and not damages on account of grief and mental suffering of the widow and next of kin. This construction, we think, is in accord with the great weight of authority on the subject. * * * Under our act of 1883 damages for the mental and physical suffering, loss of time, etc., of the deceased are also recoverable, and are superadded to the pecuniary damages sustained by the widow or next of kin."

The next case was *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131, decided at the September term, 1899. In that case the question for determination was when the statute of limitations would begin to run. In deciding this question the court took into consideration all of the sections of the Code which we have above referred to, and also the act of 1883, and, speaking through Wilkes, J., said: "We are of opinion that a careful reading of the statutes can lead to no other conclusion than that they provide alone for the continued existence and passing of the right of action of the deceased, and not for any new and independent cause of action in his widow, children, or next of kin. * * * It is alone by virtue of these statutes that a right of action exists in the widow, children, or next of kin at all for the unlawful killing of the deceased, and this right exists under the statute, not because it arises directly to those in their own right, but because it passes to them in right of the deceased." Referring to a former case (*Railroad v. Pounds*, 11 Lea, 129, 130), in which the act of 1883 had been spoken of as giving a new cause of action, Judge Wilkes proceeds: "The learned judge used an inapt expression in speaking of it as a new cause of action, and the real holding was that the parties suing were not entitled to the new and enlarged measure of damages provided by that act for a cause which arose before the act." It was accordingly held that the statute of limitations under the act of 1883, as well as under the former acts, began to run from the date of the infliction of the injury upon the person for whose death the suit was brought.

The next case was *Railway v. Davis*, 104 Tenn. 442, 58 S. W. 296, decided at the April term, 1900. This was an action brought by a widow for the killing of her husband. The suit was brought by the widow for her own use, and the children were not mentioned in

and benefit the action was brought. Upon objection to this portion of the charge, the court, speaking through McAllister, J., said: "It is insisted that, as the declaration makes no mention of the children, and the suit was brought solely for the widow, evidence of the number of children was improperly admitted, and that the court erred in instructing the jury that the plaintiff could recover such damages as resulted to her or the children. There was no error in the action of the court. In *Collins v. East Tennessee, Virginia & Georgia Railway Co.*, 9 Helsk. 641, it was held, viz.: 'In any case where there are children, when the action is brought under the Code, either by the widow or the administrator, the children are not necessary parties. The recovery inures to the benefit of the widow and children, and will be distributed as personal property.' The court in that case also said, viz.: 'It is further insisted that there is error in the charge of the court to the effect that in this action the jury could award damages to the children as well as the widow when the declaration is only on behalf of the widow. It will be seen from the Code that the law itself gives direction to the recovery in such cases. The widow and children are the beneficiaries of the action.' In *Sample v. Smith*, 1 Tenn. Cas. 284, it was held, viz.: 'It was not essential that the names of the children for whose use the action was brought should have been set forth. The law determines who are to be entitled to the benefit of the recovery.' In the case of *Spiro v. Felton* (C. C.) 73 Fed. 91, it was held, viz.: 'In an action for damages for an injury causing death, brought for the benefit of the widow or next of kin of the deceased, evidence of the number and ages of the children of the deceased is competent.' Those authorities are conclusive of this question, and it results that the judgment must be affirmed."

The next case was *Daniel v. Coal Co.*, 105 Tenn. 470, 58 S. W. 859, decided at the September term, 1900. In that case the question was, when a damage suit had been brought by the injured person, and he died pending the suit, whether it could be subsequently prosecuted without revivor. In disposing of this question the court, speaking through Caldwell, J., said: "Death from wrongful act and existence of widow or next of kin are the two controlling facts; and they must co-exist in every instance. When either of them is lacking, no one of these statutory provisions is applicable. If the person wrongfully injured by another commences his suit for damages while living, he does so under the general law; and, if he dies from the injury sued for before judgment, leaving a widow or next of kin, his suit survives, and

essential elements—death from wrongful act and existence of designated beneficiary—be wanting, that provision does not authorize the prosecution of a deceased plaintiff's suit without revivor; nor, indeed, does it authorize the revivor of such a suit."

The next case was *Freeman v. Railroad*, 107 Tenn. 340, 64 S. W. 1, decided at the April term, 1901. This was an action for damages for personal injury resulting in the immediate death of one B. T. Robertson. It was brought by the administrator for the benefit of the next of kin of the deceased, who were stated to be his mother, one brother, and sister. The declaration averred that the deceased left no widow or children or father surviving him, but left a mother, brother, and sister. The contention was made in the court below and in this court that the mother was the next of kin to the defendant, and that it was error to allow the plaintiff to show that deceased had a brother and sister, as they could have no interest in the recovery, and that the fact that there was a brother and sister induced the jury to give greater damages than they otherwise would have given. Upon this subject the court, speaking through Wilkes, J., said: "We think that the conclusion is hardly warranted upon any reasonable hypothesis, and we cannot see that the fact would have at all increased the amount of damages awarded, and such assumption is not well grounded. The action in the case is based on the provisions of the statute (Shannon's Code, §§ 4025-4029). These sections prescribe the persons for whose benefit the action may be brought, and, in substance, that the right of action vests primarily in the widow, next in the children, or in the personal representative for the benefit of the widow or next of kin. It has been held that, if no widow or children survive, then the right of action belongs to the father, or to the personal representative for the use and benefit of the father or next of kin. *Railroad v. Bean*, 94 Tenn. 395, 396, 29 S. W. 370. The judge was of opinion these sections of the Code should be construed in connection with and in the light of the statutes relating to the distribution of estates. Subsection 5 of section 4172 provides that in the distribution of personal estates, 'if there is no father, the property shall go to the mother and brothers and sisters, or the children of such brothers and sisters representing them, equally, the mother taking an equal share with each brother and sister.' We think this is the proper view of the statutes. The recovery, when realized, becomes personal property, and follows the usual course of distribution of personalty. *Loague v. Railroad*, 91 Tenn. 461, 19 S. W. 430; *Railroad v. Bean*, 94 Tenn. 388, 29 S. W. 370. The parties who are entitled to take under

of the deceased, as well as a mother. It is said that the court should have charged the jury that the mother and brother and sister of the deceased were not entitled to the wages of deceased as a matter of law, and that they were not dependent upon him in a legal sense. It is only necessary to say that no such claim was made in the declaration, and damages were not sought upon this ground. Evidence was introduced to show the earning capacity of the deceased, and, without any objection, it was shown that he supported his mother, and the witnesses were cross-examined upon this point, and no exceptions were made to the evidence. The damages recoverable in such cases are those which the deceased would have been entitled to had he survived, as well as those which the parties suing would have been entitled to in their own right. It does not appear that anything more was allowed than would have been recoverable in right of the deceased, and the recovery is small compared to the injury done, and the reckless manner in which it was done. We think the general charge sufficiently instructed the jury that they could give no damages for the physical suffering, or mental anguish of the next of kin. It was not insisted that damages could be awarded for this, and there is no evidence that it was taken into consideration by the jury."

The next case was *Railway v. Bentz*, 108 Tenn. 670, 69 S. W. 317, decided at the April term, 1902. This action was brought by the widow of one Edward Bentz to recover damages for his death, alleged to have been caused by the negligence of the defendant company. An assignment of error was filed upon the following paragraph of the trial judge's charge: "You also look to the loss of the aid—I don't mean pecuniary aid, but the aid of advice and counsel—that the plaintiff, Mrs. Bentz, has sustained by virtue of his death, and also look to the loss of comfort and enjoyment of his society. Now, these are the elements of damages to be considered by the jury in determining what amount of damages to allow her, if you find in favor of the plaintiff." Reviewing this instruction, the court, speaking through the present chief justice, said: "We think this error is well assigned. In *R. R. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434, it was said that under chapter 186, p. 259, of the Acts of 1883, which provided for a recovery of damages resulting to the parties for whose use and benefit the right of action survived from the death consequent upon the injuries received, the widow could only recover her pecuniary loss on the death of her husband, and that case was reversed because the trial judge had said to the jury upon the measure of damages 'that they could look to the mental and physical suffering of the surviving widow.' The court then

in fixing the amount of the survivor's personal loss. In the present case the learned trial judge—evidently by an inadvertence—excluded from the jury all consideration of the widow's pecuniary loss, and told them 'to look to the loss of comfort and enjoyment sustained by her from the negligent, fatal injury (if such it was) to her husband.' For this error the judgment was reversed."

The foregoing are all the decisions of this court upon the sections of the Code referred to and upon chapter 186 of the Acts of 1883 which in any wise throw light upon the measure of damages applicable to this class of cases. We have introduced into the inquiry some cases which, perhaps, have only a remote bearing, and so, it may be, we have extended our references beyond those which were really necessary to elucidate the subject. Still we think even these authorities will be found useful in presenting a full and complete view of the law upon the subject as administered in this court. Regarding these cases all together in one comprehensive view, from the earliest to the latest, a striking fact appears, viz. that in all of them only one right of action is recognized—that of the deceased—and that they all, so far as they speak to the subject at all, deny that any independent right of action exists in the widow, the children, or the next of kin. In no case is the point more strongly stated than in one of the latest—*Whaley v. Catlett*. In that case it is said: "The statute provides alone for the continued existence and passing of the right of action of the deceased, and not for any new, independent, cause of action, in his widow, children, or next of kin. * * * It is alone by virtue of these statutes that a right of action exists in the widow, children, or next of kin at all for the unlawful killing of the deceased, and this right exists under the statute not because it arises directly to them in their own right, but because it passes to them in right of the deceased." 103 Tenn. 347, 53 S. W. 131. Again, in another late case occurs the following: "The right of action is still the right of the deceased, although the recovery may include as an element such damages as were sustained by the persons to whom the statute gives the recovery." *Loague v. Railroad*, 91 Tenn. 458, 19 S. W. 430. These other authorities also recognize the fact that, although the action is a single one, two kinds or classes of damages are comprised in them. This point is aptly and briefly set forth by *McAlister, J.*, in a recent case as follows: "Under our act of 1883 damages for the mental and physical suffering, loss of time, etc., of the deceased, are also recoverable, and are superadded to the pecuniary damages sustained by the widow or next of kin." *Railroad v. Wyrick*, 99 Tenn. 500, 511, 42 S. W. 434.

72 S.W.—62

First, damages purely for the injury to the deceased himself; second, the incidental damages suffered by his widow and children, or next of kin, from his death. In the first class are embraced damages for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries. In the second class is embraced the pecuniary value of the life of the deceased (*Railroad v. Wyrick*, 99 Tenn. 500, 508, 511, 42 S. W. 434; *Collins v. Railroad*, 9 Heisk. 851; *Railroad v. Stevens*, Id. 12, 14, 15, 17, 18), to be determined upon a consideration of his expectancy of life, his age, condition of health and strength (*Railroad v. Spence*, 93 Tenn. 173, 188, 189, 23 S. W. 211, 42 Am. St. Rep. 907; *Railroad v. Stacker*, 86 Tenn. 343, 352, 353, 6 S. W. 737, 6 Am. St. Rep. 840), capacity for labor, and for earning money through skill in any art, trade, profession, occupation, or business (*Railway Company v. Howard*, 90 Tenn. 144, 19 S. W. 116; *Bridge Co. v. Barnes*, 98 Tenn. 601, 39 S. W. 714; *Railroad v. White*, 5 Lea, 540), and his personal habits as to sobriety and industry (*Railroad v. Prince*, 2 Heisk. 580); all modified, however, by the fact that the expectation of life is at most only a probability, based upon experience, and also by the fact that the earnings of the same individual are not always uniform (*Railroad v. Spence*, 93 Tenn. 173, 188, 189, 23 S. W. 211, 42 Am. St. Rep. 907). All of these elements are to be taken into consideration by the jury, and, after weighing them all, they should assess such amount of damages as may be sufficient to compensate for the loss of the life whose value they are attempting to estimate. In cases where there is contributory negligence they should make proper deductions for this, and in cases where the negligence of the person that inflicted the injury is gross or wanton they should make proper additions by way of adding punitive damages. *Railroad v. Stacker*, 86 Tenn. 343, 352, 6 S. W. 737, 6 Am. St. Rep. 840; *Railroad v. Wallace*, 90 Tenn. 54, 15 S. W. 921; *Railroad v. Fleming*, 14 Lea, 137; *Railroad v. Guinan*, 11 Lea, 98, 47 Am. Rep. 279. No rules more exact than these can be formulated. At last it is a matter dependent most largely upon the judgment of the jury, and their sound discretion, after carefully, honestly, and fairly considering all of the various elements that enter into the question.

In some of the cases referred to (notably the case which first made the suggestion—*Collins v. Railroad*) it is said that damages belonging to what has just been denominated the "second class," are to be estimated as if the deceased were himself still alive, but totally disabled, and in that condition suing for such injury. In the same connection,

however, it is said that, if he were so alive, and so injured, he would be unable to give his family that attention and care which he could otherwise give to them, and that in this manner they would also suffer as well as he. But this is merely a method of showing how the injury to the husband and father has resulted in an incidental damage to the wife and children, or widow and children, or next of kin; illustrating the principle above referred to that there is only one cause of action—that of the person who was killed or injured—and that this cause of action is always viewed by the court as a single one. Or it may be said that for convenience in estimating damages, and in order to separate in the mind the damages for the deceased's pain and suffering, mental and physical, his loss of time, and necessary expenses attendant upon the injury (those damages peculiarly personal to him), from the incidental damages which the widow and children or next of kin are entitled to recover because of the incidental injury sustained by them, it is held that the latter damages are to be assessed as if the deceased were still alive, and totally disabled. For practical purposes, however, it is unnecessary that this supposition should be called to the attention of the jury, or considered by them as the starting point of the inquiry, or at any stage of it. It is sufficient that the pecuniary value of the life destroyed may be ascertained, as far as such a matter can be ascertained at all, in the manner and according to the rules already laid down. In two of the cases referred to above (*Collins v. Railroad*, 9 Heisk. 841; *Railroad v. Davis*, 104 Tenn. 442, 58 S. W. 296) the existence of children of the deceased was allowed to be proven, and in another (*Freeman v. Railroad*, 107 Tenn. 340, 64 S. W. 1) the existence of brothers and sisters; but not in either case, it seems, for the purpose of enhancing damages, but only for the purpose of showing the existence of beneficiaries provided for by the sections of the Code and the act of 1883—a matter always proper. *Daniel v. Coal Co.*, 105 Tenn. 470, 58 S. W. 859.

The foregoing, we think, truly presents the result of all of our cases when brought together in one general view.

It is insisted, however, in the brief filed for defendant in error, that the elements of damages which we have assigned to what we have denominated the second class belong really to the first class; that is, should be considered in estimating the damages which accrued to the deceased personally, as distinguished from those that should be assessed for the injury sustained by the next of kin or widow and children. This contention is based upon certain language appearing in *Fowlkes v. Railroad Company*, 9 Heisk. 831-833; *Railroad v. Smith*, 9 Lea, 474; *Railroad v. Gurley*, 12 Lea, 53. The language referred to in *Fowlkes v. Railroad* is that the action "is brought for the same cause as if

the injured party himself had brought it." This is followed on the next page by the observation: "It is true that some of the cases [referring evidently to the *Prince Case*, the *Collins Case*, and the *Stevens Case*] seem to have introduced a new element of damages in cases where the action is brought by the representative—that is, damages for the loss of the society, etc., of the husband, father, or relative to the widow or next of kin; that in such cases damages might be allowed beyond what would be proper where the action is brought by the party himself. Some of those cases stand upon doubtful grounds; but even where the action is brought by the party himself damages might, in a proper case, be given to the same extent as if death had ensued—i. e., when the injury disables the party for life. In such a case the injury, in a pecuniary sense, would be the same as if death had ensued." The language referred to in the *Smith Case* is the following: "This is the statutory action given by section 2291 et seq. of the Code, and is the same action whether it be brought by the injured party in person or by his administrator after his death. *Fowlkes v. Railroad*, 9 Heisk. 829. Hence the damages to be recovered are those sustained by the injured party. The action is not for the wrongs to the husband or next of kin. The damages are such as the injured party could have recovered if, instead of being killed, she had been disabled for life; if not the same amount, at least for the same elements of damages." The language referred to in *Railroad v. Gurley* is the following: "The damages which were recoverable in this action were such as the injured party himself could have recovered if, instead of being killed, he had been disabled for life; if not the same amount, at least the same elements of damages. *Railroad v. Smith*, 9 Lea. 470, 474. It was competent to show the ability of the deceased to labor, and his capacity for labor, as well as skill in his art, business, or profession, in order to show what he was capable of earning."

It must be admitted that these statements cover the same elements of damages which we have assigned to the second class of damages, *supra*, and more. They cover every element of damages that are recognized by the *Prince Case*, the *Stevens Case*, and the *Collins Case*, as those authorities are now interpreted and understood; because there can be no doubt that, if a person should be totally disabled by an injury, he could recover for mental and physical pain and suffering, loss of time, necessary expenses incurred by reason of the injury; and in estimating the value of the time lost by him we should necessarily have to ascertain his probable expectancy of life, together with his capacity for labor and for earning money by his skill in any art, business, profession, or occupation. It results, therefore, that the rule for the measure of damages laid down in these cases (of *Fowlkes*, of *Smith*, and of

Gurley) cover all of the elements of damage that could arise out of the deceased's cause of action.

It is undeniable, however, that the earlier cases—the Prince Case, the Stevens Case, and the Collins Case—were for a time understood as meaning more than this; that is, as warranting an independent right of action, and the recovery of independent damages, in behalf of the widow and children or next of kin. This is apparent from the remark of McFarland, J., in the Fowlkes Case, 9 Heisk. 833, 834, that “some of the cases seem to have introduced a new element of damages in cases where the action is brought by the representative—that is, damages for the loss of the society, etc., of the husband, father, or relative, to the widow or next of kin; that in such cases damages might be allowed beyond what would be proper where the action is brought by the party himself. Some of these cases stand upon doubtful grounds,” etc. The same view is again indicated by Judge McFarland in the Smith Case. He says (9 Lea, p. 474): “The charge is also erroneous in instructing the jury that in estimating damages they might take into consideration the loss of social relation of husband and wife, parent and child, etc., and the advice and protection of the deceased as wife and mother. There are expressions in some of our opinions justifying this charge, to some extent at least. But,” etc. The deliverance in the Gurley Case was taken directly from the Smith Case without reference to the earlier cases, but in a case in the volume immediately preceding (*Railroad v. Pounds*, 11 Lea, 127, 130, 131) the same construction of the older cases appears. It was there said that the act of 1883 (which was in the exact language of that portion of the Prince Case stating the measure of damages) constituted “a new or additional cause of action” in favor of the widow and children or next of kin. The same view of the older cases was entertained in *Railroad v. Toppins*, 10 Lea, 58, and *Railroad v. Conley*, 10 Lea, 531. So, the indirect dissent in the Fowlkes Case and the cases depending on it from the measure of damages established in the Prince Case and the cases based on it was founded on the construction given to the latter cases, to the effect that they authorized the assessment of damages other than and in addition to such as arose out of the cause of action of the deceased himself, such as the loss of society, the comfort, counsel, and moral aid and support of the lost husband, father, mother, son, or brother.

It is true that the opinions in the Prince Case and in the Stevens Case, by reason of the generality of the language in which they were expressed, were open to that construction. But the Collins Case, construing the other two, seems, in the discussion appearing in the last two pages of the opinion, to place the damages to be recovered as specially applicable to the widow and children or next

of kin entirely upon the deceased's right of action, working it out on the theory that, if the deceased had been wholly disabled by the injury for life, but still left alive, he would have been entitled to compensatory damages. “If,” continues the opinion, “he had a wife and children, whom he had supported by his industry, to whom he was now unable to render any assistance on account of his injuries, this privation of himself and family would necessarily constitute an element in the computation of damages. And if his life is lost to them, why may not the privation to them of the aid and maintenance he had given them still enter into the computation of actual damages sustained by them? The widow has lost a husband, the child a father, and both have lost the food and raiment which his industry provided. Had he lived, he could have indemnified the last privation by his action against the wrongdoer; and, having died, the same right of indemnity passes to them.” That is, the right of action which the widow and children or next of kin enforce by suit after his death is his right of action, and the damages they claim grow out of that right of action, not an independent right of action in them. This was the view taken of the meaning of the old cases and of the act of 1883, immediately after the passage of that act, or in the earliest cases that came up which were controlled by that act. This is manifest from the direction given for the assessment of damages in the Stacker Case, *supra*, the Howard Case, and the Spence Case; and from the ruling in the Loague Case, the Johnson Case, and the case of *Whaley v. Catlett*, that the cause of action under which the widow and children or next of kin claim, and under which they maintain this suit for damages, is the right of action of the deceased, and not any independent right in them.

It is insisted, however, in the briefs, that a different view is expressed in the Bamberger Case and the Freeman Case, *supra*. The Bamberger Case is not out of harmony with the other cases mentioned. In that case it was held that the one suit by the administrator covered any claim for damages that could be brought forward on account of the death of the deceased. It was implied in the opinion that the statute preserved to the father the right of action which he would have had against one who had deprived him of the services of his son, past or prospective, without depriving the latter of life, and that this was embraced in the action brought by the administrator. Still, in strictness, this would not fall outside of the elements to be considered in assessing damages on the deceased's own right of action; that is to say, the matter spoken of as the father's right would fall within the elements spoken of as “loss of time” in fixing the damages recoverable for one killed who owed no service. There is, therefore, nothing in this case that in anywise impeaches the principle that the dam-

ages to be recovered are only those that arise out of the deceased's right of action.

Nor is the Freeman Case out of harmony with the prevailing doctrine. Some point was made in the argument at the bar on the following sentence occurring in that opinion: "The damages recoverable in such cases are those which the deceased would have been entitled to had he survived, as well as those which the parties suing would have been entitled to in their own right." It was not intended by this to say that the widow and children or next of kin had the right to enforce any claim for damages that did not arise out of the deceased's own right of action, but merely, in a general way, to mark the difference between those damages which were purely personal to the deceased (his mental and physical suffering, loss of time, and expenses) and those occurring more immediately to the widow and children or next of kin, arising out of the loss of the life of the deceased, and expressed by the pecuniary value of that life, to be ascertained in the manner already stated. Indeed, the entire substance and spirit of that opinion is to the effect that all of the damages recoverable belong to the estate of the deceased, and are distributable as the personal property thereof; and this excludes every idea of an independent right of action in the widow, children, or next of kin.

But it is said by counsel for defendant in error that, if it be true the widow and children or next of kin have no right to recover except under the cause of action of the deceased, then there is no difference between the earlier and later cases, and there is no meaning in the expression used in several of the later opinions that the act of 1883 enlarged the right of the person suing so as to permit the recovery of damages peculiar to the widow and children, together with the damages which the deceased might have recovered for his own benefit, on account of his own suffering and loss. With respect to this matter it is to be observed that the expression referred to occurs in only three of the cases—*Railroad v. Loague*, *Railroad v. Johnson*, and *Whaley v. Catlett*. In the first and third of these cases the question before the court was as to when the statute of limitations would begin to run in cases of this character, and in the second case the question was as to the status under the sections of the Code and under the act of 1883 of a husband suing for the death of his wife. What was said in each of these cases covering the measure of damages was with a view to determining the status of the parties whose rights were under examination, as affected by the particular questions proposed for solution. In neither of these cases did the court have in mind, or attempt to determine with exactness, the several rules controlling the assessment of damages in cases of this character. The judges writing the opinion used the language referred to in a large and gen-

eral sense, having in mind the construction which had been given in the *Fowlikes Case*, the *Smith Case*, and the *Trafford Case*, to the *Prince Case* and the cases based upon it, without stopping to make a critical examination of that construction. But, however this may be, the expression above referred to and commented upon cannot change the fact that the principle runs through all of our cases, from the time the question was first mooted until now, that all of the damages recoverable in this class of cases are based upon and arise out of the cause of action of the deceased, and not out of any independent cause of action belonging to the widow, children, or next of kin. We have pointed out that this principle was obscured and rendered open to misconception in the *Prince Case* and the *Stevens Case* by reason of the generality of the language used in the opinions in those cases, but that it clearly appeared in the *Collins Case*, which referred to, construed, and applied the two former cases. It appeared with even greater clearness in the series of cases immediately following the *Collins Case*, and in the very recent cases which we have already referred to it is announced with unmistakable distinctness. It binds together in one harmonious series all of our decisions upon the subject of the measure of damages in cases of personal injuries resulting in death since the *Burke Case*; so that, in the light of it, we see that, whatever conflict or contrariety of opinion may appear in their several holdings, these are only superficial, not fundamental.

In the *Burke Case* a distinction was taken between damages for the mere act of killing and damages for pain and suffering and loss of time. It was held that the former were not allowable, but that the latter were, yet could not, in the nature of things, be allowed, when it appeared, as in that case, that the death was instantaneous, because it was said there could be neither pain nor suffering nor loss of time. It is manifest from a critical examination and comparison of this case and the *Prince Case* that the point of conflict was as to whether there could be allowed damages for the mere act of killing; the *Burke Case* holding that such damages could not be allowed, and the *Prince Case* that they could be allowed. When the *Prince Case* is read from this point of view, it is apparent that when the following language was used, viz., "that the representative of a person who had died from personal injuries should have the right to recover not only for the mental and bodily suffering, loss of time, and necessary expenses resulting immediately to the deceased from the personal injuries," the chief justice was referring to that class of damages which was sanctioned by the *Burke Case*; and when he added the following words, viz., "but also for the damages resulting to the parties for whose benefit the right of action survives from the death consequent upon the injuries," he was referring to dam-

ages arising from the mere act of killing—the class of damages which were denied in the Burke Case; and it was upon this point the Burke Case was overruled.

At first blush, it seems a solecism to speak of a man having a right of action for his own death. We can readily understand how he can have an action for mental and bodily suffering, and for loss of time, and for expenses incurred, all of these happening in his lifetime, and caused by the injury complained of. But when he dies that is the end of him, personally, in this sphere of being; and the loss occasioned by the mere act of death itself cannot, in any strictly logical sense, be said to be his loss, but rather the loss of those who come after him, and who were interested in his continuance in life. Yet it cannot be doubted that the Legislature could endow his estate with such a right of action, and vest the right to sue thereon in his administrator for the benefit of his widow, children, or next of kin; and that this was the thing in fact done was held by this court in the Prince Case, 2 Helsk. 585, 586. In the Fowlkes Case, 9 Helsk. 831, it was held that the right of action was based not on the death, but rather on the injury that produced the death; but the difference is not material, except in view of the statute of limitations as to when the statute would begin to run. In this latter case it was said that in truth there was no such thing as instantaneous death, that there must always be an appreciable interval between the impact of the force producing the injury, and the dissolution of the person receiving the injury, and that during that interval, the right of action would vest, and afterwards, by operation of law, devolve upon the administrator. We repeat that the distinction is important only in view of the statute of limitations. It is to be noted that the Fowlkes Case and the Prince Case agree in deriving the right of action from the deceased, and that neither of them gives any warrant for the theory that there was any independent right of action in the widow, children, or next of kin.

The case next following the Fowlkes Case was the Trafford Case. This case spoke to the subject of the measure of damages, but only in general terms. Then comes the case of Railroad v. Smith, 9 Lea, 470, which laid down as the rule for measuring damages that they were "such as the injured party could have recovered if, instead of being killed, she (or he) had been disabled for life, if not for the same amount, at least for the same element, of damages." It has already been shown *supra* that this rule embraces every element of damages allowed in the Prince Case. We shall add here only the observation that the clause "if not for the same amount" was intended to indicate that the damages would probably be greater when the mental and physical suffering continued through years of total disablement—a death

in life—than in case of a death preceded by a less protracted period of suffering. So it is meant that while, in an action to recover damages for the death alone, the elements composing the measure of damages would be the same as if the man had not died, but was still alive, totally disabled, and bringing the suit in that condition, yet in the latter case the damages recoverable would probably be greater, owing to the greater suffering, mental and physical. The other cases subsequent to Railroad v. Smith, 9 Lea, 470, adopted the same form of expression in enunciating the rule of damages down to Railroad v. Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840; all of them being in line with Fowlkes v. Railroad, and following its lead. The implied dissent in the Fowlkes Case, and the cases depending on it, from the Prince Case, and the cases depending on it, was based upon what is now known to have been an improper construction of those cases; that is, that they allowed damages for the loss of aid, comfort, counsel, etc., the class of damages that goes under the name of "solatium." There never was any dissent from what is now recognized as the true meaning of those cases, and it is a notable fact that in none of the cases is anything said indicating a purpose to overrule the Prince Case, or any of the cases depending on it; but always in guarded language it is said merely that there are "expressions" in some of the former opinions that would justify or seem to justify, the several charges of the circuit judges under examination, and it was only so far as those opinions were justly subject to that construction that they were criticised. It seems from the charges of the circuit judges, as preserved and reproduced in the opinions of the court, that the construction at the bar and by the circuit judges of the Prince Case and the cases in that connection was that they allowed the solatium, and they—the circuit judges, or some of them—seem to have construed the act of 1883 as restoring that form of measuring damages, and this course of construction on their part is by no means surprising, in view of the language used by Judge McFarland in the Fowlkes Case; but, as we have seen, such was not the true construction of the Prince Case and its congeners, and it could not be the true construction of the act of 1883, because that is in the very language of the Prince Case. So the Fowlkes Case and its associate cases did not antagonize the Prince Case and its associate cases, but only the erroneous construction placed on them, or rather those cases erroneously construed.

But, however this may be, the rule is now by a line of discussion fully settled; and the measure of damages in all of the cases since the Burke Case is the same, although the forms of expression may differ; and this measure is no other than that which is contained in the act of 1883, and it is the same

the court upon the subject, exclusive of the Burke Case. Moreover, this rule for the adjustment and determination of the amount of damages in any given case belonging to the class of cases we have before us seems wholly fair and just. By means of it the widow and children are enabled to recover judgment for an amount of damages which fully compensates (as fully as it is possible to introduce certainty into such an inquiry) the injury done to the deceased in his own peculiar and personal relation, and, in addition, for a sum that will compensate (as far as such a matter can be rendered certain) the widow and children or next of kin for the pecuniary loss they have sustained by the death of the deceased; and at the same time the wrongdoer is thus made to respond in damages for the whole injury done, so far as money can compensate such an injury.

Another effect of the principle under which the rule is formulated is that the right of recovery is fitted into our general system of law, and we are enabled to clearly understand how the recovery falls under and is to be disposed of according to our statute of distributions, as other personal estate of the deceased; the only difference being that it is not liable to the claims of creditors.

The logical consequence of this legal status of the recovery, taken in connection with the rule for the measure of damages as formulated, is that there need be no testimony introduced for the purpose of showing that the widow, children, or next of kin were dependent for support or pecuniary aid upon the deceased in his lifetime. It is sufficient, so far as this phase of the matter goes, to prove the status of widow, child, or next of kin at the date of the death of the deceased from the wrongful act.

Further, upon the inherent justice and fairness of the rule for the measure of damages laid down we desire to add that, after we pass the point that nothing can be allowed as solatium—that is, for the loss of the aid, comfort, counsel, and companionship of the deceased, which was determined in several of the cases cited supra, and which seems to be involved in the legal fact that the recovery ranks as personal estate of the deceased, distributable under the statute of distributions—and after we reach the point that the damages for the loss peculiar to the widow and children or next of kin are to be assessed upon the basis of the pecuniary loss sustained by the destruction of the life in question, which is held in substantially all of the cases that refer to the subject, it would seem that when the whole pecuniary value of that life, as far as such value can be ascertained by legal processes, is allowed in recovery for indemnification, all is done that can be done by law in the way of granting reparation for a

time and necessary expenses incident to the injury done, which sum so ascertained is added in the recovery of the said widow, children, or next of kin.

With these principles before us, we shall now determine whether the charge given by his honor the circuit judge was correct. The charge upon the measure of damages was as follows:

"You will assess the damages at such amount, not exceeding twenty thousand dollars, as will be compensation for the injuries received.

"In the assessment of damages the statute provides as follows: 'Where the person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, the party suing shall if entitled to damages have the right of recovery for mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received.'

"There are two classes of damages provided for in the statute: First. Such damages as the deceased himself could have recovered had he been permanently disabled for life and he himself were prosecuting the suit. In estimating this class of damages you will take into consideration the mental and physical suffering of the deceased, his earning capacity, and the probability of his continuance of life. Inasmuch as it is in proof and undisputed that the death of Hollister occurred in less than one hour after the accident, the loss of time is not a material consideration, and no proof has been introduced as to the necessary expenses resulting to the deceased from the personal injuries.

"Second. In addition to such damages, the plaintiff would be entitled to recover also such pecuniary damages as have been sustained by the widow and child consequent upon the death of Hollister. In estimating such damages, you will look to the ability of Hollister to furnish his wife and child a support and maintenance, the nature and extent of the support he did give them, and to the probability of the continuance of that support, and his ability to provide, and to the probability of a continuance of their dependence upon him for support and maintenance.

"But the plaintiff would not be entitled to recover any damages for the mental and physical suffering and grief of the widow and child, nor the loss of the society and affection of the husband and father, but, as before stated, only such pecuniary damages as were sustained by the wife and child consequent upon the injury.

"With these instructions to govern you,

you would fix the amount of the damages at such an amount, not exceeding twenty thousand dollars, as will be compensation for the injuries received."

We think the charge was erroneous, as will be clearly seen upon comparing it with the rule which we have above laid down. The error consists in the instruction as given to the jury in the paragraph beginning with the word "second." In that paragraph the jury are, in effect, told to duplicate that portion of the damages which had already been provided for in the direction that they were to assess "such damages as the deceased himself could have recovered had he been permanently disabled for life, and he himself were prosecuting the suit," and that they were to take into consideration "his earning capacity, and the probability of his continuance in life"; in other words, his life expectancy. These directions substantially covered the damages which the jury were told to allow again in the paragraph referred to in the language, "the plaintiff would be entitled to recover also such pecuniary damages as have been sustained by the widow and child, consequent upon the death of Hollister." The "pecuniary damages" or loss of the widow and children or next of kin are the pecuniary value of the life of the deceased as shown by his expectancy of life and his earning capacity. As we have already shown, likewise, the expression in the charge taken from some of our decisions that the damages were to be "such as the deceased himself could have recovered had he been permanently disabled for life, and he himself were prosecuting the suit," is merely another form of saying the same thing, viz., that the damages would be measured by the value of his life, which in turn would be measured by the life expectancy and earning capacity. Again, when the jury were told in the said paragraph that in estimating such damages—that is, the "pecuniary damages" sustained by the widow and child, consequent upon the death of the husband and father, Hollister—they were to "look to the ability of Hollister to furnish his wife and child a support," and "his ability to provide," they were, in another form, told to again value his earning capacity; and when they were told to "look to the probability of the continuance of that support" they were again instructed to look to the life expectancy of Hollister and to value it a second time.

It was insisted in argument at the bar that the right to duplicate damages had been recognized and approved by this court in the case of *Railroad v. Wyrick*, 99 Tenn. 500, 42 S. W. 434. The expression referred to does appear in that opinion, wherein the judge who delivered the opinion of the court in that case spoke of "the rule for the assessment of duplicate damages laid down in the *Prince Case*." But in the three paragraphs that immediately follow that one in which the expression referred to occurs the mean-

ing that it bore in of the opinion is a quotation made from the doctrine of the statute embraced, ages for the suffer loss of time, etc., his death caused to or next of kin," a aspect the subject-ilar to the statutes sylvania, and the pecuniary damages graph it was sho Penn. R. R. Co. that by "pecuniary children—or, rather was meant "what ably have earned labor in his busin the residue of his have gone for the ing into considera disposition to labor and expenditures." McAllister, after n Judge Sharswood's served that Judge the damages result of kin, but, under for the mental and time, etc., of the able, and are sup damages sustained kin." It is observ double damages, b the whole damages or classes in the ready set forth in opinion.

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LOUISVILLE (Supreme Court of CONTINUANCE—AB SION TO DE -CUR

1. To defeat a c nesses, the party n facts which it is cl and it is not enou that they would tes 2. Error in refus witnesses was cur was over, the par was able to obtain proved the facts to would testify.

Error to Circuit Sam Holding, Ju Action by A. R. & Nashville Railr

¶ 1. See Continuanc

Burch, for defendant in error.

SHIELDS, J. This is an action for personal injuries, brought by the defendant in error against the plaintiff in error in the circuit court of Lawrence county, resulting, on a trial, in a verdict and judgment against the plaintiff in error, which it has brought before this court for review.

When the case was called for trial in the circuit court, the plaintiff in error moved the court for a continuance on account of the absence of three witnesses, and in support of its motion presented a special affidavit, stating the names of the absent witnesses, the facts which plaintiff in error expected to prove by them, and all other facts necessary to constitute an affidavit showing good grounds for a continuance. The plaintiff below, conceding that the affidavit stated a good cause for a continuance, proposed to agree that the absent witnesses would testify as stated, and that the affidavit be read in evidence in behalf of the plaintiff in error on the trial of the case as the depositions of those witnesses, and thereupon the court refused the continuance, and required the plaintiff in error to go to trial. This action of the court is now assigned as error, the contention of the plaintiff in error being that it was entitled to have its witnesses before the court and jury in person, and that nothing short of a direct and absolute admission of the truth of the facts which it claimed its witnesses would testify to would authorize the court to deny it this right, and disallow its application for a continuance of the case. This contention is sound, and the action of the court in requiring plaintiff in error to go to trial upon the agreement of the plaintiff below that the witnesses would swear as stated in the affidavit, and that the affidavit be read as their depositions, was, nothing else appearing, reversible error. The plaintiff in error had the right to have its witnesses before the court, and nothing short of an absolute and unqualified admission of the truth of the facts proposed to be proven by the absent witnesses, by the opposite party, justified the court in refusing the continuance and requiring the plaintiff in error to go to trial.

This court, in a case involving this question, commenting on the case of *Rhea v. State*, 10 Yerg. 257, holding that the defendant in a state case had the right to have his witnesses present, notwithstanding an offer upon the part of the state to admit as true what was proposed to be proven by the absent witnesses, said: "While we think this statement perhaps goes too far, when it is assumed that the agreement to admit that the facts stated are true, as set forth in the affidavit, might not be sufficient, because if

case like the present, where the mere statement of an affidavit is merely agreed to stand as the testimony of the witnesses or what they would swear if present. In a case like the present, where the witnesses are to facts that tend to contradict and impeach the testimony of witnesses offered by the state, all must concede the special importance of having the two classes of witnesses before the jury, so that their personal bearing, their intelligence and means of knowing the facts, and freedom from bias, or the opposite, may be seen by that body. A defendant would be placed at a disadvantage that might be ruinous to his case by losing the benefit of all these elements of weight in giving effectiveness to testimony we have stated—elements conceded by our law to be legitimate matters of consideration to be remarked on by the trial judge in giving the rules to a jury by which to test the value of the testimony of witnesses deposing before them. A mere written statement of what witnesses are expected to swear, as contained in an affidavit, has no one of these elements in it, and thus the defendant is deprived entirely of them by such practice. While the constitutional provision that the defendant is to have compulsory process for obtaining witnesses in his favor may not imperatively demand their presence in any case, yet the view of Judge Reese is certainly more in accord with the fair implications of that provision than the opposite view. It would ill accord with the spirit of that right, where the witnesses are in the reach of the process of the court, if the defendant is compelled to take a mere written statement as the equivalent of the personal presence contemplated by the use of the process guarantied to him by the Constitution." *State v. Baker*, 13 Lea, 330, 331. This was a criminal case, but the reason for the rule applies with equal force to civil cases, and the rule should be enforced in all cases. It has been done in other jurisdictions. *Smith v. Creson's Ex'rs*, 5 Dana, 298, 30 Am. Dec. 688; *Maughmer v. Bering* (Tex. Civ. App.) 46 S. W. 917; *Murphy v. Murphy*, 31 Mo. 322.

But while this action of the trial judge was error, it was obviated by the fact that, before the trial was over, the plaintiff in error was able to obtain other witnesses by whom it could and did prove the same facts it asserted it could prove by the absent witnesses, and for this and other reasons clearly appearing in the record it was not prejudiced by this error of the court. In such cases the error is cured, and no reversal will be allowed, as the merits are not affected. *Porter v. State*, 3 Lea, 496; *Womack v. State*, 6 Lea, 152; *Rexford v. Pulley*, 4 Baxt. 365, 366. In the *Encyclopædia of*

Pleading and Practice, it is said: "A party cannot avail himself of an error of the court in refusing to grant his application for continuance, where he was not prejudiced thereby. * * * The appellate court will not reverse the judgment because of the refusal of the trial court to grant a continuance on account of the absence of a witness, where the party on the trial adduced from other sources the substance of the alleged testimony, or where the facts were proved by witnesses for the opposite party, or where the witnesses appeared voluntarily or involuntarily on the trial and could have been examined or actually did testify, or where the party otherwise had the benefit of his testimony, or where it is clearly evident that the testimony of the absent witnesses could not have changed the result." Ency. of Pl. & Pr. vol. 4, pp. 909, 910.

The assignment of error is therefore overruled, and the judgment of the circuit court affirmed, with costs.

JONES v. MAYOR, ETC., OF NASHVILLE.
(Supreme Court of Tennessee. Jan. 17, 1903.)
MUNICIPAL CORPORATIONS—WATER SUPPLY—POLICE REGULATIONS—VALIDITY.

1. An ordinance prohibiting the city officials from furnishing water to consumers until all indebtedness of such consumers for water previously supplied shall have been discharged is reasonable and valid.

Appeal from Circuit Court, Davidson County. J. A. Cartwright, Judge.

Action by Linnie B. Jones against the mayor and city council of Nashville. Judgment for defendants, and plaintiff appeals. Affirmed.

Colyar & Daniel, for appellant. Price & McCannico, for appellees.

SHIELDS, J. This suit was brought by the plaintiff, Linnie B. Jones, against the city of Nashville to recover \$5,000 damages for the failure and refusal of the defendant to supply her with water. The plaintiff avers in her declaration that the defendant owns and maintains a system of water-works, built and operated for the purpose of supplying its inhabitants with water; that she has been a resident of the city for some three years past, engaged in the business of keeping a boarding house, in rented premises at several places in the city, and that the defendant has wrongfully and unlawfully declined and refused to supply her with water, at these several places, for the space of some three years, although she, and her landlord and children for her, have tendered the money in payment of the usual and regular charges and rates therefor in advance, and thereby has destroyed her business and greatly damaged her.

The defendant filed two pleas, the general issue of not guilty, and a special plea averring that, under an ordinance of the defend-

ant duly enacted by its mayor and council, it was unlawful, and its officers were prohibited from furnishing and supplying any person, firm, or corporation, with water, indebted to the city for water previously furnished and failing to pay such indebtedness upon the demand of the city authorities at the place where the indebtedness was contracted, or at any other place, until such indebtedness should be discharged, and that, before it failed and refused to furnish the plaintiff with water, she had become and was indebted to the defendant for water theretofore supplied her, which indebtedness she refused to pay upon proper notice and demand, and that for this reason it had lawfully refused to further supply her with water.

The sections of the ordinance, which the defendant pleads in defense of plaintiff's action, necessary to be stated, are as follows:

"Sec. 381. After the water tax assessment shall have been completed by the water tax assessor and turned over to the comptroller for collection, the comptroller shall insert twice in each of the daily papers an advertisement notifying water consumers of the completion of the water assessment. He shall also send to the name of each water consumer appearing on the book, taking street by street, a postal card, notifying such consumer that, if the tax assessed be not paid within twenty days from the date of notice, that the water will be turned off, and in cases of metre measurement he shall also give the reading of the metre of each consumer, showing quantity of water used and the cost thereof; provided, however, that the making out of the statement and the addressing of the cards to the respective water consumers shall be done in the water works office, and the board of public works and affairs are hereby authorized to employ an additional clerk at a salary not to exceed fifty dollars per month to perform this work and such other work as may be required of him.

"Sec. 382. At the expiration of the period named in said card of notice, the water tax assessor shall examine the books of the comptroller wherein is kept a list of the water consumers, and taking street by street, certify therefrom to the board of public works and affairs, the names of all parties who have not paid their water tax, giving names and number of street. This certified list the comptroller shall compare with his books, ascertain its correctness, and add his certificate thereto.

"Sec. 383. Whenever the water tax assessor and comptroller, in the performance of their duty as defined by law, certify to the board of public works and affairs, that any person, firm or corporation, is indebted to the city and is in arrears for water tax, said board is hereby authorized and required to have the water supplied by the city to such person, firm, or corporation, shut off.

"Sec. 384. The water thus turned off shall not be again turned on, except by officers or employees of the city duly authorized, and in no instance by them, until the entire tax due to the city by such persons, firms or corporations, is paid; provided, however, that all persons, firms or corporations that may be in arrears for two or more assessments at the date of the passage of this ordinance, shall be required to settle up said delinquency by installments, making at least one payment in amount equal to one of said assessments in the order they appear on the tax books every sixty days. Upon a failure of any delinquent to pay as above required, it shall be the duty of the comptroller to report said failure to the board of public works and affairs, who shall at once have the water turned off, and the water shall not be again turned on until the entire tax due is paid."

"Sec. 408. Whenever any person, firm or corporation becomes indebted to the city for water, and fails, on demand of the city authorities, to discharge said indebtedness, as provided in sec. 384, it shall not be lawful to furnish water to said firm, person or corporation, at the place where said indebtedness was contracted or at any other place within or without the city, until said indebtedness is discharged."

Sections 384 and 408 contain the provisions which were relied upon by the defendant. The other sections are set forth that the object and purpose of those relied upon, and their bearing upon the management and government of the waterworks department of the defendant, may fully appear.

The plaintiff assails the validity of sections 383 and 408, making it unlawful to furnish persons with water who are indebted for water previously supplied them, after notice and demand of payment, at the place where the indebtedness was contracted, or any other place, until such indebtedness shall be discharged, upon the ground that they are harsh, oppressive, and discriminating in their operation, and therefore unreasonable, in that they authorize and enable the city to coerce and compel its inhabitants receiving their water supply from it to pay past-due indebtedness created for water furnished them, by declining to further supply them with water until such indebtedness is paid, although they may be ready and willing to pay for the water desired, notwithstanding its duty as a public corporation to supply all persons with water who tender the regular rates therefor; and that for this reason said sections are to this extent void, and afford the defendant no protection in this action. The question, therefore, for determination is whether the ordinance in question is reasonable and valid or unreasonable and void, and, there being no controversy as to the facts, it is one of law to be determined by the court.

There is no arbitrary rule by which the

reasonableness or unreasonableness of ordinances can be tried and tested, but much depends upon the surrounding circumstances, and the nature, purpose, and operation of the ordinance in question. And the same may be said in regard to the by-laws of public service corporations for the regulation of their business relations with the public, for such by-laws and ordinances of municipalities, of the nature of the one here involved, are much alike, and largely subject to the same limitations and rules of construction. It may be said, generally, that ordinances must be consonant with the Constitution and statutes of the United States and of the state, and with the general principles of the common law. They must be authorized by the charter of the corporation or general laws applying thereto, and consistent with the objects and purposes of its creation. They must be general, and applicable alike to all persons and property affected by them, and certain in their application and operation, and their execution not left to the caprice of those whose duty it is to enforce them. They must be just. And they should be adapted to the locality and affairs which it is intended they shall control and affect. They must not be harsh and oppressive. They must not discriminate in favor of or against any class of persons or property, but must be general in their nature, and impartial in their operation and effect. *Long v. Taxing District*, 7 Lea, 137, 40 Am. Rep. 55; *Dillon, Mun. Corp.* vol. 1, §§ 319-330; *Am. & Eng. Ency. of Law*, vol. 21, pp. 985-987.

An ordinance which is free from the objectionable features enumerated, and contains those stated to be necessary, may as a general rule be said to be reasonable and valid. The material and operative parts of the ordinance complained of are as follows: (1) That when the water has been turned off, after the period of delinquency has expired, and the party has been notified to pay and has failed, it shall not be again turned on except by officers or employees of the city duly authorized, and in no instance by them until the entire tax due the city has been paid. (2) That whenever any person, firm, or corporation becomes indebted to the city for water, and fails on demand of the city authorities to discharge said indebtedness as provided in section 384 above quoted, it shall not be lawful to furnish water to said firm, person, or corporation, at the place where the said indebtedness was contracted, or any other place within or without the city, until said indebtedness is discharged. The specific ground of attack upon it is that the provisions prohibiting the city from supplying any one with water indebted to it for water furnished them, which indebtedness they have failed to discharge after notice and demand, at the place where the indebtedness accrued or any other place within or without the city, enables the city to coerce the payment of past-due indebtedness, and

that for this reason it is oppressive and discriminates against those in arrears for water. We do not think the ordinance subject to this criticism. It is clearly consistent with the law and within the powers conferred upon the city by its charter, and contributes toward effecting the ends and purposes of its incorporation. It is general in its scope and application, and uniform in its operation. Every inhabitant of the city is secured a continuous supply of water by complying with its provisions, and any of them, regardless of their circumstances in life, will be refused water upon their failure to observe them. Its execution is certain, and nothing is left to the discretion or caprice of the officers of the defendant. It is just, in that it provides that all the inhabitants of the city shall pay their proper proportions of the expense of this almost indispensable public service. It is plain and unambiguous in its terms, and all parties are informed by it upon what terms they will be supplied with water, and under what circumstances, and when, the supply will cease. Everything is certain and definite. A notice is required to be given of the amount due and the time within which payment must be made before the supply is turned off, and no one can be taken by surprise, or should be unprepared to meet their just dues for the service rendered them. Again, the ordinance contributes to the economical and prompt collection of the water assessments, and is almost necessary for that purpose, as, without it, not only would the city be delayed in the collection of the assessments, but would be put to the expense of a multitude of petty suits annoying to it and harassing to its inhabitants, and would suffer great loss on account of insolvencies. The assessment required to be paid is not a past-due indebtedness in the sense contended for by the plaintiff, but the dues for water recently and then being furnished. It is to all intents and purposes a current charge. We see nothing harsh and oppressive or discriminating in this ordinance, but are of the opinion that it is reasonable and valid, and that its enforcement against the plaintiff furnishes here no legal cause of complaint against the defendant. In this conclusion we are sustained by precedent in this and other states.

In the case of *Wautauga Water Co. v. Wolfe*, 99 Tenn. p. 432, 41 S. W. 1060, 63 Am. St. Rep. 841, it is said: "A water company which is under legal obligations to furnish water to all inhabitants of a city at designated rates, and without discrimination, may adopt reasonable rules for the conduct of its business and the operation of its plant, and such rules, so far as they affect its patrons, are binding on them and may be enforced even to the extent of denying water to those who refuse to comply therewith."

In the case of *Wood v. the City of Auburn*

(Me.) 32 Atl. 906, 29 L. R. A. 376, it is said: "Water companies and municipalities undertaking to supply water to the people have an undeniable right, when not affected by legislation, to impose such reasonable rules as will husband the supply and economize the use of the water, as well as protect the plant, keep up its efficiency, and as will insure a reasonable revenue and its prompt receipt."

In *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35, it was held that: "A rule of the water company which requires water rates to be paid quarterly, adds a penalty of five per cent. in case of default of payment in ten days, and provides that after default for fifteen days the water shall be shut off from the premises, is a reasonable regulation."

In *Williams v. Mutual Gas Co.* (Mich.) 18 N. W. 236, 50 Am. Rep. 266, it is said: "The requirement of a deposit of money to guaranty the payment of the price of gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with."

In *Shiras v. Ewing*, 48 Kan. 170, 29 Pac. 320, a rule of the water company giving it the right to shut off water from the premises of the consumer who wastes it was held reasonable, and sustained.

In *People v. Manhattan Gas Light Co.*, 45 Barb. 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past-due gas bill was affirmed.

The view we have taken of this ordinance is not in conflict with the case of *Crumley v. Wautauga Co.*, 99 Tenn. 420, 41 S. W. 1058, which is relied upon by counsel for plaintiff to sustain this action, as a very different question was there presented. In that case, the Wautauga Water Company arbitrarily refused to furnish the plaintiff Crumley with water until he should pay an old debt, which he owed the company, consisting of the sum of \$11 for piping and \$4 for water rents. The facts showed that in 1894 and 1895, Crumley, who was a citizen of Johnson City, and a patron of the company, became its debtor in the sums aforesaid for piping and water rent. The two sums were consolidated, and the plaintiff gave the company his due bill for the aggregate of \$15. Thereafter he received water from the company for several months, and paid the required charges. Then, for a short time, he did not take the company's water. In August, 1896, he decided to take it again, and requested the proper representative of the company to turn the water into the hydrant at his residence in the city, at the same time tendering the price of one quarter's rent in advance, according to the rules of the company. This request was refused, and he was denied the benefit of the company's water unless he should pay the whole, or at least part, of his old outstanding due bill. He failed to pay any part of the

duebill, and the company refused to supply the water. One month later he commenced his action to recover damages. This court properly held that the defendant water company, being a public corporation, charged with the performance of certain duties in which the public was interested, and having made and entered into a contract with Johnson City to furnish the inhabitants with a plentiful supply of water, could not arbitrarily refuse to furnish the plaintiff with water when he tendered the price therefor a quarter in advance as required by the rules of the company, when the only reason assigned for refusal to furnish him water was that he had not paid an old bill which he owed the company, which he had been allowed to settle by a duebill, and afterward receive water and pay for the same. In this case it is said: "The defendant, Wautauga Water Company, is a public corporation, as contradistinguished from a private corporation. By the law of its creation it was charged with the imperative duty of erecting waterworks and machinery of sufficient capacity to furnish Johnson City and the inhabitants thereof with a plentiful supply of water; and by its contract with that city it bound itself to furnish an ample supply of water for the use of the city, and for families and domestic purposes. Thereby it assumed, first, by necessary implication of law, and, secondly, by express contract, to furnish water to all the inhabitants of the city upon reasonable terms, and without discrimination. From which it follows that the company breached its duty toward Crumley in refusing to let him have water upon its regular rates, and, as a legal consequence, became liable to him in damages for whatever injuries he sustained as the proximate cause of the breach. These views are not without abundant support in the authorities. * * * The defendant in the present case cannot justify its declination to furnish water to the plaintiff by the facts of his failure to pay the whole or a part of his outstanding duebill given for water and piping furnished a year or two before. Upon tender of the regular rates, he was entitled to water like other persons, and without reference to his past-due obligation. The company had given him credit for the matters covered by the duebill, and could not thereafter coerce payment by denying him a present legal right." This case is, therefore, merely authority for the proposition that a water company, under the duty imposed upon it by positive law, and assumed by it by express contract to furnish citizens of a city with water, cannot arbitrarily refuse to furnish a citizen with water who tenders the price therefor, in conformity with the rules of the company, and put its declination upon the ground that the citizen owed it an old bill for which it had given the party credit years before it had refused to furnish him water, and had actually furnished him water be-

tween the date of its acceptance of his duebill and the date of the refusal complained of, and has no application to a case like this.

The case of Merrimac River Savings Bank v. City of Lowell (Mass.) 28 N. E. 97, 10 L. R. A. 122, cited by the plaintiff, only sustains the proposition that "a city or town which is authorized by statute to furnish water to its inhabitants, to be paid for by them, and which has received from the householder payment in advance for water to be furnished, and then arbitrarily cut off his supply, can be held liable for damages in an action at law." In this case water had been furnished for the year, commencing April 1, 1886, and was not paid for as required by the ordinance, and on January 13, 1887, the plaintiff, having a mortgage on the premises, entered to foreclose it, and afterwards continued in possession. On June 3, 1887, the plaintiff paid the full amount of the water rates for the year commencing April 1, 1887, and on September 3, 1887, the water was shut off for nonpayment of the rates assessed for the year commencing April 1, 1886. The water had not been cut off during the year for which the unpaid assessment was made, and at the time it was cut off it was being furnished for a term for which the city had received from the plaintiff payment in advance. The court, among other things, said: "The receipt of this money amounted to a contract, or created a duty, to furnish plaintiff with the water throughout the year, in the manner contemplated by the statute, so far as it could be done, by making a reasonable effort to perform the duty which the city had assumed, and precluded the city from afterwards cutting off the water under its ordinance on account of failure of his predecessor in title to pay the rent for the former year. Whether, if the water had previously been cut off under the ordinance, the plaintiff could have compelled the city to turn it on without payment of the amount due for the previous year, it is unnecessary to decide." It will be seen that in this case, just as in the Wautauga Water Co. Case, in 99 Tenn. 422, 41 S. W. 1058, the city, after delinquency had occurred, had received the plaintiff's money, turned on the water, and, during the period for which it had received his money, arbitrarily cut off the water and broke its contract to furnish him water during a given period, in an effort to coerce the plaintiff into paying the past-due debt. The city in this case was not acting under any ordinance the reasonableness of which was before the court for consideration, but it was just a case of where the city had broken its contract. While the court says that the point is not before it for decision whether the city would have been justified originally in not turning on the water until the past-due debt was paid, under the city ordinance, the inference is that if this question had been before the court it would

have decided it favorably to the contentions of the defendant in this case.

The case of *James Wood v. The City of Auburn (Me.)* 32 Atl. 908, 29 L. R. A. 376, cited in the *Watauga Water Co. Case*, and relied upon by counsel for plaintiff, is only authority for the proposition "that a city which has undertaken to furnish its inhabitants with water cannot, after accepting the rates and furnishing water to a consumer for a period beyond that for which a disputed unpaid claim against him exists, shut off the supply for the purpose of coercing payment of such claim."

The case of *American Waterworks Co. v. State of Nebraska ex rel., etc. (Neb.)* 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610, also relied upon by plaintiff, decides in substance that a rule of a private corporation, engaged in supplying a city and its inhabitants with water in pursuance of a franchise granted by such city, to the effect that "water rents shall be due and payable on the first day of January and July of each year, in advance, at the company's office, and, if not paid within thirty days after they fall due, the water will be turned off, and not turned on again until all back rents are paid, including a charge of one dollar for turning the water off and on," to be unreasonable, so far as it required a patron in default of water rents to pay \$1 as a condition precedent to his right to again be furnished with water, and void. In so far as this case touches the question involved in the case at bar, it is in accord with our conclusion. The court intimates that, in so far as the company's rule provides that the water shall not be turned on again until all back rents are paid, the rule is valid; but holds that it is invalid and void to the extent that it requires a fee of \$1 to be paid by water consumers for making connections after water had been turned off for delinquency.

We are therefore of the opinion that there is no error in the judgment of the circuit court dismissing the action of the plaintiff, and the judgment of that court is affirmed, with costs.

TEGARDEN BROS. v. BIG STAR ZINC CO.
(Supreme Court of Arkansas. March 7, 1903.)
BROKERS—SALE OF LAND—COMMISSION—PROMOTORS—OBLIGATION TO CORPORATION.

1. The owner of certain mineral land authorized plaintiffs to sell the same for \$2,000, they to receive for their services all over that amount they obtained. F. contracted with plaintiffs to make the sale and receive half the profits. F. thereafter formed a corporation to buy the land, representing that the price to be paid the owner was \$5,000, and that he was to receive 10 per cent. thereof for making the sale. The sale was made, \$3,000 being paid in cash, of which plaintiffs received \$500, and a note for \$2,000 being given by the corporation to the owner of the land for the balance. Held, that F. sustained a fiduciary relation to the corporation, which was entitled to the land for

the price actually paid to the owner, and hence plaintiffs were not entitled to recover any part of the amount agreed to be paid by the note.

Appeal from Circuit Court, Marion County, in Chancery; Elbridge G. Mitchell, Judge.

Action by Tegarden Bros. against the Big Star Zinc Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

S. M. Woods and J. C. Floyd, for appellants. W. F. Pace and Frank Pace, for appellee.

RATTLE, J. On the 5th day of February, 1900, Tegarden Bros. commenced a suit in equity in the Marion circuit court against the Big Star Zinc Company, H. M. Bardeen, and Merle McFarland, and alleged in their complaint therein substantially as follows: That they are a firm composed of W. S. Tegarden, R. B. Tegarden, and B. F. Tegarden, formed for the purpose of doing a general real estate and mining business in Marion county, in this state. That the Big Star Zinc Company is a corporation organized under the laws of the state of Connecticut, and is doing business in the state of Arkansas. That on or about the 4th day of October, 1897, H. M. Bardeen, being the owner of the possessory right to certain mineral lands in Marion county, authorized them, Tegarden Bros., to sell the same for \$2,000, and agreed to pay them for selling all for which they sold the same above that amount. That thereafter Merle McFarland, representing that he could be of assistance in making a sale, proposed to aid them, provided they would divide the profits with him. That plaintiffs accepted the proposition; and that afterwards they, plaintiffs and McFarland, sold the lands to the defendant Big Star Zinc Company at and for the price of \$5,000, of which \$3,000 was to be paid in cash, and the remainder of \$2,000 one year after day of sale. That the \$3,000 were paid, and the Big Star Zinc Company executed to Bardeen its note for the \$2,000, and 6 per cent. per annum interest thereon, due and payable one year after the 4th day of April, 1898.

That it was agreed by and between the plaintiffs and the defendants Bardeen and McFarland that the purchase money should be divided as follows: \$2,500 to be paid to Bardeen and \$2,500 to be equally divided between the plaintiffs and McFarland. That plaintiffs have received \$500, and a balance of \$750 and interest remains due and unpaid, and was included in the note executed by Big Star Zinc Company to Bardeen.

That the defendants, on the 28th of November, 1898, conspired to cheat and defraud them out of the \$750, and that in furtherance of their conspiracy the defendants Bardeen and McFarland surrendered the note to the Big Star Zinc Company, well knowing that plaintiffs owned \$750 of the note and interest thereon, and that the same had not been paid.

That they were a lien on the lands sold for the payment of the amount due them, and they asked for a judgment for that amount, and that the lands be sold to pay the same.

The defendants Bardeen and McFarland failed to answer the complaint. The defendant Big Star Zinc Company answered, and admitted the purchase of the lands from Bardeen, and the execution of the note; alleged that they had paid the purchase money; and denied all the other allegations in plaintiffs' complaint.

Upon a hearing of the cause the court dismissed the complaint as to the Big Star Zinc Company, because there was no equity in it, and rendered judgment in favor of the company for costs, and the plaintiffs appealed.

The facts in the case are substantially as follows: In the spring of 1896 defendant Bardeen authorized the appellants, Tegarden Bros., to sell certain mineral lands. In the summer of the same year they (appellants) agreed with the defendant McFarland that, if he would assist them in selling the land, they would divide with him the commission received for selling. In the fall of 1896 appellants received a letter from McFarland, saying that he was about to organize a company for the purpose of purchasing the land. He failed in this undertaking. After this, in the spring or summer of 1897, they received another letter from him, saying that he was about to organize a company in the East to purchase. In the latter part of September, 1897, he informed the appellants that he had formed the company. He then said Bardeen, who agreed to give him the privilege of purchasing the land at the price of \$2,000, for a specified consideration gave him six months in which to make the purchase. Thereafter, on or about the 6th of October, 1897, McFarland and Bardeen entered into a contract in writing, by which Bardeen, for a valuable consideration, agreed that McFarland should have the option of purchasing the land at any time within six months at the price of \$5,000. This contract was made with the consent of Tegarden Bros., but they were not named in it. It was first intended that the option should be given to the Big Star Zinc Company, but its organization was not then complete, and McFarland was substituted.

Outside of the written contract it was understood and agreed by and between Bardeen on one part, and McFarland and Tegarden Bros. on the other part, that \$2,000 of the \$5,000 should be paid to Bardeen for the land, and the remainder should be paid as commissions for selling. Five thousand dollars were named in the written contract as the purchase price, so that persons buying from McFarland and appellants would not know what was paid them for commissions.

After this the organization of the Big Star Zinc Company was completed under the laws of the state of Connecticut. In the progress

of its formation McFarland represented to each member that the said lands were valuable, and could be purchased for \$5,000, and nothing less, and that, if he sold the same, he was to receive 10 per cent. commissions for selling. When fully organized, the company (he being a member) authorized him to purchase the lands for it at the price of \$5,000, which he did. It paid \$3,000 in cash, and executed its note to Bardeen and McFarland for the other \$2,000, which was deposited in a bank at Yellville, in this state. The purchase not having been made within the six months, Bardeen demanded \$2,500, instead of \$2,000, as his portion of the purchase money, which was conceded. Accordingly \$2,000 of the money paid were retained by Bardeen, and \$500 were paid to McFarland and the same amount was received by Tegarden Bros., and it was agreed that \$500 of the \$2,000 for which the note was given were the property of Bardeen, and that the remainder belonged to McFarland and Tegarden Bros. in equal parts; making \$750 the portion of Tegarden Bros.

The bank delivered the note to the Big Star Zinc Company, it being authorized to do so by McFarland and Bardeen. The consideration therefor received by Bardeen was the note of the company for \$500. The evidence does not show what McFarland received. The note was delivered without the consent or knowledge of Tegarden Bros. The company had no notice that they had any interest therein until after the delivery. This suit was instituted to recover the \$750 of the note claimed by the appellants. Are they entitled to recover?

In *Densmore Oil Co. v. Densmore*, 64 Pa. 43, Justice Sharswood, in delivering the opinion of the court, said: "There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority. The first is that any man or number of men who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associations. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. * * * The second principle is that, where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation

to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs."

While promoters of a corporation are not its agents, they assume a relation of trust and confidence towards those whom they invite to join them in the contemplated enterprise by becoming members of the corporation. Such relation "requires the same good faith on their part which the law exacts of directors of corporations and all other fiduciaries." Like directors and other officers of corporations, they can make no profit out of such relation except openly, and with the consent of those to whom they are so related. If they take advantage of their position, and make a secret profit out of their purchases for the corporation or corporators, the profit is the property of the proposed corporation when organized, and they may be compelled to account for it in any proper proceeding. 7 Thompson's Commentaries on the Law of Corporations, § 8286; 1 Clark and Marshall on Private Corporations, § 110b, and cases cited.

In *Redhead v. Parkway Driving Club*, 148 N. Y. 471, 42 N. E. 1047, *Redhead & Suydam* brought an action against *Burrill* to recover the sum of \$2,000, claimed to be due to them, as partners, from him, for services as real estate brokers upon the sale of certain real estate. The defendant *Burrill*, admitting his liability to some one for the commissions claimed, applied to the court for permission to pay the money into court for discharge from liability to any one for the same. It appearing that the *Parkway Driving Club*, a corporation, claimed the money, he was allowed to pay the money in court, and the *Parkway Driving Club* was made the defendant in the action. It seems that plaintiff *Suydam* was a member of the club, and was appointed as a member of a committee to purchase real estate for the club; that he accepted the appointment, and, acting in that capacity, purchased the real estate of *Burrill*, with the understanding that \$2,000 of the money paid by the club for the property should be paid to his firm (plaintiffs) as commissions for selling. The court held that the club was entitled to the money; that *Suydam* occupied relations of a confidential and fiduciary character to it, and could not, in purchasing property for the club, reserve a benefit to himself or to a firm of which he was a member.

In the opinion of the court in the case it is said: "It is urged in support of the appeal that the services of *Suydam* belonged to the firm, and that he could not, by any arrangement with the defendant, deprive the partnership, of which he was a member, of the broker's commission arising from the sale of

the property. If it were a question simply between him individually and the firm, that proposition might be correct. It might even be conceded that upon an accounting between the plaintiffs as partners he would be chargeable with the commission, and still it would not follow that the fund in question belonged to the firm as against the claim of the defendant. The partnership relations of *Suydam* cannot change his confidential and fiduciary obligations to the defendant. He was competent to become a member of the corporation, and of assuming duties and obligations towards it which involved relations of trust and confidence. He could and did place himself in relations with the defendant which precluded him from reaping any private benefit from the transaction, either individually or as a partner. Moreover, upon the findings, he assumed these duties upon the express understanding that his services should inure to the benefit of the corporation, for which he acted. If the arrangement which he was competent to make, and did make, with the defendant, was in any sense unjust to his partner, that may be a matter for adjustment between themselves, but it cannot affect the defendant's rights under the contract for the purchase of the land made in its behalf by him."

McFarland occupied the same relation of trust and confidence to the *Big Star Zinc Company* in this case as *Suydam* sustained to the *Parkway Driving Club* in that case. In organizing the *Big Star Zinc Company* for the purchasing of the lands from *Bardeen*, *McFarland* represented the *Tegarden Bros.* and himself. He did so with their knowledge and approval. This was a means devised by them for the purpose of selling the lands. The appellants thereby authorized *McFarland* to assume a relation to the zinc company which deprived him of all secret profits, and entitled it to the lands at what *Bardeen* was to receive for them, free of all charges for selling, unless it be the 10 per cent. commission which he said he was to get. The zinc company authorized him to purchase the lands for it, and he was without authority to impose upon it the burden of paying any amount for the lands in addition to that the vendor was to receive as the purchase price. He could not bind the zinc company to pay the \$2,500, the secret profit, which he and *Tegarden Bros.* were to receive as commissions for selling the lands. He could not act as agent for the purchaser and seller at the same time. If *Tegarden Bros.* are entitled to recover anything in this action, it must be under the contracts made by *McFarland* with *Bardeen* and the zinc company. As the zinc company was entitled, under these contracts, to the lands at what *Bardeen* received for them—\$2,500—it follows that the *Tegarden Bros.* have no right to recover of the zinc company any sum whatever.

Decree affirmed.

1. Pending a bill to redeem from foreclosure, the foreclosure purchaser brought ejectment against certain persons claiming under the mortgagor. Defendants in ejectment answered, setting up that their vendor, the mortgagor, had made a tender to redeem within the statutory time, and that a redemption suit was pending, involving the same questions involved in the ejectment suit. On request the plaintiffs in the redemption suit were made defendants in the ejectment suit. *Held*, that it was error to transfer the ejectment suit to the equity court and consolidate the two, as one was purely cognizable in equity, and the other at law.

2. In a suit to redeem from a foreclosure sale, an amendment to the complaint setting up irregularities in the foreclosure sale was properly refused, as it had the effect of changing the cause of action.

3. An amendment to a bill to redeem from foreclosure sale, not presented until the cause was ready for hearing, was properly refused.

4. In ejectment by a foreclosure purchaser against persons claiming under the mortgagor, it was error to refuse an amendment to the answer setting up irregularities in the foreclosure sale, as such would have been a good defense.

Appeal from Chancery Court, Prairie County; Jno. M. Elliott, Chancellor.

Bill to redeem by T. M. Robinson and another against the United Trust, Limited, and others, consolidated with ejectment suit by Albert S. Caldwell against A. J. Barrett and others. Bill to redeem dismissed, and judgment in ejectment reversed.

W. E. Atkinson, for appellants. Norton & Prewitt, for appellees.

BUNN, C. J. This is a bill in equity by appellants to redeem from foreclosure sale under a certain mortgage or deed of trust made by said Robinson to Charles Cunler, as trustee, to secure certain indebtedness owing by him to the appellee company, on the 16th day of May, 1894, and on the 12th July, 1894, the same was duly recorded. The lands included in the mortgage were described as follows, to wit: The southeast quarter of the northwest quarter of section four, the north half of the northwest quarter and the northwest quarter of the northeast quarter of section nine, township two north, range five west. By deed dated 11th December, 1894, Robinson conveyed to John L. Anderson the northwest quarter of the northeast quarter and the north half of the northwest quarter of said section nine, and the same was recorded on the 10th day of September, 1895. On the 7th September, 1895, Anderson and wife conveyed the last-described lands, by deed of that date, to plaintiff J. G. Thweatt, which deed was recorded on the 10th September, 1895. Robinson still retained title to the southeast quarter of the

was duly appointed as a substituted trustee. On the 14th of May, 1897, the said Williamson, as trustee, acting under the power conferred upon him in said mortgage or deed of trust, sold all of the lands included in the same, and the appellee Albert S. Caldwell became the purchaser of said lands, for the price of \$350, and on the 20th day of May, 1897, received his deed from said trustee, and the same was recorded on the 10th June, 1897. The transcript of the record in this case unfortunately gives no dates to the various pleadings and steps taken in the progress of the case—a practice to be condemned in no mistakable terms. The plaintiffs, Robinson and Thweatt, instituted their suit to redeem, and in the complaint make an offer of tender in certain amount, which they claim is sufficient, and, if not, aver that they are ready to pay whatever amount the court may adjudge as the correct amount. This complaint was filed on the anniversary of the sale under the mortgage; but the proof shows that the attorney for plaintiffs, or else one of the plaintiffs himself, directed that no summons should be issued thereon until further directions, as an arrangement was expected to be made whereby the matter might be disposed of otherwise than in court, or language to that effect. So that the suit was never in fact commenced by the plaintiff within the period of redemption. It seems, however, that the defendants, discovering the complaint on file, voluntarily answered it, and upon this the suit proceeded and progressed to the rendition of decree. Afterwards, as we infer, the said Caldwell, purchaser as aforesaid, brought suit in ejectment against A. J. Barrett, A. F. Yopp, and H. C. Miles, alleging that they wrongfully held possession of a portion of the said lands, claiming under said Robinson. Barrett and Yopp answered, denying title in Caldwell, but admitting the execution of and sale under the mortgage, but made this statement, to wit: "Whether said sale was made at public outcry, and in manner provided in said trust deed, or whether the said property was ever appraised, or brought two-thirds of the aforesaid value thereof, defendants are not fully advised, either to admit or deny same, and ask that strict proof be required with regard to same; * * * that under the said sale the said T. M. Robinson had a right, under the law, to redeem said land within twelve months from the date of said sale, and that the said Robinson did offer to redeem the same, and file a bill in the chancery court of Prairie county for the redemption of same, within twelve months from the date of said sale by said trustee; that said suit is now pending in the Prairie chancery court, and involves the very same questions as are involved in this case.

† 2. See Equity, vol. 19, Cent. Dig. § 559.

plants further state that they are owned and are lawfully in the possession of said land, the southwest quarter of the north-easter of said section 4, under a deed from the said T. M. Robinson, a copy of which is hereto attached, and marked 'Exhibit A,' and made part of this answer. Defendants state that the plaintiff Albert S. Caldwell is, and was, and has ever since the sale of said lands under said deed of trust been, a nonresident of the state of Arkansas, and, at the time the said T. M. Robinson was ready and able to redeem said land within twelve months from the time of said sale, he was unable to make a personal tender to the said Caldwell, and was compelled to file his bill in chancery for the redemption of said land, making said tender in connection with said bill." Defendants then ask that Robinson be made a party to this suit, and that this cause be transferred to the chancery court, with a view of consolidating same with said chancery suit, which embraces the questions as are involved herein." A minute is made in term time, on the 20th September, 1899, to the effect that the defendants in the foregoing ejectment suit were permitted to file their answer on the 21st September, 1899, and also their motion to transfer to the chancery court. From this it may be assumed that the foregoing answer was filed on the 21st September, 1899; and on the 22d September, 1899, Robinson and Thweatt asked to be made parties defendant to this ejectment suit, which request was by the court granted. Thereupon the court ordered the case to be transferred to the Prairie chancery court, for the Southern District, to which ruling and judgment of the court the plaintiff at the time excepted. At the November term, 1900, the defendants in the ejectment suit transferred as aforesaid filed an amended answer, setting up irregularities in the foreclosure sale, and, among other things, that the appraisers never went upon the land to appraise the same. The plaintiff in ejectment moved to strike out said amendment to the answer, and this motion was sustained, and also to suppress the deposition of Charles Thompson, which had previously been taken; and this, also, was sustained. Exceptions were made and reserved. The court held, on the motion to strike out the amendment to the answer and to suppress the deposition, that the amendment raised issues totally inconsistent with the prayer to redeem, and the said deposition should be suppressed because it was not relevant to the issues raised in the bill to redeem and the answer thereto. Subsequently the plaintiffs, Robinson and Thweatt, asked leave to amend their original complaint by inserting therein substantially the amendment to the answer of Barrett and Yopp, theretofore stricken out, which was denied. The cause was then heard upon the pleading and evidence, and the court found

that there was no equity in the bill, nor in the defense of Barrett and Yopp in the ejectment, and the defendants appealed to this court.

The case of Caldwell v. Barrett and Yopp involved purely law questions, and should not have been transferred to the equity court. It follows, of course, that the consolidation of the two cases in one was erroneous, as the two presented matters incongruous, besides being one purely cognizable in equity, and the other at law.

The motion by plaintiffs in the redemption suit to amend their complaint by inserting therein the subject-matter of the amendment to their answer in the ejectment suit, presented by the defendants therein, Barrett and Yopp, was properly overruled, because it had the effect of changing the cause of action, and also because same was not presented until the cause was ready for hearing; and for the same reason, as to them, the ruling of the court striking out the amendment to the answer of Barrett and Yopp was not erroneous, but as to Barrett and Yopp the ruling was erroneous, for the amendment contained a legitimate defense for them in the ejectment suit, if sustained by the proof.

The bill to redeem is dismissed for want of equity, but the judgment as to the ejectment suit is reversed, and the cause remanded for a new trial as between the original parties thereto, with directions to transfer that cause back to the Prairie circuit court, to be tried as it originally stood on that docket.

PARK v. PARK et al.

(Supreme Court of Arkansas. March 7, 1903.)

HOMESTEAD—CONVEYANCE—VALIDITY— NONJOINER OF WIFE—STATUTES— —CONSTRUCTION.

1. Sand. & H. Dig. § 3713, provides that no conveyance, mortgage, or other instrument affecting the homestead of any married man shall be valid, except for taxes, laborers' and mechanics' liens, and the purchase money, unless the wife joins therein. Held, that such section was not limited to invalidating specific liens on the homestead made without the wife's consent, but covered a conveyance of the homestead by the husband in which the wife did not join.

2. Where a husband conveyed the homestead by deed in which the wife did not join, reserving to the grantor the right of possession and rents and profits during his life, but making no reservation of the wife's interest therein, the deed was void under Sand. & H. Dig. § 3713, declaring that no conveyance affecting the homestead of a married woman should be valid unless the wife joined therein.

Appeal from Circuit Court, Johnson county; John N. Tillman, Judge.

Action by S. S. Park and others against Leonard Park. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

George Park was the owner of a tract of land in Johnson county containing 60 acres, upon which he resided with his wife, and

sideration of \$150, and is in the usual form, except a provision therein as follows, to wit: "The said party of the first part reserves the right of possession, and all rents and income of said land for and during his lifetime, together with all and singular the appurtenances to the said premises belonging." The wife of George Park did not join in the execution of this deed, nor acknowledge the same in any way. The wife of George Park died in February, 1900, and he died in July of same year. He remained in possession of the homestead until his death, after which Leonard Park, his grantee, took possession. Afterwards the other children and heirs of George Park brought this action to recover their interest in the land. The defendant, for answer, set up the deed. On the trial, the court held that the deed was void, and gave judgment in favor of plaintiffs. Defendant appealed.

J. E. Cravens, for appellant. J. H. Basham, for appellees.

RIDDICK, J. (after stating the facts). This is an action of ejectment, and the only question presented is whether the deed of George Park conveying to the defendant the land in controversy was a valid deed. Plaintiff claims that the deed was void by reason of a section of an act of 1887, which is as follows, to wit: "That no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same." Sand. & H. Dig. § 3713.

Defendant's first contention is that the purpose of this statute was to prevent the husband from mortgaging or otherwise incumbering the homestead with specific liens without the consent of the wife, and that it does not prevent him from making an absolute sale and conveyance of it by his sole deed. Counsel for defendant admits that this construction of the statute is in conflict with the decision of this court in the case of Pipkin v. Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241, and it seems to us that it is also in conflict with the statute. We must judge the intention of the Legislature by the language used, and the words "no conveyance, mortgage or other instrument" found in the statute, it seems to us, cover absolute deeds as well as mortgages. We are therefore compelled to overrule the contention of appellant on this point.

The next contention of the defendant is that, as the deed reserved the right of possession and of the rents and profits to the grantor during his life, it did not affect his

was to protect the interests of the wife in the homestead by forbidding the husband either to sell or incumber it without her joining in the deed, but the construction which counsel for defendant seeks to put upon the statute, by his argument on this point, would permit the husband to convey the homestead subject to a life estate in himself, which, in the event that he died first, might deprive the wife of the homestead against her will. It is clear, we think, that the husband cannot make any conveyance of his homestead affecting the interest of his wife therein, without her consent, other than those named in the statute.

Counsel for the defendant has referred us to the case of Ferguson v. Mason, 9 Wis. 377, 19 N. W. 420, as supporting his contention. In that case the court, under a statute similar to ours, held that the deed of the husband conveying the land upon which the homestead was situated was valid, even though the wife did not join in it, where there was an express reservation of the homestead rights of both the husband and wife, the deed in that case by its terms conveying only the reversion after the homestead rights of both husband and wife had terminated by death. We need not undertake to decide what the effect of such a deed would be under our statute, for that case is very different from the one we have here. The homestead interests of the wife were reserved by that deed, but the deed in this case did not reserve them. We think, therefore, that this deed came within the statute, and, as the wife did not join in its execution, we are of the opinion that the circuit judge correctly ruled that it was void. Pipkins v. Williams, 57 Ark. 242, 21 S. W. 433, 38 Am. St. Rep. 241.

Judgment affirmed.

ROWLAND v. WADLY et al.

(Supreme Court of Arkansas. March 7, 1903.)

HOMESTEAD — RIGHTS OF WIDOW — MINOR CHILDREN — ADVERSE POSSESSION — CONTINUITY — TAX SALE — REDEMPTION.

1. Act Jan. 2, 1851 (Laws 1850-51, p. 71), providing that, where the whole of a decedent's estate did not exceed in value \$300, the same should be allowed to the widow, was repealed by Act Dec. 8, 1852 (Laws 1852, p. 9), commonly known as the "Homestead Act," in so far, at least, as regarded the homestead rights of the minor children conferred by the latter act.

2. To acquire title to land by adverse possession under the seven-years statute of limitations, the possession for the seven years must be continuous and unbroken.

3. A widow having minor children permitted her homestead to be forfeited for nonpayment of taxes, procuring a third person to buy it in

¶ 2. See Adverse Possession, vol. 1, Cent. Dig. § 227.

get rid of the interest of the minor children in the homestead, and to amount to a mere redemption from the tax sale by the widow.

Appeal from Green Chancery Court; Edward D. Robertson, Chancellor.

Action by S. W. Rowland against William Wadly and others. Decree for defendants, and plaintiff appeals. Reversed.

J. D. Block and F. H. Sullivan, for appellant. Luna & Johnson, for appellees.

BUNN, C. J. This is a suit by appellant against appellees to recover the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 8, in township 16 north, of range 6 east. The appellant deraigned title through an entry from the state by Thomas Tolbert, and alleged that Tolbert died intestate and in possession of the lands, owning the fee, and that his heirs at law, after his death, conveyed the lands to the plaintiff. In his answer, defendant Scott denied that plaintiff was the owner of the land, and alleged that he himself was in possession of a portion of it. The answer of Wadly and wife, Exor Wadly, denied that the plaintiff was owner of the land, and denied that he was entitled to the possession; and they further state that Thomas Tolbert entered the lands, and that when he died he left surviving him a widow and some minor children, and that at the time of his death he occupied the land as his homestead, and that his entire estate did not exceed the value of \$300, and therefore it vested in his widow, who conveyed the land in controversy afterwards to John Roberts, and he to William T. Roberts, from whom the defendant Exor Wadly inherited the premises. The answer also alleged that the land was sold on the 22d day of November, 1869, for the nonpayment of the taxes of 1868, and one C. H. Bornhill became the purchaser at such sale, and received his certificate, and assigned the same to John Roberts, to whom the county clerk conveyed by his tax deed of the 29th of October, 1872, and he conveyed to William T. Roberts, from whom said appellee Exor Wadly inherited as aforesaid. The seven-years statute of limitation was also pleaded, and it was alleged that the action was not begun (May 30, 1896) within three years from and after the heirs of Thomas Tolbert, under whom the plaintiff claims, attained their majority. The statute of two years in favor of the tax title was also pleaded, and it was alleged that the lands had not been redeemed from the tax sale within two years after the minor heirs of Tolbert had attained their majority; and two years' possession by defendants after said heirs had attained their majority. Defendants also claimed to have made improvements to the value of \$371, and \$300 taxes paid, and asked that this be set off against

defendants, and the plaintiff.

There are two questions 1st is whether or not the 2, 1851 (Laws 1850-51, p. 71) where the whole estate of did not exceed in value the same should be allowed to be repealed by the subsequent 8, 1852 (Laws 1852, p. 9), as the "Homestead Act," in as regards the homestead right of children, conferred by the

In *Johnston v. Turner*, 29 held that, under the homestead estate is created benefit of the wife and minor children, and none of them can do an act or prejudice the rights of a child subsequent to the 1851, under which the wife fee in the case at bar; and this case cited and in many cases construed the homestead act of 1851, where a homestead act of 1852 repealed by the allowance act of 1851, and the value of the estate, when \$300, could not affect the rights of children in the homestead, if allowance to her, as in this the sale of her right in the homestead, if in fact, would be void. See *v. Sallie, Admr., et al.*, 29 Ark. 1; *Trotter et al.*, 31 Ark. 1; again held that there could be no homestead by any act of the legislature having rights therein; cases wherein the act of 1851 was considered.

In *Kirksey et al. v. Cole* (2 Ark. 1) wherein all the cases are cited that the design of the act was to continue the homestead right of the minor children, and the children should become severs or divert such homestead occupancy and enjoyment as the minority of any of the children the cases on the subject are held to be incapable of any right they may have.

It follows that the defendant William J. Roberts, took no interest from John Roberts, who upon the widow's conveyance right, as the widow of the decedent and original enterer.

The second question is whether the appellee held continuous, adverse possession against the plaintiff during the statutory period. It is

widow had left the premises when she sold to John Roberts, and he never took possession, but at once sold to William T. Roberts, who took possession, resided on the land about one year, cultivating a small portion of the same, and then moved off of it for his health, and something more than a year afterwards died, so that his possession, at farthest, only covered a period of three or three and a half years. There does not appear any bona fide possession by any one, except in a mere spasmodic way, for a period of about twelve years, when the appellees took possession, they having paid the taxes during the time—about six years next before the institution of this suit—and made improvements. The statute of seven years commenced to run, if at all, when the widow sold to John Roberts, and his grantee, William T. Roberts, took possession. We cannot find that unbroken possession extended over a period of seven years in favor of appellees, but that they did have adverse and continuous possession for a shorter period extending up to the time of the institution of this suit.

The statute of two years in favor of tax titles did not apply. The widow was a joint tenant as to the homestead with the minor children, and under the proof and her own admissions she undertook to deprive these children of their interests in the homestead by suffering it to be forfeited for the non-payment of the taxes, procuring one Bornhill to become the purchaser at the sale, and afterwards reimbursing him for the outlay, and having him assign his certificates of purchase to John Roberts, who had already or immediately afterwards purchased the land from her—that is, her right to the same by said allotment. This was a scheme or device to get rid of the interest of the minor children in the homestead, and amounted to nothing more than a redemption from the tax sale by the widow.

For the reasons above given, the decree is reversed, and cause remanded to be tried not inconsistently with this opinion.

MILLER v. STATE.

(Court of Criminal Appeals of Texas. March 25, 1903.)

RAPE—AGE OF FEMALE—WITNESSES—CROSS-EXAMINATION—CONTRADICTION—ACCOMPLICES.

1. Where, in a prosecution for rape of a female under 15 years of age, prosecutrix testified that she was 14 years of age at the time of the alleged intercourse with defendant, it was error for the court to refuse to permit defendant to ask her on cross-examination, for the purpose of impeachment, whether on dates specified, about the time of the alleged offense, she had not stated to other persons named that she was 16 years of age.

2. In a prosecution for rape, evidence that prosecutrix agreed with defendant not to disclose the facts constituting the offense, in order to shield defendant from prosecution, was insufficient to make her an accomplice.

Appeal from District Court, Coleman County; Jno. W. Goodwin, Judge.

H. B. Miller was convicted of rape, and he appeals. Reversed.

F. L. Snodgrass, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape upon a female under the age of 15 years, and his punishment assessed at confinement in the penitentiary for a term of 7 years.

Bill No. 3 complains that while prosecutrix, Minnie Jesse, was on the stand, and after she had testified that she was born May 26, 1886, and that she was 15 years old on May 26, 1901, and that she was 14 years of age at the time of the alleged act of intercourse, appellant, on cross-examination, asked the following question: "Did you see Bob Carson about the 22d of July, 1901, out in the prairie, 150 or 200 yards from your father's house, and tell him at that time that you were sixteen years old?" The state objected to this testimony. The defendant propounded the question for the purpose of impeaching the witness, and expected said witness to answer that she did not make any such statement, and expected to prove by Carson that she did tell him at said time and place that she was 16 years old. By the fourth bill it is made to appear that appellant, on cross-examination, asked prosecutrix, Minnie Jesse, if she did not tell Henry Hedgecock in June, 1901, that she was 16 years of age. Subsequent bills show both of said witnesses were offered to prove that prosecutrix had stated such fact to them. This testimony was excluded by the court, and, as stated, appellant was deprived of the privilege of asking prosecutrix, on cross-examination, if she had not made such statements. The fact that prosecutrix was under 15 years of age, and could not consent to rape, does not prevent the cross-examination by appellant as to her age. Clearly, if she made a statement to other parties, out of court, utterly at variance with her testimony upon the trial, it is proper and legitimate, on cross-examination or by impeachment, to show said contradictory statements. When prosecutrix is permitted to testify, this presupposes, in legal contemplation, her competency as a witness. This being conceded, and the state insisting that she is competent to testify, it is proper for defendant to show that her statements in reference to her age are unreliable. If she has told various parties that she is over the age of consent, this testimony should be admitted, as going to the credibility of her testimony. Therefore the court erred in excluding the same.

Appellant insists that prosecutrix is an accomplice, and that the court erred in failing to charge on the law of accomplices. As to this matter, prosecutrix testified: "I remember when the grand jury was in session in September, 1901. While the grand jury was

in session, I made an agreement with defendant not to tell what I knew. Yes, sir; the grand jury adjourned before I told what I knew about it. Yes, sir; the object of us making that agreement was to prevent a prosecution. Defendant did not want me to tell it. I understood that the purpose of the agreement was to keep defendant from being indicted and prosecuted. Yes, sir; I made the agreement for that purpose. At the time I made the agreement I was over fifteen years old. I made the agreement with defendant during September, and I was fifteen the 28th of the preceding May." Even conceding that prosecutrix could be made an accomplice upon a proper showing, the evidence before us does not make her such. "One is not an accessory who merely neglects to make known to the authorities that a felony has been committed, or forbears to arrest the felon, or agrees not to prosecute him. Keeping a witness, by persuasion or intimidation, from appearing against a felon on his trial does not render one the felon's accessory." Bishop, New Cr. Law, vol. 1, § 694. Nor does the fact that one agrees, for money, not to give evidence against a felon, or knows of the felony and does not disclose it, make said party an accessory after the fact. There must be some independent criminality to make them an accomplice. Wharton, Cr. Law, vol. 1, § 242. For a further discussion of this matter, see *Chittister v. State*, 33 Tex. Cr. R. 635, 28 S. W. 683; *Caylor v. State* (Tex. Cr. App.) 68 S. W. 982; *Prewett v. State* (Tex. Cr. App.) 53 S. W. 879; *Grimminger v. State* (Tex. Cr. App.) 60 S. W. 583; *Martin v. State* (Tex. Cr. App.) 70 S. W. 973.

Appellant also insists that the court erred in failing to charge on alibi. The writer does not think the issue of alibi was presented by the evidence, but, in the opinion of the majority of the court, such a charge was required. We do not deem it necessary to pass on appellant's various other assignments of error.

For the error discussed, the judgment is reversed, and the cause remanded.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1903.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—OTHER OFFENSES—MOTIVE—DECLARATIONS OF ACCUSED.

1. Where defendant killed deceased in a quarrel in which deceased was the aggressor, and there was no evidence that defendant feared deceased would prosecute him for violating the local option law, evidence that some two weeks prior to the killing defendant asked deceased to remain quiet, as the grand jury was about to meet, and deceased replied that he would not swear to a lie for any one, and that just prior to the killing deceased obtained whisky at defendant's place, together with the minutes of the county commissioners' court establishing local option in the county where defendant kept a saloon, was not admissible to show a motive for the crime.

2. In a prosecution that defendant, previous prosecutions against him under law were to be made, and he would rather have than a prosecution selling liquors, was

Appeal from County; N. R. L. John Walker, appellant, and he appeals.

D. G. Hunt, for appellant, Asst. Atty. Gen.

DAVIDSON, P. In the second degree, confinement for a term of 15 years.

The state was a widow of deceased two weeks before appellant sold him further testified drive up in front stayed in the bug; into the house, and returned to the bug the beer, and said now. The grand jury band remarked, 'I body.' Defendant looked down, turned into the house." Saturday, before his husband and my Walker's place of his husband got out, and shortly after returned to the bug my husband and his husband paid deference were urged this testimony—acts constituted other transactions which upon the question of the trial. The court said "that the evidence of defendant to be were told that they any other purpose, permitted to introduce of the court showing the putting in Eastland county to be for various reasons this bill by was offered in court of Mrs. Kilner as to deceased that grand jury would was informed at only consider the in force in Eastland of showing a motive to kill deceased consider it for no testimony was clearly

icide occurred on the night of the 23d of December. These matters occurred long prior to the killing, and were in no way connected with it. Extraneous facts and crimes are sometimes admissible when they go to show the intent, develop the *res gestæ*, or connect defendant with the crime for which he is being tried. Walker and deceased, Kilner, were friends, and had been for quite a length of time. On the occasion of the difficulty, Kilner was drinking, and, some of the witnesses say, quite drunk. He was very abusive and aggressive in his conduct towards appellant, threatening to kill him and using violence and epithets toward him. Appellant sought to avoid and pacify deceased, but was followed by deceased. He left his place of business, closing the door, and requested his porter to carry deceased in one direction, while he (appellant) went in the opposite direction. Deceased insisted, and followed him up. Appellant returned to the lot in the rear of his business house while pursued by deceased. On their return to the rear of the building the homicide occurred. There was no eyewitness to the transaction, and it was at night. Appellant's statement and evidence claim self-defense from aggressive movements, acts, and demonstrations of deceased. Deceased was shown to be a violent and dangerous man, having previously killed Purcell. All the witnesses who testify in regard to his character show that when drinking he was a violent and dangerous man, and one who would likely execute a threat. There is nothing in the record tending to show appellant was afraid deceased would prosecute him for violating the local option law. In fact, he seemed to be accustomed to these prosecutions. Therefore we hold the testimony in no way tended to throw any light on this transaction, and only served to prejudice the minds of the jury against accused.

Another bill of exceptions recites that while witness Bollinger was testifying he was permitted to state: "I know John Walker [defendant]. Have known him for two years. Some time prior to the killing of Kilner—I don't remember the exact time—I had a conversation with him in the town of Cisco, Texas. He called me out from the barber shop, and said to me he would rather have a murder case against him, than a whisky case, in Eastland county. This was just before Walker's local option cases were to come up in the county court." Various objections were urged to the introduction of this testimony. It was certainly very damaging, and without any apparent connection with the homicide. It showed him to be a violator of the local option law, and his dread of prosecutions for violating said law. It may have left, and doubtless did leave, the impression on the jury that he had less compunctions of conscience in taking human life, and less dread of a prosecution for that heinous offense, than for violating the local

option law. A severer criticism of his character could not well be imagined. It was prejudicial in the extreme. The court undertook to control all this testimony by relegating it to the question of motive. This was a charge on the weight of evidence. It assumes the fact that the motive for the killing was to avoid the prosecution which might be predicated on the evidence of deceased, without a fact in the record to connect those transactions with the homicide.

For the errors indicated, the judgment is reversed and the cause remanded.

HENDERSON, J., absent.

ATCHISON v. STATE.

(Court of Criminal Appeals of Texas. March 4, 1903.)

MALICIOUS MISCHIEF—ANIMALS—DOG KILLING —DEFENSES—EVIDENCE—THREATS OF OTHERS—BILL OF EXCEPTIONS.

1. Where, in a prosecution for maliciously shooting a dog, defendant pleaded an alibi, he could not set up either actual or apparent danger from the dog, or his vicious habits, in justification.

2. Where defendant shot prosecutor's dog at a distance of 25 or 30 yards, while the dog was standing inside his owner's fence, with his nose sticking under the lower strand of wire, barking, defendant was not justified in shooting the dog on the ground of self-defense.

3. Where there was no evidence that, at the time of the shooting, defendant was in any danger from the dog, which was within its owner's inclosure, and was not attempting to break therefrom, evidence of the dog's viciousness was inadmissible.

4. In a prosecution for maliciously shooting a dog, a bill of exceptions that defendant offered to prove that he had heard other persons in the community threaten to kill the dog was insufficient, for failure to name the persons making such threats.

5. Where, in a prosecution for killing a dog, there was no evidence that any other person, except defendant, was in the vicinity at the time of the shooting, and there was no fact proved tending to proximately connect any one else with the shooting, evidence that others had threatened to shoot the dog was inadmissible.

6. In a prosecution for maliciously shooting a dog, evidence held to justify the conviction.

Appeal from Hill County Court; L. C. Hill, Judge.

Homer Atchison was convicted of malicious mischief, and he appeals. Affirmed.

Dearden & Cypert, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was adjudged guilty of malicious mischief, for shooting a dog, and his punishment assessed at a fine of one cent.

The result of this appeal has brought before this court a record containing 20 bills of exception, and the spirit usually manifested in litigation where a dog is at issue. A brief summary of the substance of the facts

is necessary to bring in review the questions suggested for revision. J. B. Gant was the owner of two dogs, both being black; and, as far as we are able to discover, the only distinguishing difference between the dogs consisted in the fact that one had a brown spot in his breast, and the other a white. Gant resided on the east side of a public road which ran north and south. Between sundown and dark on the 19th of April, 1902, defendant, traveling along this road, had passed Gant's residence some 25 or 30 yards, when the dog with the white breast stuck his nose under the barb wire fence and began barking. Defendant turned around and fired at the dog, being 25 or 30 yards distant, striking him in one eye and in the front part of the face. The shot were No. 8 bird shot, one of which also struck the gallery post. Appellant's defense was alibi, which he supported by his own testimony and that of several others. There was considerable evidence introduced of a damaging character to the dog's reputation for peace and quietude, which was subsequently excluded by the court from the consideration of the jury. Appellant also sought to prove threats against the life of the dog by other parties. This, we think, is a sufficient statement of the record to bring in review the questions upon which a reversal is sought.

We deem it unnecessary to review the case from the standpoint of the alibi. The jury disregarded this theory entirely, and, if true, defendant could not set up either actual or apparent danger from the dog or his vicious habits. Therefore we take the case from the state's standpoint; there being no other testimony, except the direct evidence for the state and that for the defendant. If the state's case be true, and the jury so considered, then appellant shot the dog, under the circumstances stated, at a distance of 25 or 30 yards; the dog standing inside the yard, with his nose stuck under the lower strand of the barb wire fence, barking. There could be no danger to appellant, either actual or apparent, from the dog at that distance. It is not undertaken to be shown that the barking of the dog "was a dangerous weapon, or the semblance thereof," or the fact that appellant was within the sound of the dog's voice when barking rendered that barking an assault. If the barking of the dog constituted an assault, then, of course, he was evidently within reach of the sound of the voice, and the fact that it reached him would constitute a battery. But we do not believe this character of act by the dog suggested an assault, and the corresponding right of self-defense. Had the dog been rushing upon appellant in such manner as to leave the impression and belief upon his mind that he was about to attack or bite him, or that he had serious intent to do so, then, unquestionably, defendant would have the right to defend himself. Then, in our opinion, the mere barking of the dog did not

suggest self-defense apparent danger.

Nor was the court testimony as to the dog. The mere fact and of bad character party in shooting, something which, authorize the shooting dog had been attacked, the violent character have been relevant strengthen the belief that the dog in way injure him. It is relegated to the either of person or may be. Under no mischief, under no be justification for fence-breaking stock time they must beerty. Because an "fence breaker," or would not justify shooting the animal it—more especially inclosure of its own break into the inclosure the rights of another.

Appellant's ninth cites that, "in his own prove by himself that if permitted to do have testified, to other persons in the community, of the place dog, threaten to kill to shoot the same. purpose in offering show that some of the shooting," and prove his alibi, as endangered of attack show the dog's reputation a public and private noticed that the barking who the parties to have made the testimony where discloses the party to the shooting court did not err in The rule in reference established, and see Tex. App. 230, has in reference to other should not be per positive or circum the inculpatory fact mately connected other words, to show would not be admitted other facts also in pertinently connect the act at the time v. State, 22 Tex. A Inturf v. State, 20 authorities there cited

bill is totally insufficient to suggest the admissibility of the testimony, and under the record and bill of exceptions as presented, the court did not err in excluding it.

It is contended the evidence is not sufficient. We are of opinion it is. Two witnesses identify appellant as the party who shot the dog. This was met by appellant with evidence of alibi. The jury settled these questions adversely to appellant, and we are not authorized to disturb their finding, as the record is presented, and therefore the judgment is affirmed.

Ex parte STONE.*

(Court of Criminal Appeals of Texas. Feb. 11, 1903.)

HABEAS CORPUS—CONTEMPT—EVIDENCE—JURISDICTION—INJUNCTION—FAILURE TO SERVE—NOTICE OF ORDER.

1. Where one has been found guilty of a contempt, and applies to the Supreme Court for habeas corpus, if there is any testimony in the record showing that the court had jurisdiction, and the court decides that it did have, its action cannot be reviewed.

2. In order to render one guilty of a contempt, consisting of the violation of an injunction, it is not necessary that the writ should have been served on him, if he had actual knowledge of its issuance.

3. Where, in a suit by a railroad company, a number of ticket brokers were enjoined from dealing in certain tickets, the fact that one of them filed an answer in the suit did not show that he had knowledge of the issuance of an injunction, so as to render the same binding on him; there being evidence that he had no knowledge of the suit, and that the attorneys were retained by other brokers, and authorized by them to represent all the defendants.

Application by W. H. Stone for writ of habeas corpus in a contempt proceeding. Relator discharged.

Geo. C. Altgelt and R. B. Minor, for relator. Newton & Ward and Robt. A. John, Asst. Atty. Gen., for respondent.

HENDERSON, J. This is an original application for the writ of habeas corpus in a contempt proceeding before Hon. S. J. Brooks, judge of the Fifty-Seventh Judicial District of Texas. It appears from the record that a suit was brought in said district court against Seth Testard and others, including relator, on October 18, 1902, by the Galveston, Harrisburg & San Antonio Railway Company and certain other railway companies, enjoining them from buying or selling, or otherwise dealing in, certain railroad tickets issued by said roads on account of the San Antonio International Fair for the year 1902; said tickets being indorsed "Nontransferable." After bringing said suit, and the issuance of said injunction, relator, with others, was attached on a charge of having violated said injunction, and was

brought before the court and tried as for a contempt in disobeying the order of said court. Relator was adjudged guilty of violating said order, and fined in the sum of \$100. He sued out a writ of habeas corpus, and now brings the case before us; claiming, among other things that, as to him, the court acted without jurisdiction, in that he was never served with the writ of injunction, and was in the employ of no person who was served with said writ. While other questions are raised in the record, we only deem it necessary to notice this one, because, if it is true that he was not served with said writ of injunction, as an individual, and had no notice that his employer was served with same, then the court which punished him for contempt never acquired jurisdiction of him, and its action was without authority of law. 2 High on Injunctions, §§ 1421, 1422, 1452; 1 Beach, Injunctions, § 262; Am. & Eng. Enc. of Law (2d Ed.) vol. 7, pp. 54, 55. We have carefully examined the record to determine whether or not the court acquired jurisdiction of him under the injunction proceedings, for if this were a doubtful question, or if there was testimony in the record tending to support this view of the case, and the court a quo decided that it did have jurisdiction, then we cannot revise the action of that court on a habeas corpus proceeding. But unquestionably we are authorized to inquire into the jurisdiction of the court below over the subject-matter or person of relator, and the authority to render the particular judgment. If either of these essential elements are lacking, the judgment is fatally defective. Ex parte Degener, 30 Tex. Cr. App. 566, 17 S. W. 1111, and authorities there cited. The proceeding here was not for a contempt in the face of the court, but for a constructive contempt, in disobeying the writ of injunction which had been granted by the district judge. We do not understand that it was necessary that said writ should have been formally served on appellant. It was not even necessary that any writ should have been issued; and some of the authorities go to the extent of holding that the mere pronouncement of the order, without an entry of record, where this is brought home to the knowledge of the party of the proceeding, is sufficient. See Hull v. Thomas, 3 Edw. Ch. 237; People v. Brower, 4 Paige, 405. It is an undisputed fact, as we find from the record, that a suit was brought against Testard and others, including relator, on the 18th day of October, 1902, by the Galveston, Harrisburg & San Antonio Railway Company, with other railway companies, and that an injunction had been sued out in said court, restraining defendants in said suit from selling certain described railway tickets. The writ of injunction, however, was not served on this relator until about 3 o'clock on the evening of the 24th of October. The sale of the ticket in question was on the morning of the 24th of Octo-

*Rehearing denied March 26, 1903.

¶ 2. See Injunction, vol. 27, Cent. Dig. § 446.

ber, about 9 o'clock. So that, if the validity of the judgment for contempt depended on the record of service, it must inevitably fail.

However, it is contended on the part of the respondent that, although relator was not served with a copy of the writ of injunction prior to the sale of the ticket, yet he was amenable to the writ, because he had notice thereof, or such knowledge of its issuance as put him on notice, or that he acted for one Seth Testard in the sale of the ticket, and, knowing that Testard was enjoined, his action was in contempt of court. In regard to the last proposition, while the record does show that relator must have had notice prior to the sale of said ticket that Seth Testard had been enjoined from selling the same, still there is no evidence showing that in the sale of said ticket he acted as the agent or servant of Seth Testard. On the contrary, the record is undisputed to the effect that he did not act as such agent or servant.

On the other proposition, as to the notice of the issuance of the writ, it is contended that through his attorneys, Messrs. Minor and Altgelt, he filed an answer in said suit, and consequently is held to a knowledge of the injunction proceedings. However, the appearance of these attorneys on behalf of relator in said suit is explained by showing that they were employed by other defendants in the case, who were conducting a ticket-brokerage business in San Antonio, and their fee was arranged by these other parties. And it is also shown how these attorneys came to represent appellant, which was at the instance of Seth Testard, who, on the inquiry of said attorneys as to whether or not they should represent all of said defendants, responded that they were to represent all of the defendant. Both Testard and the attorneys testified that they never had any conference with the relator as to representing him in said case, and the relator himself testified that he knew nothing of the pendency of the suit against him, or that he was a party thereto, and did not request said attorneys to represent him, or have any knowledge that they had done so. So that, as we understand the record on this question, the appearance of said attorneys on behalf of relator is fully explained, in a manner consistent with his own statement; and it remains an uncontroverted fact that he had no knowledge of the pendency of said suit as against himself, and that the appearance of said attorneys on his behalf was without his knowledge or consent. We do not think it will be seriously contended that the unauthorized appearance of an attorney could subject relator to a fine and imprisonment, or that such appearance, though with color of authority, could not be satisfactorily explained, so as to relieve him of the penal consequences ensuing from the disobedience of an injunction of which he had no actual knowledge. That is, the unauthorized ap-

pearance of an attorney for the purpose of constraining him to the obedience of the writ. He did not make an agent of Testard without any contravention of the ticket by relator, who was no party to the proceeding, and, as the record is closed, had no opportunity to make a summary of the testimony which the court intended affected the issuance of the writ, which the court permitted him to set aside and to set aside the contempt against him, which the court permitted him to set aside and to set aside the contempt against him. In a suit, or that any other suit, must be governed by the facts presented to us; and the fact of notice to the relator, the court believed his disobedience of the writ was a matter of contempt, and this was a controversy, and there was any evidence of the jurisdiction of the court to set aside the writ of injunction, and the court was authorized to revise the judgment. We can only say that when the record does show that the judgment was void, either the court did not have jurisdiction, or the subject-matter was not within the particular jurisdiction of the court, and there was no service of the writ on the relator prior to the sale of the ticket, nor does the record show that he had knowledge that he was in contempt, and that the writ was issued thereunder; and that the relator had no authority or power to set aside the writ of injunction, and there was no service, and of the judgment, as a matter of course.

The judgment of the court is ordered discharged.

FREEMAN

(Court of Criminal Appeals)

PERJURY — EVIDENCE DICTMENT — SUFFICIENT PROPER CONDUCT — EXCEPTIONS.

1. In a prosecution in favor of one on trial to murder that he did at the place where a portion of a certain evidence, and claimed one accused of the crime, the latter's testimony that his purpose was to introduce a witness was to show up by him was not the one introduced by

the same piece of paper. The attorney also testified that prior to putting defendant on the stand he had talked to him about what his testimony would be. *Held*, that the testimony was properly received.

On Motion for Rehearing.

2. Statement by counsel for defendant, on learning that one of the jurymen had admitted having had some information respecting the case before he was drawn, "that defendant would not acquiesce in said conduct of said juror," is not equivalent to a request that the court withdraw the case from the jury, nor is it an objection to proceeding with the trial.

3. A bill of exceptions complaining of the exclusion of apparently irrelevant testimony, which does not show why the testimony was offered, or what purpose was to be attained by introducing it, is too indefinite.

4. In a prosecution for perjury in testifying in favor of one on trial for assault with intent to murder that he (defendant) did not pick up at the place where the shooting occurred a portion of a certain newspaper claimed to have been used by the one accused of the shooting as wadding for his gun, it was proper to permit the facts and circumstances attending the shooting to be considered by the jury.

5. An indictment for perjury predicated on two certain statements made by defendant while testifying in a criminal prosecution, averring, "And which said statement so made" by defendant was untrue, etc., was not bad for omitting the letter "s" from the word "statement," making it singular instead of plural.

6. Evidence in a prosecution for perjury examined, and *held* to sustain a conviction.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Arthur Freeman was convicted of perjury, and appeals. Affirmed.

J. B. Keith and J. T. Daniel, for appellant. Lee Riddle, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years.

The state relied upon the alleged false statements made by appellant on the trial of Dock Baines for assault with intent to murder Minnie Freeman, in this: that he swore he did not pick up a portion of a certain newspaper called the "Ram's Horn," in the yard where Minnie Freeman was shot, immediately subsequent to the shooting of Minnie Freeman. The shooting occurred at night. It is not necessary to further state the evidence upon which the perjury was assigned. Arthur Freeman was used as a witness in the defense of Dock Baines.

J. B. Keith, Esq., who was one of Baines' counsel, on this trial was permitted to testify that the purpose of himself and counsel in using appellant as a witness in behalf of Dock Baines was to prove by him that the piece of paper picked up by him in the yard of J. C. Freeman, the night Minnie was shot was not torn in the same way as the one introduced in evidence, and that it was not the same piece of paper. Exception was reserved to this testimony because it was the conclusion and opinion of the witness, and be-

cause the reason actuating counsel for Baines placing appellant on the stand in Baines' behalf could not bind defendant; and, whatever may have been their object or purpose, it in no way bound appellant, or could be admissible against him; and he could not be made to suffer for the acts, purpose, and intent of Baines' counsel in placing him on the stand. The bill of exceptions is qualified as follows: "That the witness testified further that, prior to putting Freeman on the stand in the Baines case, he talked to him about what his evidence would be."

"The reason and purpose, as well as the admissibility, of evidence is, we think, apparent. Our Code declares that a false statement, made through inadvertence, or under agitation or by mistake, is not perjury. Now if, from the information derived previously from the witness, the attorney was induced to call him upon the stand to swear to the facts to which he did testify, it stands to reason that such statements, when thus sworn to, could not have been made through inadvertence, nor have been the result of agitation or mistake." *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228. Under this authority the action of the court was correct in admitting the testimony.

We believe the charge of the court as given sufficiently presented the issues arising under the testimony, and therefore there was no error in refusing the requested instructions. There being no error in the record, the judgment is affirmed.

On Rehearing.

(March 26, 1903.)

The judgment herein was affirmed at a previous day of the term, and is now before us on motion for rehearing. Appellant complains of that portion of the original opinion which briefly stated the substance of the false statement upon which the perjury was based. Critically speaking, the statement is not sufficiently full, and to satisfy the criticism we will state the matter thus: The false statement, as found in the indictment is as follows: "That is to say, that the piece of paper then shown to him, said Arthur Freeman, by the district attorney, while he, Arthur Freeman, was on the stand testifying, was not the same piece of paper picked up by the said Arthur Freeman in the yard of J. C. Freeman on the night of the shooting of Minnie Freeman, and that there was not on the piece that he picked up the words, 'The Modern Dance,' in large printed letters; which said statement so made by the said Arthur Freeman was then and there material to the issue in said cause." And then follows the allegation of the falsity of the statement. On the trial of Baines appellant was used as a witness, and testified to the fact that he picked up a piece of the newspaper in the yard where the shooting occurred which resulted in wounding

Minnie Freeman, but the piece of paper he picked up was not the same piece introduced on the trial of Baines for the assault upon Minnie Freeman. The issue before the jury was whether or not appellant committed perjury in swearing that the piece of paper introduced in evidence was not the piece of paper he picked up on the night of the shooting. The state took the affirmative, and appellant defended against that proposition. We trust this is a sufficient statement to satisfy the criticism in the motion for new hearing.

Appellant insists the court erred in not considering his fourth assignment of error, which is set out in his third bill of exceptions in regard to the juror Woodward. Woodward was present as juror, and was questioned in the usual manner on his voir dire, and stated he had formed no opinion as to the guilt or innocence of Dock Baines. He then further answered that he had formed no conclusion as to the guilt or innocence of appellant. He was further asked whether he was present at either of the former trials of Dock Baines, McCoy, or Freeman, to which the juror replied that he was not, "and knew nothing of the case." He further stated, if taken as a juror he could give defendant a fair and impartial trial under the law and evidence. He was taken as a juror. "That thereafter, when the state had introduced the paper wad and most of the evidence it relied on for a conviction, the said Woodward went to the court privately, and told the court that he had seen the said paper introduced in evidence on one of the former trials, and that he had heard at least some of the evidence introduced by the state in one of the former trials, and perhaps had sat upon one of the juries in one of the cases that had been previously tried; he did not know. Thereupon the court announced to defendant and his counsel the statement said juror made to the court, and defendant, through his counsel, Nugent, excepted to the conduct of said juror, and the defendant would not acquiesce in the conduct of said juror at all. Thereafter the court continued in this cause, and tried defendant with said Woodward as one of the jury that tried defendant; and that said jury, with said Woodward as one of same, returned into court subsequently a verdict of guilty. * * * That all of the above proceedings were had in the presence and hearing of the jury. That when the said juror Woodward returned to his place in the jury box, he stood up, and told the court that he had an opinion now as to the guilt or innocence of defendant Baines, but that same would not influence his action in finding a verdict in this case. To which action of the juror Woodward, and the action and ruling of the court in continuing the trial, defendant then and there in open court excepted for the reasons above stated, and tenders this, his bill of exceptions." This is approved by the court without comment or qualification. This was not noticed in the

original opinion and still, as presented in the complaint set out by Nugent stated to the jury, "What conclusion would you reach as to the guilt of the defendant after the state has shown by the evidence that the paper wad and most of the evidence introduced in the conviction. It is overlooked or forg as to his relation of the former conviction at the time of the trial as to the guilt of the defendant. Under the circumstances the attitude of the juror could have been different. The simple counsel that he "deduct of the juror" quest that the court the jury, nor is it with the trial. We are presented during the trial the rights are involved in the trial as to emergencies as to the trial not authorized to the jury, because this appellant; and, as to the responsibility of emergencies, as to the trial with the juror was made known to the jury, we would question had the court stated, we thought this question there appellant could con and, but for the rehearing, the matter was discussed.

Appellant complains in not considering the fourth assignment of error; at least in the original opinion. While the witness was testifying for defendant, he had been before the court when they were investigating the case of Baines for shooting on the night at the supper table of Arthur, to mark the Ram's Horn, which he remembered the paper wad was picked up in Freeman's case. Minnie was shot was a fork or knife at the time. The witness marked off how the paper wad was torn, and the way he had to the time. Counsel for the witness to state

counsel for the state objected, and the court sustained the objection, to which action of the court defendant excepted. That said witness would have testified, if permitted to do so by the court, that he had been before the grand jury, and that the wad was not shown to him, and that he had heard that the wad picked up in the yard was lost, and could not be found, and that for these reasons Arthur marked off the way said wad was torn which he picked up in the yard the night Minnie was shot, and gave same to Joe Gordon; and defendant here and now tenders his bill." A most casual inspection of this bill will show that it is too indefinite and uncertain to be considered. Why this testimony was offered, the object and purpose to be attained by introducing it, is not stated in the bill, and we do not see why the reasons of the witness for asking Arthur to mark off the way the wadding was torn, etc., could be legitimate evidence. They were not trying to prove any act, but simply the reasons of the witness for asking defendant to mark off the way the wad was torn. He had already proven the fact, and, without the bill making it appear that the reasons of the witness for stating the fact was of some legal or legitimate force in the trial, these reasons are totally irrelevant and inadmissible.

It is complained also that the court did not consider and pass upon the tenth assignment of error, "because it is shown by the evidence taken on said motion that the jurors who tried this cause considered the testimony in the Dock Baines case for the purpose of determining the weight to be given to other evidence as shown by the evidence taken on the trial of said motion." If it is meant by this that the jurors considered the facts and circumstances attending the assault of Baines upon Minnie Freeman, and the facts and circumstances which were introduced to connect him with the shooting of Minnie Freeman, then the jurors were correct in considering it, because the facts and circumstances which incriminated Baines were necessary facts upon the trial of appellant for perjury. The piece of paper introduced in evidence upon the trial of Dock Baines was one of the cogent circumstances to connect Baines with the shooting, because the paper picked up in the yard corresponded exactly with the newspaper found at Baines' residence, and, when fitted into the torn place in the newspaper found in Baines' residence, corresponded exactly, even to the wording and the pictures. Appellant's testimony in regard to this piece of paper was to the effect that it was not the same piece of paper that he (appellant) picked up in his father's yard the night his sister was shot, and which he states he gave to the witness Joe Gordon. The testimony for the state traced this paper from appellant's

case without this testimony. Some facts were introduced on the trial of Baines as a means of connecting him with the assault upon Minnie Freeman, and it was necessary to connect Baines with that shooting, and appellant was placed upon the stand in behalf of defendant to meet the state's case on Baines' trial. Of course, there was evidence introduced to identify the Baines trial, upon which appellant is alleged to have committed the perjury. However, the court properly restricted this in his charge to the jury as to its office and mission in the record. We have been unable to see any merit in this contention of appellant.

It is also contended the court did not discuss in the original opinion the motion to quash the indictment, in that "the indictment charges two separate and distinct statements made by defendant, on either of which statements an assignment of perjury could have been based." This question was raised on motion in arrest of judgment. The only proposition under the eleventh assignment of error is the following: "The indictment in this cause does not charge any offense against the laws of the state of Texas, and is subject to the criticism made in defendant's motion to quash the same." The motion in arrest was based upon the statement: "There are two separate and distinct statements alleged in said indictment, to wit, that the witness testified that the piece of paper picked up by him was not the same piece of paper shown him by the district attorney, and that the words, 'The Modern Dance,' in large printed letters, were not on the piece of paper which he, the said Arthur Freeman, picked up on that night; and it is not alleged in said indictment which of said statements are untrue; and neither is it alleged that both of said statements are untrue and false." In this particular connection the indictment uses this language: "And which said statement so made by the said Arthur Freeman as a witness in said case in the manner and form as aforesaid was deliberately and willfully made, and was deliberately and willfully false." Whether or not the language imputed to the witness on the trial of Baines can be made the basis of two assignments of perjury is wholly immaterial, so far as this point is concerned. Had the language of the indictment, "And in which said statement so made by the said Arthur Freeman as a witness," etc., read, "And in which said statements so made by the said Arthur Freeman as a witness," etc., we are led to believe appellant would have thought the indictment sufficient. In other words, the omission of the letter "s" from the word "statement," making it singular instead of plural, is the fatal defect of which he now complains. We hardly thought that worthy

of serious consideration. We were of opinion then, and still, that the indictment is sufficient, and the objection is hypercritical.

The remaining criticism of the opinion was that it failed to pass upon the assignment of error that the evidence was not sufficient to support the conviction. Baines was on trial for the shooting of Minnie Freeman, and one of the most important, if not the most important, fact connected with it centered in and around the piece of paper picked up in the yard where the shooting occurred. This piece of paper had been used as a wadding for the gun which fired the shot, and was picked up by appellant and turned over to Gordon. The circumstances pointed out Baines as the assaulting party. It was done at night, and the state had to rely upon circumstantial evidence. Tracks were traced towards Baines' residence, and shown to have corresponded with the shoes Baines wore. A newspaper at Baines' residence was found, called the "Ram's Horn." From this newspaper a piece had been torn, and this piece of paper was found at the place of the assault, and the piece picked up by appellant. It was fitted into the Ram's Horn found at Baines' house, and corresponded exactly, even to the most minute particular. The words on one piece were fitted to the other, and corresponded with and were complements of the other. Even a picture in it was made complete by fitting in the piece of paper picked up in the yard. This, then, was one of the most important circumstances in the whole trial of Baines. Appellant was placed upon the stand for the purpose of showing that the piece of paper they fitted into the Ram's Horn at Baines' house was not the piece of paper he picked up in the yard, and so testified. The piece was identified beyond any question. Appellant contends that he was honest in his belief that it was not the same, and sought to so impress the jury. Baines was his brother-in-law. All the circumstances were shown and portrayed before the jury. If appellant was swearing falsely, it is a clear case of perjury, and on a most material question. This issue as to his honesty of purpose, his belief in the truth of his statement, etc., were submitted to the jury, and by them decided adversely to him. We believe the testimony is sufficient to support the conviction.

The motion for rehearing is overruled.

LEE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1902.)

RAPE—SHAM MARRIAGE—COMMON-LAW MARRIAGE—EVIDENCE—ADMISSIBILITY.

1. In a trial for rape by means of a sham marriage, the fact that nine months later the defendant married another woman is admissible as showing that he had no purpose or motive at the time of the alleged rape to consummate the marriage.

2. In a trial for committed by means not competent to was married, nine his wife by abducti

3. In an appeal for rape by means of exceptions show that he knew dei "them" going to a he saw defendant t man. The court re show that witness man. Held not err therein to show that cutrix.

4. Where one by obtained the consen cohabitation, after home, and he never of consummating a hold her out to the mon-law marriage the cohabitation w

5. Pen. Code 189: the carnal knowledg consent, obtained b etc. Article 636 re sist in the use of so woman is induced t husband." Held, th by fraud upon a si woman, and theref edge obtained by m

6. Testimony by t versation defendant a third party had n timacy between the was properly reject

7. In a trial for sham marriage, a bad reputation of examination named speaking of her. A rect examination th told him of having her was inadmissib

Davidson, P. J.,

Appeal from Dis ty; Chas. F. Clin

Lon Lee was co appeals. Reversed

J. C. Muse and J. Robt. A. John, A State.

BROOKS, J. A rape, and his punish ment in the penite years.

The indictment c been committed on by the use of force following is substa Prosecutrix, about Coppel, a small v Appellant was kee ther, and frequentl Rosa Parrish. App of age. After asso time they came to ecutrix states that appellant took her cured a room, and with a party, who Brown. Thereupon of the inmates of

riage. After the marriage was performed said Brown wrote out what was said to be a certificate, certifying to having performed the marriage, and gave the license, with the certificate, to appellant, for which service appellant paid said Brown some money, but she did not know how much. Thereupon the parties who witnessed the marriage, together with the minister, departed, and she and appellant went to bed in the room, and stayed there three or four hours. They then went back to prosecutrix's home, some 16 or 17 miles from Dallas, stopping on the way at a physician's to stay all night. Prosecutrix was accidentally shot in the leg just before reaching the physician's, and they stopped there for medical assistance. After prosecutrix returned home, appellant accompanying her, he left. A short while after this appellant went to San Antonio, and from there various letters were written, making the utmost asseverations of love and fealty on the part of appellant to prosecutrix. However, after returning from San Antonio, appellant informed prosecutrix that he had received a letter from said Brown, who was reputed to have performed the marriage ceremony, informing appellant that the marriage was a farce, and that he was not a clergyman, nor did he have any license to perform the marriage. This letter was shown to prosecutrix by appellant. Prosecutrix, however, states that appellant pacified her over this condition under assurance that he would rectify the matter as soon as he should be able by a legal marriage, and would make her his wife. Subsequent to his going to San Antonio he came back to Dallas, and lived there for some time. From Dallas he also wrote various letters to her, still protesting fealty and love, promising to bring her to live with him after awhile. On several occasions prosecutrix visited appellant in Dallas, and stayed at hotels all night with him. In the latter part of October or first of November they stopped at the National Hotel. Mrs. Ray, the proprietress thereof, testified that appellant introduced prosecutrix to her as Mrs. Rosa Parrish. This was prosecutrix's real name. The clerk of the hotel testified that appellant told him prosecutrix was his wife, and they occupied the same room at the hotel. On another occasion they went to a boarding house run by Mrs. Rath, and appellant there told his name as Parrish and that prosecutrix was Mrs. Parrish. At this place he secured for prosecutrix and himself a week's board, paying for the same in advance. Prosecutrix stayed there three days, and left with him. They left the house during the night, upon ascertaining the fact that Mrs. Rath had discovered their deception. There is a great deal of evidence on the part of

or ceremony at the Alamo Hotel. The evidence further discloses that some time after this transaction for which appellant is being prosecuted he was married to another woman.

The first bill of exceptions complains that the court erred in permitting the state to prove by J. M. Skelton, justice of the peace in Dallas county, that on April 6, 1902, witness, as such justice, under a marriage license issued from the county clerk of Dallas county, solemnized the rites of matrimony between defendant Lon Lee and Ella Lee. He also objected to introduction of the marriage license. Appellant insists that said testimony was irrelevant and immaterial and impertinent, and tends to show another offense committed by defendant, and that said evidence was calculated to create a prejudice in the minds of the jury against defendant; and because said marriage between defendant and Ella Lee is not and cannot be an issue in this case, or as tending to shed light upon the rape charged in the indictment. The rape alleged to have been committed was on July 7, 1901; and the fact that appellant on the 6th day of April, 1902, married another woman, is a circumstance that might be properly considered by the jury in passing upon the intent, purpose, and motive of appellant at the time that the rape is alleged to have been committed,—that is, it is a circumstance going to show that he had no motive or purpose of ever consummating the marriage at any time. Its probative force is a question for the jury.

Bill No. 2 complains that the court erred in forcing appellant to testify that he went to Arkansas for his wife, and to various and sundry matters going to show that he had abducted his wife from the home of her parents, against their wish, will, and consent, and ran away with her, and brought her to Dallas, and married her. These circumstances would not be germane to any issue being tried, and would be introducing, as appellant insists, other offenses or acts that shed no light upon the crime for which he is being prosecuted.

The third bill insists that the court erred in the following: Appellant introduced Jones Paynes, who testified that he knew appellant, and that in the latter part of October or the first of November, and late in the evening, "he saw them going to the National Hotel, in the city of Dallas, situated on Pacific avenue." That on that night about 9:30 or 10 o'clock he went to said hotel, and to defendant's room, and knocked on the door. Defendant opened the door, and talked with witness, and he saw a woman in the room. Counsel asked said witness how defendant was dressed when he came to the door, and whether or not he was undressed. The state

connection that this testimony may have with the other facts of this case. It is true, as above stated, the bill of exceptions shows that the witness testified "that he saw them." There is nothing shown by the bill as to whom this relates. Clearly, if appellant went to the National Hotel with prosecutrix, and there are circumstances showing that prosecutrix was in the bed with appellant, it would be proper to permit the testimony to be introduced, but the bill does not show that any error was committed.

Appellant insists that the court erred in failing to peremptorily instruct the jury to return a verdict of not guilty, for that, under the testimony of Rosa Parrish, defendant and Rosa Parrish were lawfully married in accordance with the laws of Texas. As we understand appellant, he insists that the evidence of prosecutrix makes out a lawful marriage under the laws of Texas. Appellant justly insists that there can be marriage in Texas without a license, as provided by the statutes, since the decisions hold that the statute authorizing licenses to marry does not inhibit a common-law marriage without license. In *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802, we held that all that can be required in any case involving marriage is proof of a valid marriage, for the violation of which the parties thereto may be punished, whatever be the form of the ceremony; or if there be no ceremony, if the parties agree presently to take each other for husband and wife, and from that time on live professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding on the parties, which would subject them to legal penalties for the disregard of its obligations. An inspection of the evidence in said case discloses that the parties lived together, acknowledging each other as husband and wife, for years after the consummation of the marriage. In *Ingersoll v. McWillie* (Tex. Civ. App.) 30 S. W. 56, Chief Justice Lightfoot, delivering the opinion of the court, after commenting upon the failure to get a license, said: "Of course no such excuse can be shown now for a failure to observe all the rules and regulations prescribed by law and sanctioned by an enlightened people and Christian civilization, but the policy of the law in protecting parties who have innocently been led into such a marriage is the same. From the testimony in this case we think there can be no doubt that Hortense Dix, an inexperienced and confiding girl, just from school, and who had a right to look to A. R. Collins as a protector, was induced to enter with him into the marriage state, under the agreement of present marriage, he giving some business complications as an excuse for not making it public by license and pub-

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insisted by appellant, and
not err in so ruling.

Appellant furthermore insists that the court erred in not instructing the jury to acquit because there was no evidence of rape by force or threats, and that the state's case hinged upon the theory of a fraudulent impersonation by defendant as the husband of Rosa Parrish, and, if not married, the facts disclose no offense, for that since a rape by such means is under the statute applicable alone to the protection of married women. In support of this proposition appellant cites *King v. State*, 22 Tex. App. 652, 3 S. W. 342; *Franklin v. State*, 84 Tex. Cr. R. 203, 29 S. W. 1088; *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574; *Melton v. State*, 24 Tex. App. 286, 6 S. W. 39; *Mooney v. State*, 29 Tex. App. 258, 15 S. W. 724; *Payne v. State*, 38 Tex. Cr. R. 494, 43 S. W. 515, 70 Am. St. Rep. 757. These cases appear to support appellant's contention; but an inspection of the statement of fact in each instance shows that these were prosecutions for rape by fraud upon a woman theretofore married—that is, a woman married to a person other than appellant—and the decisions merely hold in that character of prosecution that the indictment should show the woman was a married woman. Article 633, Pen. Code 1895, defines rape as follows: "Rape is the carnal knowledge of a woman without her consent, obtained by force, threats or fraud," etc. Article 636 reads: "The 'fraud' must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband." From these articles this court would not be authorized in holding that the woman upon whom fraud is practiced, in order to secure her consent to an act of copulation, must be a married woman in every instance. This would be a strained construction; in fact, would not be a construction at all, but an interpolation upon the statute. This is not warranted in construing any law. Nor can we say that the Legislature intended to permit fraud practiced upon a single woman not to be rape when the same fraud would be rape if practiced upon a married woman. If the fraud is such as to cause the woman, whether legally married or unmarried, to give consent to the act of copulation, believing she is the wife of the man she is copulating with, it is nevertheless rape whether the woman be married or single. We therefore hold that the court did not err in refusing to charge the jury as insisted by appellant.

Appellant insists that the following portion of the court's charge is erroneous, to wit: "In this case the means charged to have been used in committing the alleged rape is fraud. The fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband. It is a presumption of law which cannot be rebutted by testimony that no consent was given when the intercourse was had by fraud as above defined. Stratagem means the use of any artifice or trick,

and to constitute the fraud essential to render the act of copulation rape the stratagem resorted to must have been intended by the offender to induce, and must have induced, the injured female to believe that the offender was her husband." And again: "If you believe from the evidence beyond a reasonable doubt that in Dallas county, Texas, on or about July 7, 1901, the defendant did represent to Rosa Parrish that he had procured a marriage license to marry her, and that he carried her to the Alamo Hotel, in the city of Dallas, to marry her, and that he sent out for a person authorized to marry them, and had brought into the said hotel the person introduced by the defendant to the said Rosa Parrish as a minister of the gospel, and had said person to perform the marriage ceremony and marry him, the defendant, to the said Rosa Parrish, and that by virtue of the said ceremony said Rosa Parrish believed, and was induced thereby to believe, that the defendant was her husband, and that the defendant intended by telling her of said marriage license, and sending for and introducing said person as a minister, and having him perform the marriage ceremony, to believe that he was her husband, and that defendant resorted to said acts for the purpose of having carnal knowledge of the said Rosa Parrish, and that he did by said means have carnal knowledge of her, and that she submitted to his embraces, believing then and there that he was her husband; and you further find that said marriage ceremony was a sham, and said marriage a mock marriage, and that defendant then and there knew it to be a sham and mock marriage; and you further find that defendant was then and there an unmarried male person over the age of sixteen years, and that said Rosa Parrish was then and there over the age of fourteen years,—then the defendant would be guilty of rape as charged, and you will so find, affixing the penalty therefor." Appellant objected to said charges, because the definition of fraud was not applicable to the facts of the case, and because, if there was no statutory or common-law marriage, Rosa Parrish was not a married woman, and the statute has relation only to the protection of married women. These questions have all been reviewed above, and the charge as copied is responsible to what has been heretofore stated. We think the charges are correct. We do not believe that appellant could justly insist that the court should define common-law marriage under the laws of this state, because, in our opinion, the evidence does not raise this issue.

Appellant insists in the fifth bill of exceptions that the court erred in admitting the testimony of prosecutrix, the substance of which is detailed above. Without passing seriatim upon the several questions raised, since they have been discussed above, we will merely say that the evidence offered by the state was germane to the issues to be

proven, and appellant's exceptions, as contained in said bill, are not well taken.

By the sixth bill it is made to appear that Rosa Parrish was introduced as a witness by the state, and the defendant upon cross-examination proved by her that she had an uncle by marriage by the name of Tom Stringfellow, and that she had a conversation with defendant about Stringfellow. At this point the jury were retired, and the following questions and answers were elicited: "Did you ever have a conversation with defendant concerning certain charges that your uncle, Stringfellow, had made against you and defendant, in which he reported that he had followed you and defendant or knew where you entered in a cornfield; that you had lost your handkerchief there, and that he had found it; and it looked as though you all had laid down in the field; and that he was telling it around the country that you and defendant were criminally intimate; and is it not true that you told defendant about it?" The witness answered, "Yes, sir." "Did you not know that defendant afterwards hunted Stringfellow up and whipped him for it?" To which witness answered, "Yes, sir." "The Court: When was that time? Ans. I do not remember the date. The Court, to defendant's counsel: I do not think it would be relevant evidence unless you had the man himself here." This testimony would be hearsay, as indicated by the court, and there was no error in excluding the same. The same character of testimony was offered to be proved by Rosa Parrish with reference to another uncle by the name of Frank Parrish. None of this testimony was admissible.

The seventh bill complains of the following. Appellant introduced witness Huggins, and asked: "Are you acquainted with Rosa Parrish, and were you acquainted with her and her general reputation for chastity and virtue prior to July 7, 1901, in the community in which she lived?" He answered, "Yes; and that her reputation in that regard was bad." Upon the cross-examination by the state said witness was asked if he had heard anybody speak or talk about the general reputation of Rosa Parrish for chastity and virtue, and he answered in the affirmative. He was then asked to name the persons with whom he had talked touching such reputation, and the witness named a number of parties, among them Bob Hardcastle. Defendant, upon redirect examination, asked the witness to state what the several parties had said to him touching the general reputation of Rosa Parrish for chastity. On objection by the state the witness was not allowed to answer. Defendant then offered to prove by said witness that Bob Hardcastle, with whom he had talked, had told witness that he (Hardcastle) had repeatedly had carnal intercourse with said Rosa Parrish prior to July 7th. This was hearsay testimony, and the court did not err in excluding it.

Appellant tend court, which were full review of the court erred in so us is very volumed to pass upon appellant.

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DAVIDSON, P. give some reasons my Brethren in forth in their opinion.

I concur in the assigned in sustaining. 2. I dissent from judgment on the exceptions No. 1. In admitting the testimony that admitted in perceive the relevant marriage to Rosa Parrish. Testimony alleged to have been 7, 1901; and the 6th day of April, man is a circumstance considered by the intent, purpose at the time that it been committed—going to show that pose of ever come any time. Its proper for the jury." Hence on the 6th man, could tend to rape upon another. If the doctrine of every marriage becomes legitimate the previous rape party to such marriage.

The court instance, that the if true, would constitute Appellant, on the her testimony was jury, he would be upon two grounds: rape; and, secondly, constitute a rape by added, third, that rape, because she carnal intercourse. question clearly in make a substantial bearing on the question of the most material question of marriage.

Rosa Parrish testified that appellant told her that he was 21 or 22 years of age—something a year older than herself; that on the morning of July 7, 1901, he came to her mother's residence (who was a widow), and requested her to attend a campmeeting; that after they had gotten in the buggy and started for the supposed campground appellant urged her to go with him to Dallas, a distance of some 18 miles, and marry him; that she agreed to this proposition. After reaching Dallas appellant registered their names at the Alamo Hotel, but she was not advised as to the names placed on the register, as she did not look to see. "Defendant said we would go to the hotel and be married there; get a minister and witnesses, and be married there. I think we must have stayed there three or four hours. While we were there he took me to a room, and went out and got a minister and witnesses, and we were married. He introduced the minister to me by the name of Brown. He brought in two witnesses. He introduced them, but I don't remember their names. They were a man and a woman. He said it was the man and his wife of that hotel. I don't remember their names. I had been in that room just a few minutes when defendant went down and got the minister. Defendant took me to the room, went out, and was gone some little time, and he came back with the minister and the two witnesses, and we were married there, and the minister wrote out the certificate and gave it to him, and the witnesses signed their names. The minister wrote out the certificate on the dresser—there was no table in the room. He did that in the same room we were in. He gave the certificate to Lon Lee. The minister had a marriage license to authorize him to perform that ceremony. He kept the license. I did not read it, and don't know what was in it. I don't know whether this man was a minister or not. That occurred on Sunday. Lon Lee claimed that he got the marriage license at Cleburne. He paid the minister a fee, but I don't know how much. He paid him a bill. That ceremony was performed in Dallas county, Tex. After the ceremony was performed, the minister and witnesses went out of the room. I don't know where they went. Defendant and I stayed in that room three or four hours after the minister left. We stayed there some time, and then went home. I had carnal intercourse with defendant in that room, in the bed. I believed I was his wife at the time I let him have carnal intercourse with me." Later in the evening they returned in the direction of their home, which was near Coppell, in Dallas county. En route defendant's pistol was discharged, wounding prosecutrix, which compelled them to stop overnight at Dr. Butler's. She further says: "I had an understanding with defendant that our marriage was to be secret. We agreed to that as we came to Dallas. Defendant said he was unable to take

a wife then, because he was considerably in debt, and then he said he was going away, and he wanted me to marry him before he went away. I agreed to that. At the time of this ceremony Lon Lee was a single man and I was single. After that marriage defendant said we would have to keep it secret until he was able to provide for me. He afterwards told me that the man who performed the ceremony was no minister. I do not remember exactly when it was he told me that, but think it was in November of last year (1901). I kept insisting that defendant tell that we were married, and he always made excuses for not telling it, and then showed me a letter he received from this man that married us, and he said he was no minister, and the marriage was all a fraud. Defendant has that letter, or had it at the time I saw it. I read the letter. Defendant said he had received it from the man that married us. Defendant said he thought it was all right, and we were married, and that we would marry again. He made that statement to me some time in November, as well as I remember." Shortly afterwards appellant went to San Antonio, and from there wrote prosecutrix quite a number of letters, professing the greatest love and fealty on his part toward the witness. One of them is as follows: "My Dearest Girl. On surprise of myself as well as you, I leave for Dallas today to accept a position. I didn't know that I was going until last night, as I received a telephone message to come at once. Papa will go to Childress in my stead, but after the building is completed, then I will take charge of the business, and we will go to housekeeping. Pet, don't become worried, trust in me, and I shall be true and royal to you." It seems there was an understanding between appellant and his father that the father would secure a building at Childress, where they were to engage in the saloon business. Appellant was to take charge of the business, and this is the matter referred to in this letter. While appellant was in Dallas, at his solicitation prosecutrix several times visited and stayed with him at different hotels, where they registered as man and wife, not, however, under the name of Lon Lee and wife, but under some other name. At the hotel conducted by Mrs. Rath appellant registered himself and prosecutrix as "Mr. and Mrs. Parrish," where they remained from Sunday evening until Wednesday night. He held her out at this hotel as his wife, as he did at all of the other hotels where they registered. While there prosecutrix asked Mrs. Rath to call her husband next morning at 5 o'clock. During the conversation Mrs. Rath said something to prosecutrix which led her to believe that Mrs. Rath thought their name was not Parrish, but Lee. Prosecutrix called appellant's attention to this, and told him that she would not remain in the hotel unless he straightened the mat-

at defendant's suggestion they went by the name of Parrish at Mrs. Rath's. She says: "He told that to Mrs. Rath, the landlady. I came away the next morning after she found out what his name was. I don't know how she found out his name. I didn't stay there any longer, because he would not explain matters to her, and I told him I would not stay unless he did. I wanted him to tell her that we were married, and the circumstances of the case, and he would not do it." It is not necessary to enter into details as to the various times he registered themselves as man and wife at hotels in which he held her out at those different places as his wife. The last of these occurred about the middle of March, 1902. A child was born to them the latter part of April, 1902.

Further, as bearing upon the question of the marriage, and appellant's recognition of that marriage to prosecutrix, witness Pinson Howell testified: "I know Miss Rosa Parrish, and have known her all my life. I remember hearing of her being shot on July 7, 1901. I heard Lon Lee speak about the matter. I believe it was in his place of business when he spoke about it, in his father's saloon, where he worked. He said the shooting occurred at some place east of Farmer's Branch. He told me that he and Rosa Parrish had started to White Rock that day, to a campmeeting. After that I had some little conversation with defendant in reference to Rosa Parrish. He spoke to me about being married to her. That was some time before last Christmas, 1901." "He simply said that he and Rosa Parrish were married, is all that I know. I could not say how they were married. He just said they were married. It is true that defendant, Lon Lee, told me that he had been secretly married to Miss Rosa Parrish. He said he guessed they would go to housekeeping pretty soon." On cross-examination this witness states that he had heard of two fights appellant had had—one with Frank Parrish, uncle of prosecutrix, in regard to her, and the other was with Stringfellow, another uncle of prosecutrix. "It was about that time or after that that I had this conversation with him. He told me that she was his wife. He told me that he was married to Miss Rosa Parrish; I know that."

Along the same line, Brice, a police officer of the city of Dallas, testified, that he was acquainted with defendant, and knew him by the name of Lonnie, while he was working at the Ivy House by the Katy Depot. "He and I have talked together quite often. I used to go over there often, and we talked. Some time during the fall of last year [1901] I was in there talking to him one day, and there was a lady in the restaurant. I told him there was a party wanted to see him,

further recte acts and conduct of the parties in regard to this question of marriage, except as to the fact of the acts of intercourse occurring. These occurred whenever desired by appellant, and he states that "after July 7th, and before I came to Dallas, I had intercourse with her whenever I desired, and did it very frequently. I did not make any note of the times. I would not try to mention the number of times." Prosecutrix testifies, in substance, as did appellant.

As the writer understands the law, these facts constitute marriage. If the license was issued and the minister performed the ceremony, the marriage would be valid under the statute. If not by virtue of the license, then it will clearly come within the essentials of a common-law marriage. *Ingersol v. McWille* (Tex. Civ. App.) 30 S. W. 58; *Coleman v. Vollmer* (Tex. Civ. App.) 31 S. W. 413; *Chapman v. Chapman* (Tex. Civ. App.) 32 S. W. 564; *Id.*, 41 S. W. 533; *Simmons v. Simmons* (Tex. Civ. App.) 39 S. W. 639; *Cumby v. Garland* (Tex. Civ. App.) 25 S. W. 673; *Ry. v. Cody* (Tex. Civ. App.) 15 S. W. 136; *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105; *Cuneo v. De Cuneo*, 59 S. W. 284, 1 Tex. Ct. Rep. 306; *Bull v. Bull* (Tex. Civ. App.) 63 S. W. 727; *McClurg v. Terry*, 21 N. J. Eq. 227; *Holder v. State* (Tex. Civ. App.) 29 S. W. 793; *Simon v. State*, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; *Robertson v. Cole*, 12 Tex. 361; *Mixon v. Cattle Co.*, 84 Tex. 411, 19 S. W. 560; *Johns v. Johns*, 44 Tex. 40; 13 Moore, P. C. 242; *Barnett v. Kimmell*, 35 Pa. 13; *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563; *Tartt v. Negus* (Ala.) 28 South. 713; *Mickle v. State* (Ala.) 21 South. 66; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286.

My Brethren hold the marriage testified by the girl to be a "farce and mockery"; "that the minds of the parties did not meet"; that they did not mutually agree to the marriage.

I find this statement in the opinion: "Now, reverting to the facts, we hold that, if the testimony of the prosecutrix be true, appellant, through fraud, procured prosecutrix's consent to casual and occasional cohabitation, and she returned to her home; he never lived with her; did not hold her out to the world as his wife, and the evidence conclusively shows that he had no such purpose or intent. Could it be insisted that if appellant had fled from the country after July 7, 1901, after perpetrating upon prosecutrix what she details, he could insist in a court that he was the husband of prosecutrix? Clearly not; since, as stated, if her testimony be true, he had no purpose or intent of ever consummating the marriage or holding prosecutrix out to the world as his wife. The fact that he took her to the Alamo Hotel, which the evi-

dence shows was an assignation house, shows that he had no legitimate intent. We therefore hold that the evidence does not make a common-law marriage, as insisted by appellant, and the court did not err in so ruling."

I take issue with my Brethren upon several propositions included in this short excerpt. I insist it is a correct deduction that had appellant "fled from the country" after the events occurring at the Alamo Hotel, he was nevertheless the husband of prosecutrix. If there was a marriage, and an actual consummation of that marriage by cohabitation before they left the hotel, his flight could not alter the status thus brought about. The contract was consummated. That their minds met, that it was a mutual agreement, that the marriage was insisted upon by appellant—brought about by his earnest solicitations—the facts make unquestionably true, if the testimony is to be believed. Marriage is like any other civil contract, and governed by the same rules as to fraud. But the rule in regard to fraud has here been subverted, and the party perpetrating the fraud is justified in taking advantage of his own wrong, to the disgrace and infamy of the innocent victim, who contracted the marriage in good faith. I have searched authorities for a decision sustaining the proposition that under circumstances of this character a man can perpetrate such a fraud upon a woman through the solemnization of the marital ceremony, and after cohabitation himself declare the marriage a nullity. There are authorities which tend to support the theory that the woman, the innocent and injured party, might take advantage of the fraud by divorce proceedings, if she promptly acted upon her knowledge of the fraud. But I find no authority which gives the party perpetrating the fraud that right, even where resort is had to judicial proceedings. In *Robertson v. Cole*, 12 Tex. 361, Judge Hemphill, for the Supreme Court, said, "where the husband obtained the license, and subsequently married under the license, by means of perjury and fraud, that the girl could take advantage of that fraud in divorce proceedings, if she acted before the final consummation of the marital relation by sexual intercourse." This is an outpost case, even in favor of the innocent party. The case of *Johns v. Johns*, 44 Tex. 40, was a divorce proceeding in which the plaintiff, as husband, sought to annul the marriage on the ground that his consent was obtained by force and undue influence. He complained that appellee caused him to be arrested on a warrant charging him with having seduced her, and that the sheriff, after making the arrest, took him to the office of the justice of the peace, and appellant, being ignorant of the law, appealed to the officers of the law and the bystanders to know what to do in order to be liberated. The justice of the peace, deputy sheriff, clerk of the district court, and other persons advised him that it would be lawful and to his interest

to marry prosecutrix, and thereby he would be relieved from the prosecution for seducing her. Upon these grounds he stated in his petition that the marriage was not valid and legal, and that their living together as man and wife was intolerable and insupportable. The trial court refused the divorce, and the Supreme Court affirmed the judgment. Speaking of this, the court said: "The plaintiff appears to have understood that the marriage would cancel the offense with which he was charged and release him from custody. He knew whether or not he was guilty of the charge against him when he married, and he cannot now cancel the marriage, and rid himself of the marriage as he did the prosecution, without showing a better reason for it than he has given in his petition." In that case the marriage was procured by fraud and perjury, and the plaintiff, who was a minor, was married without the consent of her parents. In cases of seduction the party charged with crime has the option to marry the girl and avoid the consequences of the seduction, or stand his trial, with the chances of conviction and punishment. This is not a compulsory marriage; it is optional with the accused whether or not he marries the seduced woman. Even from the standpoint of this statute, a marriage of this kind, under the decision of my Brethren, would not be a meeting of the minds of the parties. It would not be a mutual agreement, and therefore not a marriage, if the seducer "fled from the country" after marriage. If it be necessary that the minds of the "parties must meet," in *Johns v. Johns*, supra, there was not a meeting of the minds of the parties, for there was a mental reservation by the seducer that he would not be bound by the marriage, and sought a divorce. It would have been a case of rape, not a marriage, if my Brethren be correct. If marriage be a civil contract, it follows that parties assuming that relation are bound by it despite mental reservations to the contrary by one of them. *Tartt v. Negus* (Ala.) 28 South. 713; 13 Moore, P. O. 242. An accused may marry to avoid the punishment for seduction, with the mental reservation not to fulfill the marital relations. He may marry simply to avoid the consequences of his crime; but this does not affect the good faith of the marriage, nor make the intercourse rape by fraud. It is as binding, nevertheless, as any other character of marriage. If such a marriage has been annulled on the ground of want of mutual consent, it has escaped the observation of the writer. The rule for which I contend is sustained by the authorities. *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563; *Barnett v. Kimmell*, 35 Pa. 18. In *Barnett v. Kimmell*, 35 Pa. 13, the doctrine was thus laid down: "Consent to a marriage will be presumed from the formal ceremony of marriage, although there was a secret intent on the part of one of the parties not to perform the duties of the marriage relation." And

this marriage is complete when the parties have assented to it. *Robinson v. Robinson*, 188 Ill. 379, 58 N. E. 906; *Elzas v. Elzas*, 171 Ill. 682, 49 N. E. 717; *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Cuneo v. De Cuneo*, 59 S. W. 284, 1 Tex. Ct. Rep. 306. Cohabitation is not necessary to the completion of the marriage or to make a marriage contract valid. *Franklin v. Franklin*, 154 Mass. 515, 28 N. E. 681; *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563. Nor does an agreement that the marriage is to be kept secret affect the validity of that marriage, though it may cast a suspicion upon the intent of the parties. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 28, 131; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286. If the marital contract is complete, and marriage occurs—they agree to live together as husband and wife—the fact that they agree to keep the marriage secret does not affect the marriage. It is a contract by which, the parties are bound, as much so as if it were any other civil contract, whether the world knew it or not, and constitutes a valid marriage. Judge Neill, speaking for the Court of Civil Appeals, in *Cuneo v. De Cuneo*, 59 S. W. 284, 1 Tex. Ct. Rep. 306, among other things uses this language: "The present consent and agreement between the parties is the gist of the common-law marriage. It requires only the agreement of the man and woman to become then and thenceforth husband and wife, and the marriage is complete. *Simmons v. Simmons* [Tex. Civ. App.] 39 S. W. 639. It is not sufficient to agree upon a present cohabitation and a future marriage. 1 Bishop, Mar., Div. & Sep. § 262; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737 [2 Am. St. Rep. 105]. It is required that the cohabitation be as man and wife and in pursuance of the marriage contract. It can of itself be no part of the marriage contract, except it take place after and not before the agreement. *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105; *Farley v. Farley* [94 Ala. 501, 10 South. 646, 33 Am. St. Rep. 141]. 'A consent de præsenti is essential to such a marriage, and a subsequent marriage is established by a proof of a promise and a copula, on the ground that the copula was a consequence and performance of an anterior promise. The copula does not constitute marriage, but it is taken, when circumstances justify it, as evidence of the performance of a previous promise.' *Rodg. Dom. Rel.* § 87; *Simmons v. Simmons*, supra."

Perhaps it is useless to pursue this line of thought or investigation. Tested by the authorities and all the rules of law and fact applicable to this record so far as I am apprised, if the testimony of prosecutrix is true or believed by the jury, the marriage is valid. Certainly appellant cannot say nay. He will not be permitted to deny that his mind met that of prosecutrix. Why? Because it was

at his instigation she came to Dallas, and it was at his urgent request and solicitation she married him, and for his gratification she submitted her body to his desires. So, we have by the testimony an actual marriage, followed almost immediately by cohabitation, and continuing to within about a month of the birth of their child. There is nothing wanting under her testimony to make a complete marriage, and if appellant had died before the second marriage there would have been no question of the right of prosecutrix and the child to inherit whatever of his property the law would set apart to his widow and child. It is not asserted the second marriage annulled the first. This could not be the law, if asserted.

Suppose appellant had been charged with seduction of the prosecutrix, instead of rape, and she had testified the marriage occurred under the circumstances detailed and subsequent to the seduction, would it be contended for a moment that any court in this state would permit a conviction for seduction? Certainly not. Or suppose appellant had been tried for bigamy for the second marriage, with this testimony before the jury would it not have become the bounden duty of the trial court to charge the jury, if they believed the facts stated, appellant would be guilty of that crime in contracting the second marriage? Most assuredly. I desire to say, in concluding this branch of the case, that prosecutrix's testimony as to the marriage is denied by appellant in toto. He says the ceremony never occurred; so there is a square issue as to whether or not the marriage took place. But if the jury believed it occurred then the girl is not contradicted. In fact, by appellant's letters, by his confessions, by his acts, by his holding her out at the hotel and thus to the world as his wife, by his admissions and statements, and by all his conduct, the testimony of the girl is corroborated, it occurs to me, in the fullest manner. His admissions alone are proof of his marriage. *Miles v. U. S.*, 103 U. S. 304, 26 L. Ed. 481; *State v. Hughes*, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195; *State v. Hilton*, 3 Rich. Law, 434, 45 Am. Dec. 783; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Forney v. Hallacher*, 8 Serg. & R. 159, 11 Am. Dec. 590; *Jackson v. People*, 2 Scam. 23.

In regard to the other branch of the case, in which the court charged the jury to find appellant guilty of "rape by fraud," it occurs to me this is so utterly at variance with the law that the mere statement of the proposition brings its own refutation. If the majority be correct, then a man, after inducing a girl to enter the marital relation with him, may desert and leave her a wreck on society, his children bastards, and this desertion form the basis of "rape by fraud." In order to sustain this ruling of the trial court, every decision in Texas on the question must be

of rape by force or threats, and that the state's case hinged upon the theory of a fraudulent impersonation by defendant as the husband of Rosa Parrish, and, if not married, the facts disclose no offense, for that since a rape by such means is under the statute applicable alone to the protection of married women. In support of this proposition appellant cites *King v. State*, 22 Tex. App. 652, 3 S. W. 242; *Franklin v. State*, 34 Tex. Cr. R. 203, 29 S. W. 1088; *Milton v. State*, 23 Tex. App. 204, 4 S. W. 574; *Milton v. State*, 24 Tex. App. 286, 6 S. W. 39; *Mooney v. State*, 29 Tex. App. 258, 15 S. W. 724; *Payne v. State*, 38 Tex. Cr. R. 494, 43 S. W. 515, 70 Am. St. Rep. 757. These cases appear to support appellant's contention; but an inspection of the statement of facts in each instance shows that these were prosecutions for rape by fraud upon a woman theretofore married—that is, a woman married to a person other than appellant—and the decisions merely hold in that character of prosecution that the indictment should show the woman was a married woman." This excerpt overrules another line of decisions, many of which are expressly mentioned.

In regard to the fraud which must be used where the woman is married, this language is found in article 636, Pen. Code, 1895: "The fraud must consist in the use of some strategem by which the woman is induced to believe the offender is her husband." The majority further say: "From these authorities this court would not be authorized in holding that the woman upon whom fraud is practiced, in order to secure her consent to an act of copulation, must be a married woman in every instance. This would be a strained construction—in fact, would not be a construction at all, but an interpolation upon the statute." I might perhaps rest upon the statement of the majority that all of the decisions in Texas heretofore rendered are in direct conflict with their opinion, for all former decisions expressly hold that the article just quoted refers only to married women; that is, to a woman married to some person other than the party accused of the rape. The article under discussion has been enacted and re-enacted by legislative bodies, and again and again given the same construction. And in *Payne's Case*, supra, the court went so far as to hold "that an indictment which charges a rape by fraud in personating the husband, in order to be sufficient, must allege that the injured female is a married woman, and not the wife of defendant."

But there are two or three suggestions I desire to make in regard to this matter. It will be noticed that in our Penal Code each class of offenses is treated as a harmonious whole in regard to the subject about which the legislation occurred. In regard to illicit

rape by threats, rape by fraud, rape upon imbecile women, rape upon girls under 15 years of age with or without force, with or without consent, and statutes against incest, bigamy, and seduction. Each of these crimes has within itself constituent elements, differing it from each of the others. They have been carved out by the Legislature, and were intended to be separate from and not to trench one upon the other; that each is an independent offense, made up of the elements set out in its definition, and each peculiar to itself, by the legislative act. The opinion in this case is an entering wedge into this division or subject of our Penal Code, the harmony heretofore existing is broken, confusion the result, and what has heretofore been bigamy may become rape by fraud; what has been a valid marriage to avoid the consequences of seduction is of may be a rape by fraud; and so it may be of incest, if the marriage is followed by sexual intercourse. It strikes at the fundamental constituent elements of these different offenses, and blends them all into one general "hotch-potch," denominated "rape by fraud." This construction saps the very foundation of the marital relation, and wipes out all statutory distinctions between these crimes and that of "rape by fraud." I cannot agree that the prior decisions are "interpolations on the statute." The opinion in this case is the "interpolation." The legislative mind intended what the courts have heretofore held, and what a casual inspection of those statutes demonstrates; and from these there has been no dissent, either from bench or bar, until the decision in this case. Decisions heretofore rendered have been recognized as correct; that is, that a rape by fraud upon married women must be by a party other than the husband or alleged husband of the ravished woman. Applying the doctrine now laid down by this case to the crime of bigamy, it will be found that whenever the accused enters into a bigamous marriage, and that marriage is consummated by sexual intercourse, it necessarily is rape by fraud. Why? Because such marriage is a fraud on the part of the bigamous husband. The accused in such case cannot enter into a second marriage; it is void by law, by reason of the previous existing marriage; therefore it must be fraudulent. There would be no question that the accused in a bigamous marriage would thereby induce the woman, however innocent she may be, to believe that he is her husband. That point being reached, their decision is or may be authority for the conviction for a "rape by fraud." I had heretofore thought this was one of the distinguishing characteristics between bigamy and rape. So, in seduction, if the accused, in order to avoid conviction for seduction, marries the woman,

marriage in good faith—he would thereby be perpetrating a fraud upon the woman in order to keep out of the penitentiary for the seduction, and therefore guilty of rape by fraud, and his marriage consummated to avoid the consequences of the seduction would be the incontestible proof of the more heinous crime of “rape by fraud,” for which his life could be forfeited, despite the holding of the Supreme Court that it does not constitute ground for divorce. So of incestuous marriage, if the act of sexual intercourse occurs it makes rape by fraud more than a possibility, and so of most of the prohibited acts of illicit intercourse. The court finds the facts true, but the acts and purpose of one party fraudulent; hence the presumption in favor of marriage and presumption of innocence and reasonable doubt are unitedly turned against the accused. These presumptions should have been indulged favorably to appellant, and not to force conviction. This case may be the progenitor of another line of decisions at variance with all prior decisions, and contrary to all statutory provisions on the subject, the result of which is not readily contemplated or easily foreseen.

For the reasons indicated, I cannot concur with my Brethren. The opinion is wrong in principle, and will be vicious in its application. Therefore I enter this my solemn protest, and respectfully dissent.

CADDELL v. STATE.*

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

CRIMINAL LAW — APPEAL — STATEMENT OF FACTS—ASSAULT—INDICTMENT.

1. Refusal of motion to strike out evidence because insufficient under the indictment for any purpose cannot be reversed on appeal in absence of statement of facts.

2. Where an indictment charges an assault with intent to rape, though the evidence does not show such an assault, the court may submit the question of a simple or aggravated assault.

Appeal from District Court, Eastland County; N. R. Lindsey, Judge.

W. A. Caddell was convicted of simple assault, and he appeals. Affirmed.

J. T. Hammons, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of simple assault, and fined \$20; hence this appeal.

There is no statement of facts in the record. After the evidence had been adduced, appellant moved to strike out all the evidence

determine this question. (C. matter is not in shape to

In a motion, which appeared in the motion in arrest of judgment, as follows: “After the court had heard and eliminated all the evidence in charge to the jury tending to show that the assault was not committed, and only allegation in the indictment of assault with intent to rape, by permitting the case to go to the jury to determine appellant’s guilt of simple or aggravated assault, because, says, the court had no jurisdiction in refusing, on motion, to grant the motion for evidence.” It was competent to grant the indictment in this case, for the appellant guilty of an aggravated assault; and because the court did not follow that the court had no jurisdiction to submit the case to the jury under the indictment on aggravated assault. Consequently the court erred in refusing to arrest the judgment.

There being no errors in the judgment is affirmed.

DODD v. STATE

(Court of Criminal Appeals of Texas. Feb. 18, 1903.)

CRIMINAL LAW—CONTINUANCES—MISCONDUCT OF COUNSEL—MENT OF COUNSEL—

1. An application for a continuance on the part of an absent witness is properly denied if the testimony is not probably true, if it is not produced, or any excuse is not offered, and it is not probable that the witness will swear to the facts stated.

2. The court held a juror who subsequently changed his opinion, when the juror was out of the courtroom, whereupon the district attorney moved that the juror be removed from the court that he would peremptorily select a new juror, and he was not again heard. Held, that there was no error in the court’s action in that the juror had been challenged and removed from the courtroom.

3. Appellant cannot complain of the court’s action in appointing counsel, where he did not object to the appointment of counsel to instruct the jury not to return a verdict.

4. On a criminal prosecution, the defendant remained silent when the jury collectively if they knew defendant’s name, and he was not again heard. Held, that there was no error in the court’s action in appointing counsel to instruct the jury not to return a verdict.

5. Appellant cannot complain of the court’s action in appointing counsel to instruct the jury not to return a verdict, where the jury were permitted to see the defendant on the street, and not kept together by an officer, in the absence of any evidence showing any such facts.

Appeal from District Court of Eastland County; N. A. Rector, Judge.

*Rehearing denied March 26, 1903.

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. § 538.

*Rehearing denied March 26, 1903.

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 2645.

BROOKS, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years. This is the second appeal. See *Dodd v. State*, 68 S. W. 992.

Appellant insists that the court erred in overruling his application for continuance for want of the testimony of Jim Vickers and Ward Kendall. The court appends the following explanation to the bill: "I approve this bill with the explanation that same was withdrawn as to the witness Vickers upon agreement of parties to use his evidence on a former trial, which was done. As to the witness Kendall, I made no ruling as to the materiality of his evidence or the diligence used. In the light of the evidence said testimony was not likely true. In the motion for new trial his affidavit was not produced, nor was any excuse for its absence offered. It is not probable that he would have sworn to the facts stated." A careful examination of the record shows that, if said witness had been present, and testified to the facts stated, it would not have been probably true, in the light of this record. The court did not err in overruling the application for continuance.

The second bill complains that the court permitted the state to peremptorily challenge the juror Miller when he was not in the jury box or courtroom at the time the challenge was made. The court first held Juror Miller disqualified, and subsequently changed his opinion, and so announced from the bench. At this time the juror Miller was out of the courtroom, and the district attorney informed the court that he would peremptorily challenge Miller, and after this statement the juror Miller was not produced in court. We see no error in the ruling of the court.

Third and fourth bills of exception complain of the argument of the district attorney to the jury. We see no error in this; and, furthermore, appellant did not request the court to instruct the jury not to consider these arguments.

Appellant insists that the witnesses George Melton and Doc Johnson were not sworn. These witnesses appeared for defendant. It is too late on motion for new trial, to raise this question. *Goldsmith v. State*, 32 Tex. Cr. R. 112, 22 S. W. 405.

Appellant also urges the misconduct of Reuben Hancock, one of the jurors, which is supported alone by the affidavit of W. T. Dodd. The misconduct complained of is that when questioned for peremptory challenge under the direction of the court, if he knew the defendant, John Dodd—the question being asked of all the jurors collectively, if they knew said Dodd—said Hancock remained silent, and said nothing; that by his sil-

ent further states that at the time said Hancock knew defendant well, having known him for years when said Dodd lived with his father at Buttercup, Williamson county; and while residing there Hancock was a customer at his father's store, and lived within six or seven miles of his father, where said Dodd lived. Defendant, John Dodd, testifies that there was a great prejudice against him at Buttercup, in Williamson county, where he formerly lived. Concede the affidavit to be true, it does not show how or wherein appellant was injured; and it is not shown that the juror Hancock had any prejudice against defendant.

Appellant insists that the jury were permitted to separate and walk out in the street, and were not kept together in charge of an officer of the court. There is no bill of exceptions verifying this statement. We do not deem it necessary to consider other errors assigned.

No error appearing in the record, the judgment is affirmed.

WILKINSON v. TRAVELERS' INS. CO.
(Court of Civil Appeals of Texas. March 11, 1903.)

ACCIDENT INSURANCE-POLICY-STIPULATIONS
—CONSTRUCTION—WAIVER—KNOWLEDGE—LIABILITY.

1. A stipulation in an accident policy, exempting the insurer from liability for injuries received by the insured while hunting, does not relieve the insurer from liability for injuries sustained by the insured while helping to bring in a log to make a fire while on a hunting expedition.

2. Where accident policies issued to the same person at the same time for the same period contained a stipulation that insurance on any person for a single period is limited to one ticket, and the insurer will return on demand to the insured premiums paid for tickets in excess thereof, one of the policies was void, in the absence of any proof of waiver of the stipulation or estoppel.

3. The fact that the insurer did not, before the injury of the insured, tender to him the premium paid on one of the policies, did not affect its rights under the policies to have one of them declared void.

4. The fact that it was the custom of the agent procuring the policies, and other agents as well, to issue more than one policy to the same person for a single period, did not alone show that the insurer had knowledge of the fact of the issuance of the policies on which to base a ratification of the agent's acts.

5. Where an insurer tendered to the insured and paid into court a sum in full of all claims under an accident policy, which sum was the amount fixed in the policy for a partial disability, it could not question its liability on any ground to the amount so tendered and paid, though it interposed defenses to the policy.

Appeal from Red River County Court; J. R. Kennedy, Judge.

Action by A. L. Wilkinson against the Travelers' Insurance Company. From a

JAMES, C. J. On January 8, 1902, appellant obtained two accident policies, in terms the same, covering the same period, in defendant's company. On January 12, 1902, he was in the Indian Territory on a hunting expedition, and, while helping to bring in a log to make a fire, he slipped and fell, and both his hands were caught under the log, mashing the nail on the second finger of each hand. He claimed on each policy the sum of \$12.50 per week provided for cases in which the assured was by the accident, "independently of all other causes, immediately, continuously, and wholly disabled and prevented * * * from transacting any and every kind of business and from engaging in any kind of occupation." The policies contained the provision, after stating that the policy shall be wholly void as to persons under 18 and over 65 years of age, employes of railroads and other public conveyances, etc., that "insurance on any person for any single period of time under this company's ticket is limited to one ticket in the sum of \$2,500.00 indemnity for injuries resulting in death, and \$12.50 weekly indemnity to males for wholly disabling injuries, exclusive of the extra indemnity provided in clause 'd' [of the policy], and the company will return on demand to the insured or to his or her executors, administrators or assigns all premiums paid for tickets in excess thereof." The premium paid for each policy was \$3. Plaintiff testified: "I was hurt very badly, and I could not attend to all the duties incumbent on me as railroad agent. I could not stamp the tickets. I could not stand the jar. I could not pull the tickets out of the case, as it took both my hands, and they were both injured. I could not make out bills of lading, nor shipping directions, nor seal up or open the cars. All of this was part of my duty. I could write my name, and did sign checks during the time I was injured. I could go around and could see as well as before the injury. Neither my eyes nor my legs were in any way injured. I have a little farm on Cuthand creek, and while I was unable to work at the depot I did go down there two or three times. I could only look on, however. Could not work myself. I do not follow farming for a living. In fact, I have never made anything at it, and it has been keeping me behind to support the farm from my work as railroad agent. I do not work this farm myself, but rent it out to tenants, except a part, which I am cultivating with hired labor. While I was injured I was able to go out there, and look after my tenants, and see that my hands were working. Yes, I was agent for the defendant a while, and sold tickets for it.

one ticket will be issued the same time; but the a, did issue two to me, and I of them. No, I never der of the amount paid for one tickets, because it had beer company to issue more than and the same party coverl I have taken out two sever and the company never p the amount overpaid, but it. I get \$125.00 a month Defendant's answer filed court pleaded a general de the clause providing again injuries received by the assu or fishing or violating the that hunting and fishing w ed by law in the territory that plaintiff had not beer so as to entitle him to re week, but that his injuries titled him to only two-fifth under another clause of the set up that one of the polle der the provision above qu to pay and tendered the an cy and the \$3 premium whi on the other, but had not The judgment appealed from plaintiff for the sum of amount tendered, and in fa for the costs of the county court.

Although plaintiff was on dition, he was not engaged he received his injury. T presented—one by appellee ment, that the evidence sh injuries did not wholly disable d by the terms of the him to the full weekly inde by appellant, that the court one of the policies as of no gard the latter of these que able. The contracts will be derstood and assented to in by appellant. There was question of public policy inv vision. Courts do not ma parties, but enforce them as vision was designed to gu against insurance beyond v tended that one person should policies bear on their face t "Tex. & Pac. Ry. Co., Clarke 8, 1902. Hour 11:50 A. M. and plaintiff was the railroa place. We state this simp the manner in vogue in sellin and it may well be inferred obtainable at railroad station such circumstances, the mos probably the only, way to gu

one should be of no effect, and it provided the consequence to be, not for a forfeiture of the premium paid on such a policy, but that the premium should be restored to the party on demand.

No waiver or estoppel was pleaded. No testimony was offered of knowledge by defendant company of the situation, in order that plaintiff might base upon it a ratification of the act of its agent. The policies were taken out on the 8th, and the injury occurred on the 12th. Our opinion is that the fact that defendant did not attempt to rescind the policy and tender back the premium before the injury has no effect on its rights under the terms of the policies. It would have been placed in default only by a demand for same by plaintiff and its refusal to pay. We need not, however, discuss what effect defendant's knowledge of the facts before the injury would have had on the case, as knowledge was not shown. The court did not err in giving the contracts effect according to their terms. It may have been, as plaintiff testified, the custom of the agent at Clarksville, and others, to issue more than one ticket to one and the same person covering the same time. This alone would not justify a different view of the case. It was not shown that the company knew of this, or had ever paid more than one policy to any such person; and, although plaintiff says he had previously taken policies in the same way, and no premium had ever been refunded him, he admits he never made a demand on defendant for any. It seems to us that to apply to the class of cases the doctrine applied in railway cases affecting servants, that a rule becomes no rule unless enforced, is absurd. Defendant, in our judgment, could pay some of such policies, if it pleased, without losing its right to insist on the contract as made in other instances.

Appellee is not in a position to question the fact of total disability, nor, for that matter, to question its liability on any ground, for the amount for which the county judge gave judgment. True, the answer interposed defenses, but it unqualifiedly and unconditionally alleged (and the fact was proved) that defendant had, before suit, tendered the amount of one policy; and that "it has paid into court, and now here in open court tenders to plaintiff, the sum of \$85.72 and said sum of \$3 in full of all claims and demands of plaintiff against it, and prays that it be discharged, with its costs." The tender was not made subject to the defenses pleaded, but irrespective of them. Under these circumstances, appellee, it seems to us, cannot complain of judgment being rendered for that amount.

The judgment is affirmed.

1903.)
SET-OFF — CONTRACTS CONSTITUTING ONE TRANSACTION—LIQUIDATED DAMAGES.

1. Defendants were plaintiff's agents to write fire insurance policies, under a contract made in 1898. In 1900 the parties entered into an agreement whereby defendants paid plaintiff \$299 for the privilege of extending their line of insurance, but plaintiff soon afterwards failed, and withdrew from the state entirely. Defendants at that time owed plaintiff \$315 in premiums, which they had collected but had retained. *Held*, in an action to recover the premiums, defendants could set off the damages sustained by reason of the breach of the second contract, not only because the contracts were related so as to form one transaction, but also because the damages were liquidated.

Appeal from Harris County Court; E. H. Vasmer, Judge.

Action by the Netherlands Fire Insurance Company against Spears & Kattman and others. From a judgment for plaintiff, defendants appeal. Reversed.

Byers & Byers, for appellants. Watkins & Jones, for appellee.

GILL, J. This suit was brought by the appellee insurance company against Spears & Kattman to recover \$315, alleged to have been collected by them on fire insurance policies as agents of appellee, and wrongfully withheld by them from the company. Spears & Kattman had given bond for the faithful performance of their duties as agents of appellee, and the sureties on the bond were also made defendants to this suit.

Spears & Kattman answered, admitting the collection and detention of the money as alleged and conceding the right of appellee to a judgment therefor. But, in offset and reconvention, they alleged that, subsequent to the date of the bond and contract of agency sued on, they entered into an agreement with the company whereby, in consideration of the sum of \$299.20 paid to the company by the said agents, the company agreed to enlarge its line of insurance and permit the agents to write policies on cotton in compresses, and upon cotton seed and its products, and other property not necessary to be here mentioned. That, in consideration of this agreement and the enlarged field of business which would thus be opened to them, they paid the said sum of \$299.20. That thereafter the company failed and refused to allow them to enlarge their line of insurance risks, but, instead thereof, curtailed the same, and shortly thereafter withdrew from the state of Texas and ceased to do business therein. That the purpose to so withdraw had been formed when the contract of agency was made, but was unknown to appellants. That appellee is a foreign corporation which has ceased to do business in

ment. Appellant repaired the machine, and held it subject to her order, and has always stood ready to deliver it on her compliance with her agreement and the payment of \$6 for repairs. Without further payment, and without offering to pay for the cost of repairs, she brought this suit, and has recovered as stated.

It was shown without contradiction that the machine without these repairs was valueless, and that with the repairs it was worth no more than the cost of repairs. The other facts above stated are undisputed.

The appellee has no cause of action for two reasons:

First. Under the contract of sale, the appellant had the right to resume possession of the machine in case of default, and default was shown. *Singer Mfg. Co. v. Rios*, 6 Tex. Ct. Rep. 293, 71 S. W. 275.

Second. He had the right to retain the machine until the charges for repairs were made, and these the appellee has not even offered to pay.

Judgment is reversed, and judgment here rendered for appellant. Reversed and rendered.

CANE BELT RY. CO. v. HUGHES et ux.
(Court of Civil Appeals of Texas. March 9, 1903.)

EMINENT DOMAIN—RAILROADS—DEPOT GROUNDS—HOMESTEAD—EVIDENCE.

1. On the trial of an appeal from the commissioners' award of damages for land condemned for depot purposes, the admission of evidence that the railroad company owned land adjacent to that condemned, which was equally suitable for depot purposes, was error.

2. Where, in proceedings to condemn land for depot purposes, the place is shown to have a market value, capable of ascertainment, its sentimental value as an old homestead is not an element proper for the consideration of the jury.

Appeal from Matagorda County Court; Jesse Matthews, Judge.

Proceeding by the Cane Belt Railway Company to condemn land of Woodford Hughes and wife for depot purposes. From the judgment entered on appeal of the landowners from the award of damages of the commissioners, the railway company appeals. Reversed.

C. E. Lane and E. F. Higgins, for appellant. Gaines & Holland, for appellees.

GILL, J. This proceeding was instituted by appellant against the appellees to condemn for depot purposes lot No. 3 and the west half of lot No. 2 in block 7 of the town of Matagorda, in Matagorda county, Tex. On a hearing before commissioners appointed for the purpose, appellees were awarded damages in the sum of \$500. On appeal by them to the county court they recovered \$825, and were awarded the right to remove their improvements. From this judgment the rail-

way company has appealed to this court, and, as cause for reversal, has assigned errors on the admission of testimony, the amount of the judgment, and the verdict awarding the right to remove the improvements.

Over the objection of the company, the court admitted testimony to the effect that the company owned other property adjacent, which was equally as suitable for depot purposes as the property condemned, and this is assailed as error. The evidence adduced did not present the issue of the right to condemn. That was shown beyond dispute, and the court, so holding, did not submit the issue to the jury. The evidence complained of could not have lawfully affected the issue, for it is well settled that as to what land a railway company may select for its right of way and depot grounds the discretion of the company is absolute, and will not be revised by the courts. In the proper construction of railways and their necessary appurtenances, the public have a large interest, and for this reason the power of eminent domain is conferred. If different courts and juries were allowed to pass on the necessity or advisability of condemning each tract out of the many which go to make up a right of way for a railway line, straight courses from point to point, with the consequent lessening of mileage, would in many, if not all, cases be impossible to secure. So in the case of depot grounds. One jury might hold, on competent evidence, that the land in question was not necessary to the purposes of the railroad. Another might render a like verdict as to any other tract sought to be subjected to its uses, and by such a course the company could be excluded altogether. So the rule is that the company, having shown its corporate existence, and a purpose to use the land for corporate purposes, may have its decree of condemnation, subject to the payment of the market value of the property taken, and incidental damages when less than the whole tract is taken. In this case the whole of defendants' holdings are condemned, and the sole issue for the jury to determine was the market value of the property. The evidence complained of could have no legal bearing upon that issue, and so was in no respect material. It could serve only to prejudice the jury on the issue of damages, by leading them to believe that the discretion of the agents of appellant in selecting this lot for their uses was capriciously or vindictively exercised.

The court erred also in permitting Woodford Hughes to testify that the place was the homestead of himself and wife, and had been such for many years, and for that reason had a peculiar value to him. The place was shown to have a market value capable of ascertainment, and its sentimental value as an old homestead was not an element proper for the consideration of the jury. The

right thus to forcefully appropriate an old homestead, surrounded, doubtless, by hal-
lowed memories and associations, is a hard
doctrine, and one against which the ordinary
mind naturally rebels as an outrage upon pri-
vate right; but it is none the less the law,
and is founded upon public necessity. The
measure of the citizen's damage when his
rights are thus invaded is fixed and deter-
mined by law on the basis of value, and all
elements of sentiment are excluded.

The verdict of the jury on the issue of val-
ue is not beyond criticism, in view of the
testimony properly admitted, and when to
this is added the further feature of the ver-
dict, awarding to defendants their improve-
ments, which had neither been prayed for
in the pleadings, nor submitted as an issue
by the trial judge, it becomes manifest that
the improper testimony had its effect, and
that the effort of the trial judge to withdraw
it by charges was unavailing.

The judgment is reversed, and the cause
remanded for another trial. Reversed and
remanded.

JOHNSON v. HOUSTON & T. C. R. CO.*
(Court of Civil Appeals of Texas. March 5,
1903.)

SERVANT—INJURIES—NEGLIGENCE—QUES-
TION FOR JURY.

1. Evidence examined in an action against
a railroad company for the death of an em-
ployé, caused by his falling from a coal car,
and held not to sufficiently tend to show that
the company's negligence, if any, in failing to
furnish a proper coupling apparatus for the
cars, was the cause of the fall, to take the case
to the jury.

Error from District Court, Harris County;
Wm. H. Wilson, Judge.

Action by Mercy Johnson against the
Houston & Texas Central Railroad Company.
Judgment for defendant, and plaintiff brings
error. Affirmed.

O. T. Holt and Jno. M. Cobb, for plaintiff
in error. E. W. Townes and Andrews &
Ball, for defendant in error.

GARRETT, C. J. This action was brought
by the plaintiff in error against the defend-
ant in error for the recovery of damages for
injuries resulting in the death of her hus-
band, Charley Johnson, and alleged to have
been caused by the negligence of the de-
fendant while the deceased was in its em-
ployment as a switchman. The plaintiff
sued, also, in behalf of her infant child,
Pearl Johnson, and of Chloe Thomas and
Martin Johnson, the mother and father of
the deceased. This is the second appeal.
The first will be found reported in 66 S. W.
72. The cause was submitted to a jury with
the charge of the court, and the trial result-
ed in a verdict and judgment in favor of the
defendant. The plaintiff seeks to reverse the

judgment of the
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*Rehearing denied.

there, with my flag in my hand, and he went along the cars, on the coal cars, walking, and passed the crossing by me; and I noticed the cars as they were rolling, and I kept looking the way the cars were going, and Charley was on those cars as they were moving down. After that I heard Charley halloo, 'Oh!' and he put his hands up, and then he was going over backwards from the car. He had his back turned, and he fell backwards from the car, with his hands up, that way. He was on the same side of the train that I was on, and he probably might have been 100 feet away from me at that time." It was shown that the couplings on coal cars that were in the train when the accident occurred were in good condition, but it did not appear that more than six or seven of the cars were examined. It was shown, however, that it was a common occurrence for couplings not to work the first time a lever was thrown; that this might be the result of the chain being too long. The engineer testified that he got only an ordinary stop signal, and that his engine came to a standstill with one application of the service stop; that, after he stopped, the flagman came up with a red flag, and he applied the emergency, so that there would be no possible way for the engine to move. Both of the witnesses who saw deceased when he fell testified that the train was moving at the time. Williams testified that "the cars did not stop suddenly, but it slackened the speed when the cars failed to come loose. It gave him [Crawford] the slack, and the cars never stopped rolling at all. They separated and rolled right on." There was expert evidence that the effect of a sudden checking the speed of the engine would be to cause a jerk in taking the slack out of the cars; that, if the speed was slackened gradually, it would gradually take out the slack. No witness testified to any unusual jerk or jar of the train, and those who testified on the subject stated that the slack was gradual, and that the application of air to the engine reduced the speed, and had the effect to slow the train down; that there was no unusual jerking or jolting.

The appellee submits as independent propositions why the judgment of the court below should be affirmed, although there may have been error in the charge of the court submitting the case to the jury, and in the exclusion of the testimony as shown by the bill of exception, that (1) the plaintiff wholly failed to make out her charge of negligence against the defendant; and (2) it did not appear from the evidence, if there was any negligence on the part of the defendant, that it was the proximate cause of the death of plaintiff's husband. If either of these propositions is true, the judgment should be af-

As to the first proposition, there was some evidence of negligence in failing to furnish a sufficient coupling apparatus, from the fact that the coupling did not work when the switchman, Williams, first pulled the lever to separate the cars, and that, though this was a common thing, it generally happened because the chain was too long, and we are inclined to hold that this would be sufficient evidence to require the issue of negligence to be submitted to the jury. But there is no such relation between the failure of the coupling to work and the fall of the deceased from the car as would show that the former was the proximate cause of the latter. The cars were rolling on, without jerking, when the deceased fell. It was not shown that he fell as the result of a jerk, or that the failure of the coupling to work caused any jerk. He was seen to throw up his hands and fall from the car to the side, at right angles to the track, and not to the front, as he would have fallen if the fall had been caused by a jerk, the result of the sudden stopping of the engine before the cars had been uncoupled. There is no testimony that this was done, and there was no evidence to show that the fall was the result of the cars failing to uncouple when Williams first pulled the lever. There was no stopping of the engine until after the signal from Crawford, the foreman.

As we are of the opinion that the injuries were not shown to have been the proximate result of the failure of the coupling to work. It will be unnecessary to consider plaintiff's assignments of error, for no other judgment should have been rendered under the evidence in the case.

The judgment of the court below will be affirmed. Affirmed.

HEATH v. JORDT.

(Court of Civil Appeals of Texas. March 5, 1903.)

GARNISHMENT—JUDGMENT—SETTING ASIDE—INEXCUSABLE NEGLECT.

1. Under statutes providing that, in suits by publication, no trial shall be had until the second term after service, that no judgment can be taken against the garnishee until after judgment against the defendant, and that the garnishee may file his answer at any time before the trial, where the plaintiff in such a suit took judgment by default against both the defendant and garnishee at the first term after service, and the garnishee shows that the judgment against him is unjust, and that he had employed counsel, and would have answered before the second term after the service, and did not anticipate that plaintiff would take judgment before the time authorized by statute, the failure to answer was not inexcusable neglect, and the judgment against him should be set aside.

Appeal from Nueces County Court; W. B. Hopkins, Judge.

in favor of the plaintiff, the garnishee appeals. Reversed.

D. McNeill Turner, for appellant. J. O. Scott, for appellee.

PLEASANTS, J. This appeal is from a judgment sustaining exceptions to a petition for certiorari to the justice court for precinct No. 1 of Nueces county, filed in the court below by the appellant on March 31, 1902. The allegations of the petition are, in substance, as follows:

"That on December 2, 1901, appellee, Jordt, filed suit in said justice court of precinct No. 1 of Nueces county against one Clay on a liquidated demand for \$162.13, interest, and attorney's fees, and, as ancillary thereto, sued out writ of garnishment against appellant, which writ was issued and served upon appellant on December 14, 1901. That on January 2, 1902, affidavit for citation to said Clay by publication was filed in said suit, and that such citation was issued by said justice on January 2, 1902, and only returned and filed on January 28, 1902; showing service by publication on the 3d, 10th, and 17th and 24th days of January, 1902.

"That on February 24, 1902, judgment by default was entered against said Clay in the main suit for \$188.10 and costs, and against appellant Heath in the ancillary suit for same amount, interest, and costs of both proceedings. That the judgment against Clay was void, in that same was rendered upon service of published citation imperfect and incomplete at the said February term, 1902, at which term said Clay was not required to answer, and that likewise the judgment against appellant was void. That injustice was done appellant in said proceeding, and it would be unconscionable to compel him to pay said debt of said Clay, for the reason that neither at the time of the service of the said writ, nor at any time before or since said date, was he, or is he now, indebted to said Clay in any sum of money; that he did not then have, and at no time since has he had, and has not now, in his possession, any effects of said Clay, and he did not then know, and has not since known, and does not now know of any persons who were or are indebted to said Clay, or have or had effects of said Clay in their possession," but, on the contrary, "at the time of the service of said writ of garnishment said Clay was, and is now, indebted to him (appellant) in the sum of \$3,850.00, which was then due and unpaid." That said Clay is wholly insolvent, and is without property subject to execution, within his knowledge, and that, if forced to pay off said inequitable judgment, he would be with-

said writ of garnishment and that it was through negligence on his part that he defenses set out above upon garnishment proceeding court; and in this connection immediately after the said writ of garnishment D. McNeill Turner, a practitioner of law in Corpus Christi, Tex., as to employed said attorney to answer to said writ, so as to the terms of defense embraced in the aforesaid; that he was advised by his said attorney required by law to answer term, 1901, of said justice court that defendant Clay had not been notified; that on or about the 1st of January, 1902, having seen the citation of defendant Clay in the case, he again spoke to him and urged and requested him to answer and defense to said writ, and he was then informed by said attorney that the service of said published citation was not complete, so as to require him to answer before the March term of said justice's court, and that judgment could be rendered against him before the first day of May, 1902, therefore no judgment could be rendered against plaintiff in the case against him; and that, as he was given sixty days or more to answer in a hurry, and that petitioner (he) (b's said attorney) would answer and have petitioner more ample time"; that petitioner, being ignorant of the law, and the forms and procedure in garnishment suit, he was not able to employ counsel as to his proper preparation thereof; that the skill and ability of him in the truth and correctness of his statements, counsel, and advice were not appear and answer said writ as aforesaid; that he did not move for new trial nor a motion to set aside judgment in said justice's court within ten days after the rendition nor did he give notice of appeal within the time required by law; the truth is he did not know and because his said attorney did not learn, of the rendition of said judgment, until he was informed thereof by J. G. for plaintiff, Jordt, on the 21st of January, 1902, twenty-five days after entry, and, in verification of the foregoing paragraphs hereof, he subscribes the affidavit of his said attor-

prays to be considered a part hereof; that through no failure or default on his part he has been deprived of a good and meritorious defense to said garnishment suit against him, and that it is unjust and inequitable to impute to him the mistakes, oversight, or negligence of his said attorney; that, the premises being considered, petitioner prays that the writs of certiorari and supersedeas issue to Joseph Dunn, justice of the peace of precinct No. 1 of Nueces county, to stay all further proceedings in said cause," etc.

To the above petition was attached the following affidavit:

"The State of Texas, County of Nueces. I, D. McNeil Turner, attorney at law, do solemnly swear that I prepared and have read the attached application of O. C. Heath for writ of certiorari, and that the facts stated in paragraphs 7 and 8 are true; that believing that no judgment against the debtor, J. H. Clay, would be urged or could be legally rendered in the main suit until the March term of said court, 1904, and knowing that no judgment by default or otherwise could be rendered against said O. C. Heath until after judgment rendered against said Clay, and knowing that said Heath, under the statute, had a right to answer said writ of garnishment at any time before judgment by default was actually pronounced, I, as said Heath's attorney, advised and stated to him as set out in said paragraph No. 7 of his application; that, so believing and knowing then and now, I did not prepare or cause to be filed the answer and defense of said Heath to said writ, though urged thereto by him; and that whatever of default, failure, laches, or negligence there may have been in the premises, or how inexcusable same may appear, such default, failure, laches, or negligence is directly chargeable to me, and the same was not the fault, failure, or neglect of said O. C. Heath. So help me God. D. McNeil Turner.

"Sworn to and subscribed before me this the 27th day of March, A. D. 1902. G. W. Westervelt, Notary Public, Nueces County, Texas."

The only question for our decision is whether the allegations of this petition show that the injustice complained of was not caused by the inexcusable neglect of the appellant. To state the question differently, do the allegations of the petition show a sufficient excuse for appellant's failure to answer the writ of garnishment before judgment by default was rendered against him in the justice court? While the writ of garnishment commanded the appellant to answer at the next term of the court, he could, under the law, file his answer at any time before the trial of the case. *Ryburn v. Nall*, 4 Tex. 305; *Moore v. Janes*, 6 Tex. 227; *City of Jefferson v. Jones*, 74 Tex. 635, 12 S. W. 749. No judgment could be taken against the garnishee until after plaintiff had obtain-

ed a judgment against the original defendant. The defendant Clay was a nonresident, and was cited by publication. The citation to Clay was not published for the full time required by law prior to the January term of the court, and service was therefore not complete until the February term. The statute directs that in suits by publication no trial shall be had until the second term after the completion of service. Under these facts the judgment in favor of plaintiff against Clay could not have been properly rendered until the March term of the justice court. While the judgment rendered at the February term was not void, but only voidable, and appellant, being a stranger thereto, cannot question its validity, it is proper to consider its voidable character, in determining the question as to whether a person of ordinary prudence should have anticipated that plaintiff would have procured the rendition of such judgment. If a person of ordinary prudence, knowing all of the facts, would have presumed, as appellant's counsel did, that plaintiff would not procure the rendition of said judgment at the February term of the court, then it cannot be said that his failure to anticipate the rendition of such judgment, and to file an answer for appellant on or before the first day of said term, was inexcusable neglect. Judgments are not usually rendered upon imperfect and insufficient service, and a plaintiff would not ordinarily knowingly procure the rendition of a voidable and inconclusive judgment. The facts which rendered the service against Clay incomplete were known to appellant's attorney, and must have been known to the attorney for the appellee. With the knowledge of these facts in his possession, we do not think that it can be said that appellant's attorney was guilty of inexcusable neglect in not anticipating that appellee would procure a judgment against Clay at the February term of the court, and in failing to file an answer for appellant before the first day of said term. According to the allegations of the petition, great injustice was done appellant by the judgment of the justice court, and we think, under the facts alleged, that said injustice was not caused by the inexcusable neglect of appellant or his attorney. The attorney for appellant was misled by the unusual and irregular course pursued by the appellee in obtaining a premature and voidable judgment against the original defendant, and did not learn of the rendition of said judgment and the judgment by default against him until the time in which a motion for a new trial or to set aside the judgment by default could have been filed in the justice court had expired. Under the facts alleged, we think the appellant was entitled to a certiorari, and to have a trial de novo in the county court, and the court below erred in sustaining the exceptions to the petition and dismissing the suit. *Parlin & Orendorff*

The judgment of the court below will be reversed, and the cause remanded, and it is so ordered. Reversed and remanded.

NORTON et al. v. WOCHLER et al.
(Court of Civil Appeals of Texas. March 4, 1903.)

JUDGMENT—RES JUDICATA—COUNTERCLAIM—POSSIBILITY OF ADJUDICATION—SURRENDER OF NOTES—ESTOPPEL TO DENY VALIDITY—SUIT AGAINST INDORSER—LIMITATIONS—INJUNCTION AGAINST JUDGMENT.

1. The fact that the indorsee of notes, when sued on a check given for their purchase, failed to set up as a counterclaim the liability of the plaintiff on his indorsement, will not preclude a subsequent suit to enforce it, the statute authorizing a defendant to plead a counterclaim being permissive merely.

2. In a suit to enjoin the collection of a judgment for the price of notes and to counterclaim the judgment creditor's liability as an indorser, the plaintiff alleged that the judgment creditor had returned the check given by plaintiff for the notes, and informed plaintiff that he and the maker had canceled the trade for which they were executed, and requested plaintiff to cancel his purchase of the notes and return them to the maker, which plaintiff did; that on that day occurred a great storm, and in the distress and confusion following plaintiff forgot that the judgment creditor had indorsed the notes, wherefore, when sued for their price, he failed to plead his counterclaim. *Held*, that plaintiff was not estopped by these allegations to insist on the validity of the notes.

3. An indorser who has recovered judgment for the purchase price of notes is estopped thereby from denying their validity when his liability as indorser is sought to be enforced.

4. Where the maker of notes has been insolvent ever since their execution, suit against an indorser need not be brought at the next term of court after the right of action accrues.

5. A judgment creditor's insolvency will entitle the judgment debtor to enjoin the collection of the judgment so that a counterclaim which he has may be established as a credit against it.

Appeal from Galveston County Court; Jno. W. Campbell, Judge.

Action by H. N. Norton and others against Anton Wochler and another. From a judgment entered on sustaining a demurrer to the petition, plaintiffs appeal. Reversed.

Jas. B. & Chas. J. Stubbs, for appellants.
Wm. T. Austin, for appellees.

PLEASANTS, J. H. N. Norton, J. Lobit, J. B. Stubbs, and W. F. Beers brought this suit against Anton Wochler and John Hanicker to recover the amount due upon eight promissory notes for the sum of \$50 each, executed by the said Hanicker on September 7, 1900, and payable to the said Wochler, by whom they were sold and indorsed to the said Norton, and to restrain the execution of a judgment rendered by the county court of Galveston county on February 23, 1901, in favor of Wochler against the plaintiffs for the sum of \$275.

The petition alleges, in substance, that the notes sued on were executed on September 7, 1900, by Hanicker, and were payable to the order of Wochler, the first being payable October 15, 1900, and one of the remaining seven being payable on the 15th day of each consecutive month thereafter until all of them should be paid; that said notes were given by Hanicker in payment of the purchase money of certain property sold him by Wochler, and were, on said 7th day of September, 1900, sold and indorsed by Wochler to plaintiff Norton; that in payment of the purchase money for said notes plaintiff Norton delivered to Wochler his check on the bank of Adoue & Lobit for the sum of \$275, and surrendered to said Wochler two notes theretofore executed by him in favor of said Norton for the aggregate sum of \$100; that on the morning of the 8th day of September, 1900, Wochler returned the check to Norton, and informed him that he and Hanicker had canceled the trade for the property in consideration of which the Hanicker notes had been executed, and requested Norton to cancel his trade for the notes, and return same to Hanicker; that Wochler then delivered the check to Norton, and promised to execute and deliver to him new notes for the two notes in Norton's favor which had been returned to him the previous day, and which he claimed he had destroyed, and Norton thereupon returned the Hanicker notes to the maker; that on the day these transactions took place the great storm of September 8, 1900, occurred, and in the distress and confusion which followed the details of the transaction were almost obliterated from plaintiff Norton's mind, when Wochler, on October 18, 1900, filed suit against him to recover the amount of said check, claiming that the trade had not been canceled; that in his petition in said suit Wochler alleged, and on the trial of said cause swore, that the Hanicker notes were payable to Norton, and were not indorsed by him (Wochler); that plaintiff Norton, not having said notes in his possession at said time, and not being able to obtain them from Hanicker, and having no recollection as to whom they were payable, or whether they were indorsed by Wochler, did not set up Wochler's liability as indorser of said notes as a counterclaim to his suit on said draft; that Wochler recovered judgment in said suit for the amount of said draft, which judgment was affirmed by the Court of Civil Appeals on December 5, 1901, as against the plaintiff Norton and the other plaintiffs herein, who were the sureties upon his appeal bond in his appeal to the Court of Civil Appeals. The petition further alleged that both Hanicker and Wochler were notoriously insolvent; that the liability of Wochler as indorser of said notes was a just offset and counterclaim to the amount recovered against plaintiff Norton by said Wochler, and that, unless said Wochler is restrained in the execution of said judgment, and plaintiff Norton

¶ 5. See Judgment, vol. 30, Cent. Dig. § 834.

be allowed to offset the amount due upon said notes by said Wochler against said judgment, he will suffer irreparable loss. It is further alleged that plaintiff Norton had only recovered possession of said notes about three weeks prior to the filing of this petition, and discovered that they were indorsed by said Wochler; that by reason of the false and fraudulent representations made by said Wochler in said former suit plaintiff was misled and deceived, and thereby caused not to assert his claim against said Wochler in said suit. It was further alleged that Wochler had demanded the issuance of execution on his judgment against plaintiffs, and was threatening and intending to have same levied upon their property. The prayer of the petition is for an injunction against the issuance and levy of execution upon said judgment, for recovery of the amount due upon the notes sued on, and for equity and general relief.

To this petition defendant Wochler interposes a general demurrer and the following special exceptions: First. That it appears from the face of the petition that the matters therein complained of were *res adjudicata*. Second. That it appears from the petition that defendant Wochler is sued as an indorser, and that more than two terms of the court had elapsed after plaintiffs' right of action accrued and before the filing of the suit, and it does not appear that the notes sued on had been protested. Third. That it appears from the petition that Norton had canceled the notes, and released Hanicker, and had thereby released this defendant. Fourth. That more than a year had elapsed between the rendition of the judgment sought to be enjoined and the filing of this suit.

The appellants dismissed their suit as to Hanicker without prejudice. The court below sustained defendant Wochler's general demurrer, and his first and third special exceptions to plaintiffs' petition, and, plaintiffs declining to amend, their suit was dismissed.

This is not a suit to set aside the judgment obtained by Wochler against the plaintiff Norton, or to reopen any of the issues determined in that suit, and it is unnecessary for us to decide whether the allegations in the petition are sufficient to entitle plaintiff Norton to a new trial of the issues determined in the former suit, since no such relief is sought. The question of Wochler's liability to Norton as an indorser upon the Hanicker notes was not an issue in the former suit. Conceding, for the sake of argument, that plaintiffs' right of action on the notes might have been set up in the former suit as an offset or counterclaim to the demand of Wochler, the fact remains that it was not so pleaded, and the judgment in the former suit was not *res adjudicata* upon the issue of the liability of Wochler upon said notes. It is well settled that a judgment is conclusive only as to the matters determined thereby, or which were put in issue and could

have been determined under the pleadings in the suit in which such judgment was rendered. *Philpowski v. Spencer*, 63 Tex. 606, 607; *Teal v. Terrell*, 48 Tex. 508; *Oldham v. McIver*, 49 Tex. 572; *James v. James*, 81 Tex. 381, 16 S. W. 1087.

The statute authorizing a defendant to plead in any suit brought against him for debt any counterclaim he may have against the plaintiff is merely permissive, and not mandatory, and his failure to plead his counterclaim does not defeat his right to recover thereon in a separate suit brought by him against the plaintiff. *Stone v. Darnell*, 25 Tex. Supp. 430, 78 Am. Dec. 582.

The allegations in the petition that plaintiff Norton, at the request of the defendant Wochler, on the 8th day of September, 1900, canceled his trade with Wochler, and surrendered the notes to Hanicker, were clearly made in connection with other allegations for the purpose of explaining plaintiffs' want of knowledge of the fact that Wochler had indorsed said notes, and accounting for and excusing plaintiffs' delay in asserting his rights against Wochler; and plaintiffs are not estopped by said allegations from asserting the validity of said notes. On the contrary, the defendant Wochler, having recovered his judgment against the plaintiff Norton on the ground that the trade had not been canceled, is estopped from claiming its cancellation as a defense to his liability on the notes. It would be manifestly against equity and good conscience to permit him to recover from Norton the price of the notes which he had sold and indorsed, and when he is sued upon said indorsement by Norton to defeat his liability thereon by the plea that the notes were nonenforceable by reason of the cancellation of the sale of said notes by him to Norton. 3 E. R. C. 310. If, as alleged in the petition, Hanicker is, and has been ever since the execution of the notes, notoriously insolvent, the statute requiring suit against an indorser to be brought at the next term of the court after the right of action accrues has no application. *Insall v. Robson*, 16 Tex. 128; *Hanrick v. Alexander*, 51 Tex. 494; *Burrow v. Zapp*, 69 Tex. 474, 6 S. W. 783. The petition shows a good cause of action in favor of plaintiff Norton against the defendant Wochler, and the action of the trial court in sustaining the general demurrer and dismissing the suit cannot be sustained.

We are further of opinion that the allegation of Wochler's insolvency, the claim asserted by plaintiffs being one which can be properly set off against Wochler's judgment, entitles plaintiffs to an injunction restraining the execution of said judgment, and that upon a hearing of the cause and a recovery by Norton on his claim against Wochler plaintiffs would be entitled to a decree establishing same as credit or offset against the Wochler judgment. *Hanchett v. Gray*, 7 Tex. 549.

The judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

McLAIN et al. v. McCOLLUM & FRAZIER.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

CHATTEL MORTGAGES—FORECLOSURE—JOINT POSSESSION—JUDGMENTS—SEQUESTRATION—PARTIES—JOINDER—RESIDENCE—PLEA OF PRIVILEGE—WAIVER.

1. Where L., who was in joint possession of mortgaged chattels, was made a party to a suit to foreclose in which a writ of sequestration was issued, and L. filed a special demurrer to the jurisdiction on the ground of nonresidence, but alleged that the writ of sequestration was issued on an insufficient affidavit, and prayed that the property be discharged from the writ, he thereby invoked the jurisdiction of the court, which constituted a waiver of his privilege.

2. Where L. was made a party to an action to foreclose a chattel mortgage merely because he was in joint possession of the property with the mortgagor, and a writ of sequestration was quashed, and the only issues presented were the liability of the mortgagor on the notes secured and plaintiff's right to foreclose, a judgment against L. for the debt or for the value of the property was error.

Appeal from Delta County Court; D. H. Lane, Judge.

Action by McCollum & Frazier against W. R. McLain and others. From a judgment in favor of plaintiffs, defendant McLain appeals. Modified.

J. S. Young, for appellant. James Patterson, for appellees.

JAMES, C. J. Appellees sued J. L. Pulliam and W. R. McLain in a justice's court in Delta county on notes of Pulliam payable in Delta county, and to foreclose a mortgage lien on a mare and buggy, which, as alleged in the affidavit for sequestration, were in Nacogdoches county in the joint possession of defendants. In the justice court McLain filed a plea of privilege alleging on oath that at the time of commencement of the action he resided in Nacogdoches county, and that he now resided there; that the alleged conversion of the property, if any, did not occur in Delta county; that he was not a party to any written contract which would give the court jurisdiction of his person; that his co-defendant, Pulliam, was not a resident of Delta county. The affidavit for sequestration alleged that the property was in Nacogdoches county. The justice overruled the plea, and gave judgment against Pulliam for the amount of the notes, foreclosing the lien as against both defendants. McLain appealed. In the county court he also interposed special demurrers on the ground of privilege, and on same day plaintiffs filed an exception to his plea of privilege. The

court sustained and overruled 1 things except as which was quasi special demurrer: dered released fr iff.

The question of action of the court of privilege, and demurrers in so far as the court's person. We regard demurrers as a jurisdiction of the a waiver of his p the demurrer: "one of the defer and numbered c excepting and sp jurisdiction of this this defendant, s ters set up in fo the record in this fendant did not s which he could be that he lived in and did not live Delta county; an that the property foreclose their li doches county, T obtain jurisdiction said property by sued to said coun said writ was wr son that the aff sworn to as requ reason the writ v this court did not property of these defendant prays cause as to him, a erty, and that th out day and reco said property be r

It will be obse which sets up his the jurisdiction of something else th to be sued in Na sufficiency of the not only invoked, court upon this r quashed. This w diction over him v. Tanquerry (Ka

This, as already and chattel mort plaintiffs, McLain was in joint pos property with Pu was quashed. Th restored to defer court ordered. T stands as if it b There are no plea

*Rehearing denied March 25, 1903.

defendants. The court had no authority to give any money judgment, either absolutely or alternatively, against McLain for the debt or the value of the property. If it is not found to satisfy the foreclosure, it may be that McLain will be liable for its value upon a proper showing or proper pleadings.

The judgment will be reformed as to McLain so as to limit the money judgment against him and the sureties on his appeal bond to costs, and, as thus reformed, the judgment will be affirmed.

GULF, C. & S. F. RY. CO. v. GARREN.*
(Court of Civil Appeals of Texas. Feb. 28, 1903.)

MASTER AND SERVANT—RAILROADS—INJURY TO FIREMAN—DEFECTIVE APPLIANCE—PROMISE TO REPAIR—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—EVIDENCE—QUESTION FOR JURY.

1. Where an engineer discovered a defective step on the engine as he was about to start on a trip, and informed the fireman that he would have the same repaired, and the fireman, when he attempted to use the step, and was injured thereby, supposed it had been repaired at an intervening station, where car repairs were kept, he was not guilty of contributory negligence.

2. An engineer's promise to a fireman to have a defective step on the engine repaired was the promise of the company, on which the fireman was entitled to rely.

3. Where an engineer promised a fireman that he would have a defective step on the engine repaired, and the fireman had no knowledge that the repairs were not made at an intervening station, where they could have been made, the fireman did not assume the risk of injury by continuing to work and using such step.

4. Where, in an action for injuries to a fireman by a defective step on the engine, one of the defenses was contributory negligence, evidence that when plaintiff attempted to use the step he supposed that it had been repaired at an intervening station was admissible.

5. Where an engineer promised a fireman that he would have a defective step on the engine repaired, and such repairs could have been made at an intervening station, but were not, and plaintiff thereafter used the step and was injured, whether he was justified in believing that the step had been repaired was for the jury.

Appeal from District Court, Johnson County; O. T. Plummer, Special Judge.

Action by B. F. Garren against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and Ballinger Mills, for appellant. S. C. Padelford and T. J. Sanford, for appellee.

*Rehearing denied March 21, 1903.

¶ 3. See Master and Servant, vol. 34, Cent. Dig. § 642.

Conclusions of Fact.

Appellee was a locomotive fireman in the employ of appellant company. His run was from Cleburne to Purcell, and from Purcell back to Cleburne. On May 21, 1901, while on the eve of pulling out of Purcell, it was discovered by him and the engineer that one of the iron steps on the engine used in getting on and off the engine was out of repair. The engineer attempted to fix it, but could not, for the want of proper tools. He said to the fireman: "I'll turn it round under the engine. I'll have it fixed." He did turn it under the engine, and tightened it in that position. The train pulled out of Purcell, and reached Gainsville about sundown, and stopped 25 minutes for supper. After leaving Gainsville and nearing Saginaw, the fireman noticed some sparks flying from under the engine trucks. When the engine stopped at crossing of the Ft. Worth & Denver City Railroad he got out to see what it was. Some pieces of waste had caught fire. He reached under and pulled it off, and the engineer started the train. It was moving slowly, and, when the gangway reached the fireman, he reached up, caught hold of the hand holds, and placed his foot on the step, which turned, causing him to fall, resulting in the injuries alleged. The engineer was superior to the fireman, and the fireman worked under his directions, though the engineer had no right to employ or discharge. When out on a trip, it is the duty of the engineer to inspect and keep his engine in repair, as near as he can. When the engine reaches the terminal, which was Cleburne in this instance, it is the duty of the engineer to enter upon the roundhouse register any defect, if any, that it may be repaired there. There were train inspectors at Gainsville, but their duty was only to inspect cars, not engines. It was the custom not to have defects repaired at Gainsville unless such defect interfered with the running of the train. When there is a defect that the engineer desires fixed at Gainsville, he wires ahead for some one to fix it. He did not wire in this instance. The train stopped at Gainsville long enough to have had the step repaired, but it was not done. The fireman, at the time he was hurt, supposed that the step had been repaired at Gainsville. He was not guilty of contributory negligence.

Conclusions of Law.

1. The evidence showing that it was the duty of the engineer to inspect and repair, or have repaired, the said step, and that the fireman was working under his directions, his promise to have said repairs made was the promise of the defendant, and the fireman was warranted in regarding it as

ber 22, 1899, long prior and subsequent to said dates, Gid Smith was the head of a family consisting of himself, wife, and several children, and prior to and on said November 15th owned 150 acres of land in Tannin county, and used and occupied same as a homestead.

"(6) That some time prior to said November 15, 1899, said Smith learned that the premises in question, described in plaintiffs' petition, consisting of four parcels mentioned in said petition as 'first parcel, 97% of M. H. Shyrock survey; second parcel, 20 acres of D. Jackson survey; third parcel, 82% acres of said Shyrock survey; and fourth parcel, 84 acres of the D. Cunningham survey—known as the "Bank Land"'—were for sale, whereupon he decided to sell the homestead he then owned, and buy said bank land, and make that his homestead.

"(7) That before he sold his said homestead he arranged with the said bank to purchase the land in question, known as the 'Bank Land,' declaring at the time he arranged for said purchase that he intended the bank land for his homestead, and to so use and occupy it.

"(8) That on said November 15, 1899, he did sell the homestead he then owned, and November 24, 1899, he bought the bank land, and when he bought the same he owned no other land, and then had no homestead.

"(9) That when said Smith bought the bank land, same being the land in question, the parcels hereinabove mentioned as first, second, and third lay in one body, and constituted one tract, containing a fraction of an acre less than 200 acres, were improved, mostly clear, and had thereon mansion house, outhouses, and barn and cribs and tenant houses, and were ready for occupancy, and needed no additional improvements to make the same habitable; that there was not sufficient timber on the tract consisting of said three parcels to supply firewood and keep up the place; that the 34-acre parcel lay about a mile distant from said improved land, was timbered, and was used by prior owners of the land in question and by said Smith to supply the improved portion with firewood and such timber as was needed in carrying and keeping up the farm.

"(10) That said Smith intended to make the land in question his homestead at the time he purchased it, and so declared his intention to use same to the agents of the bank, his wife, and divers other persons, and to move on it as soon as he could get possession thereof.

"(11) That a tenant of said bank had rented and was occupying the land in question for the year 1899, and it was agreed between said Smith and the bank that Smith should not take possession until the tenant got his crop off.

mansion house on the improved land, and continued to reside in same and occupy and use said improved land as a homestead until he sold the portion of same on which he resided to defendant Chaney on September 27, 1901.

"(12) That on November 30, 1900, said Smith and wife sold and conveyed by deed the said timbered tract of 34 acres to defendant Dorsey, but continued to reside on, use, and occupy the improved land as a homestead until January 25, 1901, on which day he and his wife sold 50 acres of the 82% acres to defendant Winston, and continued to reside on, use, and occupy as a homestead the residue of the improved land, being parcels 1, 2, and part of 3, mentioned above, until September 27, 1901, when he and his wife sold and conveyed said residue to defendant Chaney.

"(13) That defendants Chaney and Winston took immediate actual possession of the parcels purchased by them at the time of purchase, and still have such possession thereof; that defendant Dorsey has not taken actual possession of his land.

"(14) That the First National Bank of Bonham, Texas, conveyed the lands in question to said Smith. That the conveyance was made by two deeds. One deed conveyed the first and second parcels mentioned above, reciting as the consideration therefor \$150 cash and said Smith's notes for \$1,050, and expressly reserving a vendor's lien to secure their payment. The other deed conveyed the third and fourth parcels mentioned above, same being the 82%-acre tract and the 34-acre tract, reciting as consideration therefor \$200 cash and said Smith's four notes, one for \$245, due December 1, 1901, and the other three each for \$200, to become due December 1, 1901, 1902, and 1903, respectively, each bearing 8 per cent. per annum from date and secured by a vendor's lien expressly reserved. That all of said last-named notes and interest remained unpaid at the time Smith sold to Dorsey, and all of said notes save the sum paid by Dorsey for his land were unpaid at the time Smith sold to Winston.

"(15) On November 30, 1900, said Smith and wife conveyed by deed said 34 acres to defendant Dorsey, who paid therefor \$250 cash. That on said day said Smith and Dorsey paid said \$280 to the First National Bank, the legal owner of Smith's notes given for the lands of which the 34 acres were a part, and directed said bank to apply the same to the payment of Smith's said notes given for said lands, and said bank did then and there apply said sum to the payment of said notes. That said Smith and wife conveyed by deed to defendant Winston the land described in his answer—50 acres of the 82%-acre parcel mentioned above—for which said Winston paid Smith \$100 cash and made

Smith his three notes of even date with deed for \$233½ each, bearing 10 per cent. interest per annum from date, and falling due on December 1, 1901, 1902, and 1903, respectively. That said Smith transferred said Winston's notes to said bank, which took same, and gave Smith credit on said notes made by him to said bank for the lands of which Winston's 50 acres were a part. That said Winston paid the first of said notes, with interest thereon, made by him for said land, to the bank, when it fell due, and stands bound to pay the others as they fall due.

"Conclusions of Law.

"(1) That by reason of the defects in said abstract of judgment, and the irregularities and mistakes in recording and indexing same, no judgment lien ever attached to the land in question, even though no part of same had become Smith's homestead.

"(2) That parcels first, second, and third, constituting, as they did, one tract of less than 200 acres, became and was Smith's homestead eo instanti at the time same was purchased, and is not subject to the plaintiffs' judgment lien, though same were a valid and subsisting lien on other land not a part of said tract."

The judgment is affirmed.

COCHRAN et al. v. MOERER.*

(Court of Civil Appeals of Texas. Feb. 27, 1903.)

TRIAL—INSTRUCTION—EVIDENCE TO SUPPORT.

1. In an action to try title, the defendant pleaded adverse possession, and the court charged that an inclosure, within the statute, would have been maintained if defendant had kept the land fenced on three sides, and if a bayou on the fourth side was a stream of such nature and depth as to constitute a barrier, but there was no evidence as to the nature and size of the stream. *Held*, that the giving of the charge was a reversible error.

Appeal from District Court, Harris County; Wm. H. Wilson, Judge.

Action by Jerome B. Cochran and another against Frederick Moerer. Judgment for defendant, and plaintiffs appeal. Reversed.

G. W. Thorp, for appellants. W. P. & A. R. Hamblen, for appellee.

GILL, J. This suit was brought in the form of an action of trespass to try title to recover 43.7 acres of land, a part of the western half of the Luke Moore league, situated in Harris county, Tex. The plaintiffs, Jerome B. Cochran and W. J. Settegast, Jr., claimed that the land in controversy was situated on lot 8 of the subdivision of said western half of the league, and therefore belonged to them. Defendant, Moerer, claimed the land to be situated on lot 13 of said subdivision, and that it belonged to him. Upon this issue the case is one of boundary,

*Rehearing denied.

and the evidence conflicting. We shall not notice the assignments of error addressed to this issue, as the judgment must be reversed upon another ground. For a like reason, it is unnecessary to set out the facts in this connection. The defendant also defended under the 10-year statute of limitation. The trial court submitted to the jury both this and the issue of boundary, and there was a general verdict and judgment for defendant.

The land in controversy was situated on Bray's Bayou, and that stream constituted its southern boundary. On the question of limitation, the evidence was conflicting as to whether the land had ever been actually inclosed for a time sufficient to sustain the 10-year bar, and there was testimony tending to show that its southern boundary had never been fenced; the side fences extending only to that stream. The court charged the jury, in effect, that if they believed from the evidence that the land was inclosed by fences on three sides, and that the bayou was a stream of such nature and depth as to constitute a barrier on the fourth side, such stream, with the fences, would constitute such an inclosure as would satisfy the statute, and, if such an inclosure had been adversely maintained by defendant for 10 years, to find for defendant on the issue of limitation. Appellants complain of this charge on the ground that there was no evidence adduced as to the nature or character of the stream. We think the assignment should be sustained. If the stream was of such a nature as to constitute a barrier or answer the purposes of a fence, it would have served to complete the inclosure. But the burden was on defendant on the issue of limitation, and it devolved on him to disclose the size and nature of the stream. According to the record, he failed to do this. No evidence was adduced upon the subject, and the court erred in submitting the issue. As the verdict is general, we are unable to say what effect the error had upon the verdict, and for this reason the judgment must be reversed and the cause remanded, and it is so ordered.

Reversed and remanded.

REICHERT v. INTERNATIONAL & G. N. RY. CO.

(Court of Civil Appeals of Texas. March 11, 1903.)

RAILROADS—INJURY TO PERSON NEAR TRACK—DUTY TO USE CARE—EVIDENCE—INSTRUCTIONS.

1. Evidence examined in an action against a railroad company for injuries to one walking along a path beside the track, alleged to have been caused by his being struck by a timber projecting from a passing train, and *held* not to show negligence in the defendant.

2. If a railroad company does not know of the use by the public of a path alongside of its track, and the facts do not necessarily charge it with such knowledge, it cannot be required to anticipate the presence of persons thereon,

or to use ordinary care to discover their presence and avoid inflicting injury upon them.

3. If a party objects to the court's charge for submitting to the jury an issue which he deems to have been established as matter of law, he should prepare and request a special charge presenting his view.

4. A witness is not entitled to testify concerning a matter where he testifies that he is merely guessing.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Stephen Reichert against the International & Great Northern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bell & McAskill, for appellant. Hicks & Hicks, for appellee.

NEILL, J. This suit was brought by appellant against appellee to recover \$10,000 damages for personal injuries alleged to have been inflicted upon the former by the latter. As his cause of action, the plaintiff alleged, in substance, that on the 24th of December, 1900, between sunset and dark, he was walking along a pathway which ran by the side of defendant's railroad track in the city of New Braunfels, at such a distance therefrom as made a person walking therealong free from danger of being hurt by passing trains, if operated with ordinary care; that the path was commonly and generally used by the public in traveling to and fro thereupon, and by the people going to and from their work at the Landa Mills, and that the path or roadway, and the said uses thereof, were well known to said company; that, while walking along the path at the time stated, he saw an approaching train, and stepped to the farther side of the path to wait for it to pass, and, while standing there, from five to seven feet from the passing cars, he was struck on the arm and in the side by a piece of timber or hard substance of some kind, in the form of a pole or beam, fastened to and extending from one of the cars at such an angle as would strike a man standing near the passing train, and which was carried forward at the same speed of the moving car; that he did not see the piece of timber until just as it struck him, nor did he have reason to suspect its existence and place; that the blow broke three ribs, ruptured reins and arteries, caused several hemorrhages of the bladder, etc. The appellee pleaded not guilty, and that appellant was a trespasser on its track and right of way, and guilty of contributory negligence in walking thereon at the time and under the circumstances when injured. The trial, which was before a jury, resulted in a judgment in favor of the defendant.

Conclusions of Fact.

The evidence shows that there was a path, commonly used by the public, such as is described in appellee's petition. The appellant testified that, after standing in the path and

watching some railroad hands work, he started back to the depot, about dark, when they quit work, and, seeing a freight train coming on appellee's road, he stopped and stepped to the farther edge of the path from the track, and, as the cars were passing about three feet from him, he was suddenly struck in the side by a projecting piece of timber extending from one of the cars at such an angle as to hit him, and knocked about 15 feet, and, being unable to get up, lay there all night. He was found about 6 o'clock next morning by the city marshal of New Braunfels, laying in a gully west of appellee's track, in a helpless condition and bleeding profusely, and was carried by the marshal to the county jail for treatment.

Appellant's reputation for sobriety is bad. On December 24, 1900, at about 4 o'clock p. m., he was seen drunk—"sleepy drunk," as described by the witness. While drunk that evening, he stated to another witness that he was going to walk to Davenport, which is south of New Braunfels and between there and San Antonio. Two freight trains of appellee passed through New Braunfels on December 24, 1900—one about 6 o'clock, and the other at about 6:40 o'clock—both bound for San Antonio. They were the only south-bound freight trains from New Braunfels to San Antonio on that date. If appellant was injured by a train, it must have been by one of them. The conductor of each testified that there was no timber or timber car in his train, and that there was no projecting timber extending from any part of his train; that, before reaching the point where appellant claims he was hurt, each train passed across two overhead iron bridges, each with upright framework which came within two feet of the side of the cars on either side, and that any timbers projecting two feet from a car would have been broken off before reaching the point where appellant claims he was injured.

From the whole testimony we conclude that the appellant was not injured by the negligence of appellee, as alleged in his petition.

Conclusions of Law.

After defining negligence, the first paragraph of the court's charge is as follows: "If you believe from the evidence that on or about the 24th day of December, 1900, the plaintiff was standing in a pathway running along near the track of defendant company in the town of New Braunfels, and if you further believe from the evidence that the mill hands working at Landa's Mill and other people were accustomed to go upon and travel along said path upon which it is alleged plaintiff was at the time of the accident, and if you further believe from the evidence that the defendant company knew of such use of said pathway, then the plaintiff would be a licensee upon said pathway, and would not be a trespasser in going upon

pathway, and that while so standing on said pathway the defendant company propelled one of its cars along its track, and that said car was so loaded that a piece of timber protruded so far beyond the side of said car, on the side next to said pathway, that it reached beyond said car far enough to strike a person in said pathway, and that while plaintiff was standing in said pathway the plaintiff was struck by said piece of timber and injured as alleged in his petition, and if you further believe from the evidence that the defendant company was guilty of negligence in propelling said car with said timber so protruding, if you find it did so, and that such negligence, if any, was the proximate cause of plaintiff's injuries, then you will find for the plaintiff, unless you find, under the charge hereinafter given you, that the plaintiff was guilty of negligence that contributed to his injuries."

The first assignment is directed against this part of the charge, and is as follows: "The court erred in his charge in making knowledge on the part of defendant of the existence of a commonly used pathway beside its railroad track a prerequisite to liability, and that plaintiff was a trespasser unless defendant knew of said pathway." The rule announced by the Supreme Court in *Railway v. Smith*, 87 Tex. 357, 28 S. W. 520, is "that railroad companies at crossings, and such portions of its track as may be commonly used as footways or crossing, which is known to the company, and at which persons may be expected, must use ordinary care to discover their presence and to avoid inflicting injury upon them, and that in the exercise of that degree of care they must use such an amount of vigilance and caution as a man of ordinary prudence would use under like circumstances." It will be observed from our statement of the case that appellant alleged that the path or roadway, and the use thereof by the public, were well known to the company. It was the knowledge on the part of appellee of the situation and use of the path which would cause the operators of its trains to anticipate that members of the public might be walking therealong, and require such servants of the company to use ordinary care to discover their presence and to avoid inflicting injury upon them. If such knowledge on the part of the appellee did not exist, or the facts were not such as would necessarily charge it with such knowledge, the duty to exercise such care would not exist. Therefore, the part of the charge complained of is simply an enunciation of the rule and principles stated as applied to the pleadings and evidence in this case. If the appellant deemed the evidence such as to charge appellee with knowledge as a matter of law, or it could have by the exercise of ordinary diligence

the law upon such state of the evidence to the jury. Having failed to do this, he is in no attitude to complain, for the charge is certainly the law as far as it goes. What we have said disposes of the other assignments in reference to the charge.

The court did not err in excluding the answer of the witness Grube, as is complained of in the sixth assignment of error. The witness stated that he could only "guess" at the matter of inquiry. Besides, the only part of his answer that could be of any possible benefit to appellant was not responsive to the interrogatory, and was beyond the sphere of expert testimony. The witness did testify that appellant's "injuries were caused by violent external violence." This was evidently all he knew as to the cause of the injuries. The testimony excluded was merely speculative, and cast no light upon the subject. In order to say something concerning a matter, the witness should know something. *Wehner v. Lagerfelt*, 66 S. W. 221, 3 Tex. Ct. Rep. 912.

There is no error in the judgment, and it is affirmed.

FIRST NAT. BANK OF CUERO v. SAN ANTONIO & A. P. RY. CO.*

(Court of Civil Appeals of Texas. Jan. 15, 1903.)

PRINCIPAL AND AGENT—CARRIERS—BILLS OF LADING—PLEDGE—CONVERSION—VALUE—VERDICT.

1. Where the sellers of cotton took bills of lading in their own name, and sent them, with drafts for the price, to a correspondent for collection, and the purchaser paid the drafts by checks on a bank which had agreed to pay the checks and take the bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement, the bills did not become *functus officio* in the hands of the bank, but still represented the cotton, on which it had a lien for the advances.

2. Where a bank agreed with cotton dealers to advance money to them to pay for cotton purchased, taking the bills of lading as security, and the uniform course of the business had been for such dealers to sell the cotton, and, after sales were made, to receive the bills from the bank, and on receiving payment to deposit the amount in the bank, such dealers were authorized to sell the cotton before receiving the bills therefor, the bank trusting to them to make payment; and after they had sold and delivered such cotton the bank could not refuse to surrender the bills, and recover the cotton from the railroad company.

On Motion for Rehearing.

3. Where, in an action to recover for 222 bales of cotton, the value of the whole was admitted, and also that 4 bales remained in the possession of the defendant, but it was not admitted or shown that the bales were of equal value or weight, or what was the weight or value of the 4 bales, while it was shown that 210 of the bales had been rightfully disposed of,

*Rehearing denied.

the jury had no basis on which to find the value of the cotton in defendant's hands, and a verdict for defendant was not error.

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Action by the First National Bank of Cuero against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Lackey & Lewright and Dabney & Lockett, for appellant. Proctors, for appellee.

GARRETT, O. J. This action was brought by the First National Bank of Cuero against the San Antonio & Aransas Pass Railway Company for the conversion of 222 bales of cotton. The appellant alleged that it held the bills of lading for the cotton, and that the appellee had refused upon demand to deliver the same. It sought to recover the value of the cotton as the owner thereof upon the liability of the appellee in the alternative as common carrier and as warehouseman. It also alleged that, if it were not the absolute owner of the cotton, nevertheless said bills of lading were pledged to it to secure an indebtedness of \$6,241.86, owed to it by the firm of Koenig & Van Hoogenhuyze. Appellee made the members of the firm of Koenig & Van Hoogenhuyze and the Cuero Cotton Compress Company parties defendant, and prayed judgment over against each of them. There was a trial by jury. After the evidence was all in, the appellee took a nonsuit as to the Cuero Cotton Compress Company. The case was then submitted to the jury, and resulted in a verdict and judgment in favor of the appellee.

At the beginning of the cotton season of the year 1899 the appellant bank and the firm of Koenig & Van Hoogenhuyze entered into an arrangement by which the appellant agreed to advance Koenig & Van Hoogenhuyze money for the purpose of buying cotton both locally at Cuero and also at different points on the San Antonio & Aransas Pass Railway west of Cuero. As security for the money to be advanced by the appellant, Koenig & Van Hoogenhuyze deposited with them as a margin six shares of the stock of the Cuero Compress Company, and agreed that the appellant should have a lien on the local cotton purchased by them, and that they would turn into the bank the bills of lading for the cotton shipped in by railroad. The stock was deposited as agreed, and the course of dealing in carrying out the agreement for the advancement of the money by the bank to pay for the cotton purchased by Koenig & Van Hoogenhuyze was that the cotton bought in Cuero was paid for by the bank upon checks drawn against it by Koenig & Van Hoogenhuyze, and was sold by them, and the proceeds were paid and deposited by them to their account with the bank. And cotton bought by Koenig & Van

Hoogenhuyze at points on the railroad was shipped to Cuero on bills of lading to order of the sellers, with directions to notify the buyers, and the bills of lading were attached to drafts of the sellers on Koenig & Van Hoogenhuyze for the price of the cotton, and the drafts, with the bills of lading attached, were sent to a bank at Cuero for collection. On presentation of the drafts and bills of lading to Koenig & Van Hoogenhuyze they paid them with their checks on the appellant bank, which were accepted as cash by the collecting banks, and the drafts and bills of lading were delivered to them. The checks of Koenig & Van Hoogenhuyze were charged by the appellant to their account, and they turned in the bills of lading to the bank. The checks were paid on presentation, without waiting for the delivery of the bills of lading, which were afterwards either turned in by Koenig & Van Hoogenhuyze themselves, or sent for to them by the bank. The cotton represented by the bills of lading was sold by Koenig & Van Hoogenhuyze without consultation with the officers of the bank, and, whenever a sale was effected, Koenig & Van Hoogenhuyze would send to the bank for the bills of lading for the cotton sold, and the bank would deliver them to Koenig & Van Hoogenhuyze. The bank did not require the proceeds of a sale to be deposited before giving up the bills of lading, but trusted Koenig & Van Hoogenhuyze to turn them in, which they usually did. The officers of the bank kept themselves informed as to the condition of the account by noting the daily balances, and the number of bales of cotton shown to be on hand by the bills of lading in its possession, and the amount of local cotton that appeared to be on hand, which would be ascertained by a casual inspection in riding by the back yard of Koenig & Van Hoogenhuyze's place of business, where it was usually stored. Koenig & Van Hoogenhuyze were also engaged in business as general merchants, and made deposits of money and did their banking business with appellant bank. Their merchandise and cotton accounts were kept separate, but in some instances credits were transferred from the cotton to the merchandise account, the state of the account and the amount of security on hand appearing to the officers of the bank sufficient to authorize the transfer.

The account for a balance due upon which this suit is brought began September 1, 1899, but by a deposit on September 2d this balance was reduced to \$550.55. Up to September 27th, when they became bankrupt, and the account was closed, the total amount loaned Koenig & Van Hoogenhuyze by the bank, including interest on overdrafts, etc., was \$87,934.05. They had paid to the bank an amount sufficient to reduce the balance to \$6,241.05, which should be credited with the proceeds of the compress stock, December 22, 1900, \$384. The several bills of lading, seven in number, upon which this suit is based,

were issued by the railroad company for several lots of cotton, amounting in all to 222 bales sold to Koenig & Van Hoogenhuyze by parties at Karnes City and Runge stations on the San Antonio & Aransas Pass Railway. They were issued to the sellers of the cotton as the shippers thereof. The cotton was to be carried to Cuero, and was consigned to shipper's order, notify Koenig & Van Hoogenhuyze, Cuero, Tex., and the bills had noted thereon a memorandum, "Compress in Cuero." The sellers of the cotton drew drafts on Koenig & Van Hoogenhuyze for the price of the cotton, and attached to them the bills of lading indorsed in blank, and sent them to banks in Cuero other than appellant bank for collection. The several drafts, with the bills of lading attached, were presented to Koenig & Van Hoogenhuyze for payment, and were paid by their checks on the appellant bank, which were cashed on presentation, and charged to the account of the drawers. The bills of lading and the receipted drafts of the sellers of the cotton on Koenig & Van Hoogenhuyze were delivered to the latter by the collecting bank upon the receipt of their checks on the appellant. The bills of lading were not attached to the checks of Koenig & Van Hoogenhuyze on the bank, but they were afterwards delivered to it, and were in its possession when Koenig & Van Hoogenhuyze failed, and were produced by it at the trial below. The original receipted drafts remained in the hands of Koenig & Van Hoogenhuyze, and never went into the possession of the bank. The purchases of the cotton were made September 19th and 20th, and the cotton was immediately shipped, and delivered by the railroad to Cuero Compress Company September 24th and 25th, except probably three bales, which arrived on September 27th. The drafts for the price of the cotton were paid as severally presented on September 20th to September 25th. On September 25th Koenig & Van Hoogenhuyze sold to Inman & Read 146 bales of the cotton which had arrived on the 24th, and on the 26th they sold them 79 bales, making 225 bales in all, but which included 3, and probably 6, bales that were not covered by the bills of lading sued on. This cotton was all marked in the marks of the several shippers, and was capable of identification, and is fully identified as the lot covered by the bills of lading in the possession of the appellant, except as to the three bales mentioned. It was delivered by Koenig & Van Hoogenhuyze to Inman & Read on the cotton platform of the compress, and was shipped out of Cuero on the 24th and 26th days of September over the line of another railroad. Of the proceeds of the first sale of 146 bales, amounting to \$4,398.24, Koenig & Van Hoogenhuyze paid the entire amount to the appellant, and of the proceeds of the second sale they paid the appellant \$1,979.36. The second sale was for 79 bales of cotton, and amounted to \$2,468.26. Koenig & Van Hoogenhuyze filed an application

in the federal court at San Antonio for adjudication and discharge as bankrupts on September 27, 1899, and were afterwards discharged.

Appellant's assignment of errors from the seventh to the fifteenth, inclusive, upon the action of the court in overruling the general demurrer and special exceptions of the appellant to the answer of the appellee, and in the giving and refusal of instructions, contend for the continued validity of the bills of lading as representing the cotton after they had reached the possession of the appellant. We agree with the appellant that the payment of the drafts for the price of the cotton by Koenig & Van Hoogenhuyze with checks on the appellant did not destroy the character of the bills of lading as semi-negotiable paper, since it was understood between the purchasers of the cotton and the appellant that the bills of lading of the cotton for which they paid were to be turned over to them, and it was in fact done. The bills did not become *functus officio* in the hands of the appellant, but still represented the cotton, upon which it had a lien for the security of the account of the purchasers. It would not be denied that the bills of lading would have been kept alive if the appellant had paid the original drafts to which they were attached, and took an assignment thereof. The bank paid these drafts upon checks with the understanding that the bills were to be kept alive as semi-negotiable paper, and delivered to it as security for the money advanced to pay for the cotton. The change of the form of the evidence of the debt did not destroy the lien when there was no intention that it should be destroyed. But as we are of the opinion that it conclusively appears from the evidence that Koenig & Van Hoogenhuyze were authorized by the appellant to sell the cotton for which it advanced the purchase price, and that it trusted them to pay the proceeds over to it, and that no other judgment than one for the appellee could have been rendered, all errors committed by the trial court become immaterial and do not require a reversal of the judgment. Notwithstanding the fact that the president and the cashier of the bank both testified that Koenig & Van Hoogenhuyze did not have authority to sell the cotton without the consent of the appellant, the uniform course of the business was for them to sell. They bought and drew for the price of the cotton and sold, and paid in the proceeds, or were trusted to do so. Whenever they called upon appellant for the bills of lading, they were given up without question. There can be no doubt under the evidence that Koenig & Van Hoogenhuyze had authority to sell to Inman & Read the cotton represented by the bills of lading sued on in this case, and, having done so, all lien or claim of the appellant thereon became discharged, and the cotton was rightly delivered by the appel-

ceipt and appropriation of the proceeds thereof. With the bill of lading for the cotton in its possession, the appellant received the check of Inman & Read for the greater portion thereof, and collected it, and applied the money to the credit of Koenig & Van Hoogenhuyze, and received from and credited them with nearly all of the proceeds of the second lot. We find it unnecessary to decide whether the appellant should be allowed to recover having received of the proceeds of the sale of the cotton a greater sum than it advanced to pay for the same, or whether it can recover the value of the cotton from the appellee, and at the same time hold on to the proceeds of the sale thereof.

As to the four bales of cotton which it is claimed remained in the hands of the railroad at the time Koenig & Van Hoogenhuyze went into bankruptcy, and for the value of which the appellant contends by its Forty-third assignment of error, judgment should have been rendered in its favor, neither the identity of the cotton with that covered by the bills of lading nor its value is shown, and the evidence is not sufficient to sustain any recovery therefor.

The questions in this case have been discussed with much learning and ability by counsel for both sides, but being convinced, as we are, that there was a complete sale of the cotton covered by the bills of lading to Inman & Read, as conclusively shown by the evidence, we find it unnecessary to take up and dispose of the assignments of error presented by the appellant, since no other judgment should have been rendered.

The judgment of the court below will be affirmed. Affirmed.

PLEASANTS, J., not sitting.

On Motion for Rehearing.

GARRETT, C. J. The appellant contends, in its motion for a rehearing, that the facts do not show conclusively that Koenig & Van Hoogenhuyze were authorized to sell the cotton to Inman & Read, and call attention to the testimony of both Hamilton and Joseph to the effect that they did not have such authority. These witnesses were, no doubt, perfectly honest in their statements that Koenig & Van Hoogenhuyze had no authority from the appellant to make the sale; but these statements were mere conclusions of the witnesses, and are in direct conflict with the detailed facts as stated by them showing the nature of the agreement and the course of dealing between the parties. The verdict of the jury contained a special finding that Koenig & Van Hoogenhuyze had such au-

that no other judgment could have been rendered, and such is the conclusion of the court with reference to the sale of the cotton, and without reference to the question of estoppel by the receipt of the proceeds of the sale. The appellant also contends that it should at least recover for three bales of cotton shown to be in the possession of the appellee. The assignment of error relied on for the reversal of the judgment for this reason is that it was shown and admitted that the railway company was still in possession of "three bales of cotton, and another damaged bale, all covered by the bills of lading sued on." The statement under the assignment is that the four bales of cotton were in the possession of the defendant when Koenig & Van Hoogenhuyze went into bankruptcy; that there were 222 bales, the value of which was agreed to be \$6,866.50; and that, therefore, the three undamaged bales were worth \$92.80. This might be true if it were admitted that each of the 222 bales was of equal weight and classification. The plaintiff alleged in its petition that the several bills of lading called for and described different numbers of bales of varying marks and tags and of different weights, and the waybills in evidence showed different weights. In order to return a verdict for the plaintiff for the value of these four bales of cotton, it would have been necessary for the jury to know their weight and classification, as well as the market price. One bale, shown to have been damaged, the appellant abandons, but insists that the agreement upon the aggregate value of the 222 bales furnishes a basis for the ascertainment of the value of three unidentified bales, when it appears both from the allegations and proof that the bales of cotton were of different weights. The plaintiff, having failed to furnish sufficient proof of the value of the cotton shown to be remaining in the possession of the railroad, cannot complain because the jury failed to find a verdict in its favor for an estimated amount. There is an additional element of uncertainty in the value of the cotton covered by the bills of lading remaining in the possession of the defendant arising out of the fact that it was shown and admitted that the number of bales covered by the bills of lading was 222. It was shown that the number of bales sold Inman & Read was 219, and there was evidence that the 4 bales in the possession of the defendant were covered by the bills of lading. It is probable, therefore, that one of these 4 bales was not so included. If the damaged bale was included, one of the sound ones may not have been. The motion is overruled. Overruled.

TEX. GALVESTON, H. & S. A. RY. CO. v. SCHAF-
ERMEYER et al.

(Court of Civil Appeals of Texas. March 11,
1903.)

CARRIERS—LOSS OF BAGGAGE—EVIDENCE.

1. A carrier is not liable for loss of articles from baggage, on proof merely that, after the passenger received the baggage from the transfer company, his agent, to which the carrier had delivered it, the articles were missing.

Appeal from District Court, Webb County;
A. S. McLane, Judge.

Action by Schafermeyer against the Galveston, Harrisburg & San Antonio Railway Company and others. From a judgment for plaintiff against said company, it appeals. Reversed.

Baker, Botts, Baker & Lovett, for appellant. A. Winslow, for appellees.

JAMES, C. J. The evidence is that Mrs. Schafermeyer bought of the International & Great Northern Railway Company at Laredo, Tex., a second-class passenger ticket from that place to San Francisco, Cal., and had her trunk checked through. The contract part of the ticket limited the company's liability to what occurred on its own line, and also provided that its liability as to the baggage checked was limited to wearing apparel not exceeding \$100 in value. Its connecting carriers were the Galveston, Harrisburg & San Antonio Railway Company from San Antonio to El Paso, Tex., and the Southern Pacific Company from El Paso to San Francisco. It appears from plaintiff's testimony that when she arrived in San Francisco at 9 o'clock in the morning she gave her check to a man at the baggage room, and paid \$1 to a man with a wagon and team, who delivered her trunk to her that evening about 5 o'clock. She then noticed that the articles in question, to wit, three silver bracelets, a gold watch and chain, and two gold penholders were missing from the trunk. She also testified that the railroad company's seal on the trunk was broken, that the hinges had not been tampered with nor the lock broken, and in her opinion the articles could not have been taken out, even with the seal broken, unless some one had used a key and unlocked the trunk. It also appeared that a transfer company handled the trunk from the time it was turned over by the Southern Pacific Company until it was delivered to her, and it does not appear that there was any identity, partnership, or agency between the Southern Pacific Company and the transfer company. The action was against all three railway companies. The judgment appealed from is in favor of the International & Great Northern Railway Company, and the Southern Pacific Company, and against appellant for the value of the articles as found by the jury.

Appellant has no right to complain of any error that might exist in the judgment in favor of its codefendants, because it does not

appear that it asked for judgment over against either of them (Ry. v. Clements, 20 Tex. Civ. App. 498, 49 S. W. 913); and this case will be treated as if appellant, the intermediate carrier, had been sued alone.

The court charged the jury correctly (this being an interstate matter, to which our statute is not applicable. Ry. v. Richmond [Tex. Sup.] 63 S. W. 619) that only the carrier upon whose line the loss occurred was liable, and that neither was liable for what occurred on the other's line, and to find against the one upon whose line it occurred, if on any of them.

It devolved on plaintiff to prove, in the first instance, that the jewelry was in the trunk when received by the International & Great Northern Railway Company. Her testimony tended to show this fact; also that when she received the trunk in San Francisco the articles were missing therefrom. There was, however, no direct or circumstantial proof that the loss occurred on appellant's line (or any particular line of these several carriers), and appellant's liability in the absence of such proof is fixed, if at all, by means of presumptive evidence. The case of I. & G. N. Ry. Co. v. Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541, furnishes the approved rule in this state governing this class of cases. This being a case of total loss of the articles, as distinguished from mere damage to them, a presumption of negligence arises against the initial carrier. If it had shown that such carrier delivered the trunk to appellant at San Antonio just as it had received it from plaintiff, the presumption against it would be rebutted, and the presumption transferred to appellant, because it would thereby appear that appellant received the trunk with the articles in it, and, unless appellant should rebut such presumption of negligence thus cast upon it, it would be held responsible.

Appellant says that the evidence in this record did not warrant judgment against it, and with this we are forced to agree for the following reasons: Before any presumption could be indulged against any of the carriers, it was necessary for plaintiff to show in some manner that the loss occurred in transit; that is, after delivery to the first, and before delivery by the last, carrier. It was not shown that the trunk was minus the articles in transit, nor when it left the hands of the Southern Pacific Company at San Francisco. The transfer company, or the person to whom the Southern Pacific Company delivered it, was plaintiff's agent and employé, and there is not any evidence to prove that at that time it was in the condition it was discovered to be in eight hours later, when opened by plaintiff. This fact, if true, could have been shown, but it was not. If shown, the presumptions, which the law creates in such a case would have been set in motion. For the above reasons the evidence does not warrant the judgment, and it will therefore be reversed.

The testimony of the witnesses was that the Galveston, Harrisburg & San Antonio Railway Company transported the trunk from San Antonio to El Paso just as it had received it from the initial line. Appellee insists that the following testimony is sufficient to prove that the loss happened while the trunk was in appellant's hands, and before turning it over to the Southern Pacific Company at El Paso: Bishop, appellant's general baggage agent at that place, testified that he handled this trunk; that while it was in his custody it was not removed from the car, and remained in the car while it was changed from one man to another—that is, while one man gave the car up to the man who relieved him; that he delivered the trunk to the train baggage man (the baggage agent of the Southern Pacific Company), who carried it from El Paso, and it was in the same condition as when he received it; that he handled and was in charge of the trunk at El Paso; that he did not make the examination personally; that the examination was made by Mr. H. Raynor, who is employed for that purpose; that there was no indication that the trunk had been tampered with or articles stolen therefrom before it came into his possession; that there would be a remote possibility.

Appellee insists that from this testimony, and the fact that Mr. Raynor's statement was not taken, the jury could infer that the loss occurred on appellant's line. We cannot agree with this as affirmative proof. But we are of opinion that such testimony might not be sufficient to rebut a presumption of negligence (if the presumption had been created against appellant), which would be a matter for the jury.

The case above cited settles also the question raised by the fifth assignment of error, as to the clause limiting defendant's liability in case of loss to \$100. We find no error in what is alleged in the fourth assignment. The other assignments it is not deemed necessary to discuss.

The judgment in favor of the International & Great Northern Railway Company and Southern Pacific Company will not be disturbed, and the judgment against the appellant will be reversed, and the cause as between plaintiff and appellant remanded for another trial.

BOYER & LUCAS v. ST. LOUIS, S. F. & T. RY. CO. et al.*

(Court of Civil Appeals of Texas. March 7, 1903.)

RAILROADS—CONSTRUCTION—DAMAGES TO PROPERTY—PARTIES DEFENDANT TO A SUIT—SUFFICIENCY OF EVIDENCE—COMPETENCY OF EVIDENCE—APPEAL—SUSTAINING VERDICT.

1. Where, in an action by property owners against a railway company to recover damages

occasioned by the construction of the road, defendant alleged in its answer that certain parties had agreed to save it harmless from all such claims, and prayed that they be made parties defendant, it was proper to permit the indemnifiers to appear in the suit where they admitted their liability under the agreement.

2. Where the record discloses evidence sufficient to support the findings the verdict will not be disturbed on appeal because of conflicting testimony.

3. The measure of damages to property occasioned by the construction of a railroad in front thereof is the difference between the value of the property with the railroad track there and the value without it, not taking into consideration the benefits or injuries received or sustained in common with the community in general.

4. In an action for damages to property occasioned by the construction of a railroad, the testimony of a witness as to the amount of the difference in value of the property before and after the building of the road, excluding benefits and injuries common to the whole community, was properly excluded, as calling for a conclusion of a mixed question of law and fact.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by Boyer & Lucas against the St. Louis, San Francisco & Texas Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. A. Templeton and Webb & Jones, for appellants. C. H. Smith, A. L. Beaty, and V. E. McInnis, for appellee.

BOOKHOUT, J. This is a suit instituted on the 27th day of June, 1901, in the district court of Grayson county, by Boyer & Lucas, as plaintiffs, against the St. Louis, San Francisco & Texas Railway Company, as defendant; the object and purpose of the suit being to recover damages to certain property owned by plaintiffs, situated in the city of Sherman, and abutting on Broughton street, which ran immediately between said property and the St. Louis, San Francisco & Texas Railway. The damages sought to be recovered were laid at the sum of \$3,000, and plaintiffs charged that the same were occasioned by the construction and operation of said railway by said company in front of said property. The defendant company answered by general exception, general denial, and by special plea, wherein it alleged that it had been induced to construct its said line of railway in front of plaintiffs' property by the promises, agreements, and undertakings of the citizens of Sherman, and especially of certain parties named in said plea, and who, it charged, had agreed and undertaken to save it harmless from all suits and claims for damages occasioned by the building, maintaining, and operating of said road. These parties all appeared and answered, admitting their liability for any judgment recovered by plaintiffs, and they adopted as their own the answer of the railway company. A trial was had before a jury February 27, 1902, which resulted in a verdict and

*Rehearing denied March 21, 1903.

† 3. See Eminent Domain, vol. 13, Cent. Dig. §§ 273, 290, 315.

judgment for the defendant. Plaintiffs have appealed.

It is contended that the court erred in overruling plaintiffs' exceptions to the answer of the St. Louis, San Francisco & Texas Railway Company, alleging that in building its railroad it was induced to do so by the promises, agreements, and undertakings of the citizens of Sherman, and especially of A. A. Fielder and 60 other persons and business concerns named in said plea; and it was charged that said parties, acting for themselves and for the general good and benefit of the town, agreed and undertook that they would save harmless said defendant company from all suits and claims for damages of all persons for building, maintaining, and operating said road, wherefore said defendant prayed that said persons be made parties defendant. It is insisted that the plaintiffs' cause of action arose out of tort, while the said company's cause of action against its codefendants is based upon contract. Upon the filing of the answer of the railroad company, making A. A. Fielder and others parties defendant, they at once appeared and filed an answer admitting their liability for any judgment that might be recovered by plaintiffs against said railway company.

The general doctrine of our courts is that the rights of all parties in the subject of litigation may and should be settled in one suit, within the limitation that parties cannot be so introduced as to prejudice the rights of those who have already commenced the litigation. In the case at bar there was no contested issue raised between the railway company and its indemnifiers, Fielder and others. These parties admitted their liability for any judgment that might be rendered against the railway company. We cannot see, in view of the pleadings, how the plaintiffs can be heard to complain of the making of these indemnifiers parties, when, by so doing, none of the issues are changed, and it does not appear that any delay was occasioned, or that plaintiffs' rights are prejudiced thereby. *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423; *Pope v. Hays*, 19 Tex. 375; *Johns v. Hardin*, 81 Tex. 186, 16 S. W. 623; *Ft. Worth v. Allen* (Tex. Civ. App.) 31 S. W. 236; *Morris v. Davis* (Tex. Civ. App.) 31 S. W. 853; 14 Enc. Pl. & Pr. 212; *Story*, Eq. Pl. § 544; *Siegel v. Herbine* (Pa.) 23 Atl. 999, 15 L. R. A. 547.

It is contended that the court erred in overruling the plaintiffs' motion for new trial, based on the insufficiency of the evidence to support the verdict. It is urged that the weight and preponderance of the evidence is so greatly against the judgment as to show that the same is clearly wrong, and that for this reason the judgment should be reversed. The property in question in this case consists of a storehouse and nine residences, all of which are situated and fronting on the west side of Broughton street, in the city of Sherman, near the intersection of said street with College street. The store-

house and one of the residences are situated on the north side of College street. The other eight residences are situated south of said street. Broughton street runs practically north and south. This street, north of its intersection with College street, is 60 feet wide, as is also College street. Broughton street immediately south of College street was originally 47.5 feet wide. From this point southward this street became gradually narrower, until opposite the south side of appellants' lot No. 11 it was only 16 or 17 feet wide. This street was practically the only means of ingress to and egress from plaintiffs' dwelling houses, which fronted east on the west side thereof. The St. Louis, San Francisco & Texas Railway was constructed and completed into Sherman from the north during the early part of the year 1901, and the company began operating trains over that road during the month of March of that year. By some arrangement made with the Houston & Texas Central Railroad Company, the Frisco Company uses as its main line between Denison and Sherman the line of the said Houston & Texas Central Railroad Company. It constructed a track crossing College street going south, about where this street intersects with Broughton street. It runs on the west side of the Central track until it intersects therewith at a point 817 feet south of the center of College street, at which point there is a switch stand. The track of the Frisco leading from College street south deflects to the west into Broughton street, and the dump on which it is built occupies a portion of said street in front of plaintiffs' property, as follows, viz.: In front of lot 6, seven feet; in front of lot 7, six feet; in front of lot 8, three feet; and in front of lots 9 and 10, one foot. The number of trains operated daily over this track in front of appellants' property by the appellee company is estimated by different witnesses at from 15 to 24.

There is a sharp conflict in the evidence on the issue whether the property of plaintiffs was damaged by the construction of the track and switches by the appellee, and the operation of its trains over the same. This conflict has been settled by the jury, who had the witnesses before them, heard them testify, and observed their manner of testifying, and whose duty it was to judge of the credibility and weight of the testimony. There is evidence in the record sufficient to justify them in their finding. Such being the condition of the record, it is our duty to sustain their verdict.

The court instructed the jury that, in determining the amount of damages sustained by plaintiffs, they could take into consideration the use to which the property had been put by plaintiffs, and that they should not consider the benefits or injuries to the property which plaintiffs have sustained or received in common with the community generally. The correct measure of damages was

submitted; that is, the difference in the value of the property with the railroad track and switches, and the use to which they were put, and its value without the same. The charge fairly submitted the issues on this phase of the case, and is not subject to the criticisms urged in the 20th, 21st, 22d, and 24th assignments of error.

There was no error in refusing special charge No. 1 requested by appellants, the refusal of which is made the ground of the 24th assignment of error. So far as the said charge was applicable, it was embraced in the general charge of the court.

It was not error to refuse appellants' special charge defining the words "community generally." The meaning of these words could not have been misunderstood by the jury.

While W. H. Lucas, one of the plaintiffs, was testifying in his own behalf, his counsel sought to prove by him that the property in controversy had been depreciated in value by the building and operation of the defendant company's line of railway in close proximity to said property, and "that the difference between the cash market value of said property before the building and operation of said line of railroad and its cash market value thereafter, excluding from his estimate all such injuries and benefits as were common to the community in general by reason of the construction of said road, was more than \$3,000." The testimony embraced in the quotation was excluded on exception by defendant. This testimony was improper, as calling for the opinion of the witness upon a mixed question of law and fact, and the court did not err in excluding the same. *Railway v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42.

We have carefully examined the assignments of error not discussed, and are of the opinion that no reversible error is pointed out in any of them. The judgment is affirmed.

SUN LIFE INS. CO. OF AMERICA v. MURFF.

(Court of Civil Appeals of Texas. March 12, 1903.)

APPEAL FROM JUSTICE COURT—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.

1. Where plaintiff sued and obtained judgment in the justice's court for special salary, consisting of commissions, it was error to permit him to file an amendment in the county court, claiming an additional item as guaranteed salary, as such was a new cause of action.

Appeal from Galveston County Court; Jno. W. Campbell, Judge.

Action by L. A. Murff against the Sun Life Insurance Company of America. From a judgment for plaintiff, defendant appeals. Reversed.

James B. & Charles J. Stubbs, for appellant. Marsene Johnson, for appellee.

GARRETT, C. J. L. A. Murff brought this suit November 5, 1901, in a justice's court, against the Sun Life Insurance Company of America, upon an account for commissions and salary—\$55 principal and \$6.00 interest. The defendant pleaded payment, and also, in reconvention, a balance of \$108.60 which it alleged the plaintiff owed it. A trial in the justice's court resulted in a judgment in favor of the plaintiff for the amount sued for. An appeal was taken to the county court by the defendant. In the county court the plaintiff, with leave of the court, filed an amended petition, in which he alleged that he had been employed by the defendant as assistant superintendent in Galveston, Tex., by a contract in writing by which the defendant agreed to pay plaintiff a guaranty salary of \$15 a week, and a special salary of twice the net increase of the collectible weekly debit of all agents working under the plaintiff as assistant superintendent, on condition that the net increase should average at least \$1 a week, and \$52 for the year; that said contract was effective from its date, November 28, 1898, until December 22, 1900, and plaintiff performed his duties thereunder, and defendant paid his regular guaranty salary of \$15 a week until November 28, 1900; that the net increase for the year ending November 28, 1899, amounted to the sum of \$54.04. All the conditions were alleged to have been met, and it was alleged that there became due the plaintiff by the defendant, as his special salary, the sum of \$55, which the plaintiff was entitled to recover, with legal interest. Plaintiff further alleged that on December 22, 1900, there was due him by the defendant his guaranty salary for the two weeks next preceding that date; that the defendant had paid him on account thereof \$8.80, and withheld from him the sum of \$21.20, which it had failed and refused to pay. Judgment was asked for the sum of \$55 and interest as special salary due the plaintiff, and the sum of \$21.20 and interest due him on his regular salary. The defendant excepted to the claim for \$21.20 as a new cause of action set up for the first time in the county court, pleaded payment of all amounts accruing under the contract, and again pleaded in reconvention the sum of \$108.60 as in the justice's court. The court overruled the exceptions, and the case was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff for the full amount sued for.

The plaintiff testified that the defendant still owed him \$54.04, earned by him during the first year of the contract, as special salary, and the sum of \$21.20 withheld out of his last two weeks' guaranteed salary. The defendant put in evidence 108 receipts of the plaintiff for the weekly guaranty salary for each week of his entire period of employ-

¶ 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 670.

ment. It also put in evidence 17 receipts given by him for special salary, together with a statement of his account, made out in accordance with the terms of the contract, which showed that all of the special salary up to a settlement had June 11, 1900, had been paid, and that after that date no special salary accrued, according to the terms of the contract; but in March, 1901, the plaintiff having claimed that the defendant was still indebted to him for special salary, the defendant waived the terms of the contract, which required a stipulated net increase, and paid him in full for the actual increase, according to which there would be a balance due him of \$45.08, and took his receipt for that sum, dated March 23, 1901, as for salary of every description, and in full of all demands. The plaintiff admitted the receipt of all the amounts shown by his receipts put in evidence, except the receipts for the last two weeks of guaranty salary, out of which he said the defendant reserved \$21.20 on account of lapses in policies, which plaintiff afterwards discovered to be error. Plaintiff's amendment claiming the \$21.20 was filed in the county court only two days before the case was called for trial, and, when the trial judge overruled the defendant's exceptions to the item as a new cause of action, it was too late to get the evidence of the defendant's president and secretary, as will appear from a bill of exception showing the refusal of the judge to continue the case.

We are of the opinion that the item for \$21.20 was a new cause of action, to which the defendant's exception should have been sustained. As originally brought in the justice's court, the suit was for \$55 for special salary, as fully shown by the pleading filed in the county court. The \$21.20 set out in the amendment as guaranty salary was entirely separate and distinct in its nature, and not an extension or enlargement of the original demand, but accrued subsequently to it. It will be unnecessary to consider the assignment of error upon the action of the court in refusing the continuance.

A written receipt given for money may be explained or contradicted by parol evidence, but the plaintiff did not deny the receipt of any of the sums of money as shown by his receipts put in evidence by the defendant, except as to the two last given for the guarantied salary, and these are eliminated from the case by the error of the court in refusing to strike out the item to which they relate. No explanation was given by the plaintiff of the receipts given by him for advances in special salary that prevents their application to the clear statement of his account furnished by the defendant, and the correctness of which is not disputed. It clearly appears from all the evidence in the case, according to a proper construction of the contract, that the plaintiff has been at least fully paid all that the defendant agreed

to pay him, even been waived by

The judgment reversed, and, sir shows that the recover anything will be here rendered and rendered.

ST. LOUIS SOUTH TEXAS

(Court of Civil A

CARRIERS—LIVE —SPECIAL CONTR EVIDENCE—MARKE TENCY—INSTRUC

1. Where two ca damages to a ship represented by the being identical, the and were not entit to more than six p

2. Where the cou jointly sued were empty challenges not show but that illege of striking s the list, or that an whom it desired to roneous, was witho

3. Where it was carry cattle throu per car, with privi cattle at two desig when the cattle we the feeding pens, de tiff would ship in trary to plaintiff's tageous to him tha defendant would c destination in 33 ho ment constituted a a sufficient consid

4. Where, in an shipped, plaintiff t market value of c tle were sold, and from market repor from an official pap the cattle were sen tify as to the mark

5. Where, in an while en route to m the amount of the b reason of delay, etc. from which the ex therefor could be a permitting plaintiff sales of the cattle was not prejudicial.

6. Where two cor cattle were pleaded, thORIZED a recovery law liability, and ne cial charge that the fendant if the ship other than the oral fused.

Appeal from Dist ty; Irby Dunklin, Action by M. M. Louis Southwester Texas and another. vor of plaintiff, t

*Rehearing denied M ¶ 4. See Evidence, v

Southwestern Railway Company appeals. Affirmed.

Bonner & Gilbert, R. L. Lassiter, and T. O. Wilkinson, for appellant. Matlock, Miller & Dycus, for appellee.

SPEER, J. M. M. Barnes sued the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas to recover damages on account of five shipments of live stock to National Stockyards, Ill., from Mount Pleasant, Tex., and Pittsburg, Tex. He alleged that the shipments consisted of 10 car loads of fat cattle, each intended for market, and that by reason of overloading the trains with dead freight, delays, rough handling, and extra feed, en route, he was damaged in the sum sued for. Our conclusions as to the facts will sufficiently appear in connection with our discussion of the assignments of error.

Appellant's first assignment of error complains that the court erred in holding that the defendants were not entitled to separate jury lists, and in confining them jointly to six peremptory challenges. The assignment must be overruled, because the two railway companies were jointly sued, and were making a common fight against plaintiff, being represented by the same counsel, and their interests were in no respect antagonistic to each other. They constituted but one party within the meaning of the statute. *Jones v. Ford*, 60 Tex. 127; *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 695; *Waggoner v. Dodson* (Tex. Sup.) 69 S. W. 993. If the ruling was technically erroneous, no injury was shown to the cause of appellant; for aught that appears of record, it may have exercised its privilege of striking six of the jurors peremptorily from the list. At any rate, it does not appear that the name of any juror remained upon the list whom it desired to challenge. *Snow v. Starr*, 75 Tex. 414, 12 S. W. 673; *H. & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Kelley-Goodfellow Shoe Company v. Liberty Ins. Co.* (Tex. Civ. App.) 23 S. W. 1027; *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

Under the second, third, fourth, and fifth assignments the appellant submits the following proposition, which sufficiently indicates the matters complained of: "The undisputed evidence showing that a contract had been made between plaintiff and defendant for the transportation by defendant of plaintiff's cattle from Henrietta, Texas, to East St. Louis, Ill., with the privilege on the part of plaintiff of fattening said cattle en route at Pittsburg and Mt. Pleasant, Texas; that the consideration to be paid for such through shipment was \$96.90 per car, of which sum \$30.00 were paid upon the arrival of said cattle at said feeding stations, and the balance upon the arrival of said cattle at East St. Louis, after being fattened

at said points—it is submitted that an agreement between plaintiff and defendant, made several weeks after said contract of shipment was entered into, and when said cattle were on the point of being shipped from said feeding stations to market under said contract, to the effect, and without any other stipulation than, that if plaintiff would ship said cattle in ten car load lots, that the defendant would carry them through to destination in thirty-three hours, which was alleged and proved by plaintiff to be a reasonable time, did not constitute a new and distinct contract, or any contract at all, and would not support an action."

The oral contract with appellant's general live stock agent was pleaded, and a recovery sought thereupon by the appellee. The evidence shows that a contract had been made between appellee and appellant for the transportation of the cattle from Henrietta, Tex., to East St. Louis, Ill., with the privilege of fattening said cattle en route at Pittsburg and Mount Pleasant, Tex.; that the consideration to be paid was \$96.90 per car, of which sum \$30 were paid upon the arrival of said cattle at said feeding stations, and the balance upon the arrival of said cattle at their final destination, as stated in the foregoing proposition. The testimony further shows that after said cattle were fattened and appellee was ready to ship them to market, he wired the company's chief dispatcher for cars in which to make his shipment in lots of five cars each. That it was the purpose and intention of appellee to ship his cattle from the feeding pens to market in lots of 5 cars each, and that the appellant's general live stock agent, who had authority to act in such matters, agreed orally with appellee that, if he would make his shipments in trains of 10 car loads each rather than 5, the company would transport them to said market in 33 hours. The shipment of cattle in five car lots would have been more advantageous to appellee than a shipment in 10 car lots, and he made the shipment in the larger lots upon the promise of appellant's said agent to get the cattle to market in the time specified. The evidence shows that it was not contemplated by the parties that the oral contract was to be abrogated or superseded by any written contract whatever. Thirty-three hours was shown to be a reasonable time within which to ship from the pens in Texas to the market in Illinois. As testified by appellee, the only change made in the original contract was that providing for shipments in lots of 10 car loads, and an agreement upon the part of the company to transport the cattle in 33 hours.

We are of opinion that these assignments should be overruled. That appellee had the right under the original contract to ship his cattle in lots of 5 cars seems not to be questioned. If so, then his agreement to ship in greater quantities, the effect of which was

to his detriment, was a sufficient consideration for appellant's new undertaking. Again, appellant undoubtedly considered that shipments in train lots of 10 cars would be to its advantage. We think the facts show a complete contract based upon a sufficient consideration between the parties. Pullman Palace Car Co. v. Booth (Tex. Civ. App.) 28 S. W. 721; I. & G. N. Ry. Co. v. Ritchie (Tex. Civ. App.) 26 S. W. 845; Baker v. K. C., S. J. & O. B. R. Co. (Mo. Sup.) 3 S. W. 486.

The next assignment attacks the ruling of the court in permitting the appellee to testify to the prices his cattle brought in East St. Louis. If the witness' knowledge of the market and prices brought by his cattle was derived wholly from his accounts of sales rendered him by his commission merchants, the same would be hearsay and inadmissible. G. C. & S. F. Ry. Co. v. Frost (Tex. Civ. App.) 34 S. W. 167; G. C. & S. F. Ry. Co. v. Baugh (Tex. Civ. App.) 42 S. W. 245. But where, as in this case, the witness shows himself familiar with the market, he will be permitted to testify. The witness knew the market values of cattle upon the days his cattle were sold. He acquired this knowledge by reading the St. Louis Live Stock Reporter, the official organ of the stockyards, and the market reports in the daily papers. This was sufficient information. T. & P. Ry. Co. v. Fambrough (Tex. Civ. App.) 55 S. W. 188; M., K. & T. Ry. Co. v. Woods (Tex. Civ. App.) 31 S. W. 237; Mo. Pac. Ry. Co. v. Fagan, 72 Tex. 130, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; G. C. & S. F. Ry. Co. v. Patterson (Tex. Civ. App.) 24 S. W. 349; I. & G. N. Ry. Co. v. Dimmitt County Pasture Company (Tex. Civ. App.) 23 S. W. 754. But, if it was error to permit appellee to testify from the account sales what his cattle sold for, it is not pointed out how the same could in any way have prejudiced the cause of appellant. The testimony of the witnesses as to the markets was clearly admissible, and the testimony of himself and other witnesses established the loss in flesh of the cattle by reason of the delay, etc., at 20 to 60 pounds per head. This, multiplied by the market value, would give the amount of appellee's loss for this item. Whether the cattle actually sold for the market value, or brought more or less, cannot affect appellant's liability; it can be charged with such market values only. It is not sought to recover for the loss of any particular market.

The 7th, 8th, and 9th assignments, complaining of the introduction of evidence, are overruled. Under the pleadings the testimony was admissible.

Assignments 10, 11, 12, 13, 14, and 15 must all be overruled. Each, with the exception of the 14th, which summarily directs a verdict for appellant, complains of the refusal of the trial court to give a special charge which either expressly or in effect directs the jury to return a verdict for appellant if the shipments were made under any other con-

tract than the oral one. The appellant, if he established negligence, was entitled to recover, no matter what contract controlled the shipments. They were all pleaded by one or the other of the parties. Further, it appears that the facts were so pleaded as to authorize a recovery upon the common-law liability of appellant. M., K. & T. Ry. Co. v. Webb (Tex. Civ. App.) 49 S. W. 526.

We think the evidence amply supports the verdict and judgment, and that the trial court did not err in refusing a new trial based upon such objection. We find no error, and the judgment is affirmed.

SHARP v. DAMON MOUND OIL CO.

(Court of Civil Appeals of Texas. March 9, 1903.)

CORPORATIONS—VENUE OF ACTIONS—REPRESENTATIVE CAPACITY OF PRESIDENT.

1. The president of a corporation, who had no office other than in the county of his residence, and who performed all his official acts there, was its representative in such county, within the meaning of Rev. St. 1895, art. 1194, § 23, providing that a suit against a private corporation may be commenced in any county in which it has an agency or representative.

2. His representative capacity was not affected by the fact that he was called on to perform very few official acts.

3. Nor was it affected by a private understanding had with the other members of the corporation that the other officers were to do all the work, he having been held out by its prospectus and stationery as its president.

Appeal from District Court, Jefferson County; J. D. Martin, Judge.

Action by W. B. Sharp against the Damon Mound Oil Company. From a judgment sustaining defendant's plea of privilege, and dismissing the suit, plaintiff appeals. Reversed.

L. A. Carlton, for appellant. L. J. Wilson, D. W. Glasscock, and F. J. & R. C. Duff, for appellee.

PLEASANTS, J. This is a suit upon a contract for boring a well in Brazoria county. The contract was verbal, and was made with appellant, in Jefferson county, by D. R. Beatty, president of the appellee company. Beatty lived in Jefferson county on December 13, 1901, and had resided there since January, 1901. This suit was filed in the district court of Jefferson county on December 13, 1901. Beatty is interested in several oil companies operating in Jefferson county, and has an office in the city of Beaumont. The Damon Mound Oil Company was chartered on the 4th of May, 1901. The charter authorizes the company to do business in Brazoria, Jefferson, and a number of other counties in Texas, but fixes the principal office of the company at Alvin, in Brazoria county. Beatty is named in the charter as one of the directors of the company, and his place of residence is stated to be at Beaumont, Jefferson county. Upon the or-

ganization of the company he was chosen as its president, and had continuously held that office up to the trial of this case in the court below. He accepted the office, however, with the understanding that he would not be required to do the work incident thereto. In the prospectus issued by the company, and upon all of the stationery used by it since its organization, Beatty is designated as president, and his place of residence stated to be in Jefferson county. The other officers of the company lived in Brazoria county. No office was provided by the company for the use of Beatty in Jefferson county, and he was never, by any formal resolution of the board of directors, authorized to perform any official acts in that county. No business of any importance was ever done by the company, except the making of the contract with appellant, and the boring of the well thereby contracted for in Brazoria county. It is not shown that the company had any offices or place of business for their officers in Brazoria county. The appellant conferred with Beatty in Beaumont at various times relative to the work of boring the well, and reported to and discussed with him the progress being made in such undertaking. The payments made appellant on his contract were made by Beatty at Beaumont by draft on the company, which was paid at Alvin. The defendant in the court below filed a plea of privilege to be sued in the county of its domicile. Upon the facts before found, the trial judge concluded, as a matter of law, "that while Beatty was in fact the president of the corporation, and resided in Jefferson county, he was not, within the meaning of the statute, the representative of the company for the purpose of transacting business for the company in that county"; and the plea of privilege was sustained, and plaintiff's suit dismissed.

Section 23, art. 1194, of the Revised Statutes of 1895, is as follows: "Suits against any private corporation, association or joint stock company may be commenced in any county in which the cause of action or any part thereof arose or in which such corporation, association or company has an agency or representative, or in which its principal office is situated." We think it clear that the president of a corporation, having the powers and authority usually incident to that office, is a representative of the corporation, in the sense in which that term is used in this statute. Such president might reside in one county, and have his office and perform his duties as president in another, and in such case his residence would not fix the venue of suits against the corporation; but when, as in this case, the president of a corporation has no office other than in the county of his residence, and all of the official acts done by him are shown to have been performed in that county, he is the representative of the corporation in said county, and suits against the corporation may be

brought there. The facts show that very little business of any kind was done by the defendant company, and its president was called upon to perform very few official acts; but this could not affect his official character as the executive head—the highest representative—of the company. Nor is his representative character at all affected by the private understanding had with the other members of the company that the other officers of the company were to do the work for the company. He was in fact the president of the company, with all of the powers pertaining to said office, and all persons dealing with the company were so informed by the published prospectus, as well as by the indorsements upon all of the stationery used by the company; and, notwithstanding the agreement that the other officers should do the work, he in fact did perform his duties as president, and performed them in Jefferson county. *G., B. & K. C. Ry. Co. v. T. & N. O. Ry. Co.* (Tex. Civ. App.) 64 S. W. 692.

We are of opinion the plea of privilege is not sustained by the evidence, and the judgment of the court below should be reversed, and the cause remanded, with instructions to the lower court to overrule said plea, and it is so ordered. Reversed and remanded.

TEXAS & P. RY. CO. v. WEBB.*

(Court of Civil Appeals of Texas. Feb. 28, 1903.)

SERVANTS—INJURIES—FELLOW SERVANTS—LIABILITY OF RAILROAD COMPANY.

1. A push car, 8 or 10 feet long and 3 or 4 feet high, used for transporting rock down an inclined track to a rock crusher, is a car, within the meaning of Rev. St. art. 4560f, providing that every corporation operating a railroad in this state shall be liable for all damages sustained by any servant, while engaged in operating its cars, locomotives, or trains, by reason of the negligence of any other servant, and the fact that such servants are fellow servants shall not impair such liability.

2. Plaintiff was engaged in operating the car, within the meaning of the statute, where he and another employé loaded it with rock, started it and mounted it when loaded, and, by the use of brakes, regulated its speed down the track to the crusher, and, after unloading it, pushed it back, as the statute is remedial, and should be liberally construed, in accordance with Rev. St. Final Title, § 3, providing "that the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this state respecting the subjects to which they relate, and the provisions thereof shall be their objects and to promote justice."

Appeal from District Court, Eastland County; N. R. Lindsey, Judge.

Action by C. P. Webb against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Wagstaff, for appellant. Ben M. Terrell, for appellee.

*Rehearing denied March 28, 1903, and writ of error denied by supreme court.

CONNER, C. J. This is an appeal from a judgment of \$2,000 in appellee's favor for personal injuries. The following facts are substantially alleged and proved by the uncontradicted testimony: Appellee was injured by the act of a fellow servant by the name of Greathouse, while in appellant's service, under the following circumstances: Appellant was operating a rock quarry at which laborers were at work quarrying and breaking rock in convenient sizes preparatory to loading the broken pieces upon a push car 8 or 10 feet long and 3 or 4 feet high, upon which, when loaded, the rock was transported down an inclined switch track of the usual kind to a rock crusher, used to crush rock with which to ballast appellant's main line. Appellee and Greathouse had nothing to do with quarrying and breaking the rock. It was their duty from opposite sides of the car to pick up the quarried and broken rock, and load the same upon the push car, which had a loading capacity of about 2,800 pounds, after which appellee and Greathouse were required, in the performance of their duty, to start and mount the car, and so use the brakes with which it was provided as to restrain the downward momentum within safe limits, and upon arrival at the crusher to unload and push the car back up the incline to the loading place, where they would proceed as before. Appellee was injured while loading by the negligent act of Greathouse in casting upon the car, and over onto appellee's foot, a sharp-pointed rock. It was alleged that such act was negligent, and inasmuch as no complaint is made of the manner in which this issue of negligence was submitted to the jury, or of the amount of the verdict, we need not notice such features of the case further. Appellee alleged that Greathouse was an incompetent workman, of a low order of intelligence, of which appellee was without knowledge, but of which appellant had notice, or by the exercise of reasonable prudence might have known, and that appellant was guilty of negligence in respect to his employment, and also alleged that appellee and Greathouse at the time of the injury were engaged in the work of operating the car, within the meaning of Rev. St. art. 4560f. Both of these grounds of recovery were submitted to the jury, which returned a general verdict for appellee.

Beginning with the assignments of error in reverse order, we have first to determine whether the push car, as above described, is a "car," within the meaning of the above article of the statute, and, if so, whether, within its purview, appellee at the time of his injury was engaged in "operating" it. In reaching the conclusion that it was a car, we have had no difficulty. Says Mr. Elliott, in his work on Railroads, vol. 3, § 1354: "The term 'cars,' when employed in an employer's liability act, may be taken to mean any kind of a vehicle, other than a locomotive

or tender, used by a railroad company for the transportation of passengers, employés, or property upon and along its tracks. The term is not confined to coaches nor to freight cars, but to embrace all kinds of cars. A hand car is a car, within the meaning of the statute." This statement, which we approve, is supported by *Perez v. San Antonio & A. P. Ry. Co.*, 67 S. W. 137, by our court of Civil Appeals for the Fourth District, and *Benson v. Ry. Co. (Minn.)* 77 N. W. 798, 74 Am. St. Rep. 444, and *Ry. Co. v. Crocker*, 95 Ala. 412, 11 South. 262. Our statute which we hereinafter quote is not limited to cars of any particular description or capacity, or to those used in any particular kind of transportation, or moved by any particular kind of force. The push car under consideration was used solely in the transportation of freight or material for use by appellant, and is designated by all the witnesses as a car. We hence overrule appellant's contention in this particular.

But was appellee at the time of his injury engaged in the work of operating said push car? This is the difficult question in the case. For, if this question be answered in the affirmative, then appellee is, perforce of the statute, entitled to recover, regardless of the fact that he was injured by the negligence of a fellow servant, for which the master is generally not liable, and irrespective, also, of the issue of appellant's negligence, if any, in the employment of Greathouse. If otherwise, then the court was in error, as assigned, in submitting the issue of whether appellee was operating a car as alleged. The statute involved is as follows: "Every person, receiver, or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employee of such person, receiver or corporation, and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability." Rev. St. art. 4560f. We have been unable to find any authority applicable to the precise facts now before us. In the case of *Long v. C., R. I. & T. Ry. Co. (Tex. Sup.)* 57 S. W. 803, a different article of the statute was construed; and an examination of the record in that case tends to show affirmatively that the Supreme Court was not called upon to decide whether in that case Long was at the time of his injury engaged in the work of operating the hand car that injured him while he was carrying tools to the section house. The trial court found as a fact that he was not, and this finding was adopted by us, as supported by the evidence. In *Lawrence v. The Texas Central Ry. Co.*, 61 S. W. 842, we decided that one whose employment was that of a

section hand, while engaged in unloading cross-ties from a standing freight car on a side track, was not operating such car, within the meaning of the above article. But there the movement or operation of the freight car was in no sense necessary or incidental to the section hand's duty, or the work in which he was engaged. The contrary is true in the case now before us. The switch track and car were constructed with the very object in view which found its fulfillment in the several acts above detailed, constituting the duties of appellee and his co-servant, Great-house. The constantly recurring duty of loading the car had direct and necessary connection with running it to and from the rock crusher, and both constituted integral parts of appellee's employment. Appellant's contention is to the effect that the car was being operated only when in motion. But it seems to us that this view is too restrictive. The term "operation," as used in the statute under consideration, evidently comprehends something more than the mere running of cars, locomotives, and trains of a railway company. In the statute itself the same term is used to designate those persons who shall be liable for injuries inflicted through negligence, and those who may be so injured, and in whose interest and for whose benefit the statute was enacted. The duties of the two classes thus designated are entirely dissimilar, and it hence seems to follow that the term under consideration was used and should be construed as generic in sense. We find the following among other definitions in the Office Standard Dictionary: "Operate. * * * (2) To effect any result; exert agency; act. (3) To bring about a specified result; (4) To produce the proper or intended effect." "Operation. The act or process of operating. (2) A mode of action. (3) A single specific act or transaction. (4) A course or series of acts to effect a certain purpose." The Supreme Court of Iowa, in the case of *Deppe v. C., R. I. & T. Ry. Co.*, 36 Iowa, 52, in construing their statute, that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation to any person sustaining such damage," held that, while the statute should be limited to employes engaged in the hazardous business of operating the road, it would nevertheless include an employe engaged in connection with a dirt train, and who was injured, while loading a car, by the falling of an impending bank. Error was assigned in that case to the action of the trial court in refusing to instruct the jury that the plaintiff, "in view of his employment [shoveling dirt at a bank] at the time of his injury, was not within the purpose and meaning of the act, and hence they should find for defendant." In disposing of the question the Supreme Court says: "* * * The court ruled correct-

ly in refusing the instruction asked, and this because the employment of the plaintiff was connected with the operation of a railway train. It is true, he was not injured while or by operating a train; but neither the act itself, nor the constitutional limitation, requires us to put this very narrow construction upon it. The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of the business of railroads, and, although the injuries did not arise from such hazards, they cannot be separated from the employment. If the plaintiff had been employed exclusively for shoveling or loading the dirt, he could not recover, although he might have rode to and from his work on the cars. The ground we rest our affirmance upon is that where the employment is entire, and a part of the continuous services relates to the perilous business of railroading, it brings the case within the statute and its constitutional limit." In a much later case—the case of *Akeson v. C., B. & Q. Ry. Co.*, 75 N. W. 676—the same court referred to the *Deppe* Case with approval, and, construing section 2071 of the Iowa Code, to the effect that "every corporation operating a railway shall be liable for damages sustained by employees in consequence of mismanagement of other employees in any manner connected with the use and operation of any railway on or about which they shall be employed," held that an employe engaged in loading coal upon the tender of a standing engine was within their statute. The Iowa statutes seem broader than ours, and the above cases may therefore be not very closely in point; but as will be seen by a review of the Iowa decisions in *Akeson v. Ry. Co.*, *supra*, and in *Ry. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747, their statutes are held, as we construe the decisions, to apply to those only who are in some manner engaged in labor connected with the use and operation of a railway; and the cases are hence cited, in want of authority more directly applicable, as tending to show the construction given by the Iowa court to the terms "use and operation" of a railway, and the general view that it seems to us should obtain in the construction of such statutes.

Our statute is remedial, and, we think, should be liberally construed, in accord with section 3 of the Final Title of the Revised Statutes, providing "that the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this state respecting the subjects to which they relate, and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice." Article 4560f ought not, as it seems to us, to be so construed as to exclude from its benefits engineers, firemen, brakemen, conductors, or others who at the time of an injury resulting

from negligence are engaged in some work necessarily and directly connected with the movement and operation of a car, locomotive, or train, merely because such car, locomotive, or train was not in motion or operation, in a restricted sense, at the time. Appellee, when injured, was engaged in one of the parts—one of the series of acts—proximately connected with and necessary to constitute the unit of his employment, and the fulfillment of the very purpose of the master in the construction of the track and car, and of their use. He was at work within the zone of the dangers intended to be provided against, and, as we conclude, within the spirit and beneficial operation of the legislative act under consideration. This being true, and the facts so showing being undisputed, render errors, if any, in the submission of the issue, and that relate to the issue of negligence in the employment of Greathouse, entirely immaterial.

All assignments of error are therefore overruled, and the judgment affirmed.

MARYLAND CASUALTY CO. v. HUDGINS.*

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

ACCIDENT POLICY—NOTICE OF CLAIM—STATUTORY PROVISION — CONSTRUCTION — ACCIDENTAL DEATH—CAUSE OF DEATH—POISON—UNSOOUND FOOD.

1. Rev. St. art. 3379, reads: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon, shall ever be valid unless such stipulation is reasonable, and any stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void." *Held*, that a clause in an insurance policy requiring the insured to give immediate notice of accident or injury was of no force, and the policy must be construed as though no time was specified.

2. An accident policy provided for indemnity in case of death sustained "through external, violent, and accidental means." Insured ate two raw oysters before he discovered that they were unsound, and death resulted therefrom, though the oysters contained no poison of any description. *Held*, that his death was caused by accidental means.

3. An accident policy exempted the company from liability "for injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken." *Held* that, the company having merely pleaded that death resulted from eating oysters containing ptomaine poison, it would not be heard on the contention that death resulted from something else other than poison taken.

4. An accident policy exempted the company from liability "for injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken." The death of the insured resulted from his eating unsound oysters, not knowing them to be unsound. They contained no poison whatever. *Held*, that the company was not exempted from liability.

Appeal from District Court, Bowie County; J. M. Talbot, Judge.

*Rehearing denied March 21, 1903.

Action by Sallie Maryland Casualty Co. plaintiff, and defendant.

Webber & Welker, Botts, Baker & Sheppard, Jones

RAINEY, C. The insurance policy issued by the defendant, Maryland Casualty Co., on November 1, 1901, contained the following clause: "Notice must be given to the company more or its duly authorized agent, in writing, before the accident and injury be made, with the name and address of the insured, and a true and correct copy of the certificate of death, or of the coroner's inquest, or of the jury's verdict, be furnished to the company within ten days from the date of the death, or of the accident, or of the injury." The plaintiff alleged that she did not give notice of said accident and death of her said husband until after the expiration of the policy because said policy was contrary to the provisions of the act of 1901, and in June, 1901, and in June, 1902, bringing this suit for damages, and proof of death, and the plaintiff refused to sign a blank form for the said blank form, and said refusal that the policy was denied, and the plaintiff refused against it on said grounds, and not for the reasons thereby defendant's proofs of death, and the plaintiff accepted to this all the policy contained and "that said notice was not given, and that plaintiff shows that no such proof of death, as shown by the plaintiff's said petition; and that death was ever made known to the plaintiff as shown by plaintiff's deposition was overruled as error. The contention

as provided in the policy was a prerequisite to a recovery, and that, where such notice and proof of loss are not given, a denial of liability after the prescribed time is not a waiver of such requirement. Whatever merit there might be in this contention if the clause of the policy under consideration was valid, we deem it unnecessary to determine. Said clause contravenes the provisions of our statute, article 3379, Rev. St., which reads: "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable and any stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void." The statute prescribing that such stipulation fixing the time within which such notice shall be given at a less period than 90 days shall be void, and the clause in the policy fixing a less period, it must be held that said clause is of no force, and effect as to the time fixed therein, and the policy must be construed as though no time was specified. Construing the policy thus, the allegation of waiver by denial of liability was sufficient.

It is insisted that the statute fixes 90 days as a reasonable time, and, if the policy fixes a shorter period, it renders that stipulation void, and substitutes therefor the said period of 90 days as to the time of notice. We cannot concur in this contention. The statute clearly expresses the intention of the lawmakers. It leaves it to parties to fix a time for the giving of notice, provided it is not less than 90 days, and where a less period is fixed it declares it void; and there is no intimation that 90 days shall be substituted for the less period named in the contract.

It is further urged that this is not such a claim for damages as is contemplated by the statute, and therefore it does not apply. "Damages are based on the idea of a loss to be compensated, a damage to be made good." In general, damages is "that which is given or adjudged to repair a loss." Mrs. Hudgins sustained loss by the death of her husband. The effect of defendant's contract is to respond in damages in certain contingencies, one of which has transpired. This, we think, brings her claim within the purview of the statute.

The other issue raised by the assignments is that defendant is not liable under the terms of the policy, the evidence failing to show that death resulted from an accidental cause. The policy provided for indemnity in case of death sustained through "external, violent, and accidental means" independent of all other causes. It contained a clause which reads as follows: "This insurance does not cover disappearances, nor war risks, nor voluntary exposure to danger, unless incurred in an attempt to save human life, nor injuries received while attempting

to board or alight from a moving conveyance propelled by steam, electricity, or cable (except that in case of injuries received while boarding or alighting from such conveyances while running at a rate of speed not greater than eight miles an hour, the assured shall be covered by clause 1 hereof), nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled (anæsthetics administered by a regular physician excepted), nor injuries, fatal or otherwise, received while or in consequence of having been under the influence of or affected by or resulting directly or indirectly from intoxicants, narcotics, vertigo, sleepwalking, fits, hernia, or any disease or bodily infirmity. But it is understood this policy covers the assured according to the terms hereof in the event of his injury from freezing, sunstroke, drowning, or choking in swallowing." The evidence shows that on Sunday, October 28, 1900, the insured, his wife, and son were together at dinner at the Randolph Hotel, in Texarkana, Tex. The insured ordered raw oysters for himself and son. When he had eaten two and the son one, he said to his wife: "Don't let that child eat any more of those oysters. They are not sound. They are tough." He was taken sick that evening, complained of pains in his stomach, grew worse, and died the following Thursday, November 1, 1900. The unsound oysters produced the death of the insured by passing out of the large part of the stomach, lodging in the lower part of the stomach or upper intestine, inflaming the intestine track and mucous membrane, causing the same to enlarge, locking the bowels, obstructing and preventing passage, and thereby producing death. Said oysters contained no poison whatever of any description. The insured did not discover that the oysters were unsound until he had eaten the two, and then ate no more.

It is contended that the policy exempted the company from liability for "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," and the act of the insured in eating the oysters falls within the terms of said provision; that he ate them voluntarily, consciously, and intentionally; therefore they were not "accidentally" taken. Construction of clauses in policies similar to the one here under consideration have been the subject of much dissension by the courts, and the opinions show a want of harmony in the views entertained. Some of the courts support the contention of appellant, while others of equal weight support the contention of appellee, in effect, that eating of the oysters not knowing they were unsound, he did not voluntarily eat unsound oysters, and death produced thereby was accidental. The evidence clearly shows that the insured did not intend to eat unsound oysters. If such eating falls within the mean-

ing of the word "accident," as that word is ordinarily defined and understood, then the proper judgment has been rendered in this case. "Death as the result of accident imports an external and violent agency as the cause." *Healey v. Association* (Ill.) 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637; *Miller v. Fidelity & Casualty Co.* (O. C.) 97 Fed. 836; *Association v. Alexander* (Ga.) 30 S. E. 939, 42 L. R. A. 188; *Association v. Smith*, 29 O. C. A. 223, 85 Fed. 401, 40 L. R. A. 653; *Am. & Eng. Ency. Law*, vol. 1, 294-5.

In *Cy. Law & Proc.* vol. 1, 249, in treating of accidents, it is said: "Where, however, the effect is not the natural and probable consequence of the means which produce it—an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of the means, or an effect which the actor did not intend to produce, and which he cannot be charged with a design of producing—it is produced by accidental means." In *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, it is said: "If in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury resulted through accidental means." In *Supreme Council Chosen Friends v. Garrigus* (Ind. Sup.) 3 N. E. 822, 54 Am. Rep. 298, it is said: "The word 'accident,' as used in those laws and in the relief fund certificates held by members, should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation." In *Carnes v. Association* (Iowa) 76 N. W. 683, 68 Am. St. Rep. 306, where death resulted from taking a dose of morphine, the court held that, if he took more than he intended, the death was accidental, but that, if he took the exact amount intended, and misjudged the effect, the death was not accidental.

It is true the insured knowingly ate the oysters, but he did not know that he was eating unsound oysters. The effect was not the natural and probable consequence of eating sound oysters, and the effect produced by the eating of the unsound oysters could not have been reasonably anticipated or foreseen by him. It was unexpected, unforeseen, and unusual, and therefore it cannot be said that he voluntarily ate the unsound oysters. This being true, his death was caused by "accidental means," as that term is used in the policy.

But it is insisted that, as the oysters were "taken," the company is exempted from liability under the terms of the policy. The defendant, in pleading its exemption from liability by reason of the claim under consideration, alleged that, if the oysters eaten caused the death, it was because they contained ptomaine poison, and therefore defendant was not liable. The court instructed the jury that, if the oysters contained ptomaine poison, to find for defendant. The jury found

against this theory, and the evidence supports this finding. To avail itself of the exemption, defendant was bound to plead it and the facts applicable thereto, and, having done this, its defense will be confined to the matter pleaded, and it will not be heard on the contention that death resulted from something else other than poison taken.

If it should be conceded, however, that our position on this proposition is not sound—which we do not—we are still of the opinion that the word "anything" as used in the language "poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not refer to eating of food ordinarily harmless, not knowing it to be unsound and dangerous in that condition. It must be interpreted as having reference to those agencies which are not strictly denominated poison, but which have some elements of poison, and which may produce death if improperly taken. In *Kasten v. Interstate Casualty Co.* (Wis.) 74 N. W. 534, 40 L. R. A. 651, where a similar clause was under consideration, the court say: "While the word 'poison,' as used in the policy, may be construed to mean liquids commonly known as poisons, it is followed by the words 'or anything,' which clearly indicates that the intent was to include under the entire term everything of a poisonous nature." The evidence in this case showing that the death of the insured was not caused by the taking of poison or anything of a poisonous nature, but resulting from other accidental cause, the company is not exempt from liability. *Paul v. Insurance Co.* (N. Y.) 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; *Mennelly v. Assurance Corporation*, 148 N. Y. 597, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716; *Association v. Thomas* (Ky.) 17 S. W. 275; *Association v. Alexander* (Ga.) 30 S. E. 939, 42 L. R. A. 188; *Association v. Smith*, 29 O. C. A. 223, 85 Fed. 401, 40 L. R. A. 653; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654; *Penfold v. Insurance Co.*, 85 N. Y. 822, 30 Am. Rep. 660; *Ins. Co. v. Dunlap*, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355; *Pickett v. Ins. Co.*, 144 Pa. 79, 22 Atl. 871, 18 L. R. A. 661, 27 Am. St. Rep. 618.

The judgment is affirmed.

GULF & B. V. RY. CO. v. BERRY et al.
(DILLON, Intervener).*

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

MECHANICS' LIENS—LIMITATIONS—PERSONS ENTITLED TO LIEN—CIVIL ENGINEERS.

1. Rev. St. art. 3312, provides that all mechanics, laborers, and operatives who may have performed labor in the construction or repair of any railroad, to whom wages are due, shall have a lien, etc. Article 3313 provides for the foreclosure of the lien by suit. Article 3315 prescribes 12 months as the period of limitations

*Rehearing denied March 21, 1903.

for such suits. *Held*, that limitations do not begin to run until the suit can be brought, and, if the wages are payable in the future, not until the time specified has come.

2. A civil engineer is not entitled to a lien for wages earned by him in the construction of a railroad, under Rev. St. art. 3312, being neither a mechanic, laborer, nor operative.

Appeal from District Court, Palo Pinto County; J. B. Keth, Special Judge.

Action by H. M. Berry against the Gulf & Brazos Valley Railway Company. J. B. Dillon intervenes. Judgment in favor of plaintiff and intervener, and defendant appeals. Affirmed in part and reversed in part.

Matlock, Miller & Dycus, for appellant. F. C. Highsmith and Stevenson & Ritchie, for appellees.

STEPHENS, J. This appeal is from a judgment in favor of H. M. Berry, the original plaintiff, for balance due him for services rendered appellant as civil engineer in the construction of its railway from Peck City to Mineral Wells, and thence to the Jack county line, with foreclosure of laborer's lien on that part of the road between Mineral Wells and the Jack county line; and also from a judgment in favor of J. B. Dillon, intervener, as assignee of certain promissory notes executed by appellant for "work and labor done with tools and teams" in the construction of said railway, with like foreclosure of laborer's lien. Appellant contracted to pay these debts when it completed its road to the Jack county line, but about August, 1901, abandoned the undertaking, when by the use of proper diligence it might have completed the work within six months thereafter, and before the institution of this suit, February 28, 1902.

That a suit to recover for wages is maintainable under such circumstances has been twice decided by this court, and is no longer controverted by appellant. *G. & B. V. Ry. Co. v. Barnett*, 55 S. W. 986; *G. & B. V. Ry. Co. v. Winder*, 63 S. W. 1043. The contention, however, now is, not that the suit was prematurely brought, as urged in the cases cited, but that it was not brought in time to preserve the lien given in article 3312 of the Revised Statutes, which, as provided in article 3315, "shall cease to be operative in twelve months after the creation of the lien, if no steps be sooner taken to enforce it." Article 3312 declares: "All mechanics, laborers and operatives who may have performed labor, or worked with tools, teams or otherwise, in the construction, operation or repair of any railroad, * * * to whom wages are due or owing for such work, * * * shall hereafter have a lien prior to all others upon such railroad and its equipments for the amount due him (them) for personal services, or for the use of tools or teams." Article 3313 provides for the foreclosure of this lien by suit, and article 3314 prescribes the venue of such suits. Then follows the concluding article (3315), already

quoted, prescribing 12 months as the period of limitation for such suits. Read altogether, these several articles leave little room for doubt as to the intention of the legislature expressed in the last one. The only method provided for the enforcement of the lien is by suit, which is only maintainable after the labor is performed and after the "wages are due" (article 3313); and it would be unreasonable to suppose that the legislature intended that limitation should begin to run before the suit could be brought. Any other interpretation might materially interfere with the right of a laborer to make contracts for the payment of his wages in future, and would fall far short of that liberal construction so uniformly extended to this class of statutes. *Cash v. Bank* (Tex. Civ. App.) 61 S. W. 723.

It is next insisted that a civil engineer is not entitled to a lien under this statute for wages earned by him as such in the construction of a railroad, and this position, we think, is well taken. That appellee Berry, who was appellant's chief engineer, claimed a lien for work done in the capacity of civil engineer, and that only, does not admit of controversy, for he himself testified that he "did work and perform all the services required of him as such chief engineer for said railway company, and did survey, furnish levels and grades for the entire line of railway at the instance and request of defendant railway company." It will be observed that our statute does not give a lien to every person who may have performed labor in the construction of a railroad, but only to "mechanics, laborers and operatives" who may have performed such labor. The question then is, does a civil engineer belong to any of these three classes? Clearly he is not a "mechanic" or "operative." It only remains to determine whether he is a "laborer," in the common acceptance of that term. We cannot better express our view of this question than to quote from the opinion of the Supreme Court of Pennsylvania in the case of *Railway v. Leuffer*, 84 Pa. 168, 24 Am. Rep. 189, in which a civil engineer claimed a lien under a statute in this respect entirely similar to our own, which was thus construed: "Whether the plaintiff can maintain his claim against the defendant depends upon whether he can bring himself within the class designated in the statute as 'laborers and workmen.' We are then to inquire what the Legislature intended by the use of these words. In seeking for this legislative intent we must give to the statute its common and ordinary signification. But ordinarily these words cannot be understood as embracing persons engaged in learned professions, but rather such as gain their livelihood by manual toil. When we speak of the laboring or working classes, we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their

lawyer and the doctor, and the banker and corporation officer, yet no statistician has ever been known to include these among the laboring classes." Counsel for appellee Berry cites and relies upon the case of *Van Frank v. Railway*, 67 S. W. 688, decided by the court of appeals of St. Louis, Mo., but that case arose under a wholly different statute, and was for this reason there distinguished from the Pennsylvania case above cited, and also from the case of *Tod v. Railway*, 3 C. C. A. 60, 52 Fed. 240, 18 L. R. A. 305, in line with it. The statute construed in the *Van Frank* Case did not limit its provisions to any particular class or classes of persons, but gave liens to all persons doing work or furnishing material in the construction of a railroad. As an additional authority for the view above expressed, see *State v. Rusk*, 55 Wis. 465, 13 N. W. 452, in which "laborers" was held not to include engineer corps.

It results that the judgment of the district court should be affirmed, except as to the foreclosure of lien in favor of appellee Berry, but in that respect that it should be reversed, and here rendered for appellant, with one-half the costs of appeal taxed against appellee Berry.

GALVESTON, H. & S. A. RY. CO. v. CONTRERAS.*

(Court of Civil Appeals of Texas. Feb. 25, 1903.)

CARRIERS—DEATH OF PASSENGER—ACTION BY POSTHUMOUS CHILD—COMPLAINT—ALLEGATION OF NEGLIGENCE—SUFFICIENCY.

1. Allegations that plaintiff's father was killed while a passenger on defendant's train, by reason of the derailment of the train, caused by the negligence of the servants and agents of defendant in charge thereof is sufficiently specific.

2. In an action by a posthumous child for damages sustained by reason of his father's death, caused by defendant's negligence, the fact that the mother and other children have recovered damages for such death is immaterial.

3. In an action by a child to recover for the death of his father, defendant could show the existence of the mother and five other children, who were entitled to recover pecuniary damages for the death of the father, as bearing on the extent of the present recovery.

Appeal from District Court, Val Verde County; J. M. Goggin, Judge.

Action by Porfirio Contreras against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Joseph Jones, Henry I. Moore, and H. E. McMains, for appellee.

*Rehearing denied March 25, 1903.

¶ 1 See *Death*, vol. 15, Cent. Dig. § 29.

the death of Estevan Contreras, his death caused by the derailment of defendant's passenger train near Maxon Springs, the plaintiff alleging that Estevan was a passenger on defendant's said train, and that, at said place defendant's agents and servants in charge said train so negligently and carelessly managed and controlled the same that the said train was derailed, wrecked, demolished, a fire, and said Estevan Contreras and many other passengers were imprisoned in the car, without possibility of escape, and slowly burned to death, and their bodies consumed by the flames.

The following cases hold that the allegations of negligence were sufficiently specific as against even a special demurrer: *Ry. Smith*, 74 Tex. 276, 11 S. W. 1104; *Ry. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. A. 486, 23 Am. St. Rep. 345.

Plaintiff was a posthumous child of Estevan Contreras. Defendant in its answer among other things, alleged in substance that, if such was the status of plaintiff, then he was one of six children of Estevan, with together with their mother, are entitled to proportionate part of the damages, if any caused by the father's death; that the mother and five of the children had brought suit against defendant for such damages, and March 26, 1902, had recovered \$2,800 on behalf of the mother and \$400 on behalf of each of said five children; and that defendant has satisfied said judgment.

The court sustained a special exception to said allegation, the ground of which was that such matter was immaterial, and showed no defense to plaintiff's cause of action. In this we think the court was correct. This action was on behalf of this plaintiff to recover the pecuniary damage sustained by him in the loss of his father, and what the mother and other children may have done or recovered was immaterial. Defendant would not have been entitled to prove in this case that judgment in the other case had awarded to the mother and the other children certain sum as the damage appertaining to them, as there certainly was no error in striking out so much of the allegations. But it may be that it was to some extent material to defendant to show in this case the existence of the mother and five other children, who were entitled also to recover pecuniary damages accruing to each from the death of the father, as bearing in some degree on the extent of the present recovery. Such fact would not constitute a defense, but would, at most, be admissible as evidence affecting the amount of plaintiff's pecuniary recovery. Defendant, however, sustained no injury in this respect by the sustaining of the exception, for the evidence before the jury, undisputed, was in accordance with defendant's allegation that plaintiff was one of six children of Estevan Contreras, all living, with

together with the mother, constituted his family, upon whom it was shown he spent all his earnings.

The fourth assignment is that the verdict is excessive, which we think is not the case under the evidence.

Affirmed.

TEXAS & P. RY. CO. et al. v. HALL.*

(Court of Civil Appeals of Texas. Feb. 21, 1903.)

CONNECTING CARRIERS—LIVE STOCK—INJURIES—DELAY—ACTIONS—EVIDENCE—OBJECTIONS—INSTRUCTIONS—QUESTION FOR JURY.

1. Where, in an action against two connecting carriers for injuries and delay in the shipment of live stock, the court limited the liability of each to its own negligence, and there was no evidence of any default on the part of a third carrier not sued, while the cattle were in its possession, an instruction as to the measure of damages was not error as permitting the jury to assess damages against the two carriers sued that in fact occurred on the lines of three.

2. Where the court expressly charged that connecting carriers sued for injuries to live stock were each liable only for its own negligence, an instruction referring to the fact that the train broke in two and ran together, to the injury of the cattle, while on the line of one of the defendants, was not erroneous as tending to minimize the injuries on the line of the other.

3. Where, in an action against two connecting carriers for injuries to live stock, plaintiff in his evidence expressly repudiated a joint contract for the transportation of the stock, and such issue was not submitted to the jury, a peremptory instruction on the ground that the petition declared on a joint contract, which was not proved, was properly denied.

4. The denial of requested instructions covered by the court's general charge was not error.

5. Where, in an action for delay in transportation of live stock against connecting carriers, the evidence of one of defendant's witnesses tended to show that the stock could have been delivered at its destination in time for the market of the day agreed on after delivery by the connecting carrier, the question whether such delivery could have been made was for the jury, though plaintiff, who was unacquainted with the distance, testified that it would have been impossible for the connecting carrier to have delivered the cattle in time.

6. Where all of the evidence of a witness as to the fall of the market was objected to, and some of the evidence was admissible, the objection was properly overruled.

Appeal from District court, Mitchell County; W. R. Smith, Judge.

Action by Q. D. Hall against the Texas & Pacific Railway Company and another. From a judgment in favor of plaintiff, defendants appeal. **Affirmed.**

B. G. Bidwell, for appellant Texas & P. Ry. Co. Henry & Henry, for appellant Iron Mountain Ry. Co. Shepherd & Crockett, for appellee.

CONNER, C. J. Q. D. Hall instituted this suit in the district court of Mitchell county, Tex., against the Texas & Pacific Railway Company and the St. Louis, Iron Mountain

& Southern Railway Company, to recover damage and injury to a shipment of live stock. The petition is voluminous, but we think that the following briefly but sufficiently states the substance of it: That the defendants operated a through line of railway as connecting lines from Iatan, Tex., to the National Stockyards at East St. Louis, Ill., the Texas & Pacific Railway Company operating that part of the through line extending from Iatan, Tex., to Texarkana, Tex., and the St. Louis, Iron Mountain & Southern Railway Company operating that part of the through line from Texarkana, Tex., to the said National Stockyards. That plaintiff had, on the 10th day of November, 1900, 269 head of steers at Iatan, Tex., ready for shipment, and the defendants were notified by plaintiff that he intended them for the market of November 13, 1900, at the National Stockyards. That said defendants were promising speedy transportation. That the cattle left Iatan on November 10, 1900, at 7 p. m.; were unloaded too soon at Ft. Worth at 12:30 p. m., November 11th, and delayed at many places along the route between Iatan and East St. Louis, which delays were specifically named; and finally arrived at the National Stockyards and were unloaded at 7 a. m., November 14th, about 24 hours late. That the steers were roughly and improperly handled by the defendants. That they were kept on the cars without rest, food, or water, for 60 hours between Ft. Worth and their destination. That as a result of the delay, rough treatment of defendants, and the loss of the favorable market of November 13th plaintiff's loss in the sale of his steers amounted to the aggregate sum sued for, which he asked to be apportioned between the defendants, and that he have judgment against them for the several amounts apportioned against them respectively, together with interest and costs. Both defendants answered by general denial, each making a sworn denial of partnership, and further pleading various provisions of the shipping contract limiting their liability as it existed at common law, and restricting the obligation and undertaking of each defendant to its own line. The court, upon the jury's verdict, entered judgment in favor of plaintiff against the Texas & Pacific Railway Company for \$253.06, and against the St. Louis, Iron Mountain & Southern Railway Company for \$506.02, both amounts bearing interest from November 14, 1900, from which judgment both railway companies named have appealed to this court.

Here referring to the facts in a general way, it may be stated that the evidence supports the allegations of appellee's petition as above outlined; and it further appears that, upon the termination of the shipment by the St. Louis, Iron Mountain & Southern Railway Company at East St. Louis, the cattle were by said company delivered to what is designated as the "Terminal Railway Com-

*Rehearing denied March 21, 1903, and writ of error denied by supreme court.

pany" about 1 a. m. of November 14th, and the latter company transported said cattle to the National Stockyards, a distance of some 12 miles, and there unloaded and delivered the cattle at 7 a. m. of the same morning, as alleged. Inasmuch as it thus appears that there was some five or six hours' delay in the shipment on the part of a railway company not a party to the suit, it is insisted in the first and second assignments that the court was in error in charging the jury that, in event they found the facts of negligence and injury as alleged, they would then find for plaintiff, and "assess his damages at the market value of all cattle so killed (if any) at that point of destination at the time they should have arrived there, to which you will add the difference, if any, in the market value of all said cattle that may have been so injured, if any, at National Stockyards, Ill., at the time of their arrival in the condition they were then in, and their market value at said place in the condition they should have been in at the time they should have arrived there." It is urged that this was prejudicial, in that the jury were thereby permitted to assess damages against the two railway companies sued that in fact occurred on all three lines of railway.

The entire paragraph of the charge from which the above quotation is made was substantially in the form approved in *Railway Company v. Cushny* (Tex. Civ. App.) 64 S. W. 795, and we think, when considered together with other parts of the charge, could not have been prejudicial in the particular above stated.

The court in another paragraph plainly and explicitly limited the liability of each of the railway companies sued to its own negligence, and injuries and damages proximately resulting therefrom. Besides, we fail to find any evidence of negligence on the part of the Terminal Railway Company, or of any injury done appellee's cattle while in its possession. The delay, or apparent delay, after receipt of the cattle on the part of the Terminal Railway Company, is not explained. It may or may not have been the result of negligence, but, if so, the charge as a whole evidently excluded the appellants from liability therefor, while it is quite clear that the delay did not and could not have resulted in the loss of an earlier market, so that the first and second assignments will be overruled.

It is also insisted that the charge gave undue prominence to the fact, established by the testimony, that the train broke in two, and ran together, to the injury of plaintiff's cattle while on the line of the St. Louis, Iron Mountain & Southern Railway Company. We fail to see how this charge operated to the prejudice of said company. This circumstance was particularly pleaded, and seems to be uncontroverted in the proof. If, as insisted, it tended to minimize the rough handling and injuries on the line of the Texas & Pa-

cific Railway (because of the each company proximate responsibility alone. The third assignment be overruled, and the fourth assignment to the fourth assignment be overruled.

The fifth assignment and the refusal of the court to give the instruction to the jury in *Mountain & Southern Railway Company v. The Texas & Pacific Railway Company* This contention that plaintiff has no contract for the cattle at the time for the market value, we think it sufficient to say that, if it be so construed, such an instruction is dictated by the facts, and not by the witness, and not by the jury, the court made by pleading the law liability also.

We think that the court made to the referee in the several cases were sufficient to make the main charge. That it would be in St. Louis, Iron Mountain & Southern Railway Company to have the cattle for the market value were received from the railway Company, the court properly instructed the jury to decline in making a market against this railway company that it further was unacquainted with the market at Texarkana and the plaintiff's witnesses testified of fast stock at that hour, and that the points named were authorized the in from 10 o'clock the cattle were on journey by the Southern Railway in St. Louis in November 13th. It submitted the tendency of the jury.

We also fail to see the action of the court in the case of *Sherwin v. The Texas & Pacific Railway Company* in the market value on November 14th, based on stock from stock from commission men whole, and at the time of the case of *Ry. Co. v. The Iron Mountain & Southern Railway Company*, 5 Tex. Civ.

& P. Ry. Co. v. Donovan, 86 Tex. 378, 25 S. W. 10.

The foregoing conclusions dispose of all assignments of error, save the tenth (which requires no notice), presented by the St. Louis, Iron Mountain & Southern Railway Company. The assignments presented by the appellant the Texas & Pacific Railway Company have been carefully examined, but we find no substantial merit therein. The evidence sufficiently supports the verdict against it, and we fail to find prejudicial conflict, if any, in charges given by the court, as urged in the second assignment of error.

Believing that the evidence supports the verdict and judgment, and reversible error not having been exhibited, the judgment will be affirmed.

LASATER v. FIRST NAT. BANK OF JACKSBORO.*

(Court of Civil Appeals of Texas. Nov. 8, 1902.)

NATIONAL BANKS—USURY—PENALTY—RIGHT TO RECOVER—ASSIGNMENT OF CLAIM—BANKRUPTCY OF CLAIMANT.

1. Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 8498], provides that, where a person has paid usury to a national bank, such person, or "his legal representative," may recover back twice the amount of interest so paid. *Held* that, since the statute gives the right of action to the legal representative of the person paying the interest, it is a right which survives, and therefore is assignable under the laws of Texas, and an action may be maintained by a partner who has purchased all interest in a firm which has paid such usurious interest.

2. Where plaintiff, with surety, executed a note to a national bank, secured by a mortgage of cattle, and afterwards sold the cattle to the surety in consideration of payment by him of the note and interest to the bank, such payment by the surety operated as a payment by plaintiff.

3. Under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 8498], providing that a person who has paid to a national bank a greater amount of interest than that allowed by law in the state where the bank is situated may recover back twice the amount of interest so paid, the bankruptcy of the person who has so paid usurious interest does not preclude his recovery under the statute, after his discharge, where his trustee in bankruptcy did not reduce the claim to possession.

4. Under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 8498], barring actions to recover usurious interest from national banks after "two years from the time the usurious transaction occurred," the date of the transaction is the date of the payment of the usurious interest.

Appeal from District Court, Jack County; J. W. Patterson, Judge.

Action by J. L. Lasater against the First National Bank of Jacksboro. From a judgment for defendant, plaintiff appeals. Reversed.

Wayne H. Lasater and Howard Martin, for appellant. Thos. D. Sporer and E. W. Nicholson, for appellee.

*Rehearing still pending.

† 4. See Banks and Banking, vol. 6, Cent. Dig. § 1049.

HUNTER, J. This suit was brought by appellant July 28, 1901, upon the federal statute, to recover from the bank twice the sum of \$1,526.80 usurious interest paid to it—\$3,053.60. The defense was a general denial, statute of limitation of two years, and that since the usury was paid the appellant had filed his petition in bankruptcy, and been discharged, and that he therefore had no right or interest in the claim. The case was tried by the court without a jury, who rendered judgment for the bank, and hence this appeal.

The facts are substantially as follows: The appellant and one Maggard were partners in cattle raising, and on the 30th day of March, 1898, borrowed of the bank \$4,000, and executed their joint note, with A. M. Lasater as surety, for \$4,350, due November 15, 1898, with 10 per cent. interest after maturity. They also mortgaged their cattle to the bank as further security to said note. On November 22, 1898, the firm paid \$390.90 on said note, directing it to be applied to the interest due thereon, and on the same day borrowed \$100 more, which was added to the note, and, after deducting the sum of \$390.90, interest due, renewed the same for \$4,450, dating it back to November 15, 1898. It was signed by the same parties as before, and bore 10 per cent. interest from maturity. On the 17th of August, 1899, the firm paid on said note \$382.90, with no instructions how to apply it, and on the next day paid \$167.50 more, instructing the bank to apply it to the payment of interest; and on the 17th day of November, 1899, the appellant paid \$62 more, with no instructions how to apply it. In same month of November the said Maggard sold all his interest in the firm to Lasater, the latter assuming all the liabilities, but nothing was said about this claim against the bank; and appellant renewed the note for \$4,313.50, dating it back to November 16, 1899, payable June 15, 1900, with interest at 10 per cent. after maturity. On December 6, 1899, appellant paid \$22.50; on June 29, 1900, \$15—with no instructions as to application of such payments. On the 15th day of October, 1900, A. M. Lasater, the surety, bought all the mortgaged cattle of appellant and some others, and agreed to assume and pay off the note in full consideration of said sale, and executed his note to the bank on the 17th day of said month, taking up the appellant's note, and in June, 1901, paid to the bank the sum of \$4,457 in full of said note, and the bank delivered to appellant his note so taken up. The appellant's last-named note was also secured by another mortgage given to the bank on all of the same cattle. On November 19, 1900, appellant filed his petition in bankruptcy in the District Court of the United States for the Northern District of Texas, and E. H. Cottingham was appointed trustee; and appellant was duly discharged of all his debts on January 7, 1901, and the trustee was dis-

charged of his trust on June 11, 1901. He returned no assets to his trustee. Says he had none, unless this claim for usury was one. Says he did not tell the trustee or his creditors about this claim for usury. After the note was paid by A. M. Lasater, and the cattle gotten up, he contended that there were not as many cattle as were represented by appellant, and this controversy was afterwards settled by appellant agreeing to pay him \$1,500 for the deficit, and has paid him \$500 by transferring him his interest in his grandmother's estate.

All the notes, from first to last, contained usury. The whole amount borrowed was \$4,100. The whole amount paid back was \$5,497.80. The whole time was 2 years, 6 months, and 17 days. The highest legal rate of interest allowed by Texas law was 10 per cent. per annum. The whole amount of interest paid was \$1,897.80. The whole amount of legal interest was \$1,088.05.

The facts as above stated are undisputed, and only questions of law are presented for solution.

The able counsel of appellee bank contend that appellant had no right to sue for the penalty denounced by the statute: (1) Because only the person paying the usurious interest, or his legal representative, is allowed, under the statute, to sue for it, and that appellant is neither of these, since the money was paid by the firm, and the other member does not sue. (2) The last payment was made by A. M. Lasater, who was jointly bound on the note, and he does not sue. (3) Appellant's trustee in bankruptcy should bring the action, if maintainable at all, for the fund would be an asset of the bankrupt's estate, and belong to the trustee for the use of appellant's creditors.

Section 5198 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3493] provides: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action for debt, twice the amount of interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred." The preceding section—5197 [U. S. Comp. St. 1901, p. 3493]—provides, among other things, that national banks may charge and receive on notes, bills, etc., interest at the rate allowed by the laws of the state where the bank is located, and no more.

The first question confronting us is, has the remaining member of a partnership, who has purchased all the retiring member's in-

terest in the firm debts, the right the statute gives the person by whom representatives or firm is not, and it cannot sue in the nation on contracts or other liabilities the surviving other member tion of law to isting in favor is entitled, in vivor, to sue claim to which the dissolution was liable for fore his partner remained so after use any and in discharge of action to recover facts which extend the death of passes to and so the right suppose of the partner's debts to pass. If Magg left appellant it quite clear this action in his. He succeeds in rights and liability of winding up titled to represent the representative."

But Maggare. He retired from appellant, transferred partnership property consideration to of the firm. The bank was an survivor could recover his partner, the reason why he the retirement liabilities are bound to pay can be compelled by creditors to firm to that partnership with his retirement should not his the firm be co-equal the one case, a

The words "I held to apply respect to another and represented to them law." Mutual 117 U. S. 591, citing N. Y. I

341, 56 Am. Dec. 742. See, also, *Bank v. Alves*, 91 Ky. 146, 15 S. W. 133; *Louisville Trust Co. v. Ky. National Bank* (C. C.) 87 Fed. 143; *Id.*, 102 Fed. 442; *Fidelity Ins. Co. v. Ryan* (Ky.) 58 S. W. 610; *Hammond v. Organ Co.*, 92 U. S. 724, 23 L. Ed. 767; *Ry. Co. v. Bryan*, 8 Smedes & M. 275; *Abb. Law Dict.*; *Warnecke v. Lemba*, 71 Ill. 91, 12 Am. Rep. 85; *Bradley v. Delis Lumber Co.*, 105 Wis. 246, 81 N. W. 394; *O'Neale v. Caldwell*, 3 Cranch, C. C. 313, Fed. Cas. No. 10,515.

In *Taylor v. Sturgis*, 5 Tex. Ct. Rep. 140, 68 S. W. 538, the Court of Civil Appeals for the Fifth District, in an opinion by Chief Justice Rainey, held that one who has a right of action for double the amount of usurious interest paid by him under article 3106, Rev. St. Tex. 1895, can assign the same, so as to give to the assignee the right to maintain an action thereon.

The Texas statute is as follows: "If usurious interest, as defined by the preceding articles, shall hereafter be received or collected the person or persons paying the same, or their legal representatives, may by action of debt, instituted in any court of this state having jurisdiction thereof, within two years after such payment, recover from the person, firm or corporation receiving the same, double the amount of interest so received or collected." 2 Sayles' Ann. Civ. St. art. 3106.

The learned Chief Justice puts the decision upon the ground that "this statute gives a right of action to one paying usurious interest, and in case of his death such a right would become an asset of his estate, subject to administration," and therefore the character of claim which may be bought and sold; citing *Railway Company v. Freeman*, 57 Tex. 156. In the latter case it is said that "when the injury affects the estate, rather than the person, * * * the right of action could be bought and sold, such right of action, upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as part of his assets, because it affects his estate and not his personal right."

Under a statute of Texas (Rev. St. 1895, art. 3353a) which prescribed that claims for damages for injuries not resulting in death, whether "to the health or to the reputation or to the person of the injured party," shall not abate by reason of his death, nor by reason of the death of the person against which such cause of action shall have accrued, but, in case of the death of either or both, such cause of action shall survive to and in favor of the "heirs and legal representatives" of such injured party, we held that the claim, being one which survived to the representatives of his estate, was assignable, so as to vest an interest in his attorney to whom a half interest had been transferred. *Ry. Co. v. Miller* (Tex. Civ. App.) 53 S. W. 709.

The writer, at least, is inclined to the opinion that the appellant, as remaining partner, having purchased from his retiring partner all his interest in the partnership property

and assets, agreeing to pay all the debts of the firm, is the "legal representative" of the firm which paid the usurious interest, and, being such, is entitled to maintain this action in his own name. But however this may be, we have finally concluded, though with some doubt and hesitation, that by the terms used in the article it was the intention of Congress to vest in the person who paid the usurious interest the right to "recover back twice the amount of the interest thus paid"; and in order to show that this right was not intended to be limited to him only, as a purely personal right, the words "legal representatives" were added, as words of survivorship, so that, in case of the death of the person paying the usurious interest, the right of action shall not die with him, but descend to his executors, administrators, and heirs, and thus to be classed as a claim belonging to his estate, rather than to his person only.

If we are correct in this construction of the act, it follows that the claim, being one that will survive the death of the person in whom the right of action is vested, is one which, under the laws of Texas, belongs to his estate, and consequently one that may be sold and bought like any other chose in action.

The payment made by A. M. Lasater, the surety, who purchased the mortgaged cattle from appellant, and in consideration thereof agreed to pay off the note to the bank, and in discharge thereof executed his own note, which was afterwards paid, was in law a payment by appellant in property, and the same as payment in money. *Taylor v. Sturgis*, 68 S. W. 538, 5 Tex. Ct. Rep. 140; *Hough v. Horsey*, 36 Md. 184, 11 Am. Rep. 484; *Low v. Mussey's Estate*, 36 Vt. 183; *Richardson v. Baker*, 52 Vt. 617; *Bank v. Bingham*, 50 Vt. 105, 28 Am. Rep. 490; *Nelson v. Cooley*, 20 Vt. 201; Vol. 27, Am. & Eng. Enc. of Law, p. 960.

There is no merit in appellee's contention that, because of appellant's bankruptcy, he cannot recover on this claim. His trustee, it seems, would have been entitled to the fund as legal representative of the bankrupt (In re *Kellogg* [D. C.] 113 Fed. 120; *Herndon v. Davenport*, 75 Tex. 462, 12 S. W. 1111), though there are some authorities to the contrary (*Bank v. Bingham*, 50 Vt. 105, 28 Am. Rep. 490; *Nichols v. Bellows*, 22 Vt. 581, 54 Am. Dec. 85; *Beals v. Lewis* [Ohio] 1 N. E. 641), but both the bankrupt and trustee had been discharged when this suit was filed. Only the person paying the usurious interest, or his legal representative, can maintain the action. The statute creating the right especially so provides. But, as stated, a trustee in bankruptcy, and, it seems, a receiver appointed by the court, are legal representatives, within the meaning of the statute. *Barbour v. Bank* (Ohio) 12 N. E. 5. But the fund in this instance was never reduced to possession, nor claimed by the trustee or creditors in right of the trustee, and it does not lie in the mouth of the usurer to say that

all the liabilities, but nothing was said about this claim against the bank; and appellant, with A. M. Lasater, renewed the note for \$4,313.50, dating it back to November 16, 1899, payable June 15, 1900, with interest at 10 per cent. after maturity. On December 6, 1899, appellant paid \$22.50; on June 29, 1900, \$15—with no instructions as to the application of said payments. On the 15th day of October, 1900, A. M. Lasater, the surety, bought all the mortgaged cattle of appellant and some others, and agreed to assume and pay off the note in full consideration of said sale, and executed his note to the bank on the 17th day of said month, taking up the appellant's note, and in June, 1901, paid to the bank the sum of \$4,457, in full of said note, and the bank delivered to appellant his note so taken up. The last-named note was also secured by another mortgage given to the bank on all of the same cattle. A. M. Lasater was a party to the original and all renewal notes made to the bank; he being as to the bank a principal thereon; but as between himself and the other signers a surety only on all but the last note, which was his obligation alone.

"On November 19, 1900, appellant filed his petition in bankruptcy in the District Court of the United States for the Northern District of Texas, and E. H. Cottingham was appointed trustee, and appellant was duly discharged of all his debts on January 7, 1901, and the trustee was discharged of his trust on June 11, 1901. He returned no assets to his trustee; said he had none, unless this claim for usury was one; says he did not tell the trustee or his creditors about this claim for usury. After the note was paid by A. M. Lasater, and the cattle gathered, he contended that there was not as many cattle as were represented by appellant; and the appellant agreed to pay him \$1,500 for the deficit, and has paid him \$500, by transferring him his interest in his grandmother's estate.

"Upon the foregoing facts, we deem it advisable to certify to your honors for decision the following questions: (1) Was the appellant's discharge in bankruptcy a bar to his recovery in this suit? (2) Was J. L. Lasater, on the facts stated, entitled to recover from the bank the penalty denounced by statute? In other words, was J. L. Lasater entitled, either as an assignee or as surviving partner, to recover the penalty sued for as to usurious interest paid during the continuance of the partnership? And was J. L. Lasater, by reason of his having assumed the payment of this debt due the bank when he purchased the interest of his retiring partner, Maggard, precluded from recovering or limited in his recovery to one-half the sum he would otherwise be entitled to? And is the payment

plaintiffs, and were certified upon motion for rehearing. We have examined the opinion of the court, and we think it correctly decided the several points presented. We shall therefore content ourselves with briefly stating our conclusions, and citing some authorities in addition to those referred to in the opinion.

1. The weight of authority sustains the proposition that, when such a cause of action as that asserted has accrued, it will, upon bankruptcy of the owner, pass to the trustee in bankruptcy. *Monongahela National Bank v. Overholt*, 98 Pa. 327; *Gray v. Bennett*, 3 Metc. 522; *Tiffany v. Boatman's etc. Ass'n*, 18 Wall. 375, 21 L. Ed. 868; *Tamplin v. Wentworth*, 99 Mass. 63; *Louisville Trust Co. v. Kentucky Nat. Bank (U. C.)* 87 Fed. 143; *Wheelock v. Lee*, 64 N. Y. 242; *Spicer v. Jarrett*, 2 Baxt. 454; *Moore v. Jones*, 23 Vt. 739, Fed. Cas. No. 9,768; *National Bank v. Trimble*, 40 Ohio St. 629; *Crocker v. Bank of Chitopa*, 4 Dill. 358, Fed. Cas. No. 3,397. The authorities cited by the Court of Civil Appeals sustain the proposition that, after the close of the administration of the bankrupt's estate and the discharge of the trustee, unadministered assets may be recovered by the bankrupt. The decisions of the Supreme Court of the United States make somewhat doubtful the application of this proposition to a case like this, where the trustee had no knowledge of the existence of the asset, and where the suit is brought so recently after the close of the bankruptcy proceeding that it may be reopened and further administration had. *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; *Dushane v. Beall*, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791. The bankrupt law does not contemplate that any assets shall be left unadministered; but it sometimes happens that there are such, and when neither the creditors nor the trustee asserts right to them, it is, we think, proper to regard them, at least as against a wrongdoer, as belonging to the bankrupt. This may often be found necessary, as it seems to be in this case, to prevent destruction of the property right, and a judgment thus preserving the right may be as easily reached by those entitled to do so by proper proceedings as the cause of action itself. If such persons do not choose to proceed, no good reason is seen why the bankrupt himself should not be allowed to recover. *Lancey v. Foss*, 88 Me. 218, 33 Atl. 1071.

2. That the interest of plaintiff's former partner in any cause of action which accrued to the firm passed by assignment to plaintiff is, we think, also true. Most of the authorities which hold that such claims pass to trustees in bankruptcy, assignees for credit-

A. P. McKinnon and Va
the motion.

GAINES, C. J. This is an order of this court entered of January, 1903, which is of this case from the Court for the Fifth Supreme Judge that of the Fourth Supreme Judge. The case, together with others, to be transferred in pursuance of the Legislature of April 18, 1903, p. 79, c. 53) which, for the purpose of relieving the labors of the Courts and expediting the trial in such courts, provided that they make, once each year at least, transferring cases from one of the other. The ground of the act is not warranted by the Constitution. The argument is that the act is unconstitutional because the Constitution which created the Civil Appeals limited the cases arising in their review. The language relied upon in the Constitution is found in section 6 of the Constitution, as amended 8 and reads as follows: "Supreme Appeals shall have appellate jurisdiction, extensive with the limits of the districts, which shall extend to cases of which the district courts have original or appellate jurisdiction under such restrictions as may be prescribed by law." It is claimed that the act has lost sight of another part of the Constitution. The other part is found in the same section and reads as follows: "Said courts shall have original jurisdiction, original and appellate jurisdiction, as may be prescribed by law." Laws of 1903, Const. Tex., p. 135. The act is broad and comprehensive and is sufficient to authorize the transfer of cases. The failure of counsel to refer to the section was probably due to the fact that it was omitted, presumably, from the copy of the Constitution found in the Constitution of 1903. Revised Statutes of 1903.

The motion is overruled.

(Supreme Court of Texas. March 26, 1903.)
COURTS OF CIVIL APPEALS—TRANSFERS OF
CAUSES—STATUTE—CONSTITUTIONALITY.

**FIRST NAT. BANK OF M
V. AMERICAN NAT.
KANSAS CI**

(Supreme Court of Missouri)
Feb. 18, 1903

**NATIONAL BANKS—POWERS
TRA VIRES—ESTOPPEL
FEDERAL QUEST**

1. When, in an action again to recover on a guaranty of 1 of its customer, the defendant power under the national bank such contract, a federal ques involved, and an appeal therei

Appeals is properly transferred to the Supreme Court.

2. When a national bank enters into a contract which is beyond its powers, it cannot be estopped from pleading ultra vires by the performance of the contract by the other party.

3. Under Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455], prescribing the powers of national banks, such a bank has no power to bind itself that a draft drawn on its customer will be paid, and, when sued on such a contract, it can plead ultra vires.

Appeal from Circuit Court, Jackson County; Edw. P. Gates, Judge.

Action by the First National Bank of Moscow, Idaho, against the American National Bank of Kansas City. From an order granting a new trial after judgment in favor of the plaintiff, it appeals. Transferred from the Court of Appeals on a federal question involved. Affirmed.

This is an action to recover upon three drafts drawn by Lleuallen, of Idaho, upon Clemons & Co., of Kansas City, for certain merchandise bought by the latter from the former, and which drafts were discounted by the plaintiff on the faith of a telegram to it by the defendant that they would be paid. The plaintiff recovered a judgment in the trial court. The court granted a new trial, assigning as a reason "that the court erred in refusing defendant's instructions as demurrer to the evidence and in refusing defendant's instruction requesting the court to find for the defendant." The plaintiff appealed to the Kansas City Court of Appeals, and that court transferred the case to this court on the ground that a federal question is involved.

The facts are these: Both of the parties hereto are national banks. In May, 1898, Clemons & Co. entered into negotiations with Lleuallen to ship them certain potatoes, agreeing to advance 50 cents per 100 pounds thereon. Lleuallen applied to the plaintiff bank to cash his drafts on Clemons & Co. therefor, and that bank refused to do so unless Clemons & Co.'s bank would telegraph it to pay the drafts. Accordingly the defendant bank telegraphed the plaintiff bank on May 18 and 19, 1898, as follows:

"Kansas City, Mo., May 18, 1898.

"First National Bank, Moscow, Idaho: Drafts of C. C. Lleuallen drawn on C. O. Clemons and Company with bills lading attached for three cars choice sacked potatoes, valuation fifty cents per hundred pounds, will be paid.

"[Signed] J. R. Dominick, Cashier."

"Kansas City, Mo., May 19, 1898.

"First National Bank, Moscow, Idaho: Drafts C. O. Lleuallen on C. O. Clemons and Company, with bills lading attached for three more cars choice sacked potatoes, valuation fifty cents per hundred pounds, will be paid.

"[Signed] J. R. Dominick, Cashier."

Upon receipt of these telegrams the plaintiff bank cashed three certain drafts drawn by Lleuallen on Clemons & Co., with bills of lading for the potatoes shipped attached. The drafts were payable to the plaintiff bank. The drafts were dishonored by Clemons & Co., and payment was likewise refused by the defendant bank. Clemons & Co. received all the potatoes, and sold them, and never paid for them. Thereupon this suit was brought. The defendant set up three defenses: First, want of power in the cashier of the bank to send the telegrams, and that they were not sent in course of the business it was authorized to do, and were not intended by the cashier to bind the defendant as surety or guarantor, nor to induce the plaintiff to cash the drafts; second, that the potatoes did not come up to the quality agreed to be purchased; third, that as a national bank the defendant had no power to bind itself to pay the drafts. The reply pleads estoppel on the part of the defendant to plead ultra vires. The trial took a wide range as to the character of the potatoes, the custom of banks in like cases, and the meaning of the telegrams themselves—as to whether they would be taken in banking circles to be a promise by the bank to pay the drafts or that Clemons would pay them, or simply as an expression of opinion as to Clemons & Co.'s standing and financial responsibility. It was admitted that Clemons & Co. were customers of the defendant bank, and had on general deposit with the defendant at the time more than enough money to pay the drafts, though it had not been specially set apart for that purpose; and that Clemons & Co. afterwards gave the defendant a bond of indemnity against loss, and employed counsel, and are defending this case at their own expense.

Wollman, Solomon & Cooper, for appellant. Hamner & Hamner, for respondent.

MARSHALL, J. (after stating the facts).

1. The case necessarily involves the power of a national bank to bind itself to a third person to pay a draft on one of its customers. The answer pleads want of power in the defendant under the national banking act. A federal question is, therefore, directly raised by the record, and therefore this court has jurisdiction, and the Kansas City Court of Appeals properly transferred the case to this court. *California Bank v. Kennedy*, 167 U. S., loc. cit. 365, 17 Sup. Ct. 831, 42 L. Ed. 198; *Bank v. Haseltine*, 155 Mo. 62, 55 S. W. 1015, 85 Am. St. Rep. 531; affirmed *Haseltine v. Bank*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118.

2. The powers of a national bank under the national banking act are essentially matters for federal construction and interpretation, and, whatever rules may obtain in the several states as to the powers of corporations under state statutes, all state courts

¶ 2. See *Banks and Banking*, vol. 6, Cent. Dig. § 994.

must yield to the decisions of the Supreme Court of the United States construing the powers of national banks under the national banking act. In this case the defendant pleads that it had no power under the national banking act to enter into a contract with the plaintiff bank—which is likewise a national bank—that the draft of Lieuallen on Clemons & Co. would be paid, because such a contract was a mere guaranty, and that it was ultra vires of its power to make such a contract. The plaintiff replies that the defendant is estopped to plead ultra vires, among other reasons because the contract is an executed contract on the part of the plaintiff, and because only the government can question the power of the defendant to enter into such a contract. This, therefore, raises the question of the power of a national bank to interpose a plea of ultra vires as to any contract it may make, when sued on the contract by the other party thereto. Speaking to this proposition, the Supreme Court of the United States, through Mr. Justice White, in *California Bank v. Kennedy*, 167 U. S., loc. cit. 367, 17 Sup. Ct. 833, 42 L. Ed. 198, said: "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act. The cases of *Thomas v. Railroad Company*, 101 U. S. 71 [25 L. Ed. 950]; *Pennsylvania Railroad v. St. Louis, Alton, etc., Railroad*, 118 U. S. 290 [8 Sup. Ct. 1094, 30 L. Ed. 83]; *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U. S. 1 [9 Sup. Ct. 409, 32 L. Ed. 837]; *Pittsburgh, Cincinnati, etc., Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371 [9 Sup. Ct. 770, 33 L. Ed. 157]; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24 [11 Sup. Ct. 478, 35 L. Ed. 55]; *St. Louis, etc., Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393 [12 Sup. Ct. 953, 36 L. Ed. 748]; *Union Pacific Railway v. Chicago, etc., Railway*, 163 U. S. 564 [16 Sup. Ct. 1173, 41 L. Ed. 265]; and *McCormick v. Market Nat. Bank*, 165 U. S. 538 [17 Sup. Ct. 433, 41 L. Ed. 817]—recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that—to quote from the opinion of the court in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60 [11 Sup. Ct. 478, 488, 35 L. Ed. 55]: 'A contract of a corporation, which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either par-

ty, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.' This language was also cited and expressly approved in *Jacksonville, etc., Railway v. Hooper*, 160 U. S. 514, 524, 530 [16 Sup. Ct. 379, 40 L. Ed. 515]. As said in *McCormick v. Market National Bank*, 165 U. S. 538, 549 [17 Sup. Ct. 433, 436, 41 L. Ed. 817]: "The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441 [16 L. Ed. 184]; *Pittsburgh, Chicago, etc., Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384 [9 Sup. Ct. 770, 33 L. Ed. 157]; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48 [11 Sup. Ct. 478, 35 L. Ed. 55].' The doctrine thus enunciated is likewise that which obtains in England. *Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Attorney General v. Directors, etc., of Great Eastern Railway Co.*, 5 App. Cas. 473; *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354; *Trevor v. Whitworth*, 12 App. Cas. 409; *Oreogum Gold Mining Co. of India v. Roper* [1892] App. Cas. 125; *Mann v. Edinburgh Northern Tramways Co.* [1893] App. Cas. 69."

This closes the matter, so far as this court is concerned, and it must be accepted as the law in this case that the defendant has a right to plead ultra vires as to the contract here sought to be enforced against it.

3. This leaves for consideration the question of whether the contract sued on constituted a guaranty by the defendant to the plaintiff that the draft of Lieuallen on Clemons & Co. would be paid. Section 5136, Rev. St. [3 U. S. Comp. St. 1901, p. 8455], prescribes the powers of national banks, and the seventh enumeration of powers therein contained is as follows: "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the banking business; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." This law has undergone thorough and exhaustive adjudication in the courts of the United States, and,

briefly stated, the rule declared is that a national bank has no power, either with or without a sufficient consideration, to agree or bind itself that a draft of A. upon B. will be paid; that such agreement is a mere guaranty, and is not within the powers conferred upon such banks; and that, when sued upon such a contract, the bank can successfully interpose a defense of ultra vires. See *Higman v. Charlottesville National Bank*, 3 Hughes, 647, 21 Fed. Cas. 1036; *Johnston v. Charlottesville National Bank*, 13 Fed. Cas. 885; *National Bank of Commerce of Kansas City v. First National Bank of Kansas City, Kansas*, 61 Fed. 809, 10 C. C. A. 87; *Commercial National Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799, 49 U. S. App. 596; *Western National Bank v. Armstrong*, 152 U. S. 351, 14 Sup. Ct. 572, 38 L. Ed. 470; *Bowen v. Needles Nat. Bank (C. C.)* 87 Fed. 430, and cases cited; *First Nat. Bank v. Nat. Exchange Bank*, 92 U. S. 127, 23 L. Ed. 679. This rule of the federal courts has been yielded to and enforced in state courts. *Thilmany v. Paper Bag Co.*, 108 Iowa, 333, 79 N. W. 68, and cases cited; *Groos v. Brewster (Tex. Civ. App.)* 55 S. W. 590. The rule is thus tersely stated in *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799: "The act of Congress under which the bank was organized confers no authority upon national banks to guaranty the payment of debts contracted by third parties; and acts of that nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily ultra vires. A national bank may indorse or guaranty the payment of commercial paper which it holds when it rediscunts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incident to the express authority conferred on such banks by the national banking act to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt (*People's Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907; *U. S. Nat. Bank v. First Nat. Bank*, 49 U. S. App. 67, 24 C. C. A. 597, and 79 Fed. 290); but it has never been supposed that the board of directors of a national bank can bind it by contracts of suretyship or guaranty which are made for the sole benefit and advantage of others. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power by such corporation would be detrimental to the interests of depositors, stockholders, and the public generally. *Norton v. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *State Bank v. Newton Nat. Bank*, 32 U. S. App. 52, 58, 14 C. C. A. 64, and 66 Fed. 691, 694; *Bank v. Smith*, 40 U. S. App. 690, 23 C. C. A. 80, and 77 Fed. 129. In contemplation of law, therefore, the vendors knew, when they sold the goods in controversy, that the guaranty in question was of no avail as a security, even though they supposed that it had been exe-

cuted with the sanction of the board of directors. It results from this view that, if we were able to admit that the presentation of the guaranty to Carson, Pirie, Scott & Co. carried with it an implied representation that it had been executed by direction of the board of directors, and that the bank was in a sound financial condition, yet we would not be able to concede that either of these representations was material, inasmuch as the plaintiffs below must be presumed to have known that the guaranty imposed no legal obligation upon the guarantor." It will be readily understood, however, that this rule does not prohibit national banks from issuing certified checks. *Merchants' Bank v. American State Bank*, 10 Wall. 604, 19 L. Ed. 1008. But this is very different from entering into a contract of guaranty.

It will be of no profit in this case to consider the rules of law adopted by the several states bearing upon the power of banks organized by authority other than the federal government to enter into such contracts, or to interpose the defense of ultra vires after the other party to the contract has fully performed it, for the decisions of the federal courts treat all such contracts as void and unenforceable as to national banks, and this court is in duty bound to defer to those federal decisions.

For these reasons the judgment of the circuit court granting a new trial for the reason that the contract is void, and that the plaintiff is not entitled to recover in this action, is affirmed. All concur.

CHOUTEAU LAND & LUMBER CO. v. CHRISMAN et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

EJECTMENT—JUDGMENT—NOTES—EVIDENCE OF PAYMENT—WITNESS—CREDIBILITY—CONVICTION OF OFFENSE.

1. In ejectment, defendant admitted that plaintiff held the legal title, but alleged a contract of sale, pursuant to which defendant had paid the full purchase price, and was entitled to a deed, and that he had made valuable improvements, and prayed judgment that plaintiff be required to execute a deed, or to repay him the purchase price, with interest, and for his improvements; and plaintiff admitted the contract and part payment, but denied full payment. Judgment was entered that "plaintiff take nothing by the action; that defendant go without day and recover from plaintiff the costs," etc. Held error, since either defendant was not entitled to recover at all, or, if the court found for him on all the issues, decree should have been entered as prayed in the answer, and if it found for him, except as to payment of the balance of the purchase price, the decree should have been conditional—that on payment of such balance, interest, and costs, the title should vest in him.

2. On the issue as to whether defendant had paid certain notes, the admission of the notes in evidence, when produced by him, was not error, though they were not marked or indorsed as paid.

3. Since the enactment of Rev. St. 1899, § 4680, providing that "any person who has been

convicted of a criminal offence is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination," the rule that the conviction which would affect the credibility of a witness must be of a felony or petit larceny has no application.

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by the Chouteau Land & Lumber Company against O. M. Chrisman and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This was an action in ejectment for the southeast quarter of the northwest quarter of section 15, township 27, range 11 east, in Stoddard county, Mo. Petition was in usual form. Process was regular. The answer was an equitable one, and was as follows: "Now this day comes C. M. Chrisman, one of the above-named defendants, and, for his separate answer to plaintiff's petition herein, says that said plaintiff was not and is not entitled to the possession of the premises in the petition described, as in said petition alleged. Defendant admits that he is in the possession of said premises, and had possession of same at the time of the institution of this suit, and still continues to hold same. And for further answer, defendant says that on the 23d day of February, 1895, he and one T. J. Quick were partners and business associates, doing business in Stoddard county under the firm name and style of Quick & Chrisman; that on said day Charles P. Chouteau, of St. Louis, Missouri, was the owner of the land described in plaintiff's petition, and large bodies of other lands located in Stoddard county; that on said 23d day of February one D. S. Crumb was the duly accredited and acting agent for said Charles P. Chouteau in Stoddard county, Missouri, with an office and place of business in Bloomfield, in said county; that said D. S. Crumb was on that day, and had been for long prior thereto, conducting a real estate business for Chas. P. Chouteau, and had full power and authority to sell any lands belonging to said Chouteau in Stoddard county; that on said day the said D. S. Crumb, and for a long period thereafter, was absent from his office in Stoddard county, and absent from the state of Missouri, and that, during the absence of said D. S. Crumb as aforesaid, his brother, one George H. Crumb, had charge of his said office, and the business of said Chas. P. Chouteau, and was duly authorized and empowered to transact the usual and ordinary business of said Chas. P. Chouteau in the absence of his said brother, the said D. S. Crumb, and his acts as such were at all times ratified and confirmed by said D. S. Crumb and Chas. P. Chouteau. Defendant further says that on said day this defendant, for and on behalf of Quick & Chrisman, purchased the real estate described in plaintiff's petition from said Chas. P. Chouteau by and through his said agents,

the said D. S. and Geo. H. Crumb, for the price and sum of one hundred and forty dollars, and that he then and there paid Chas. P. Chouteau, as part purchase price of said land, the sum of fifty dollars in cash, in the shape of a check on the Continental National Bank of St. Louis, Missouri, and that on said date the said firm of Quick & Chrisman made, executed, and delivered to said Geo. H. Crumb their two certain promissory notes of that date, wherein they covenanted to pay Chas. P. Chouteau the sum of ninety dollars, the balance of said purchase money for said land; that one of said notes was for the sum of fifty dollars, and due and payable one year after date, and the other for forty dollars, due and payable two years after date. Defendant states that long before said notes became due he fully paid off and discharged same, and thereby became and was entitled to a deed for said real estate. Defendant says that, after making full payment as aforesaid for said land, he demanded of Chas. P. Chouteau, by and through his agent, the said D. S. Crumb, a deed, in due form of law, conveying to him (the said defendant) the said real estate, but the said Chas. P. Chouteau has wholly failed, neglected, and refused to make said deed; that on the — day of —, 189—, the said —, by mistake, conveyed said land to one Floyd King; that said conveyance was an error, and on the — day of —, 1898, the said Floyd King reconveyed said land to the plaintiff herein; that on the — day of —, 189—, the said Chas. P. Chouteau conveyed all his lands in Stoddard county to the Chouteau Land & Lumber Company, the plaintiff herein; that Chas. P. Chouteau is the principal stockholder in said company, and organized the same for the purpose of assuming and conducting the business of said Chas. P. Chouteau in the sale of lands in Stoddard and other counties of southeast Missouri, and carrying out the sales and contracts of the said Chas. P. Chouteau in relation to said land, and that they took said land described herein subject to all the equities and claims of this defendant, with full knowledge thereof; and that the said D. S. Crumb was for a long time after said change of name the agent of the said plaintiff herein. Defendant further says that he has demanded a deed from plaintiff for said land, and that the said plaintiff, with full knowledge of defendant's rights in the premises, induced the said Floyd King to convey said land to them, for the purpose of enabling them to make defendant a title to same, but says that plaintiff has wholly failed, neglected, and now refuses, to make him a deed to said real estate. Defendant says that after said purchase and payment aforesaid the firm of said Quick & Chrisman was by mutual agreement dissolved, and this defendant by the terms of said dissolution became the sole owner of said real estate. Defendant therefore says that he is the owner of the equitable

title to said real estate, and entitled to the legal title thereof; that after said purchase he entered upon said land, and made valuable, permanent, and lasting improvements thereon; that said improvements are of the value of four hundred dollars. Wherefore defendant asks that his title to said premises be adjudicated, and that plaintiff be directed to convey, by good and proper warranty deed, said premises to this defendant, C. M. Chrisman, or that he have judgment against the said plaintiff for the sum of one hundred and forty dollars, the amount of the purchase price of said real estate, with interest thereon at the rate of eight per cent. per annum from the — day of —, 1895, the date of payment thereof, and the sum of four hundred dollars for improvements put upon said premises by this plaintiff in good faith, and that said sums be declared a lien upon said real estate in the hands of plaintiff, and for such other and further relief as to the court shall seem meet and proper." The answer of the other defendant, Robert King, was a general denial. The replication of plaintiff to the answer of defendant Chrisman was a general denial.

J. R. Young, for appellant. Ralph Wammack, for respondents.

FOX, J. (after stating the facts). The record discloses in this case that it was admitted by both plaintiff and defendants that appellant had the legal title to the land in controversy, subject to whatever equities the defendant Chrisman may have, and it is further admitted that defendants were at the commencement of this action in possession. It is unnecessary to burden this opinion with a detailed statement of the evidence. So far as the questions presented by the record in this cause for determination, it is sufficient to say that the only issue submitted to the trial court was the one presented by the equitable answer, and its denial in the replication.

The only contested question in this cause was as to the payment of the balance of purchase money for this land. Upon this dispute the testimony is sharply in conflict. From this record it appears to be practically conceded that, if the defendant made full payment for the land, he is entitled to a conveyance from the plaintiff. This concession we find in the brief and argument submitted to this court by the appellant, in which it is stated: "There has never been a time when he could not have paid balance of purchase price and gotten a deed. He can yet pay costs and balance of purchase price and get a deed." The testimony upon the issue, as presented by the answer, as before stated, was conflicting. Upon the submission of this cause to the trial court on the testimony and admissions of parties, heretofore mentioned, it rendered the following judgment: "Now come the parties by their respective attor-

neys, and all and singular the matters and things herein are submitted to the court for trial; and the court, having seen and heard the pleadings herein, and all the evidence adduced by the parties, and being fully advised in the premises, doth adjudge herein for defendant. It is therefore considered and adjudged by the court that plaintiff take nothing by the action; that defendant go without day, and recover from plaintiff the costs and charges in this suit expended." While we will express no opinion as to how the trial court should have decided the issue presented by the equitable answer in this cause, or in whose favor the evidence preponderated, we are clearly of the opinion that the judgment rendered was erroneous. If the court found the issues for the defendant, then there should have been a decree in accordance with the prayer in the answer, vesting the title in him, or if, under the evidence, the court found all the issues for the defendant, except as to the payment of the balance of the purchase money, then a conditional decree could have been rendered—conditioned upon the defendant paying the balance of the purchase money, and all interest due thereon, together with cost in the case; then the title to vest in the defendant. The defendant in this cause was either entitled to one of the decrees as suggested herein, or he was not entitled to recover at all. It is admitted in the record that the legal title to the land in dispute was in the plaintiff, subject to the equities of the defendant; and the only manner in which this title, as is here admitted, can be defeated, is upon a proper showing by competent evidence introduced at the trial, and a decree rendered in response to such evidence. This judgment cannot be supported upon the issues presented, and the evidence and admissions submitted to the trial court.

As this case is to be retried, we will pass upon the contentions as to the admissibility of evidence:

The first question upon the subject to which our attention is called is the error complained of in the action of the court in admitting the notes in evidence, which defendant says he had paid. It is urged that this was error, because the notes were not marked or indorsed as being paid. There was no error in the admission of this testimony. There is no law, rule, or custom requiring notes to be thus marked or indorsed. The defendant had the notes, identified them as notes having been executed for the payment of part of the purchase for this land, and stated that he paid them. He had the right to exhibit these notes and make proof of them to the court. The fact that they were not indorsed as paid might be considered by the court in weighing the testimony as to whether or not they had been paid, but the absence of this mark could not affect their admissibility.

The only other question as to the admissibility of evidence during the progress of this

trial, of which complaint is made, is the refusal of the court to permit defendant Christman to answer the question, "Were you not indicted for stealing timber a short time ago, and did you not plead guilty?" We can readily understand why the court excluded this testimony. It simply followed a long and unbroken line of decisions, holding that "convictions which would affect the credibility of a witness must be a conviction of a felony or petit larceny." In 1895 the General Assembly enacted what is now section 4680, Rev. St. 1899, which provides that "any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer." Laws 1895, p. 284. Most of the cases announcing the rule mentioned—that the conviction had to be for a felony or petit larceny—were decided prior to the enactment of this section. Some of them, however, were decided since. But this court, at its present term, in the case of *State v. Blitz*, 71 S. W. 1027, fully interprets that section, and announces that the rule as laid down in the cases suggested is no longer to be followed. This question was a proper one, and it was error for the court to exclude it.

Entertaining the views as herein expressed, and to the end that the court may have an opportunity of rendering a proper decree in this cause upon a retrial of it, the judgment in this cause is reversed and remanded. All concur.

CROWSON et al. v. CROWSON et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

WILLS—CONTEST—MENTAL CAPACITY—UNDUE INFLUENCE—EVIDENCE—VERDICT.

1. Evidence in a contest of a will, on the ground of mental incapacity and undue influence, examined, and *held* that there was no substantial evidence to support the verdict that the paper was not the will of the deceased.

2. On an issue as to the mental capacity of a testator, his statements made before and after the execution of the will are competent evidence as external manifestations of his mental condition and of the state of his affections, and not as evidence of the truth of the facts stated.

3. The tests of mental capacity to make a will are, did the testator know what property he owned, what disposition he desired to make of it, all the persons who came reasonably within the range of his bounty, and did he possess sufficient intelligence to understand his ordinary business and what disposition he was making of his property.

4. Undue influence, coercion, overpersuasion, fraud, or deceit in the procurement of the execution of a will, to invalidate it, must have dominated the will of the testator at the time of its execution, so that in fact it was not his will.

5. The burden is on contestants to show undue influence or fraud in the procurement of the execution of a will.

Appeal from Circuit Court, Callaway County; John A. Hockaday, Judge.

Statutory contest of the will of R. T. Crowson by Eugene L. Crowson and others against Minnie Crowson and others. From a judgment in favor of the plaintiffs, defendants appeal. Reversed.

Robt. McPheeters, J. W. Tincher, and N. D. Thurmond, for appellants. D. P. Bailey and D. H. Harris, for respondents.

BURGESS, J. This is a statutory contest of the will of R. T. Crowson, deceased, late of Callaway county. The will bears date March 2, 1899, and the testator died on March 6, 1899, at the age of 69 years. The will was admitted to probate by the probate court of Callaway county on the 9th day of March, 1899. The petition alleges: First, that at the time R. T. Crowson executed said will he was not possessed of sufficient mental capacity to make a valid will; and, second, that said pretended will was procured by undue influence of Minnie Crowson, his wife, over the said R. T. Crowson. The answers were general denials. The answers of all the defendants, except Minnie, were by their guardian ad litem, they being minors. The issues were duly framed by the trial court and submitted to a jury, resulting in a verdict that the paper in evidence was not the will of R. T. Crowson. Defendants appeal.

The facts, briefly stated, are that R. T. Crowson was married twice, his first wife leaving at her death three sons, Eugene L., Jonathan (called Doc), and Egbert. At the time of the death of their mother they were all minors, living with their father on his farm, where they remained until about the time they became respectively of age, or nearly so. The two younger ones, Doc and Egbert, worked their father's farm a year or two after they became of age, and received a part of the crops for their services. In November, 1889, six or eight years after the death of his first wife, R. T. Crowson married the defendant Minnie, whose name before her marriage was Liggon, and took her to his home. The two younger boys were still with their father, and remained with him for a year or more after his marriage to his second wife. These sons, as they became of age, received small sums from their father, as much as his circumstances permitted him to give them, and also received, from their grandmother's estate, money or property amounting to seven or eight hundred dollars. R. T. Crowson died, leaving the three sons by his first wife, and three small children by his last wife, to wit, Edmund, 8 years old, Mary, 5, and Ruth, 2. At the time of his death his older sons were all established in business. The oldest, Eugene, was a practicing physician doing a good practice near St. Joseph, Mo.; Doc was on a farm near Fulton; and the young-

est, Egbert, owned a farm of 17 acres, set out in young fruit trees, within about four miles of St. Joseph.

For 8 or 10 years before his death, R. T. Crowson was troubled with smothering spells, supposed to be caused by heart trouble. These spells became more frequent the last year or two before his death. He had not been able to perform any heavy manual labor for a number of years. Any violent exertion or any unusual occurrence would bring on the smothering spells, so that he would have to be fanned, and have the doors and windows opened so as to get as much air as possible. During the winter prior to his death his health was worse than it had been; however, he continued to look after his stock, fed them, and sheltered them himself, until about a week before his death. He was troubled a good deal with his breathing on the 18th of February, and also on the 25th, and on up to the 28; but most of that time he continued to look after and feed his stock, except on one or two days, when his son Doc, or a neighbor, did that work for him. On Monday, February 27th, he was worse, and seemed to have what his wife thought was a hemorrhage of the lungs, and she sent for the doctor, who came to see him for the first time Monday night about bedtime. The doctor thought from his first symptoms that he was attacked with pneumonia, but afterwards concluded he did not have pneumonia, but that he died from the effects of an attack of the grip and general prostration from age. On Tuesday he asked his nephew, who was going to Fulton Wednesday, to ask the probate judge to send him a form of will. His nephew saw the probate judge, and asked him for a blank will for his uncle Dick. The probate judge had no blank forms for wills, but wrote out from a book the beginning and the attesting clause of a will, and sent that, with two extra sheets of the same kind of paper, the last being requested by William Crowson, the nephew, that in case he spoiled one he could use the other. These papers were delivered to him Wednesday evening late, and he directed his nephew to put them in a certain drawer, which he did. On Thursday morning he directed his brother-in-law, Burnham Liggon, about how to feed and look after his stock, and also requested him to go over to his neighbor John A. Griffith, and ask him to come over; that he wanted him to attend to some business for him. Liggon returned, and informed him that Mr. Griffith was sick and could not come. He then asked Liggon to go over to another neighbor, Charles Whaley, and ask him to come over and write a will for him, and that if he could not come to ask his son, Curtis Whaley, to come. Both of these last two gentlemen came as soon as they could, but when they got there he was having his will written by John Beaven, who happened to call that morning. There were several present when

the will was written. He expressed pleasure at Mr. Beaven's having come, and told him that he wanted him to write a will. Before, however, he would give any directions about writing the will—the provisions of the will—he requested his wife to set a table out for Mr. Beaven, and requested Mrs. John A. Griffith to open a certain drawer and get the papers (the same papers he had sent his nephew for; the form of will that Judge Beaven had sent him). He also requested his wife or Mrs. Griffith to get the pen and ink. After this he requested his wife and Mrs. Griffith to leave the room, which they did, and did not return for some time afterwards, when Mrs. Crowson and Mrs. Griffith were requested to leave the room by Mr. Beaven. Mrs. Crowson was not in the room at any time while he was giving any directions about his will. He directed the will to be written disposing of his property as therein provided, and spoke about his purposes in so doing, that his little children would have to be educated, and the older sons were provided for, and that his wife was extravagant and did not know the use of money, and that if he left his property all to her, absolutely, she might spend it and leave nothing for the children, and for that reason, in case of his wife's remarriage, she should only have her dower, and the rest he wanted to go to the children. While Mr. Beaven was writing the will his older sons—all three of them—came, and wanted to go in the room where their father was, but his wife put them off, as they say, by telling them that he was having a sinking spell, and it might kill him for them all to go in at that time. In about 15 minutes after the sons came Mr. Beaven had completed the will, and the sons were admitted to the room. He died on Saturday morning following, continuing to get up and down, with assistance, to the time of his death.

The will is very short and free from ambiguity. It disposes of all of the testator's property in one clause, which reads as follows:

"First, I will and bequeath to my wife all my real and personal property—after paying all my just debts—to be held in trust by her during her widowhood or lifetime for her support and the support and education of her children. If she marries again she is to have her lawful dower and the remainder is to be divided between my younger children, Edmund, Mary and Ruth, except one dollar each to my older children, Eugene L., Jonathan and Egbert. I hereby appoint my wife as executrix to carry out this will."

On the question of mental capacity, there is some conflict in the evidence of the "opinions" expressed by the witnesses. Defendant contends that there was no evidence to support the verdict on mental incapacity to make the will.

While counsel for the contestees admit

that on the question of mental capacity of the testator there is some conflict in the evidence of the "opinions" expressed by the witnesses, they contend that there was no evidence to support the verdict on mental capacity sufficient to make the will.

Upon this feature of the case, John T. Beaven, who wrote the will, signed it as an attesting witness, and certified to it as such that at the time of its execution the testator was of sound mind and disposing memory, testified upon the trial as follows: "I didn't think he was of sound mind" at the time he made the will. "He was very sick, suffering, breathing very hard and very rapid, and was very nervous and excited, and didn't seem to realize the difference between personal property and real estate." "I didn't consider that he was at himself properly. He was not composed at all in mind."

This witness, having attested the execution of the will, was competent to give his opinion as to the condition of the testator's mind at that time; but he gave no satisfactory reason for the change of his mind with respect to the condition of the testator's mind at the time he certified that he was of "sound mind and disposing memory," and at the trial, when he testified that he did not think he was of sound mind at the time he made the will. But the facts which occurred at the time of the execution of the will, including the provisions of the will, show to the contrary, and that the testator not only knew what property he owned, what disposition he desired to make of it, all the persons who come reasonably within the range of his bounty, but that he possessed sufficient understanding and intelligence to understand his ordinary business and what disposition he was making of his property. These are the tests of mental capacity to make a will. *Harvey v. Sullens' Heirs*, 56 Mo. 372; *Benolst v. Murrin*, 58 Mo. 307; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890; *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031.

Other witnesses, offered by plaintiffs upon this feature of the case, were as follows:

Dr. E. L. Crowson, a son, who saw deceased a few minutes after the will was written, says: "Father was very restless, nervous, excited, and talkative. When we would rouse him up he would ask questions and answer questions; I should say semi-intelligently. If left for a few moments, he would sink into a kind of delirium and talk kind of delirious." "Pulse, 130; respiration, 42; temperature, 99." "I don't think he was in a condition from the time I got there to transact ordinary business." "I would say that any person in the condition in which I found him was not capable of transacting business matters."

Dr. Gibbs, the attending physician, says that on Monday deceased had had a hemorrhage; that he got there that night at 10 o'clock, and stayed until 8 o'clock next morn-

ing. "His respiration was excited, also his circulation, and he was excited—scared." "Pulse 110; no fever." Thursday night, "I got there just about 12 o'clock. He had weakened considerably. Temperature, 98; pulse, 112; respiration, 52—normal being 18 to 24."

Jonathan Crowson testifies that he was not in condition to transact business; that on Wednesday before the will was made he was "just as bad as he could be."

Egbert Crowson says: "When I saw him (Thursday, the day the will was made) I thought he was dying."

John Guy, who stayed with deceased the night of March 2d, says: "He was in bed. He didn't talk much. Sometimes he would talk flighty."

James T. Crowson, a nephew, stayed there Tuesday night, and until 11 o'clock Wednesday. "His mind was kind of off, I think, all the time." "Talked right smart." "During Tuesday night he took two kinds of medicines alternately, and whisky." "I think he was growing a little worse all the time. I wouldn't think he was capable of transacting business in the shape he was in while I was there."

Thomas F. Crowson says: "Was at his house the day the will was written." "Found him a pretty sick man." "He seemed to be very nervous, and was picking at the bed-clothes." "I wouldn't say that his mental capacity at that time to attend to ordinary business was very good."

The only statements of these witnesses which have any bearing whatever upon this feature of the case are to the effect that the testator "was not at the time of executing the will capable of transacting business matters." These statements were mere opinions of nonexperts, without a single fact upon which to predicate them. There was no attempt by the testator to transact any business at that time other than to make his will, and his directions with respect thereto to Mr. Beaven, who wrote it, showed that he had a clear perception of what he was doing, and what disposition he was making of his property. The expert testimony did not help the contestants' case. Besides, a man may be capable of making a will and yet be incapable of making a contract or managing his estate. *Brinkman v. Rueggiesick*, 71 Mo. 556; *Jackson v. Harding*, 83 Mo. 175; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *Crossan v. Crossan* (Mo. Sup.) 70 S. W. 136.

We agree with counsel for the contestees that the burden was upon the contestants to show undue influence, coercion, or overpersuasion, or fraud and deceit, in the procurement of the execution of the will, and that such influence, to invalidate the will, must have dominated the will of the testator at the time of its execution, so that the will was not in fact his own will, but was that of his wife, Minnie Crowson. *McFadin v. Catron*,

120 Mo. 252, 25 S. W. 506; *Sunderland v. Hood*, 84 Mo. 298; *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440. It is not the existence of undue influence, but the exercise of it in the execution of the will, which invalidates it. There was some evidence adduced—but very little—by the contestants tending to show that the will was procured by the exercise of undue influence over the mind of her husband by Mrs. Crowson. On the other hand, there was evidence that he was a man of strong will power, as well as substantial evidence tending to show that the will was made in pursuance of a plan conceived by him about the time his youngest child was born. His statements made before and after the execution of the will were competent evidence as external manifestation of his mental condition and of the state of his affections, and not as evidence of the truth of the facts stated. *Rule v. Maupin*, 84 Mo. 587; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552. The evidence showed that about the time his last child was born the testator said that he had provided for the other children and clothed them until they were of age, and that he expected to leave to these three little children his property.

It is said in *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, that "the influence of a wife or child upon a testator, while the latter has power to deliberate and estimate the inducements, will not avoid the will, if the influence is exerted in a fair and reasonable manner, and without fraud or deception. The influence of one occupying such relation to the testator, to avoid the will, must be such as to overreach and destroy the free agency and will power of the testator." There is no evidence of fraud or deception practiced upon the testator; and, in view of the fact that there is no such evidence, the will ought not to be set aside for undue influence of the wife, in the absence of evidence showing that, considering the state of the mind of the testator, the influence was not of such a character as to destroy the free agency of the testator, and make it her will and not his. *Myers v. Hauger*, 98 Mo. 483, 11 S. W. 974; *Campbell v. Carlisle*, 162 Mo. 634, 68 S. W. 701.

Nor do we think the will so unfair and unjust to contestants as to cast any imputation of fraud or unfairness on the part of Mrs. Crowson in the procurement of its execution. She was not present when the will was executed, and simply holds the land in trust during her widowhood or lifetime for her support, and the support and education of her children. If she marries again she is to have her lawful dower, and the remainder to be divided between her children. The contestants have all arrived at their majority, and have had for several years homes of their own, and been doing profitable business for themselves. The three contestees were at the time of their father's death aged, re-

spectively, 8, 5, and 2 years, and nothing could seem more natural than that he should have an earnest solicitude for their welfare, and, with that object in view, he should give all that he possessed to their mother in trust for them.

Our conclusion is that there is no substantial evidence to support the verdict. We therefore reverse the judgment, without remanding the cause. All of this Division concur.

DALTON v. CITY OF POPLAR BLUFF.
(Supreme Court of Missouri, Division No. 2
March 17, 1903.)

**CONTRACT—PAYMENT—TRIAL—RULINGS OF
LAW—PAROL EVIDENCE.**

1. Where, in an action against a city to recover on grading contracts, plaintiff introduced resolutions authorizing the contracts, and parol evidence that the resolutions were adopted in the manner required to enact ordinances, and were therefore sufficient, though ordinances were required by the city charter, a refusal to declare the law to be that, "under the pleadings and evidence, the verdict must be for plaintiff," was not error, since, unless the evidence is such as to require the interpretation of the court, the court or jury should be left to determine the credibility of the witnesses.

2. Plaintiff's intestate contracted with defendant city to grade certain streets, agreeing to assume all risks of its failure to comply with the statutes or its ordinances, and to accept special tax bills in full payment and discharge of the city for doing the work. He performed the work and received the tax bills, and collected most of them from the property owners; the remainder being sold by plaintiff. Thereafter plaintiff sued the city to recover on such contracts on the ground that such tax bills were illegally issued and void. *Held*, that plaintiff was not entitled to recover.

Appeal from Circuit Court, Madison County; J. D. Fox, Judge.

Action by J. D. Dalton, administrator of the estate of I. M. Davidson, deceased, against the city of Poplar Bluff. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

This is an action upon certain contracts entered into by plaintiff's intestate, I. M. Davidson, deceased, and the city of Poplar Bluff, for reducing to grade certain streets of that city by him in pursuance of the provisions of said contract. The answer admits the incorporation of defendant city, and that the resolution of October 17, 1892, was passed and published, but avers that said allegation in the first count of plaintiff's petition touching said resolution wholly fails to state the facts stated in said resolution. The answer also admits the passage of an ordinance on November 21, 1892, as entitled, but avers that plaintiff wholly fails to set forth any of the provisions thereof, and denies that the facts stated touching said ordinance are true, and avers that plaintiff's allegation touching said ordinance does not state the facts thereof, nor any of the facts. It denies that said ordinance gave any power or

authority, or any direction, by force thereof, to do any of the acts alleged in plaintiff's petition, or in any way was connected with, referred to, or gave to said resolution any force or validity. The answer then avers that Davidson was fully paid for any and all work of any and all kind he executed for said city. The case was tried by the court, sitting as a jury, who found the issues for the defendant, and rendered judgment accordingly. Plaintiff appeals.

Geo. L. Edwards, for appellant. Phillips & Phillips, for respondent.

BURGESS, J. (after stating the facts). The facts are substantially the same as in the case of *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088, with the exception that in the case at bar the evidence showed that Davidson had received all the tax bills to which he was entitled under the contracts, and had collected thousands of dollars upon them, and those not collected were sold by the plaintiff herein, as the administrator de bonis non of his estate, in pursuance of an order of the probate court of Butler county, to one James A. Lavin, for the sum of \$100, and that Davidson had repeatedly expressed himself as being satisfied with what he had received from the abutting property owners for what grading he had done.

At the close of all the evidence plaintiff prayed the court to declare the law to be as follows: "That under the pleadings and evidence the verdict and judgment must be for the plaintiff"—which was refused. This was all the declaration of law asked by either party. Under this state of facts, we are asked to reconsider and overrule the *Wheeler Case*, and establish a result, as claimed, more in harmony with justice. Such a request should at least come from a party to an action who is bona fide interested in the result, and not a mere figurehead, or instrument in the hands of some person who is interested. It is boldly asserted by counsel for plaintiff in his brief: "I take opportunity to say that it is true that the contracts of I. M. Davidson, sued upon, have been sold to others, who are now prosecuting this action. I take also opportunity to say that those others are the same citizens of the defendant city who furnished the money to grade its streets involved in the *Wheeler Case*, and lost it through the decision in that case; and I submit to this court if there is anything wrong in their attempt to thus diminish their loss, or if that is any reason why their appeal in this case should not receive the most careful investigation by this court." In response to the first assertion, we may be permitted to say that it is verified by the record, which shows conclusively that all the interest which I. M. Davidson had remaining in the contracts at the time of his death was evidenced by a few tax bills which remained uncollected at that time,

and which were thereafter sold by an order of the probate court of Butler county to James A. Lavin. In answer to the other contention, it may not be out of place to say that it would certainly be as inequitable and unjust to the property holders of Poplar Bluff who paid the tax bills for grading the streets in front of their respective properties, for which counsel for plaintiff insists that "the city is not entitled, under any circumstances, to have credit for such of illegal tax bills as contractor may have collected," to impose upon them the burden of being again taxed, as they would necessarily be compelled to be, for the payment of any judgment which might be rendered in favor of plaintiff in this case, as it would for plaintiff to lose a suit in which the estate that he represents has not 1 cent interest, and the real party in interest \$100, which he evidently invested for purely speculative purposes, with knowledge of all the facts connected with them. Moreover, it is not only provided by section 9 of Ordinance No. 188 of said city that "any person who shall make any contract with the city, and who agrees to be paid from special assessments for the work done by him, shall have no claim or lien upon the city in any event or contingency; and no work, the payment of which is to be made by special assessments, shall be awarded to any contractor who will not so agree," but the contract between Davidson and the city contains this provision: "Said first party [Davidson] agreeing to assume all risk for failure to comply with said ordinances and statutes as aforesaid by said second party. And the said first party hereby agrees to accept said special tax bills, issued as aforesaid, in full payment and discharge of said second party for the doing of the work herein contracted for." And the evidence not only shows that he collected a large proportion of the tax bills, but that his administrator thereafter sold, as such, for the benefit of his estate, all of them that remained uncollected; and it does not now lie in the mouth of his administrator to say that the provisions of the contract quoted, or the tax bills issued in accordance therewith, are void.

There was no error in the refusal of the declarations of law asked by plaintiff. Plaintiff introduced parol evidence, over the objection of defendant, to show that the resolutions read in evidence were adopted and approved with the same formality and procedure required to enact ordinances, and were therefore sufficient to authorize the contracts sued upon. In *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622, the trial court directed a verdict for plaintiff, and refused all the instructions asked by the defendant; and, in passing upon the action of the court in this regard, it is said: "There are cases where such an instruction may properly be given—as where the plaintiff's case, under the pleadings, turns wholly on the construction of a contract, the construction of which

is simply a question of law, or where the answer admits the plaintiff's cause of action, and sets up new matter as a defense, and the evidence fails to make out a prima facie defense. Ordinarily, where the plaintiff produces parol evidence to support his action, the issue of fact should be submitted to the jury. The evidence may be all one way, yet it is for the jury to say whether they believe the witnesses or not. The court has no right to tell the jury they must believe the witnesses. It was so held and ruled at an early day by this court. *Bryan v. Wear*, 4 Mo. 106, approved in *Vaulx v. Campbell*, 8 Mo. 224, and in *Gregory v. Chambers*, 78 Mo. 294." *Mineral Land Co. v. Ross*, 135 Mo. 101, 36 S. W. 216; *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795. In *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642, it is said: "But when evidence is given in support of an issue, and such evidence is not of a character which requires the interpretation of the court, it has been held that the jury should be left to pass upon it, though no contradictory evidence be given. The jury, it is said, must determine the credibility of witnesses, and the weight to be given to their evidence; and a court, when it undertakes to pass upon the sufficiency of such evidence to prove a given fact, usurps the province of the jury. This rule has not been uniformly recognized in this state, but was declared at an early day, and has been generally followed in later decisions. *Bryan v. Wear*, 4 Mo. 106; *McAfee v. Ryan*, 11 Mo. 364; *Wolff v. Campbell*, 110 Mo. 120 [19 S. W. 622]." The same rule is announced in *Ford v. Dyer*, 148 Mo. 528, 49 S. W. 1091. In the absence of this evidence, it was not affirmatively shown that the resolutions of the city council were passed with the same formalities required for the passage of an ordinance, and it will be held that they were not so passed. *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088. This declaration of law, had it been given, would have deprived the court, in its province, sitting as a jury, of the right to say whether it believed the witness or not, but, in effect, declared that the court must believe the witness. This declaration was properly refused upon the further ground that, upon the facts of the case as disclosed by the record, plaintiff is not entitled to recover.

The *Wheeler* Case was concurred in by all of the members of this division. It was again considered on motion for rehearing presented by the same counsel who appears for plaintiff in this case, and the motion overruled by the unanimous concurrence of the members of this division; and we are entirely satisfied that the legal principles therein announced are well sustained by both reason and the adjudications of the appellate courts of this state, and we therefore adhere to that opinion.

In conclusion, we may say that, in our opinion, there is no merit in this appeal, and that

the conclusion reached by the trial court was for the right party, and that its judgment should be affirmed. It is so ordered.

GANTT, P. J., concurs. FOX, J., not sitting.

HILGERT v. BARBER ASPHALT PAVING CO.

(Supreme Court of Missouri. March 4, 1903.)
SUPREME COURT—JURISDICTION—APPEALS—
CONSTITUTIONAL QUESTIONS—CONSTRUCTION OF LAWS AND CONTRACTS.

1. There is nothing in an issue as to when an act of the Legislature took effect (the validity of the act not being questioned) to give jurisdiction to the Supreme Court of an appeal direct from the circuit court.

2. No constitutional question is raised in determining an issue as to whether a paving contractor was excused from completing the contract within the prescribed time by the failure of the city to grade the street, and by an ordinance extending the time.

3. An allegation by defendant in an action by a private citizen to cancel tax bills issued against his property in payment for paving "that for the court to hold that the city is estopped to say that the work was not completed within the time required by the contract, but that plaintiffs are not precluded from so saying, and that the tax bills are void, would be in violation of defendant's rights, established by Const. Mo. art. 2, § 15, of immunity against laws impairing the obligations of contracts, and Const. U. S. art. 1, § 10, inhibiting state laws impairing the obligations of contracts," does not raise a constitutional question; such provisions relating to the enactment of laws by the Legislature, and not to decisions by the court.

In Banc. Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by Josephine Hilgert against the Barber Asphalt Paving Company. From a judgment in favor of plaintiff, defendant appeals. Transferred to Kansas City Court of Appeals.

Scarritt, Griffith & Jones and R. A. Brown, for appellant. Culver & Phillip, for respondent.

ROBINSON, C. J. This suit was begun by respondent, as plaintiff below, to have declared void and canceled certain tax bills issued to appellant by the city of St. Joseph in payment of the cost of certain street improvements made in front of respondent's property. The general improvements consisted of paving, curbing, and laying sidewalks on Ashland avenue for a distance of about 2,000 feet at an aggregate cost of something like \$15,000; the tax bill issued against respondent's property, and sought to be canceled, however, being only for the sum of \$984.18. The grounds alleged by respondent for having said tax bills canceled are that they are void, first, because the contract for the work was not approved by the common council of the city of St. Joseph; and, second, because if the contract was approved by the council, the contractor failed to comply with the pro-

vision thereof, and to complete the work within the time specified. Defendant's answer denied, first, that the contract had not been confirmed, admits that the work was not completed within the time specified in the original contract, and pleads in avoidance that the time had been extended by ordinance, and that, even if it had not been extended, the city had prevented appellant from completing the pavement within the required time, by failing to seasonably grade the street by independent contractors, as it undertook to do, and that the city was therefore estopped to say that the work was not completed within the specified period. The answer contains this further averment, and on account of which appellant now contends this court had jurisdiction of the case on this appeal:

"And this defendant states that for the court to hold or declare that the said city, by reason of the premises, is estopped to say that the work was not completed within the time required by the terms of the contract, but that the plaintiffs are not for that reason precluded from so saying, and that the tax bills described in the petition, and therein alleged to have been issued in part payment of the price of said work, are void, would be in violation of the defendant's rights, established by section 15, art. 2, of the Constitution of Missouri, of immunity against laws impairing the obligation of contracts, and contrary to the rights of defendant under section 10, art. 1, of the Constitution of the United States, inhibiting state laws impairing the obligations of contracts, and this defendant invokes the protection of the rights guaranteed under the constitutional provisions aforesaid."

As is readily seen, there is nothing in the character of the suit, or in the amount involved, to give to this court jurisdiction to hear and determine this appeal, unless it be true, as appellant asserts, that a constitutional question is raised by the last paragraph of its answer. If we may assume that the appellant's last plea is good, let us see what was done in the case to give this court jurisdiction of this appeal. The first issue raised by the pleadings was, did there exist a valid contract between the city and defendant for doing the work for which the tax bills were issued? The respondent, as plaintiff below, contended against the validity of the contract, because the confirmatory ordinance, as it is called, of March 19, 1901, was passed by the common council after that body had been abolished by an act of the Legislature passed and approved March 13, 1901, and after it ceased to have any legal existence. Appellant's contention was that the action of the council was legal, and the contract was valid. To determine this issue, which was found in favor of the appellant by the trial court, the only question for consideration was, when did the act of the Legislature abolishing the common council of the city of St. Joseph take effect? The validity of the act

was in no wise questioned by either party to the controversy. Its construction was alone involved. There is nothing then in that issue of the case to give this court jurisdiction of this appeal.

The next issue raised by the pleadings, and the one upon which the trial court found in favor of the plaintiff, and upon which its decree is predicated, was this: Did defendant lose the right to enforce its tax bills issued against plaintiff's property because it had not completed the work of paving, curbing, and laying of sidewalks on Ashland avenue within the time originally specified? It was defendant's contention at the trial of the case, as it was by its answer filed, that it did not lose its right to the tax bills issued against plaintiff's property, for the reasons, first, that time was not of the essence of the contract under which the work was done; and, second, because the city did not provide in time a graded street upon which the pavement could be laid, as provided by the contract it should do, and because it was prevented from prosecuting its work by the express orders of the city's officers; and, third, because the city, by ordinance duly passed and approved, had extended the time for the completion of the work by the defendant, and that the work was done during that extended period. The mere statement of the issue tendered by this plea shows upon its face that no constitutional question was involved in its determination, but only the application of general principles of law governing contracts, and the excuse for their nonperformance in the original specified time, and the question of the extent of the power of St. Joseph under its charter privileges. The consideration of no proposition asserted by appellant to uphold the validity of the tax bills issued to and held by it involves the construction of either the state or the federal Constitution. It is also to be noted that the averment in the last paragraph of defendant's answer is not that any statute, act, or ordinance invoked by respondent is void because in violation of the provisions of section 15, art. 2, of the Constitution of Missouri, or of section 10, art. 1, of the Constitution of the United States, or that its contract with the city for the doing the work of grading and paving its streets was made upon the faith of a particular construction which the court had placed upon an act, statute, or ordinance, the reversal of which construction or the overruling of which opinion at this time would be to impair the obligation of its contract made with the city, but the averment is "that for the court to hold or declare that the said city, by reason of the premises, is estopped to say that the said work was not completed within the time required by the terms of the contract, but that the plaintiffs are not for that reason precluded from so saying, and that the tax bills described in the petition, and therein alleged to have been issued in part payment of the price of said work, are void, would be in vio-

lation of defendant's rights, established by section 15, art. 2, of the Constitution of Missouri, of immunity against laws impairing the obligation of contracts, and contrary to the rights of the defendant under section 10, art. 1, of the Constitution of the United States, inhibiting state laws impairing the obligation of contracts." If it could be said that the reversal by a court of a prior decision construing an act, law, or ordinance, upon the faith of which prior construction a contract had been made, would operate to impair the obligation of such contract, that would not imply that a constitutional right of a defendant claiming under such a contract had been violated, or that a constitutional question was involved in the determination of his case. The language of the state Constitution is that no law impairing the obligation of contracts can be passed by the General Assembly, while that of the federal Constitution is that no state shall pass any law impairing the obligation of contracts. The decision of a court that a certain contract is good or bad, valid or invalid, enforceable or nonenforceable against the assertion of a claimant under such a contract, can in no sense be said to violate his or her constitutional right under the provision of either the state or the federal Constitutions mentioned. These provisions inhibit only the impairment of the obligation of contract by subsequent legislation. Neither of these instruments undertakes to guaranty to the citizens immunity against the possible error of construction by the courts of contracts before them for consideration.

As the obligations sought to be canceled by this proceeding are less in amount than \$4,500, and as no constitutional question was properly involved in the consideration of the contract out of which they arose, this court is wanting in jurisdiction to hear and determine the case on appeal, and the cause is ordered transferred to the Kansas City Court of Appeals for hearing and determination therein. All concur.

STATE ex rel. WILLIAMS v. HARRISON,
City Treasurer, et al.

(Supreme Court of Missouri, Division No. 2.
March 17, 1903.)

**MANDAMUS—LICENSE—APPLICATION—EX-
PIRATION OF TIME—APPEAL.**

1. Where the time for which the relator applied for license to keep a dramshop expired before the hearing of his appeal from a judgment denying a writ of mandamus to compel the issuance of such license, the judgment will be affirmed without consideration of the merits.

Appeal from Circuit Court, Jackson County; E. P. Gates, Judge.

Mandamus by the state of Missouri, on relation of James R. Williams, against J. Scott Harrison, Jr., treasurer of Kansas

City, and another. From a judgment in favor of defendants, relator appeals. Affirmed.

L. A. Laughlin, for appellant. R. J. Ingraham and F. M. Black, for respondents.

BURGESS, J. On September 26, 1899, relator sued out before Hon. E. P. Gates, one of the judges of the circuit court of Jackson county, a writ of mandamus, directed to J. Scott Harrison, Jr., treasurer of Kansas City, and Amos R. Cecil, auditor of said city, who at that time had the power and authority to issue dramshop licenses in said city, reciting "that on the 18th day of September, 1899, one James R. Williams duly tendered to you the sum of one hundred and twenty-five dollars in lawful money, together with his application, in writing, for a license to keep a dramshop at 900 East Nineteenth street, in said city, but that you declined to accept said money or issue said license," and commanding them "that, immediately after the receipt of this writ, you, the said J. Scott Harrison, Jr., upon tender of said sum of money, do receive the same, and issue a receipt therefor, and you, the said Amos R. Cecil, upon the presentation of said application of said James R. Williams for a dramshop license, together with said receipt, do issue to him a license to keep a dramshop at said place until January 4, 1900, or show cause before our honorable circuit court, in Division No. 3 thereof, held at Kansas City on the 29th day of September next ensuing, at 11 a. m., why you should not do so." The writ was duly served, and on September 29, 1899, respondents made return thereto as follows: "And now come the said J. Scott Harrison, Jr., treasurer of Kansas City, and Amos R. Cecil, auditor of Kansas City, and, for return to the writ of mandamus heretofore issued in this case, say that said relator ought not to have his writ of peremptory mandamus, because they say that, while they admit all the allegations of the alternative writ of mandamus, yet they further say that the refusal of these respondents to accept the sum of one hundred and twenty-five dollars tendered them by relator, and to issue a dramshop license to him, according to his application therefor, was solely because said application did not have indorsed thereon a certificate signed by the board of police commissioners, that such applicant has proved himself to be a person of good moral character, as required by section 33, art. 17, of the charter of Kansas City. Wherefore respondents pray judgment for their costs." Thereafter, on the 26th October, 1899, on a trial in the circuit court of said county, there was judgment for defendants against the relator. From that judgment the relator appeals.

As the time expired January 4, 1900, up to which time relator made application for license to keep a dramshop, whatever our conclusion might be as to the merits of his application upon an investigation of the case.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 446L.

as a peremptory writ could not in any event be awarded, it would serve no useful purpose to do so, and we therefore affirm the judgment. All concur.

HUBBARD v. ST. LOUIS & M. R. R. CO.
(Supreme Court of Missouri, Division No. 1.
March 18, 1908.)

CONSTITUTIONAL LAW—JURY—VERDICT BY NINE—NEGLIGENCE—PERSONAL INJURY—DISCHARGE OF ONE TORT FEASOR.

1. The amendment to Const. art. 2, § 28, allowing nine jurors to find a verdict in courts of record, is constitutional.

2. Plaintiff, an employé of an express company, while riding in a wagon driven by another employé was injured by a collision with a street car. He received a small sum of money from the express company, and executed a release of said company from all claim arising from personal injuries in such collision. *Held*, that by the release of the express company the street car company was discharged, even though plaintiff could not have recovered from the company because the driver was his fellow servant.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Henry Hubbard against the St. Louis & Meramec River Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action for damages for personal injuries sustained by the plaintiff on May 5, 1900, at the corner of Eleventh and Locust streets, in St. Louis, in consequence of a collision between the defendant's car and a wagon of the American Express Company on which the plaintiff was riding, and by which company the plaintiff and the driver of the wagon were employed, their duties being to collect and deliver express packages. The negligence charged is running the car at a rapid and reckless rate of speed, and failure to keep a vigilant watch for persons or vehicles approaching the track. The answer is a general denial, a plea of contributory negligence, and a plea that the plaintiff had been paid in full for his injuries by the express company, and had executed a release to said company, which also released the defendant. The reply is a general denial.

The facts developed on the trial are: That the plaintiff and one Henry Vollinger were employed by the express company—Vollinger as the driver, and the plaintiff as a helper—to collect and deliver express matter. At the time of the accident the plaintiff was seated in the rear of the wagon. The wagon was going southwardly on Eleventh street, at a slow trot. When the driver approached the defendant's track, he looked west, and saw no car. He then looked east, and saw a car approaching. According to the plaintiff's witnesses, the car was then 75 feet east of the east side of Eleventh street, and, according to the testimony of the defendant's

motorman in charge of the car, the car was about 40 feet east of the east side of Eleventh street. According to the plaintiff's evidence the car was running between 12 and 15 miles an hour, while according to the defendant's testimony it was running only 7 or 8 miles an hour. According to the plaintiff's testimony, when the driver of the wagon saw the car approaching, he at once guided his horses towards the west, hurried them up, and used every possible effort to get across the track before the car reached the crossing, but failed, the wagon was struck by the car, and the plaintiff was thrown out and injured. According to the defendant's evidence, when the motorman discovered the wagon approaching the track, he slackened the speed of the car, and at the same time the driver of the wagon slackened the speed of his horses, and finally stopped them when close up to the track. By that time the car was within 15 feet of the east side of Eleventh street. When the motorman saw that the wagon had stopped, he released the brakes, applied the power, and started forward. At about the same time the driver of the wagon started his horses and tried to cross the track. The result was a collision. The motorman himself testified in favor of the plaintiff, and said that, when he saw the wagon approaching the track, he at once attempted to slacken the speed of said car, but that he lost his head, and instead of turning off the power he turned it on at full force, and that the car struck the wagon when it was turned on at full force and the brakes off; that the car ran about two car lengths after the collision, before it was stopped; and that after the collision another motorman was put in charge of the car. The evidence showed that the gong was sounded on the car several times between Tenth and Eleventh streets.

The defendant offered in evidence the release that plaintiff gave to the express company, and showed the payments to him by the company of the amount therein specified, which was as follows: "Received of the American Express Company, forty-six dollars and sixty-one cents, and in consideration of the payment of said sum, I, Henry A. Hubbard, of St. Louis, state of Missouri, hereby remise, release and forever discharge the said American Express Company by reason of any matter, cause or thing whatever, whether the same arose upon contract or upon tort, and especially from all claim which I now have, or may hereafter have, arising in any manner whatever, either directly or indirectly, in whole or in part, from or on account of personal injuries sustained by me on or about May 5th, 1900, in collision of street car with wagon of said American Express Company, near the corner of Eleventh and Locust street, in the city of St. Louis, state of Missouri. In testimony whereof, I have hereunto set my hand and seal

¶ 1. See Jury, vol. 31, Cent. Dig. §§ 4, 222.

this twenty-ninth day of June, A. D. 1900. [Seal.] H. A. Hubbard. W. A. Schaperkotter, S. McCullough, Witness."

At the close of the whole case the defendant asked a peremptory instruction to the jury to find for the defendant, which the court refused to give, and this is the principal error complained of. There was a verdict for \$1,000, and the defendant appealed.

McKeighan & Watts and Robert A. Holland, Jr., for appellant. Wilfley & Wilfley, for respondent.

MARSHALL, J. (after stating the facts). This court has jurisdiction because the constitutionality of the amendment allowing nine jurors to find a verdict is challenged. Of this, however, it is only necessary to say that the amendment has been declared constitutional by this court in *Gabbert v. Railroad*, 70 S. W. 891.

The defendant contends that the release of the express company releases this defendant also. The undoubted rule of law is that a release of one of two joint tortfeasors releases the other. *Barrett v. Railroad*, 45 N. Y. 628; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Goss v. Ellison*, 136 Mass. 503; *Tompkins v. Railroad*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Metz v. Soule*, 40 Iowa, 236; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370. And "if a claim is made against one, and released, all who may be liable are discharged, whether the one was released or not." *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107. "The compromise of the asserted claim does not necessarily involve an admission on the part of him against whom the claim is asserted that the claim is well founded. * * * But the other party should not be allowed to deny that he had any right to the money, the payment of which he induced under pain of a prosecution of the action already commenced. He should not be permitted to assert, with any beneficial result to himself, 'I pursued the defendant falso clamore, and I took the money by way of a settlement of a pending action in which I never could have recovered.'" *Tompkins v. Railroad*, 66 Cal. 163, 4 Pac. 1165.

The plaintiff's contention in this case that he could never have recovered against the express company, because he and the driver of the wagon were fellow servants, cannot avail him, for his injuries were single. He was entitled to only a single compensation. He has received a compensation, satisfactory to himself, from the express company, and he released that company. He is not entitled to any other satisfaction, and the defendant is released.

The case of *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107, is very analogous. There the plaintiff was injured through the negligence of the superintendent under whom

he was working. He compromised with their common master and released him, and then sued the superintendent, and it was held that the release of the one released the other.

The same result has been held to follow where it was agreed between the plaintiff and one of the tortfeasors that the amount received from him was to be regarded as only a part and not a full payment (*Goss v. Ellison*, 136 Mass. 503); and also where the plaintiff agreed not to prosecute the one, but to press his suit against the other, and, if he received from such other more than the amount he had received by way of compromise, he was to reimburse the one for the amount he had recovered from him, and keep only the excess (*Seither v. Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905).

Tortfeasors are jointly and separately liable whether they acted in concert or independently. *Newcomb v. Railroad* (Mo. Sup.) 69 S. W. 353. But when the injured party voluntarily accepts a sum satisfactory to himself in compensation for the injury, and releases the one so paying the same, all the other tortfeasors who might have been otherwise held liable are released also. It does not lie in the mouth of such a plaintiff to say he had no cause of action against the one who paid him for his injuries, for the law presumes that the one who paid committed the trespass, and occasioned the whole injury. *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Seither v. Traction Co.*, supra; *Tompkins v. Railroad*, supra; *Metz v. Soule*, supra.

It follows that the circuit court erred in refusing to give the peremptory instruction asked, and that the plaintiff is not entitled to any judgment against the defendant. The judgment of the circuit court is therefore reversed. All concur.

COMER v. STATHAM et al.

(Supreme Court of Missouri, Division No. 1. March 18, 1903.)

APPEAL—OBJECTIONS TO EVIDENCE.

1. Technical objections to plaintiff's evidence of title in ejectment cannot be considered on appeal, no specific objections thereto or rulings thereon having been made below, but merely a motion for judgment on the evidence, which was overruled without exceptions to the ruling.

Appeal from Circuit Court, Ray County; E. J. Broadus, Judge.

Action by George E. Comer against Charles Statham and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Ball & Bogle, for appellants. Lavelock & Kirkpatrick, for respondent.

BRACE, P. J. This is an action in ejectment to recover possession of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36, township 54, range 28, in Ray county.

The petition is in common form. The answer admits possession, denies the other allegations of the petition, and pleads the statute of limitations. Issue was joined by reply. The case was tried before the court without a jury. Finding and judgment for the plaintiff, and defendants appeal. Since the appeal Charles Statham has died, leaving the other defendant, Esther A. Statham, his wife, the sole appellant in the case.

The bill of exceptions opens with the following recital: "Plaintiff offers in evidence the following records of conveyances in the office of recorder of deeds, and probate office in Ray county, Missouri, showing chain of title to the northwest quarter of the southeast quarter of section thirty-six (36) in township fifty-four (54), of range twenty-six (26) in said Ray county, this being the land in controversy, which records are now admitted by the court, subject to all legal objections, and by agreement the abstract of the conveyances only are set out, except two, which are given in full." Then follows an abstract of conveyances showing a complete unbroken chain of record title in the plaintiff from the United States, then some oral evidence upon the issue of adverse possession, and the rental value of the premises; and plaintiff rested. Thereupon defendants moved for judgment on the evidence, which motion was overruled, and no exception taken to the ruling.

Some technical objections are now here urged against the two muniments of title set out in the abstract. But it does not appear that these, or any specific objections, were made by the defendants to this evidence on the trial, that any ruling was made by the court thereupon, or that any exception was taken to any ruling of the court upon this or any other evidence. Hence these objections cannot be considered on appeal. The rule on this subject is so uniform, well settled, and has been so often stated, that it is only necessary to cite some of the cases. *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551, and cases cited on page 507, 156 Mo.; page 553, 57 S. W.; *Allen v. Mansfield*, 82 Mo. 688; *Wayne Co. v. Railroad*, 66 Mo. 77; *Buckley v. Knapp*, 48 Mo. 152; *Woodburn v. Cogdal*, 39 Mo. 222; *Hannibal & St. J. Railroad v. Moore*, 37 Mo. 338; *Grimm v. Gamache*, 25 Mo. 41; *McCartney v. Shepard*, 21 Mo. 573, 64 Am. Dec. 250.

No declarations of law were asked or given. The finding and judgment must have been for the plaintiff on his legal paper title, shown by evidence unobjected to, unless the defendants' plea of adverse possession was sustained. The finding of the court on the questions of fact raised by that plea was in favor of the plaintiff. There was abundant evidence to support that finding, and by it this court is concluded under another rule as uniform, well settled, and as often stated as the former one, and, as before, it is only necessary to cite a few of the many cases by which it is established: *Smith v. Royse*, 165

Mo. 654, 65 S. W. 994, and cases cited on page 658, 165 Mo., page 995, 65 S. W.; *De Lassus v. Faherty*, 164 Mo. 361, 64 S. W. 183, 58 L. R. A. 193; *Moore v. Farmer*, 156 Mo. 33, 56 S. W. 493, 79 Am. St. Rep. 504, and cases cited.

Finding no reversible error in the record, the judgment of the circuit court will be affirmed. All concur.

STATE ex rel. WARD v. ATCHISON et al.
(Supreme Court of Missouri, Division No. 1.
March 18, 1903.)

TAXATION—PROPERTY OWNER—FALSE RETURN—DECEASE—LIABILITY OF ESTATE.

1. Rev. St. 1899, § 9150, provides that if any person shall deliver to the tax assessor a false list of his property, with intent to defraud, the assessor's charges to that effect shall be tried before the board of equalization, and, on being found true, the board shall make a true list, and, by way of penalty, shall treble such person's taxes, and he shall, in addition, be liable for perjury. Section 96 saves certain civil actions arising ex delicto from abatement by the defendant's death. *Held*, that the estate of a deceased property owner could not be made liable to treble taxes as a penalty for his false return; section 9150 being penal and criminal in its nature.

Appeal from Circuit Court, Clinton County;
A. D. Burnes, Judge.

Certiorari by the state, on the relation of Hanna Ward, administratrix of the estate of John Ward, deceased, against D. R. Atchison and others, constituting the board of equalization of Clinton county, to review the action of the board in assessing penalties for a false return of property for taxation. From a judgment of the circuit court quashing the record and proceedings of the board, its members appeal. Affirmed.

Thos. W. Walker and W. S. Herndon, for appellants. E. J. Smith, for respondent.

BRACE, P. J. This is an appeal from a judgment of the circuit court of Clinton county, in a proceeding in that court by certiorari, quashing a record and proceeding of the board of equalization of said county. By section 9150, Rev. St. 1899, it is provided that "if any person shall, with intent to defraud, deliver to any assessor a false list of his property, it shall be the duty of the assessor to give notice in writing thereof to the said county board of equalization, and the said board of equalization shall, on receiving such notice, give notice thereof to the person who shall have furnished such false list, which notice shall specify the particulars in which said list is alleged to be false, and shall fix a time for the hearing of the matter, on which day the person aforesaid shall have the right to appear and defend against such charge; and if it appear that such person is not guilty as charged, the said board shall dismiss the matter; but if it appear that

such person is guilty as charged, it shall be the duty of said board of equalization to ascertain the true amount and value of all property of such person subject to taxation, and to tax the same as similar property of other persons is taxed, and in addition shall, by way of penalty for furnishing such false list, treble the amount of taxes thus ascertained against such person, and such person shall be required to pay such treble amount, and shall, in addition thereto, be liable to be punished for perjury." On the 29th of September, 1899, John Ward, late of said county, deceased, gave a list of his taxable property to Phillip V. Bowman, the assessor of said county, and afterwards, on the 12th of November, 1899, died intestate, and the respondent became his administratrix. Afterwards, on the 14th of April, 1900, the said assessor gave notice in writing to the board of equalization of said county that the said John Ward did on said 29th day of September, 1899, with intent to defraud, deliver to said assessor a false list of his property, in this: "That said list contains, for other personal property, sixty dollars; money, notes, twenty-five hundred dollars—when, in truth and in fact, the said John Ward was on the 1st day of June, 1899, the owner of additional personal property, which he failed to list, as follows: Money, notes, thirty thousand nine hundred and sixty-nine dollars and forty-three cents—as shown by the records in the probate office of said Clinton county, Missouri." Thereupon the board ordered that said matter be heard on the 19th of April, 1900, and that a copy of said notice and order be served upon the respondent administratrix, to appear before the board on that day to answer the charge, which on the same day was served on said administratrix; and on the 19th of April, 1900, she appeared by attorneys before the board "for the purpose of the motion only, and moved that the proceeding be dismissed on the following grounds: First, because this is a proceeding to enforce a penalty wherein the party against whom the charge is made is dead; second, because there is no statute authorizing this proceeding against the estate of the decedent for a personal violation of the law, even where there has been a violation of law; third, because this proceeding, as well as all other penalties under the statute for giving a false list for assessment, can only be brought against the individual who makes such false list, and in this case the party charged is dead; fourth, because there was not sufficient notice of the charge herein given, or any notice given, to the deceased; fifth, because the board of equalization has no jurisdiction of this matter, nor of the administratrix herein." The motion was overruled, the said John Ward was found guilty of the charge that the true amount of all his property on the 1st day of June, 1899, was

\$33,529.43, and it was ordered that treble that amount be placed on the personal assessment book for the taxes for the year 1900. Upon the record of the proceeding being brought before the Clinton circuit court on certiorari, the same was quashed, and from the judgment of that court this appeal was taken by the board of equalization.

1. In support of appellants' contention that this proceeding before the board of equalization is authorized by the section of the statute quoted, the case of *State ex rel. Ferguson v. Moss*, 69 Mo. 495, in which it was held to be constitutional, and *State v. Cannon*, 79 Mo. 343, in which it was held that, on the trial of a taxpayer for perjury under this section, it was not necessary to his conviction that he should first have been found guilty by the board of equalization, are cited, all of which may be conceded. And in further support thereof section 93, Rev. St. 1899, providing for the survival of certain civil actions *ex delicto* which formerly abated by death under the common law, and cases on this subject, are cited. But in the view we take of this case, these authorities are not in point, and the argument based on them need not be reviewed. This section, in its present form, has been on our statute books since 1865 (Gen. St. 1865, p. 102, § 25; Rev. St. 1879, § 6691; Rev. St. 1899, § 7537). By its terms—plain, simple, and unequivocal—a public offense is created, defined, and the punishment therefor prescribed; a criminal offense; one of the highest grade; a felony. The crime is a heinous one, and the punishment severe; and the penalties therefor cannot be inflicted on any person who has not been duly charged therewith, tried, and convicted thereof, in manner and form as prescribed by law. It goes without saying that a dead man cannot be so charged, tried, and convicted. The fact that, before all the penalties of the crime can be visited upon the culprit, he must be twice tried and found guilty, and before different tribunals, and that the proceeding in the one is in no way connected with or dependent on the other, in no way affects or changes the nature of the offense or the character of the proceeding; in either, in both, it is essentially criminal; and for that offense, under this statute, a dead man can no more be tried and convicted before the board of equalization than he could be tried and convicted as for perjury in the circuit court. This law has been upon our statute book, in one form or another, ever since the organization of the state government, and has never assumed any other aspect. 2 Rev. St. 1856, p. 1331, c. 135, art. 2, § 28; Rev. St. 1845, p. 932, c. 147, art. 2, § 20; Rev. St. 1835, p. 532, art. 2, § 15; 2 Rev. Laws Mo. 1825, p. 667, § 10; 1 Mo. Ter. Laws 1804-24, p. 734, c. 299, § 9.

The judgment of the circuit court ought to be affirmed, and it is so ordered. All concur.

SPERRY v. SPERRY.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

DIVORCE—DEATH OF PARTY—DISMISSAL OF APPEAL.

1. Where a husband to whom a divorce has been granted dies pending an appeal, and the wife asserts no right to have the action revived for the determination of property rights, the appeal will be dismissed.

Error to Circuit Court, Lawrence County; H. C. Pepper, Judge.

Action for divorce by S. R. Sperry against Rebecca H. Sperry. From a judgment for plaintiff, defendant brings error. Dismissed.

Fielding P. Sizer, for plaintiff in error.

PER CURIAM. This writ of error was sued out to reverse a judgment granting the plaintiff a divorce in this action, in which only constructive service was had on the defendant. Since the case was brought here the plaintiff has died, and as the defendant asserts no right to have the action revived for the determination of property rights, but concedes that it abated at the death of the plaintiff, the appeal is dismissed.

CHILDERS v. R. C. STONE MILLING CO.*

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

GOODS SOLD AND DELIVERED—PLEADING—PROOF—IMMATERIAL VARIANCE—FAILURE TO REPLY—APPEAL.

1. The complaint in an action for the price of wheat sold and delivered alleged that a contract for the future sale and delivery was entered into in June, but later alleged an actual sale and delivery in August. On the trial it appeared that the June contract was expressly superseded by a later one, under which the August delivery was made. Defendant did not attack the complaint, but filed a general denial. Held that, as a cause of action was stated, plaintiff's recovery could not be defeated by his failure to prove the June contract as alleged.

2. Where an affirmative defense was pleaded in the answer, and the record did not show that a reply was filed, but there was no motion for judgment on the pleadings, and the case was tried as if a reply had been filed, an objection for alleged failure to reply cannot be first raised on appeal.

Appeal from Circuit Court, Christian County; G. W. Thornberry, Judge.

Action by J. J. Childers against the R. C. Stone Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Lyons, for appellant.

REYBURN, J. In view of the assignments of error in this case, which was appealed from the Christian county circuit court, the pleadings are given intact, as follows:

"Comes now J. J. Childers, plaintiff in the

above entitled case, and, for cause of action against the defendant, alleges and says that the defendants, R. C. Stone and Charles A. Barnard, were at all times herein mentioned engaged in the grain, feed, fuel, and milling business in the city of Springfield, Greene county, Missouri, as partners, under the firm name and style of R. C. Stone Milling Company; that heretofore, to wit, on the — day of June, 1901, in consideration of one hundred and fifty dollars paid to him by the said defendants, plaintiff contracted and agreed to sell and deliver to said defendants, at Springfield, Missouri, 1,000 bushels of wheat; that thereafter, in full compliance with said contract and agreement on his part, plaintiff, on the 22d day of August, 1901, sold and delivered to said defendants, at their place of business in the city of Springfield, Missouri, one thousand and one bushels and fifty pounds of wheat, for which said wheat said defendants agreed to pay plaintiff 71½ cents per bushel; that there is now due and owing to plaintiff from said defendants, on account of said contract as aforesaid, the sum of five hundred and fifty-six dollars and four cents (\$556.04), which said sum said defendants have wholly failed, neglected, and refused to pay, and does still refuse to pay, although plaintiff has demanded the payment of said sum from said defendants, in accordance with their said contract and agreement, and that said amount still remains due and unpaid. Wherefore plaintiff demands judgment against said defendants, and each of them, for the sum of \$556.04, and the cost of this action, and all other and proper relief."

"Now come the defendants, leave of court first having been obtained, and, for amended answer to plaintiff's petition, say that they deny each and every allegation therein contained, except as hereinafter expressly admitted. Defendants admit that the firm of R. C. Stone & Co. was a partnership at the time of the transaction set out in the plaintiff's petition, and composed of R. C. Stone and C. A. Barnard. And admit that they agreed by written contract dated June 8, 1901, to purchase from plaintiff one thousand (1,000) bushels of wheat, to be delivered at their elevator in Springfield, Mo., as soon as plaintiff threshed, and not later than August 1, 1901, at the market price then ruling in said city of Springfield. That defendants on the date of the execution of said contract paid plaintiff one hundred and fifty (\$150) dollars as part of the purchase price of said wheat, and for which plaintiff agreed to pay seven (7) per cent. interest from date of said contract under the date wheat was delivered. Further answering, defendants aver: That, some time prior to the 1st of August, they, in order to encourage plaintiff to deliver said wheat at an early date, and as an inducement, further proposed to him that if he would hasten the delivery of his said wheat, and get it in by the 1st of August, they

*Rehearing denied March 17, 1903.

would either pay him sixty-two (62c.) cents per bushel for it, or would allow him to deposit the same in their elevator. That wheat at said time was selling in Springfield for about sixty (60c.) cents per bushel. Thereupon plaintiff elected that he would deposit his wheat in defendants' elevator, and, in pursuance of said last-mentioned agreement, plaintiff, after delivering his said wheat, received from defendants a certificate of deposit, wherein it was stipulated and agreed that plaintiff had deposited his said wheat in defendants' elevator, with the understanding that defendants were to have the privilege of mixing said wheat with any wheat they might have in said elevator, and to draw from the said elevator from time to time, or continuously, for mill or market, and to replenish the said elevator with other wheat, and that they would return a like amount of wheat from said elevator to plaintiff at any time he might demand the same; defendants agreeing at all times to keep in their said elevator an amount of wheat equal to that deposited by plaintiff; and it was further agreed that plaintiff should pay 1½c. per bushel per month for storage. That said last-mentioned contract of deposit was substituted for and instead of the contract first aforesaid set out and described in plaintiff's petition, and the said contract sued on by plaintiff was thereby abandoned. Defendants say they have been, and are now, ready and willing to comply with said contract of deposit; that plaintiff has never at any time made a demand for his wheat under said contract, or returned to defendants the \$150 aforesaid, which defendant asks to be returned, with interest from said first-mentioned date. Defendants further aver that the ruling price of wheat in the city of Springfield on the 1st of August, 1901, was sixty (60c.) per bushel. Wherefore defendants pray to be dismissed, with their costs."

In the trial before the court, a jury being waived, the testimony was conflicting upon the issue whether the wheat admitted to have been delivered by plaintiff to defendants had continued on storage, or had been purchased by defendants from plaintiff; the plaintiff testifying to the sale, and one of the defendants testifying to the other conditions. At the close of plaintiff's case, defendants asked the court to declare the law to be that, under the pleadings and the evidence adduced by plaintiff, no recovery could be had, and at the close of all the evidence a like request was made on behalf of defendant. The defendants also asked two other declarations of law, based upon the theory that plaintiff had brought his action upon a prior contract made in June, 1901, which the evidence showed had been abandoned or modified, and, having shown no breach of it, was not entitled to recover. All of which instructions the court declined to give, and rendered judgment for plaintiff. The customary motion for new trial, as well as a

motion in arrest of judgment for the reason that the judgment was erroneous and void upon the pleadings and record, were filed on defendants' behalf, and overruled.

1. The first error assigned by defendants is that the plaintiff based his action upon the original contract of June 8th, which the proof established had been abandoned. The only color lent to this claim of defendants is to be found in the preliminary sentences of plaintiff's petition, referring to the agreement of plaintiff and defendants as of date June, 1901; and the trial court, no doubt, treated these portions of the complaint as surplusage, and adjudged that sufficient allegations of delivery and sale of the wheat were contained in the petition, stating a cause of action. The petition was not assailed by defendants in any manner. A general denial was made in the amended answer, and, in our opinion, the trial judge properly held that a cause of action for sale and delivery of the grain was set out in the petition. A plaintiff will not be deprived of remedy, nor his rights judicially denied, merely because his averments were not all sustained by proof, when the unproven allegations were not necessary to warrant recovery, and the testimony supports averments sufficient to establish a cause of action. *Gannon v. Gas Co.*, 145 Mo. 511, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Knox County v. Goggin*, 105 Mo. 191, 16 S. W. 684.

2. The case was tried, manifestly, upon the theory that the issues had been completed by a reply on behalf of plaintiff to the affirmative matter set out in defendants' answer, as appeared from the testimony offered by defendants to establish the affirmative allegations constituting their defense, as well as by the absence of any default for want of reply or motion for judgment upon the pleadings; and, while the record does not affirmatively show that a reply was filed, such objection cannot now be presented to this court. This rule has been frequently laid down by the courts of this state, and is too firmly established to be now questioned. *State ex rel. v. Phillips*, 137 Mo. 259, 38 S. W. 931; *Ferguson v. Davidson*, 147 Mo. 664, 49 S. W. 859.

No reversible error being shown, the judgment of the lower court is affirmed.

BLAND, P. J., and GOODE, J., concur.

PEPPERDINE v. HYMES et al.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

EXECUTION—FORTHCOMING BOND—INTERPLEA—SUBSTITUTE PLAINTIFF—TRUSTEE IN BANKRUPTCY—AMENDED COMPLAINT.

1. A judgment was recovered against a husband, and an execution thereon levied on his interest in a stock of goods. His wife claimed the goods, secured possession of them on giving a forthcoming bond, and filed an interplea in the

controversy, which was stricken out on motion of the judgment creditor. Subsequently the husband's trustee in bankruptcy was substituted as plaintiff in the execution in place of the judgment creditor, and filed an amended complaint praying that the husband be adjudged the owner of the property; that it be ordered given up by the wife; and that, in lieu thereof, plaintiff have judgment on the forthcoming bond for its value. *Held* that, as an adjudication in favor of plaintiff in the execution proceedings was indispensable to his right to proceed on the bond, a trial of the rights to the property could only be had after a reinstatement of the wife's interplea, or the filing by her of an amended one.

Error to Circuit Court, Greene County; Jas. T. Neville, Judge.

Action on a forthcoming bond by George Pepperdine, trustee, etc., against Mildred Hymes and another. Order striking out plaintiff's amended complaint, and he brings error. Affirmed.

Heffernan & Heffernan, for plaintiff in error. Barbour & McDavid, for defendants in error.

BLAND, P. J. A history of the proceedings in this case will be found in the case of *Carriage Company v. Hymes* (St. L.) 87 Mo. App. 193, where the judgment was reversed and the cause remanded. After the cause was remanded, on the petition of G. W. Pepperdine, as trustee in bankruptcy of the estate of A. W. Hymes, the United States District Court sitting at Springfield, Mo., made an order on Pepperdine to apply to the Greene county circuit court to be substituted as plaintiff in the case of D. M. Sechler Carriage Co. v. A. W. Hymes, Defendant, and Mildred Hymes, Interpleader, and to take charge and prosecute the same for the benefit of the creditors of the bankrupt. On the production of this order, Pepperdine, as trustee in bankruptcy of A. W. Hymes, was by order of the circuit court of Greene county substituted as plaintiff in the above entitled cause.

After the order of substitution was entered, Pepperdine, as trustee, filed what he calls an "amended complaint," which set out the recovery of the judgment against A. W. Hymes; the issue of execution thereon; the levy of the execution on the interest of A. W. Hymes in the partnership goods of Hymes & Bennett; set forth the claim made by Mildred Hymes to the sheriff, to the effect that she was the owner of the interest in the goods levied on; the fact of the giving of an indemnity bond by plaintiffs in the execution and the giving of a forthcoming bond by Mildred Hymes; the fact that Mildred Hymes filed an interplea in the circuit court of Greene county claiming to be the owner of the interest in the goods levied on as the property of A. W. Hymes; the fact that the interplea was stricken out by the circuit court on the motion of the plaintiffs in the execution; alleged that the goods levied on were the property of A. W. Hymes and Frank Bennett, a partnership dealing in farm imple-

ments and buggies; and further alleged that they were the owners of the property at the date it was levied on; and ended with the following prayer: "Wherefore the plaintiffs pray this court to adjudge that the said property levied upon was at the time of said levy the property of said A. W. Hymes and Frank Bennett in equal interests, and pray an order that the said property be returned to said sheriff, and, on failure of the delivery of said property to said sheriff on said order, to render a judgment against said Mildred M. Hymes and said Frank Bennett and C. M. Bennett for the amount of money due and costs of suits."

A. W. Hymes appeared for the purpose of filing a motion to strike out the amended complaint, assigning the following grounds therefor: "First. The said A. W. Hymes is not a party to the suit entitled as at the head of this paper, nor to any suit in this court, pertaining to the subject-matter set out in said paper now sought to be stricken from the files, but is sought to be made a party to the pending suit by the mere filing of the complaint here sought to be stricken out. Second. Because there is no such suit now pending in this court entitled 'Geo. Pepperdine, Trustee of the Estate of A. W. Hymes, Bankrupt, vs. A. W. Hymes'; and the filing of such a paper in this case in the suit pending in this court entitled 'Geo. Pepperdine, Trustee of A. W. Hymes, Bankrupt, Plaintiff vs. Mildred Hymes,' is without right or authority, and, if allowed, would only inject into the said cause now pending matters which would make 'confusion worse confounded.'" The court sustained the motion, and struck out the so-called amended complaint. Pending the motion, Pepperdine, trustee, offered evidence tending to show that A. W. Hymes and Frank Bennett were, at the time the execution was levied, carrying on a partnership business under the firm name and style of Hymes & Bennett, and as partners were the owners of the goods levied on. After taking proper steps to save exceptions to the ruling of the court in striking out the amended complaint, plaintiff brought the case here on writ of error.

When the case was here on the former appeal, we held that the forthcoming bond given by Mrs. Hymes was not a statutory bond, but a common-law one, which obliged Mrs. Hymes to deliver to the sheriff such of the goods levied on only as should be adjudged to be the property of A. W. Hymes, and that no order for their delivery could be made on her until the goods, or some of them, were adjudged to be the property of A. W. Hymes. We did not intend to be understood by this ruling as holding that this issue was then pending on live pleadings, but intended to be understood as holding that an adjudication in favor of the plaintiffs in the execution was indispensable to their right to proceed on the forthcoming bond, and that the controversy would have to be settled on

the same issues as were raised by Mildred Hymes by her interplea and plaintiffs' denial thereof—that is, by a trial of the rights of the contesting parties to the property. The interplea was in the nature of a replevin suit, and was appropriate for this purpose, but after it was stricken out by the court there was nothing left in this proceeding upon which the rights to the property could be tried. In this proceeding a trial of the rights to the property could only be had after a reinstatement of the interplea that was stricken out, or by the filing of an amended one by Mrs. Hymes, or by the institution of an appropriate original suit. No offer or attempt was made to do either, but plaintiff undertook to have the rights of property adjudged ex parte after the plaintiffs in the execution had driven Mrs. Hymes out of court. Plaintiffs in the execution put Mrs. Hymes out of court by their motion to dismiss her interplea. After sending her hence, they nor the assignee in bankruptcy could remain in, and proceed to take away her property rights by an ex parte proceeding instituted on their own motion and without notice to her. When the interplea was stricken out, nothing remained upon which the court might rightfully proceed to judgment.

The judgment is affirmed.

REYBURN, J., concurs. GOODE, J., not sitting, having been of counsel.

DE LOACH MILL MFG. CO. v. LATHAM et al.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

EXEMPTIONS—PURCHASE-MONEY NOTES—CONDITIONAL SALE—VENDOR'S LIEN—EXECUTION—WAIVER.

1. Rev. St. 1899, § 3170, subjects personal property in all cases to execution on a judgment against the purchaser for the purchase price, and excludes it from exemption rights against such judgment and execution. Plaintiff purchased machinery of defendant, and gave his notes therefor, providing that, until full payment was made, title should remain in the vendor, who was to have the right to take possession of the property, in default of payment, without legal process. *Held*, that the right to seize the machinery on an execution on a judgment for the purchase price was not waived by the vendor by the terms of the purchase notes, as the rights therein were but cumulative to and not exclusive of the statutory right, and as defendant did not take possession of the machinery, Rev. St. 1899, § 3413, providing that before taking possession under a contract of conditional sale the vendor shall first tender to the vendee the amount paid on the contract, less reasonable compensation for the use of the property, was not applicable.

Appeal from Circuit Court, Taney County; Geo. W. Thornberry, Judge.

Action by the De Loach Mill Manufacturing Company against R. C. O. Latham and John Hugh O'Neill. From an order overruling his motion to set aside an execution, defendant O'Neill appeals. Affirmed.

Lincoln & Lydy, for appellant.

REYBURN, J. The facts in this case are practically undisputed, and may be outlined as follows: In August, 1897, plaintiff and defendants contracted for the sale of personal property, consisting of machinery, at the purchase price of \$771. Defendant O'Neill paid on account \$100, and later paid the additional sum of \$110 freight upon the property purchased. For the balance of the purchase price the defendants executed and delivered to plaintiff three promissory notes, all of date August 14, 1897, the first for the sum of \$103.04, maturing January 1st, the second for \$105.04, maturing April 1st, and the third for \$272.09, maturing July 1st, all in the year 1898, the exact form of which notes is shown by the language of the first note, which is as follows:

"\$103.04. Day, Mo., Aug. 14th, 1897.

"On January 1st, 1896, after date we promise to pay to De Loach Mill Manufacturing Company, or order, Atlanta, Ga., One Hundred and Three and ⁰⁴/₁₀₀ Dollars, payable at Christian County Bank, Ozark, Mo., without offset, for value received.

"This note having been given the said De Loach Mill Manufacturing Company as per contract in part payment for No. 1 saw mill complete, one extra head block, one 50 C. C. T. saw, 40 feet 8x4 belt, one 15 H. P. C. C. engine and portable boiler, it is hereby agreed that the ownership and title to said machinery remains in De Loach Mill Manufacturing Company until this note or any renewal thereof is fully paid and in default of payment as above agreed, they or their agent may take possession of and remove said machinery without legal process, and for any deficiency from wear, damage or destruction of above machinery we assume the responsibility and waive all homestead and exemptions as to this debt.

"Should this note not be paid in full at maturity, the amount unpaid shall bear interest at eight per cent. per annum until paid, and counsel fees of ten per cent. on the amount due, if collected by attorney.

"R. C. O. Latham.

"John Hugh O'Neill.

"Witnessed by: S. R. Goodale, Notary Public. John C. Rogers, Notary Public. [Seal.]"

Defendants received and took possession of the property purchased, and subsequently, but prior to the action later mentioned, defendant O'Neill appears to have transferred the property to A. M. Mintz, his father-in-law, and Mintz transferred it to defendant Latham, who in turn transferred it to defendant O'Neill, who was in possession at the time the judgment was rendered, execution issued thereon, and levy thereunder complained of was made. The plaintiff brought suit to the April term, 1901, of the circuit court of Taney county against defendants upon the three notes or contracts mentioned, and on April 25th a general judgment for the total sum of \$596.15 was

rendered by default against the defendants in favor of plaintiff. On this judgment, execution was issued and levied upon the machinery described in the notes, and on the 11th day of May, 1901, the sheriff of Taney county sold the property for \$150 to a representative of the plaintiff. Defendant O'Neill at the time of the levy and sale under execution was the head of a family, a resident of Taney county, and claimed the property as exempt under the statute, and after the sale, having given due notice, filed a motion to set aside the execution sale, claiming exemption rights in the property, and also incorporating in his motion the terms of the notes or contracts, and that he had paid as part of the purchase money of said property \$295; that it was worth at the time of the sale \$550; that neither the sheriff nor the plaintiff had ever tendered to him any part of the purchase money paid by him, nor had the plaintiff ever demanded possession of the property. Which motion, after due hearing, the court overruled, and defendant O'Neill has appealed to this court.

Under the various sections of the chapter of the statutes entitled "Executions," personal property designated and to the limit in value restricted, when owned by the head of a family, is made exempt from attachment and execution. The statute, however, has also provided exceptions to these general exemption rights created, among which may be classed section 3170, Rev. St. 1899, by the provisions of which personal property is subjected in all cases to execution on a judgment against the purchaser for the purchase price, and excluded from exemption rights against such judgment and execution. Under this section the plaintiff, as vendor of the personal property sold, had the right to seize, on an execution on the judgment for the purchase price against appellant as the purchaser, the machinery sold, without any exemption rights therein on the part of the appellant. This section of the statute has been judicially interpreted as conferring no lien upon the property sold in favor of the vendor, but that under it a debtor holding personal property not paid for could not claim it as exempt from execution for the purchase price which his creditor was seeking to recover by judgment and execution. *Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940, and cases cited. The right to subject the personal property to the payment of the indebtedness for its purchase price was not waived by plaintiff by the terms of the purchase notes on which the suit was brought. The rights reserved in these notes were at best but cumulative to and not exclusive of the statutory right of subjecting the personal property sold to execution sale for its purchase price. If plaintiff had exercised or sought to enforce the rights reserved in the purchase notes by taking possession of and removing the machinery without legal process, then the ob-

jection of appellant that the contract was in effect a sale on conditions, and that plaintiff had no right to possession of the property until it had first tendered to appellant the amount paid on the property, less reasonable compensation for its use in compliance with section 3413 of the Revised Statutes of 1899, might have applied; but the plaintiff did not apply the provisions of the purchase notes by taking possession and removal of the property sold, but resorted to its legal right to sue for and recover a general judgment upon the balance of the indebtedness, and put in operation the statutory right to subject the machinery to execution sale in satisfaction of the judgment, immune from any exemption claim therein on the part of appellant, the purchaser.

The action of the trial court in overruling the motion to set aside the execution was therefore correct, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE ex rel. LATIMER v. GRAY.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

PROBATE JUDGE—INTEREST AS COUNSEL—EXCEPTIONS TO ADMINISTRATOR'S REPORT—CERTIFICATION TO CIRCUIT COURT.

1. Under Rev. St. 1899, § 1760, providing that a probate judge may practice as an attorney in any court except his own, but shall not sit in a case in which he may have been counsel, etc., when any party in interest shall object, and that when such objections are made such cause shall be certified to the county or circuit court, a probate judge, on affidavit being made that he was counsel in some matters involved in exceptions to an administrator's report, cannot determine the fact whether or not he was counsel, but must certify the exceptions to the circuit court.

2. The fact that the probate judge is alleged to have been of counsel only in some of the matters of exception will not warrant his retaining jurisdiction of the other exceptions to the report, but the exceptions as a whole should be certified.

Appeal from Circuit Court, Pike County; David E. Eby, Judge.

Mandamus by the state, on the relation of Albert G. Latimer, as administrator of the estate of Mary A. Latimer, deceased, against William O. Gray. From an order sustaining a motion to quash an alternative writ, the relator appeals. Reversed.

J. H. Blair & Son, for appellant. Hostetter & Gray, for respondent.

Statement of Facts and Opinion.

GOODE, J. Albert G. Latimer, the relator, is the administrator of the estate of Mary A. Latimer, deceased, the administration being in progress in the probate court of Pike county, Mo., of which the respondent, W. O. Gray, was judge. Latimer filed his first annual settlement February 15, 1902, in said court, whereupon the residuary legatees of

the will of the deceased, Mary A. Latimer, to wit, Kate Monroe and Fanny Edwards, filed exceptions to said settlement, averring that the administrator had taken credit for \$114.59 for commissions when he was entitled to only \$12.72; that he had failed to charge himself with \$350 paid him as administrator by George Schwegman; that he had failed to charge himself with \$1,200, the price received for a piece of real estate sold to John E. Latimer; that he had failed to charge himself with interest on moneys of the estate which he had received; that he had used a portion of the money of the estate without accounting for interest on it; and that he had failed to demand payment of accounts due the estate. The exceptions were set for hearing on May 19th following their filing, but prior to the hearing the administrator filed an objection, verified by affidavit, to Judge Gray's sitting at the hearing, on the ground that he had been of counsel in some matters involved in the exceptions. Instead of certifying the exceptions to the circuit court, the probate judge overruled the objection to his sitting, heard the exceptions, and sustained them to the extent of ordering that Latimer be charged on his settlement with the sum of \$419.22 on account of the items excepted to.

After the objection to respondent's sitting was overruled, the relator took no further part in the hearing, but applied to the circuit court of Pike county for an alternative writ of mandamus to compel the relator to vacate and annul his ruling on the exceptions, and to certify the same to the circuit court for hearing and determination. An alternative writ was issued, both the writ and the petition stating the facts as they are stated above. Afterwards the respondent appeared in the circuit court, and filed a motion to quash the alternative writ, for the reasons that neither the petition nor the writ alleged the respondent had been of counsel in the case which the relator objected to his hearing; that it was not alleged the respondent had been executor or administrator of the estate; that the affidavit did not state in what particular matters assigned as grounds of exception respondent had been counsel, and whether or not he had been counsel in any of said matters was a question of fact which it was his duty to pass on and find in order to correctly rule on the relator's challenge of his right to sit. The motion to quash was sustained by the circuit court, and the relator appealed.

The following statute bears on the point at issue, and the interpretation to be put on the statute will determine how the point should be determined: "The judge of probate, if otherwise qualified, may practice as an attorney and counselor at law in any of the courts of this state, except his own; but no judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either

party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified by affidavit; and when such objections are so made, such cause shall be certified to the county or circuit court, which court shall hear and determine the cause; and the clerk of the county or circuit court shall deliver to said probate court a full and complete transcript of the judgment order or decree made in such cause, which shall be kept with the papers in said office pertaining to said cause," etc. Rev. St. 1899, § 1760.

This case has caused us no little perplexity, principally on the question of whether the probate judge, when an objection is made to his hearing a cause, or some proceeding connected with the administration of an estate, on the ground that he had been of counsel in the matter, has the right to determine as a fact whether or not he had been of counsel as alleged, and, if he finds he had not, to refuse to certify the proceeding to the circuit court. The language of the particular section involved differs from the section in relation to the course a justice of the peace must take when an affidavit is made that the title to real estate is involved in a case pending before him. Rev. St. 1899, § 3951. The latter section, by its words as well as by the construction put on it, leaves the justice no discretion when such an affidavit is filed, but he is compelled to forbear the exercise of further jurisdiction, and forthwith transmit the case to the circuit court. *Bennett v. McCaffery* (St. L.) 28 Mo. App. 220. The statute relating to the practice in similar conjunctures in the probate court is less peremptory, and may, perhaps, allow the inference that an objection to a probate judge proceeding because he is interested or has been of counsel is not enough to deprive him of further authority, but to have that effect the disqualifying fact must not only be charged, but exist. Still, we think the safer view to take is that on the filing of a duly verified objection the probate judge should certify the matter to the circuit court.

Of course, no judge who has been of counsel in any litigation or controversy over a disputed right will wish to determine that right; neither, indeed, has he the power to do so. If no objection is made, he should on his own motion certify the case, when he is aware he has an interest, has given advice, or acted as an attorney. *Gale v. Michie*, 47 Mo. 326. All the more should he do so when a party in interest insists on a hearing before some other judge. *Id.* If a false affidavit is filed—one alleging a probate judge had been of counsel in a particular controversy when in truth he had not been—the affiant may be prosecuted; and this would seem to afford sufficient protection against wanton and unfounded objections.

A statute somewhat similar to ours exists in the state of Illinois, and came up for construction in *Graham v. The People ex rel.*, 111 Ill. 253. Jurisdiction of the administration of estates in that state appears to be in the county courts. One of the county judges of De Witt county had been counsel in a certain administration matter which came before him later as county judge, to which office he was subsequently elected. The relatrix, who was administratrix of her deceased husband's estate, objected to Judge Graham passing on the matter, which involved the approval of the appraisement of the relatrix's award as widow. The objection filed by her asked that the hearing of the exceptions to the inventory and the appraisement of the widow's award be certified to the circuit court of the county for settlement, the Illinois statutes providing for that practice as ours do. Instead of certifying the exceptions, Graham awarded a change of venue to another county judge called in to preside in the county court where they were pending. Thereupon the administratrix sued out a mandamus to compel certification of the proceeding to the circuit court, and the Supreme Court held it was the plain duty of Graham to do so when the objection was filed. That authority is more in point as to the right to have a particular matter arising in the administration of an estate certified than it is on the question of the competency of the probate judge to pass on the fact of whether he had been of counsel or not. As to the first proposition, the opinion says: "We are, however, of opinion that only the questions in which the respondent is interested as counsel should be certified. In all other respects the settlement of the estate may proceed before him as well as another. An estate is not a single litigation. Its settlement may involve many distinct legal controversies, in some of which one attorney may be interested, and in others different attorneys; and so far as is here perceived the interest of the respondent goes no further than the question of the widow's award."

On the whole our opinion is that, when the right of a probate judge to hear a matter arising in the course of administration is challenged by affidavit on the ground that he was of counsel or interested, the particular matter should be transmitted to the circuit court. If frivolous or unwarranted objections, tending to embarrass a probate court in the exercise of its jurisdiction or the performance of its duties, are made, the criminal law of the state may be called into play to punish the offender.

As to the point that the affidavit stated that Judge Gray had been of counsel in some of the matters of exception, we think the same tribunal ought to pass on all the exceptions. It would introduce confusion into administration affairs if each item in a list of specified exceptions to a settlement was regarded as a separate proceeding to be cer-

tified to the circuit court on objection, or retained by the probate court, according to circumstances. The exceptions as a whole constitute a step in the process of administration, and should all be settled on one hearing and by the same tribunal.

The judgment is therefore reversed, and the cause remanded with directions to the circuit court to grant a peremptory writ of mandamus commanding the probate court to vacate the order made sustaining the exceptions to relator's annual settlement, and to certify said exceptions to the circuit court of Pike county for hearing and determination.

BLAND, P. J., and REYBURN, J., concur.

BUTTS v. NATIONAL EXCHANGE BANK.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

PERSONAL INJURIES—FALLING OF GUARD RAILING—QUESTION FOR JURY—MENTAL SUFFERING—EVIDENCE.

1. Where a section of iron railing protecting the windows of defendants' building fell, injuring the foot of a pedestrian on the sidewalk, and it appeared that the other sections were fastened, while the one which fell was not, and had been loose for some time, and there was no claim that plaintiff was negligent, there was sufficient evidence of defendants' negligence to take the case to the jury on that issue.

2. In an action for personal injuries, evidence that plaintiff was in reasonable apprehension of blood poisoning was admissible to show mental suffering as an element of damage.

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by A. F. Butts against the National Exchange Bank. From a judgment for defendant, plaintiff appeals. Reversed.

Tatlow & Young, for appellant. Mann, Seebree & Farrington, for respondent.

REYBURN, J. The plaintiff sues defendant for personal injuries caused by the alleged negligence of the defendant, predicated on the following facts: Defendant, a federal banking corporation, had its place of business in the city of Springfield, in a building of which it was owner and had the care, management, and control on the 20th day of September, 1901. The building is located on the public square on the corner of Booneville street, and the sidewalks on both sides are on principal thoroughfares of the city of Springfield. The south side of the bank building is adjacent to and abuts upon the sidewalk on the north side of the public square, and along this side east and west an iron sill course about eight inches above the sidewalk and about eighteen inches in width extended along and formed part of the front of the building, and upon it, with spaces of six or seven feet between were erected iron columns supporting the front wall of the

structure, and between and back of these columns were installed the plate-glass fronts of the banking room, resting upon the sill course, the surface of which was about eight or nine inches above the level of the sidewalk. For the purpose of protecting the glass fronts from injury, a guard railing was placed at the front of the recesses between the iron columns resting upon and two or three inches from the outer edge of the sill course, these railings being of iron, and weighing 50 to 75 pounds each, and finished on the top with eight or ten iron barbs or spear points six to eight inches in length. That on the date stated plaintiff stopped on the sidewalk in conversation with an acquaintance, and to get out of the way of the many people passing, as well as to escape the sunlight, stepped in the shade of the building next to one of these guard rails, which almost immediately turned over and fell upon the sidewalk, and one of the barbs penetrated plaintiff's shoe, and pierced partly through his foot at the instep, causing the injuries complained of. It appeared that this iron guard rail was not fastened to the window sill upon which it rested, nor to the columns on either side, but it does not appear what caused it to fall. Appellant, as well as the man with whom he was conversing at the time of the accident, testified that they did not know what caused it to fall; and the latter that he did not know whether they had touched it or not. The evidence further tended to show that for several months prior to the date of the accident the guard railing by which plaintiff was injured was resting loosely upon the sill course between the columns, and for that length of time had not been fastened or secured in any manner, and that a slight touch was sufficient to overturn it, and after the injury this guard railing was secured by bolting it to the columns, and that all the other lengths of such railing were fastened and bolted.

The petition set out substantially the foregoing facts, the defendant being charged as having wrongfully, negligently, carelessly, improperly, and unlawfully kept and maintained and permitted to remain in, upon, in front of the side of said building and premises aforesaid in an unsound, unfast, insecure, defective, and dangerous condition, and in a careless, imprudent, and unsafe manner, a heavy iron railing about six feet long, weighing about 50 pounds, and in consequence of such negligent, careless, imprudent wrongdoing and misconduct of defendant the guard rail became unbalanced, and, overturning, fell with the points of the barbs towards the sidewalk, and injured plaintiff. At the conclusion of the testimony offered by plaintiff, the defendant prayed the court to instruct the jury to find the issues for defendant, which instruction was given by the court, and plaintiff took a nonsuit, with leave to move to set the same aside, which motion being overruled, the plaintiff appealed.

1. Defendant, as owner and in possession and charge of its banking house, owed the duty to the public to maintain its building in such a reasonably safe condition that pedestrians on the abutting sidewalk of the public thoroughfare should not sustain injury. *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938. Whether the defendant, under the facts presented in this case, had performed such duty, or whether plaintiff's injury had been caused by ignoring its obligation in that regard, should have been left to the jury to determine under the evidence, with appropriate legal instructions from the court. Negligence is not a fact which is susceptible of direct proof, but an inference deducible from the evidence, and is as frequently in issue, even where the facts are not controverted, as where issues of fact are also presented. *Wharton, Negligence*, § 420. The broad rule has been frequently recognized, and is of continual application in this state, that in passing upon a demurrer to the evidence it is the duty of the trial court to indulge the plaintiff with every inference of fact in his favor which a jury might draw with any degree of propriety, and unless, assuming the facts sought to be proven by plaintiff to be absolutely true, and drawing such inferences therefrom, the evidence would be insufficient to sustain a verdict in his favor, the demurrer should not be sustained. *Baird v. Ry. Co.*, 146 Mo. 265, 48 S. W. 78; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503.

The answer of defendant charged no negligence against plaintiff, and under the testimony no negligence contributing to the accident was imputable to him. It appeared that the section of railing which produced the injury had for a long period prior remained loose and insecure, that the remaining spans of railing were bolted, and that after the occurrence this section was in like manner protected. No actual notice to or proof of knowledge of the imperfect and dangerous condition of the unsecured railing was required. The span of railing had been in itself unsteady for so long a period that, in the exercise of due diligence, the jury might have concluded that defendant was apprised of its perilous condition. *Jegglin v. Roeder*, 79 Mo. App. 428. Where the facts are such that reasonable men may honestly draw different conclusions therefrom, whether, under the conditions presented, the defendant was chargeable with negligence, the case should not be withdrawn from the consideration of the jury. *Baird v. Ry.*, *supra*.

2. Plaintiff should have been permitted to show as an element of damage that he was in reasonable apprehension of blood poisoning as the possible, if not probable, consequence of his injury. Mental suffering, when a condition of mind produced by physical injury and attending it, is as proper an element of the damage sustained as the actual physical injury accompanying and causing it.

Chilton v. St. Joseph, 143 Mo. 192, 44 S. W. 766; Deming v. R. R., 80 Mo. App. 152.

We are of the opinion that the proof entitled the question of negligence to be submitted to the jury, and that error was committed in withdrawing the case from its consideration, for which it is reversed and remanded.

BLAND, P. J., and GOODE, J., concur.

HEFFERNAN v. WEIR.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

APPEAL — RECORD — SALE OF MORTGAGED REALTY—ASSUMPTION OF DEBT—BURDEN OF PROOF.

1. On appeal in equity, it is not necessary to review the declarations of law given or refused by the trial court.

2. Unless it affirmatively appears by the record on an appeal in equity that all the evidence offered has been preserved, the decision below will not be reviewed.

3. In a suit by a mortgagee to charge a grantee of the mortgaged premises with an unpaid balance of the mortgage debt, the burden is on the plaintiff to show an assumption of the debt by the grantee; such assumption not being implied from the conveyance.

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by F. S. Heffernan against A. T. Weir. From a judgment for defendant, plaintiff appeals. Affirmed.

Heffernan & Heffernan, for appellant. Vaughan & Coltrane, for respondent.

REYBURN, J. From the meager record, this appears to be an action to charge defendant upon a contract of assumption of the balance unpaid on a bond executed by John R. Marsh, originally secured by a deed of trust upon realty in Greene county, under the provisions of which, enforcing the right of sale, the mortgage indebtedness has been partially paid. The appellant, in lieu of a perfect transcript of the record and proceedings in the cause, has presented a certified copy of the record entry of the judgment appealed from, and the other proceedings constituting the abbreviated record authorized by section 813 of the Revised Statutes. The appellant's statement in print filed in this court fails to comply with the rules—especially rule 15—in many respects. The pleadings, neither abstracted nor at length, are contained therein; and the testimony, as abstracted, is evidently only part of the proof, documentary and oral, offered at the hearing. In the absence of the circuit judge of Greene county, the case was tried before a member of the Springfield bar, selected; and at the close of the hearing the court rejected the declarations of law prayed by plaintiff, and gave several at defendant's request, including a declaration that, upon the pleadings and the evidence in the case, the plaintiff was not entitled to re-

cover. From the foregoing outline, it is manifest that the record is in such a condition that it is impossible for us to fully review the case. As the proceeding is denominated and treated by appellant as a suit in equity, it is not material or necessary to inquire whether the declarations of law declared or refused by the trial court were erroneous, for the court's decree is not dependent upon the correctness of such declarations, and may in itself be correct, although error may exist in such declarations. Hall v. Harris, 145 Mo. 614, 47 S. W. 506. We are further precluded from reviewing this case by reason of the fact that, unless it affirmatively appears by the record that all the evidence offered in the trial court has been preserved, the well-established rule of practice of appellate courts in an equitable proceeding to decline to review the cause must be applied. Barnes v. Buzzard, 61 Mo. App. 346; Roberts v. Bartlett, 28 Mo. App. 611.

2. From the printed abstract of the testimony filed by appellant, it appears that a general warranty deed in January, 1899, was executed and delivered by Marsh and wife to respondent for a recited consideration of \$700, conveying the property (which had been conveyed by the prior deed of trust) to respondent, with full covenants of warranty, and without any express assumption by the grantee of the mortgage indebtedness. While it is unnecessary that the contract of a grantee to assume payment of an existing incumbrance, as part of the consideration for which a conveyance of realty is made, should be in writing, and a verbal promise of such assumption is valid and enforceable in equity, yet the promise to pay must be established by clear and cogent evidence, and cannot be implied by inference. 2 Devlin on Deeds, § 1073; Ordway v. Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; Bensieck v. Cook, 110 Mo. 178, 19 S. W. 423. The burden of establishing such contract was on appellant, and the record discloses that he has failed to establish such oral agreement. GOODE, J., is of the opinion that the action was at law, but that the rulings of the trial court were correct.

Judgment affirmed.

BLAND, P. J., concurs, and GOODE, J., concurs in the result.

FREEMAN v. LAVENUE.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

REPLEVIN—DAMAGES—CONSOLIDATION OF CAUSES—JUDGMENTS.

1. Damages to defendant in replevin can only be assessed in the replevin action after final judgment in defendant's favor, and a motion for leave to introduce evidence to show defendant's damages cannot be granted after final judgment not awarding the property to either party.

2. Where a replevin action has resulted only in an interlocutory judgment, a motion for leave to introduce evidence as to defendant's damages is premature, as there has been no final judgment in defendant's favor.

3. In a replevin action tried to the court, it found that the property was partnership property of plaintiff and defendant, to possession of which neither was entitled, and ordered the action consolidated with a suit for partition of the same property. The consolidated suit proceeded to judgment, from which no appeal was taken. *Held*, that defendant in the replevin action was concluded by the judgment in the consolidated suit, and was not thereafter entitled to introduce evidence in the replevin action to establish his damages.

Appeal from Circuit Court, Wright County; Argus Cox, Judge.

Action by George W. Freeman against J. L. Lavenue. From an order sustaining a motion to dismiss a motion for leave to introduce evidence to show damages, defendant appeals. *Affirmed*.

Plaintiff brought suit in the Wright circuit court in 1899, in replevin, to recover of the defendant the possession of a stock of drugs, medicines, and paints. The record does not show whether or not the merchandise was delivered to plaintiff under the writ. At the March term, 1899, of the Wright circuit court, the cause was submitted to the court, without the intervention of a jury, who, after hearing the evidence, rendered the following judgment:

"George W. Freeman v. J. Len Lavenue. Replevin. Now on this day this cause coming on to be heard, and both parties answering 'Ready for trial,' and a jury being waived, the cause is submitted to the court for trial, who, after hearing the evidence, finds that prior to the commencement of this action the defendant and one T. E. Gaskill were partners and joint owners of the property in controversy in this suit, and that prior to the commencement of this action the plaintiff, Geo. W. Freeman, acquired all the right, title, and interest of the said T. E. Gaskill in and to said property by purchase from said T. E. Gaskill, and that plaintiff and defendant were at the commencement of this action, and now are, joint owners of said property, subject to the partnership debts, if any, of said T. E. Gaskill and this defendant, J. Len Lavenue; that neither plaintiff nor defendant is entitled to the sole and exclusive possession of said property. And it further appearing that plaintiff herein has filed in this court his petition and affidavit against defendant for partition of said property, asking for the appointment of a receiver, and an accounting between plaintiff and defendant in relation to said property, which cause is now number 194 on this docket, it is therefore ordered and adjudged that all further proceedings herein be suspended until final action of the court in said action for partition and accounting; and it is further ordered that all questions arising between plaintiff and defendant in relation to said property, including all questions of damages

and other questions, if any, that may arise or have arisen in this suit of replevin, be adjudicated in said action for partition and accounting, but should plaintiff fail or refuse to prosecute his said action for partition and accounting, with due diligence, to a final judgment, then all other questions arising in this suit, and not herein now adjudicated, shall, on motion of defendant, be adjudicated in this action at any future term of this court. It is further ordered that, when a receiver shall be duly appointed and qualified in said cause for partition and accounting, the property in controversy in this action shall be turned over to him. It is further ordered that defendant receive of and from plaintiff his costs and charges accrued to this date in this action, for which he may have execution."

On June 24, 1899, at an adjourned term of the March, 1899, term of the Wright circuit court, an order was made by the court appointing a receiver in the partition suit mentioned in the foregoing judgment. The receiver took possession of the merchandise involved in the replevin suit, and administered it under the order of the court. At the September term, 1899, the partition and replevin suits were, by order of the court, consolidated. At the March term, 1900, a change of venue of the cause was, on the application of the defendant, awarded to the Greene circuit court. The cause was filed in the Greene circuit court August 16, 1900. Defendant filed his answer in that court on September 12, 1900. An interlocutory judgment was rendered and a referee appointed by the Greene circuit court November 23, 1900. The referee made his report to the Greene circuit court on November 28, 1900, and that court rendered a final judgment in the cause December 22, 1900, from which no appeal was taken, and to which no exceptions were saved. On April 2, 1902, the defendant filed his motion in the Wright circuit court for permission to introduce evidence of the value of the property replevied, with a view of having his damages assessed. Plaintiff filed a motion to dismiss defendant's motion. The court sustained the motion to dismiss defendant's motion for leave to introduce evidence, etc., from which ruling of the court defendant duly appealed to this court.

Musick & Neider, for appellant. F. M. Mansfield, for respondent.

BLAND, P. J. (after stating the facts). 1. If the goods were delivered to plaintiff under the writ of replevin, and if the judgment in the replevin suit rendered at the March term, 1899, is a final one, the defendant's motion to introduce evidence with a view of establishing damages came too late, as the damages in the cause could be assessed only in the proceeding which resulted in a final judgment in his favor. *White v. Van Houten*, 51 Mo. 577; *State v. Dunn*, 60 Mo. 64;

Fulkerson v. Dinkins, 28 Mo. App. 160; Clinton v. Stovall, 45 Mo. App. 642. If the judgment rendered by the Wright circuit court in March, 1899, is interlocutory, then the application for permission to introduce evidence as to the value of the goods was premature, as damages could be assessed only in a proceeding for a final determination of the rights of the parties to the possession of the property in controversy.

2. But it seems to us that the judgment of the Greene circuit court concluded the whole matter. A replevin suit may become a suit in equity—at least, equitable issues may be raised and determined in such a suit. Dilworth v. McKelvy, 30 Mo. 149; Lewis v. Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Baldrige v. Dawson, 39 Mo. App. 527. The judge of the Wright circuit court found that there were equitable issues, in respect to the rights of the parties in the property in controversy, to be settled in the replevin suit, and, we think very properly, consolidated it with the partition suit. After the consolidation the change of venue was taken to the Greene circuit court, and the whole matter was therefore within the jurisdiction of that court; and if defendant neglected to have his rights, if any, growing out of the replevin suit, adjudicated by that court, it was his own fault.

The judgment is affirmed.

REYBURN, J., concurs. GOODE, J., not sitting, having been of counsel.

KOBUSH v. SCHMIDT.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

EJECTMENT—RECOVERY—ACTION FOR IMPROVEMENTS—EVIDENCE.

1. In ejectment, plaintiff recovered certain lands on islands numbered 63 and 64 in the Missouri river, and defendant therein sued under the statute to recover compensation for improvements alleged to have been made by him on an island east of them, and his testimony showed that he had made no improvements on the islands involved in the ejectment suit. Held, that he was not entitled to recover.

Appeal from Circuit Court, Warren County; E. M. Hughes, Judge.

Action by August Kobush against Orlando P. Schmidt. From a judgment for defendant, plaintiff appeals. Affirmed.

Peers & Peers, for appellant. Jesse W. Schaper, for respondent.

REYBURN, J. The defendant herein recovered a judgment in ejectment against plain-

tiff for recovery of land described as the lower half of island No. 64 and island No. 63 in the Missouri river. Before possession was taken under this judgment, the plaintiff, as the occupying claimant, began this proceeding under the statutory provisions to recover compensation for improvements alleged to have been made by him on an island below and east of islands Nos. 63 and 64. His petition, properly verified, specifically set forth that on a date named he entered into quiet and peaceable possession of an island formed in the Missouri river below and east of islands Nos. 63 and 64, believing he had good right to enter thereon, and that he had title thereto, and had ever since remained in the quiet possession thereof in good faith; that on the — day of —, 1901, this plaintiff was sued in ejectment for said land by this defendant, who claimed title thereto, and on the — day of October, 1901, judgment of dispossession was rendered against him, and for \$— damages and \$— monthly rents and profits; that during the time he occupied said premises he had no knowledge or notice of defendant's claim on said land, or any part thereof; that in good faith he put valuable improvements thereon, believing he had title thereto, and the improvements are specifically set forth, with the further allegation that all such improvements were made in good faith, believing he had title to the land, and without notice of defendant's claim. The defendant's answer was a general denial, and the case proceeded to trial before the court; the plaintiff testifying that he had made no improvements on islands 63 or 64, and that he did not claim compensation for any improvements on either islands 63 or 64, and that the improvements were not on 63 and 64, and at the close of the evidence the court refused an instruction asked by plaintiff and rendered judgment for defendant.

Appellant's statement in print concedes that the action in ejectment was for the lower half of island 64 and island 63 in the Missouri river, and his complaint herein describes the property of which he claimed to be in possession, and upon which he made the improvements, as an island formed in the Missouri river below and east of islands Nos. 63 and 64; so we are confronted at the threshold of the case by the facts established and acknowledged that no right of action was alleged in plaintiff's petition nor sustained by his proof. This disposes conclusively of the case, and the judgment of the lower court is accordingly affirmed.

BLAND, P. J., and GOODE, J., concur.

SMITH v. FRANKFORT & C. RY. CO.
(Court of Appeals of Kentucky. March 19, 1903.)

EJECTMENT—DECREE—EFFECT—INVALIDITY OF CONTRACT WITHIN STATUTE OF FRAUDS—WAIVER—RAILROADS—SUCCESSOR OF ANOTHER COMPANY.

1. In ejectment plaintiff sought the recovery of land in possession of a railway company. The company claimed that plaintiff had donated the land to it for station purposes. Plaintiff, in its reply, alleged that the agreement with the company was not in writing, and provided for the erection of a station house thereon within a specified time, and that the building was not erected within such time. With this reply he tendered a deed of the land to the company. Subsequent to the tender of the deed the company erected a station house, but which plaintiff claimed was unsuitable. *Held*, that a decree containing no reasons, which permitted the company to withdraw the deed from the record, and which dismissed the complaint, must be considered as based on the court's opinion that the station house erected on the land was suitable, making the decree one for specific performance.

2. A plaintiff in ejectment, who, with his reply that the agreement under which defendant claimed possession was not in writing, and hence void, within the statute of frauds, tendered a deed conveying the land to defendant, waived his right to rely on the invalidity of the contract.

3. Where a railroad company acquired the property and franchises of another company, a conveyance of land to the latter company vested the title therein in the former company.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

Ejectment by E. D. Smith against the Kentucky Midland Railway Company and another, in which the Frankfort & Cincinnati Railway Company was, on its petition, made a party defendant. From a decree for the last-named defendant, plaintiff appeals. *Affirmed*.

Montgomery & Lee and W. F. Bradley, for appellant. T. L. Edelen, for appellee.

SETTLE, J. This action was instituted by appellant in the Scott circuit court against the Kentucky Midland Railway Company and the Home Construction Company on August 11, 1892. The answer of the Kentucky Midland Railway Company was filed February 6, 1893, and the reply thereto was filed October 6, 1893. The action is one in ejectment, seeking to recover an acre of ground in the form of a parallelogram situated at a point on the railroad now owned by appellee, Frankfort & Cincinnati Railway Company, known as "Duvall's Station." It is averred in the petition that the Kentucky Midland Railway Company and the Home Construction Company have the possession of the land without right, and that appellant is the owner, and entitled to the possession thereof. The petition prays judgment for the recovery of the land and \$200 damages for its detention.

Answer was filed by the Kentucky Midland Railway Company in which appellant's ownership of the land in question and his right to the possession thereof is denied.

And it is averred in the answer that before the railroad company had located its railroad stations on the line of its railway the appellant donated and gave to it for railway station purposes the land described in his petition in consideration of the undertaking that the Kentucky Midland Railway Company would locate one of its stations at that point. That appellant was very solicitous to make the agreement, and it accepted his proposition, and was put in possession of the land by him, and it has continuously held the possession thereof ever since. It is further averred in the answer that, relying upon appellant's dedication of the land, a large sum of money, namely, \$875, was expended by the railway company in grading and laying side tracks, and in making other and lasting and valuable improvements on and near the land, in order that it might be used for the erection of a station or depot. It is also averred in the answer that the Kentucky Midland Railway Company was desirous of building upon the land in controversy a suitable station house, but that it had been prevented from doing so by appellant's failure to make it a deed of conveyance for the land. It asked the court to compel appellant to convey the lot, that it might erect the station house thereon as agreed.

The averments of the answer were denied by reply, in which it is admitted, however, that the railway company had agreed to erect the station house on the land in controversy, and averred that after the institution of this suit a written agreement was entered into between appellant and the railway company, whereby the latter agreed to erect the station house within 90 days, but had failed to do so. The reply avers that the contract in regard to the land is not in writing, and is, therefore, within the statute of frauds. Notwithstanding this plea, appellant tendered with his reply a deed to the land.

It appears that the written contract referred to in the reply was never agreed to or signed by the railway company. The deed tendered to the railway company is made a part of the record, and was duly signed and acknowledged by appellant and his wife, but it contains no condition with reference to the erection of the station house. The only consideration expressed in it is \$1, the payment of which is therein acknowledged. It further appears from the record that the Kentucky Midland Railway Company did, after the tender of the deed by appellant, erect a station building on the land in controversy, but appellant insists that it is unsuitable, and not such a building as the railway company agreed to erect. On February 14, 1899, the appellee, Frankfort & Cincinnati Railway Company, filed its petition to be made a party to the action, and it thus became a party, the petition being taken as its answer in the case. It is alleged in that petition and answer that since the institution of this action the property of the Kentucky Midland

Railway Company was placed in the hands of a receiver, and thereafter was sold under decree enforcing certain liens existing thereon, and one Dandridge became the purchaser for the bondholders of the old road. Thereupon the appellee, Frankfort & Cincinnati Railway Company, was duly organized and incorporated, and to this new organization the property, property rights, and franchise of the old company were transferred and delivered. It is further alleged in the petition and answer of appellee that it now owns and holds the title to the railroad property, and assets of the former company, and that it purchased the lot in controversy with the remainder of the property, for value, and without notice of the existence of any claim of appellant thereon; and, further, that appellant, by his negligent failure to duly prosecute this action against the Kentucky Midland Railway Company, is estopped to claim or assert title to the land. After the filing of other and subsequent pleadings by the parties necessary to complete the issues, the cause was transferred to the equity docket. Numerous depositions were then taken, and the case finally submitted for trial. The court entered judgment decreeing that the Kentucky Midland Railway Company be permitted to withdraw from the record the deed from E. D. Smith and wife to it, and it was further decreed that appellant's petition be dismissed, and that each party pay his or its own costs, and from this judgment appellee has appealed.

The judgment does not recite the reasons entertained by the chancellor for the conclusions arrived at, but, in view of his decreeing the delivery of the deed from appellant and wife to the Kentucky Midland Railway Company, we must infer that he regarded the station building or depot that was erected by the Kentucky Midland Railway Company upon the land in controversy as suitable for the purposes for which it was intended; in other words, the judgment is in the nature of a decree for a specific performance. The deed had been tendered by the appellant, and the chancellor only compelled its delivery to the grantee named therein. So, in this view of the case, it seems to us unimportant that the contract, as originally made between the parties, was not in writing. The tender of the deed by the grantor was an offer of performance and a waiver of his right to rely on the statute of frauds. The acceptance of the same by the grantee, and the judgment of the court compelling its surrender to the latter, passed the title to it as effectually as if it had been done by mutual consent of the parties. As the appellee, Frankfort & Cincinnati Railway Company, acquired the property and franchise of the Kentucky Midland Railway Company, the conveyance to the latter company operates to vest the title of the land in controversy in the appellee as its successor.

Under the state of the record, we are not

inclined to disturb the finding of the chancellor, and the judgment is therefore affirmed.

COSBY v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 19, 1903.)

ASSAULT WITH INTENT TO KILL—DEADLY WEAPON—QUESTION FOR THE JURY.

1. Only where the jury, in a prosecution for an assault with a deadly weapon with intent to kill, believe that the instrument with which defendant wounded another was such an instrument as was reasonably calculated to produce death when used by a person of defendant's strength, and in the manner in which it was used by him, would they be authorized to find that such instrument was a deadly weapon within the meaning of the law.

Appeal from Circuit Court, Nelson County.
"To be officially reported."

George Cosby was convicted of crime, and appeals. Reversed.

C. F. Atkinson, for appellant. Clifton J. Pratt and M. R. Todd, for the Commonwealth.

SETTLE, J. The appellant, George Cosby, was indicted in the Nelson circuit court for the crime of unlawfully and maliciously striking and wounding one Wm. Gilky with a club and rock, deadly weapons, with the intent to kill him. Upon the trial appellant was found guilty by the verdict of the jury, and his punishment fixed at confinement in the penitentiary for a term of three years. A new trial was refused him; hence this appeal.

The lower court gave five instructions, four of which, viz., 1, 2, 3, and 5, we do not hesitate to approve, as they fairly and explicitly set forth, as far as they go, the law of the case; but we are unable to approve instruction No. 4 given by the court, which is as follows: "By the words 'a deadly weapon,' as used in these instructions, is meant a weapon with which death might be produced in the manner in which defendant used the club and rock, or either, on the occasion mentioned in the indictment (if he used club and rock, or either, on said occasion)." It was, of course, necessary to submit to the jury, as was done in instructions 1 and 2, the question of whether the instruments used by appellant in the striking and wounding of Gilky were or not deadly weapons, but it was also necessary to tell the jury in those instructions, or a separate one, what may be considered a deadly weapon in the meaning of the law. As said by this court in *Commonwealth v. Duncan*, 91 Ky. 595, 16 S. W. 531: "The statute does not say what shall constitute a deadly weapon. It merely punishes for a willful and malicious wounding with one. If one man maliciously wounds another with a rock, with which he might have killed him, there exists no reason why the same

punishment should not be meted out to him as if he had done it with a shotgun; and undoubtedly the Legislature, in enacting this statute, so intended. Whether in this instance the rock was large enough to produce death, and therefore a deadly weapon, should have been left to the jury, and the court erred in taking the question from them." This court has never adopted a form of instruction defining the meaning of the words "deadly weapon," and an examination of the opinion in the case *supra* will show that it does not undertake to say what will constitute a deadly weapon within the meaning of the statute, but simply declares that "under a statute punishing one for an injury with a deadly weapon, not only the character of the weapon used, but the manner of its use, is to be considered." We think the court might have gone further, and said that the physical strength of the person using the instrument or weapon is also to be considered by the jury in determining whether it is a deadly weapon. A deadly weapon is "one dangerous to life." A rock or club is not necessarily a deadly weapon, but may be made so in the hands of a malicious or infuriated person of ordinary strength, if used in an attack upon another with intent to take his life. It will be observed that instruction No. 4 told the jury that "any weapon" is deadly which might produce death, if used in the manner in which the club and rock were used by appellant. A bar of iron or a sledge hammer might easily produce death, if used in the manner in which the club and rock seem to have been used by appellant; but the question to be determined by the jury was not whether any weapon (such as a bar of iron or other heavy instrument) might produce death if used as the club and rock were used, but whether the latter, considering their character and the manner of their use, might have produced death. We are of the opinion that the lower court should have given the instruction on this point as follows: "If the jury believe from the evidence beyond a reasonable doubt that the club and rock, or either, with which the defendant struck and wounded Gilky (if he did so strike and wound him with a club and rock, or either), were such instruments as were reasonably calculated to produce death when used by a person of defendant's physical strength and in the manner in which they, or either of them, were used by him on the occasion mentioned in the indictment, they will in that event be authorized to find that such club and rock, or either, are deadly weapons within the meaning of the law."

For the error committed by the lower court in the matter of giving instruction No. 4, the judgment is reversed, and the cause remanded, with directions to that court to set aside the verdict of the jury and the judgment and sentence entered thereon, and to grant appellant a new trial in conformity to the opinion herein.

COMMONWEALTH v. NUTE

(Court of Appeals of Kentucky. March 25, 1903.)

TAXATION—ANNUITIES—AMOUNT ASSESSABLE—PRESENT WORTH—BACK TAXES—RECOVERY—STATUTES—CONSTRUCTION—LIMITATIONS.

1. Where a widow, entitled to dower in certain real estate, conveyed her interest therein in consideration of an annuity of \$500 per year, the present worth of such annuity, or the actual value of the obligation of the grantees, valued according to the life tables, and not the annual payment, was the amount which the widow was required to list for taxation.

2. Ky. St. § 2523, provides that limitations prescribed by the chapter shall apply to the commonwealth as well as to private persons; and section 2515 declares that an action on a liability created by statute, when no other time is fixed, shall be commenced within five years after the cause of action accrued. Act May 23, 1890, p. 149, c. 1763, authorizes the recovery of taxes which could not be collected by ordinary methods of distraint and sale, but limits such actions to taxes assessed within five years; and section 4021 declares that the state's lien on real estate for taxes assessed retrospectively is barred after five years. *Held*, that since, under section 469, providing that the term "action" shall include all proceedings in any court, a proceeding by an auditor's agent to recover back taxes on an annuity was an action, it was barred after five years from the time when the property should have been assessed.

Appeal from Circuit Court, Fleming County.

"To be officially reported."

Action by the commonwealth against Mahala Nute. From a judgment in favor of defendant, plaintiff appeals. Reversed.

B. S. Grannis and G. A. Cassidy, for the Commonwealth. Jno. P. McCartney, for appellee.

NUNN, J. On the 8d day of April, 1901, the auditor's agent for Fleming county instituted this action or proceeding in the Fleming county court to have certain property belonging to appellee assessed for taxation; alleging that she had failed to assess the property as required by law. A trial was had in the county court, and that court dismissed the proceedings. The appellant appealed to the circuit court, and another trial was had. On this trial the proof showed the following facts: That appellee had, in each and every year, at the proper time, listed her money and all property owned by her, except the following annuity, obtained as follows: She was the owner of a dower interest in 218 acres of land, and on the 20th day of August, 1890, she sold and conveyed her interest therein to Chas. Nute and J. B. Glasscock for and in consideration of the sum of \$500, due and payable on the 1st day of March, 1892, and \$500 each succeeding 1st day of March thereafter during the natural life of appellee. It is conceded that she received \$500 on the 1st day of March each year since that time on this contract, and paid the taxes thereon, or

the balance on hand, on the 15th day of September each year. The circuit court dismissed the proceedings, from which judgment appellant appeals to this court.

The appellant contends that the appellee should have listed for taxation for each of the 10 preceding years the present worth or the actual value of the obligation of Nute and Glasscock, valued under the life tables. We are of the opinion that the appellant was correct in its contention. The appellee should have listed this obligation according to its present value for each year according to the life table. If she had retained her dower interest in the land, she would have been compelled to pay the taxes on it, and this obligation represented her interest therein. There is a very important question involved in this proceeding, and in cases of like character, and that is as to whether or not there is any law as to limiting the time for retrospective assessments of property for taxation. This court is of the opinion that the statute laws of the state settle the question that limitations do apply, and that property cannot be retrospectively assessed for taxation for more than five years from the institution of a proceeding like this. Section 469 of the Kentucky Statutes is as follows: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this commonwealth." By this section it will be seen that this proceeding by the auditor's agent to back-assess for taxes is an action, within the meaning of the statutes. Section 2523 of the Kentucky Statutes is as follows: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter of this revision." Section 2515 of the Kentucky Statutes, of the same chapter as the above section, in so far as applicable to the question before us, is as follows: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, * * * shall be commenced within five years next after the cause of action accrued." Thus it will be seen, from the statutes quoted, that this proceeding is an action in the name of the commonwealth and for the benefit of the commonwealth, and that the statutes of limitations run against it the same as against a private person; that a liability created by the statutes is barred after five years from the accrual of the cause of action or proceeding, and, there being no provision in the statutes prescribing a different time for the commencement of proceedings of this kind, the five-year rule must apply. And there can be no question but that this proceeding is to enforce a liability created by statute, and comes within the rule prescribed by section 2515 of the Kentucky Statutes. Section 4021 of the Kentucky Statutes declares that counties, cities, etc., shall have a

lien on the property assessed for the taxes, which shall not be defeated by gift, devise, sale, or alienation, unless the gift, devise, etc., shall have been made for more than five years before the institution of proceedings to enforce the lien; and it also says that, when any land shall not be assessed in any one year, it may be assessed retrospectively for that year at any time not later than five years thereafter, but the lien thereby accruing shall not thereby prejudice the rights of purchasers, acquired in the meantime or before the assessment. It will be observed that this section is preserving the state's lien for taxes and protecting innocent purchasers, and the sentence, "that land can be retrospectively assessed at any time not later than five years thereafter," simply declares, as to lands, the general limitation law on the subject. By an act approved May 23, 1890 (page 149, c. 1763, Acts 1889-90, vol. 1), the commonwealth was given power to institute and maintain actions to recover all taxes which had accrued or might thereafter accrue on property which could not be collected by the ordinary methods of distraint and sale, for the purpose of enforcing the state's lien on the property, which for any reason could not be sold. This had reference to railroads, waterworks, wharf property, and other like property. Said act concludes as follows: "But no action shall be instituted upon any claim for taxes that has been assessed or might have been assessed more than five years before the commencement of same." As will be seen, this act authorizes an action for the purpose of collecting taxes due the state on property which could not be sold under the ordinary methods; and, as to this class of property, the five-year limitation was declared, which agreed with the general limitation law for the assessment of property for taxation. It will hardly be contended that the Legislature intended by section 4021 and the act of 1890, above referred to, to give lands and the property referred to in the act of 1890 a preference over other property. We can see no reason why the state, counties, etc., should be allowed to retrospectively assess for taxation money, notes, bonds, horses, mules, cattle, and other personal property, without any limitation as to time, and be limited to five years in retrospectively assessing lands, railroads, waterworks, wharf property in cities, and other like property; and we do not believe that the statutes referred to will authorize any such construction. We are aware of several decisions of this court in the past holding or seeming to hold the contrary opinion, but the most of them were rendered when the statutes were different from those that now exist, and some of them were mere dicta. But all such as are in conflict with this opinion are no longer authority on the question herein decided.

For these reasons, the case is reversed, and the cause remanded for further proceedings consistent herewith.

YOUNG et al. v. BECKHAM.

(Court of Appeals of Kentucky. March 25, 1908.)

PRIMARY ELECTIONS—NOMINATING STATE OFFICERS—GOVERNING COMMITTEE—POWERS—ELIGIBILITY OF CANDIDATES—CANVASS OF VOTES—MANNER OF HOLDING—MANDAMUS.

1. Where the petition in mandamus to compel the governing committee of a political party to place plaintiff's name on the ballot before a primary election alleges that the governing authority has called a primary election, and this is not denied by the answer, the court will proceed on the theory that the primary has been so called.

2. Ky. St. § 1550, in article 12, entitled "Primary Elections," declares that a primary election is an election within the state, county, city, etc., for the purpose of nominating candidates for office. Section 1565, in the same article, provides that the article shall apply to all primary elections held for "nominating candidates for state, county, district, or municipal offices." Held to provide for a primary election for the nomination of candidates for state offices.

3. Ky. St. § 1553, in article 12, entitled "Primary Elections," provides that the governing committee of a political party may call a primary election on giving notice as therein prescribed. Section 1563, in the same article, empowers the governing committee of the party in the county or district in which a primary is held to count the votes. Section 1565, in the same article, provides that the article shall apply to all primary elections for nominating candidates for state, etc., offices. Held, that the word "state" must be read into section 1563, so that the governing committee calling a primary for nominating state officers will be authorized to count the votes, and certify the names of the successful candidates to the Secretary of State.

4. A political party resorting to a primary election for nominating candidates must conduct such election in accordance with Ky. St. art. 12, regulating primary elections.

5. The governing committee of a political party calling a primary for nominating candidates pursuant to Ky. St. art. 12, regulating primary elections, has no right to question the eligibility of any candidate before the primary, and for that reason refuse to place his name on the ballot.

6. Code Civ. Proc. § 477, declares that a writ of mandamus is an order of a court of competent jurisdiction commanding an "executive or ministerial officer" to perform an act, etc. Ky. St. § 1563, requires the governing committee of a political party to be sworn before entering on the discharge of their duties as set forth in article 12, regulating primary elections, and prescribes a punishment for their failure to perform such duties. Held, that the governing committee of a party are "officers" against whom a writ of mandamus may be issued, within Code Civ. Proc. § 477.

Appeal from Circuit Court, Woodford County.

"To be officially reported."

Mandamus by J. C. W. Beckham against Allie W. Young and others to compel defendants to place the name of plaintiff on the ballot as a candidate for the office of governor before the primary election. From a judgment for plaintiff, defendants appeal. Affirmed.

Breckinridge & Shelby and White & Ray, for appellants. Louis McQuown and W. S. Pryor, for appellee.

PAYNTER, J. The purpose of this proceeding is to compel the Democratic committee to place the name of the appellee, J. C. W. Beckham, on the ballot as a candidate for the office of governor before the Democratic primary election called for May 9, 1908. The question of his eligibility has been raised, and the committee refuses to place his name upon the ballot. The question to be determined from the pleading is whether the governing authority of the party has called a primary election, and, if so, (a) whether the statute authorizes the holding of primary elections to nominate candidates for state offices; (b) whether the committee can refuse to place his name upon the ballot because they think he is ineligible to re-election; (c) whether, by proceeding in mandamus, the committee may be compelled to place his name upon the ballot used at the primary as a candidate for governor.

The first question is easily disposed of. It is averred in the petition that the governing authority of the party has called a primary election, and it is not denied by the answer; therefore the court must proceed upon the idea that the primary has been called by the governing authority of the party.

Sections 1550 and 1565, inclusive, of article 12, c. 41, Ky. St., embrace the law upon the subject of primary elections.

Section 1550 reads as follows: "A primary election, within the meaning of this article, and as used in this chapter, is an election held within the state, county, city, district, or subdivision thereof, as the case may be, by the members of any political party, or by the voters of some political faith, for the purpose of nominating candidates for office."

Section 1565 reads as follows: "The provisions of this article shall apply to all primary elections held for the purpose of nominating candidates for state, county, district or municipal offices hereafter held in the commonwealth, except those held in the year one thousand eight hundred and ninety-two."

From these sections it is manifest that the Legislature intended to provide for a primary election for the nomination of state officers. Section 1565 expressly provides that the article shall apply to primary elections held for the purpose of nominating candidates for state, county, district, or municipal offices.

A difficulty arises from the fact that the law is not definite and certain as to how the result of a primary election shall be ascertained and certified to the Secretary of State for the purpose of having the names of the successful candidates placed by him upon the official ballot for the regular election. When section 1565 says that the article shall apply to all elections held for the purpose of nominating candidates for state, county, district, or municipal offices, it must have meant that the committee or governing authority of the party can ascertain and certify the result of the primary held to nominate candidates for such offices to the Secretary of State, be-

cause it is provided in section 1553 that the committee or governing authority of the party may order a primary election. In addition to that, section 1563 provides that the committee or governing authority in the county or district are empowered to count the votes. In view of section 1563, making the article which includes section 1563 applicable, we must read into that section the word "state." If the committee or governing authority can call and hold a primary election, the same authority can certify to the Secretary of State the names of the parties who are entitled to be placed upon the official ballot. This power is necessarily implied.

Some of the rules prescribed for the conduct of the primary are in violation of the statute. The committee should follow strictly the provisions of the statute regulating the holding of the primary election. Unless this is done, the risk is taken that they may not be able to have those who are declared to be the nominees placed upon the ballot at the regular election. The court, in *Brown v. Republican County Executive Committee*, etc. (Ky.) 68 S. W. 622, held that there can be no lawful primary unless it is held as prescribed by the statute. In this case we deem it unnecessary to point out wherein the rules of the primary differ from the provisions of the statutes, presuming that the committee will conform its action to its provision.

We are of the opinion that the committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidates for a particular office. If the committee can say who is and who is not eligible to be nominated as party's candidate for office, they can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be exercised by a mandamus. The most

that could be done by such a writ would be to compel them to act upon the question.

The next question is, is a writ of mandamus the proper remedy in a case like this? Section 477 of the Civil Code of Practice provides: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or admission of which is enjoined by law; and is granted on a motion of the party aggrieved, or of the commonwealth when the public interest is affected."

It is urged that the committee or governing authority of a party are not executive or ministerial officers; therefore the writ cannot be issued against them. A primary election called by the committee or the governing authority of a party is to be conducted under the statute law of the state regulating such elections. The Legislature has seen proper, as it were, to take charge of them, and, to secure fairness in the conduct of same, has provided penalties for the violation of the law.

It is provided in section 1563, Ky. St., that "before entering upon the discharge of the duties set forth in this article, the committee or governing authority shall be sworn by some officer authorized by law to administer an oath to faithfully and honestly discharge the duties herein imposed; and the failure upon the part of any member of the committee or governing authority to discharge such duties faithfully and honestly shall be deemed a misdemeanor, and the person so offending shall upon indictment and conviction in the circuit court of the county or district, be fined not less than \$100, nor more than \$500, and be imprisoned in the county jail not less than sixty days and not more than one year."

A cursory reading of the section might make an impression upon the reader that this only required that the committee or governing authority should take this oath when organized to determine a contest, but a more careful reading of the section shows that it must be taken before entering upon the discharge of the duties set forth in this article. Many duties are required to be performed by the committee or governing authority of a party under the article. The article is composed of several sections in which these various duties are designated.

It must be understood that the only question decided is that the committee has no right to raise the question as to the eligibility of one who desires to become a candidate before the primary, and for that reason refuse to place his name upon the ballot.

The judgment is affirmed.

MEACHAM v. YOUNG et al.

(Court of Appeals of Kentucky. March 25, 1903.)

PRIMARY ELECTIONS—RIGHT OF COURT TO ENJOIN.

1. The court will not enjoin the holding of a primary election for the nomination of candidates of a political party, called by the governing committee of the party pursuant to Ky. St. art. 12, c. 41, regulating primary elections.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Suit by Charles W. Meacham against Allie W. Young and others. From a judgment for defendants, plaintiff appeals. Affirmed.

White & Ray and Breckinridge & Shelby, for appellant. L. McQuown and W. S. Pryor, for appellees.

HOBSON, J. The appellant, a member of the Democratic party and of the state executive committee of that party, seeks to enjoin the holding of a Democratic primary election alleged to be called for May 9, 1903. This court, in the case of Young v. Beckham (opinion delivered March 25, 1903) 72 S. W. 1092, decided that the committee or governing authority of a political party in the state was authorized under article 12, c. 41, Ky. St., to hold a primary election to nominate candidates for state offices. If the committee or governing authority called the primary, then it would have to be held, under the statute, and the court has no jurisdiction to enjoin the holding of it. The court has no more right to enjoin the holding of a primary election, if called by the governing authorities of the party, than it would have to enjoin a regular election. The calling of a primary is a party matter, to be determined by the party authorities, and the court has no power to interfere with their action. It is a matter to be settled by the party and by the authorities of the party, and, if complaint is made of the action of the party, it must be made to the proper party authorities.

Under the facts as shown, we are of opinion the primary was lawfully called.

Judgment affirmed.

LOUISVILLE, H. & ST. L. RY. CO. v. McCUNE.

(Court of Appeals of Kentucky. March 25, 1903.)

"Not to be officially reported."

On response to petition for rehearing. Petition overruled.

For former opinion, see 72 S. W. 756.

PER CURIAM. The second instruction referred to in the opinion, wherein the jury were permitted "to consider the expenses incurred for medical or surgical treatment," was error, as a matter of law, for the reason

that it was not pleaded. But what we held was that the error was a harmless one, as frequently occurs in jury trials, and which this court, by express mandate of the statute (section 135, Code), must disregard. We concluded that it was harmless because: (1) It only authorized the jury to consider such expenses as had been incurred, and, as there was no evidence of any such expenses, it was not at all likely that the jury did include compensation therefor in their verdict. (2) The damages found by the jury, under the facts shown in this case, were no more than adequate compensation for appellee's injuries and loss of time, without reference to medical expenses. If the verdict had found any sum suggestive that the jury had been influenced by the consideration of probable medical bills, we would not have hesitated to award a new trial. Counsel misunderstand the court, if they infer that we hold that an "inadvertence" of the trial court relieves its errors of their effect in law.

The petition is overruled.

MERSMAN v. WORTHINGTON'S EX'RS.

(Court of Appeals of Kentucky. March 25, 1903.)

EXECUTORS AND ADMINISTRATORS—SALE OF REAL ESTATE—POWERS—PENDENCY OF ACTIONS—EFFECT.

1. Where testator's will provided that his executors should have full power to sell, etc., and do everything for the benefit of the estate for the period of 10 years, and a subsequent settlement of controversies between the heirs provided that such settlement should not preclude the executors from administering the estate to pay debts as soon as practicable, and that their power to sell was continued until provision for the payment of testator's debts had been made, the executors had full power to sell testator's real estate to pay debts.

2. The fact that at the time of the sale an action was pending by a creditor against the estate, asking a settlement thereof, did not deprive the executors of such power.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Henry Worthington's executors against J. H. Mersman to compel specific performance of a contract for the sale of land. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

W. A. Price, for appellant. Jno. Byran, for appellees.

BURNAM, C. J. The will of Henry Worthington was probated in the Kenton county court on the 12th day of November, 1895. It disposed of an estate which amounted in the aggregate to about \$725,000, but which was charged with liabilities of about \$408,000. The bulk of the estate, after the payment of the debts due by intestate, was devised to George G. Hamilton, as trustee for Mrs. Lillie W. Stewart and Mattie Worthington, daughters of the deceased, and Roberta Hamilton, a granddaughter of the deceased, with

a large special bequest to H. S. Worthington, a son of the deceased. By the fourteenth clause of the will, George G. and Carrol Hamilton were appointed executors, with full power to sell, convey, exchange, rent, lease, build houses, etc., and do all and every thing which in their opinion might be proper for the benefit of the estate for a period of 10 years, but were required at least once a year to make full and complete statements of their accounts. A sharp controversy, which promised interminable litigation, soon arose between the devisees and the executors, and Mattie Worthington died soon after her father. On the 24th day of May, 1896, an agreement was entered into between the executors, devisees, and heirs at law of Henry Worthington, in which these controversies were compromised and settled, it being, however, expressly stipulated that the executors named in the will were to administer the estate so as to pay the debts as soon as practicable, and their power to sell and convey the real and personal estate was continued in full force until they had made provision for the payment of the indebtedness of the decedent. Under this agreement the executors reduced to cash the bulk of the personal estate left by decedent, and appropriated the proceeds to the payment of his debts. They also sold various tracts of real estate for the same purpose. On the 27th of September, 1902, the executors of Rachel S. Gaff instituted a suit in the Kenton circuit court against the executors, and alleged that their intestate was a creditor of the estate, and asked that a settlement thereof be had in that proceeding. After the institution of this suit the plaintiffs, as executors, advertised and sold at public outcry to the highest bidder all the real property of the decedent situated in the city of Covington, and, among other pieces of property, there was sold to the appellant, J. H. Mersman, a parcel of ground known as the "Casey property," consisting of a three-story brick building fronting on the south side of Park place and two double brick stores situated on the southeast corner of Court avenue and Park place, and a frame livery stable situated on the northeast corner of Fourth and Court avenue, the entire property being 63 feet on Park place and 153 feet on Fourth street, at the price of \$5,800, of which one-third was to be paid in cash, and the balance in one and two years, with 6 per cent. interest from date. The contract of sale was reduced to writing, and signed by the parties. The defendant, however, refused to take the property or to comply with the contract of purchase, upon the ground that the executors had no power to sell and convey the property after the compromise agreement of May, 1896, and also because of the pendency of the suit brought by the executors of Mrs. Gaff. Thereupon appellees instituted this suit for a specific compliance with the terms of the contract of sale.

It was adjudged by the chancellor that George G. and J. Carrol Hamilton, as executors and trustees of and under the will of Henry Worthington, had the right and power to sell and convey all the right, title, and interest in and to the real estate; and defendant appeals. To pay off and discharge the large indebtedness due by testator without unduly sacrificing it required good judgment, time, and opportunity; and testator fully realized this fact, and it was also understood by the devisees at the time of the compromise. This was manifestly the reason why it was expressly stipulated in that compromise, and the judgment rendered pursuant thereto, that the executors were to continue to wind up the estate and to pay off the indebtedness, and, to enable them to accomplish this, their power to sell and convey the real and personal property, provided for in the will, was continued in full force. Nor do we think that this power was affected by the mere pendency of the suit of Gaff's executor against them. If they had refused to discharge their duty, or had unduly procrastinated the payment of debts due creditors, the estate could have been taken out of their hands and administered through other agencies. But in this case no steps looking to such a course had been taken by the court, and no creditor has complained. The action of the executors in advertising the sale of the real estate secured more speedily the relief sought by Mrs. Gaff's suit than could have been attained in any other way. We therefore conclude that the defendants, as executors of H. Worthington, had the power to sell and convey the real estate in question under the will of testator, and convey the fee-simple title to the property bought by appellant.

Judgment affirmed. Whole court sitting, except Judge O'REAR.

JACOB v. CLARK et al.

(Court of Appeals of Kentucky. March 25, 1903.)

GAMING—PENALTY—STATUTE—CONSTRUCTION.

1. Ky. St. § 1956, which provides that if any person shall lose to another at one time, or within 24 hours, \$5 or more, or other thing of that value, and shall pay or deliver the same, such loser, or any creditor of his, may recover the same, etc.; and section 1958, which declares that if any such loser, or his creditor, does not sue within 6 months, any other person may sue the winner, and recover treble the amount, etc.—must be strictly construed, especially where invoked by a mere stranger and informer against the estate of a lunatic.

2. The statutes only apply when the gaming transaction occurs within the state.

3. The petition must aver that the transaction occurred within the state.

4. The statutes do not make the winner liable where the loser has merely given him notes for the amount won, and the notes have not been paid.

5. The loser in a gaming transaction gave notes for the amount lost to the winner, who

was afterwards adjudged a lunatic. The latter's committee recovered judgment on the notes. The loser appealed, giving a supersedeas bond. The judgment was reversed because of an error in the interest allowed, but was otherwise allowed to stand. Execution was afterwards returned "No property found." Later judgment was recovered against the surety on the supersedeas bond, which was paid. Held not to be a payment for a gaming consideration, so as to entitle an informer to recover treble the amount thereof.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by Wm. J. Jacob against W. W. Hill, as committee of William Clark, to recover three times the amount of certain notes which one Cooke had executed to Clark, and which were alleged to have been given as the result of a gaming transaction. Judgment for defendant, and plaintiff appeals. Affirmed.

C. B. Seymour, A. E. Willson, and M. B. Gifford, for appellant. Simrall & Doolin, for appellees.

SETTLE, J. One W. W. Hill, as committee for William Clark, a lunatic, recovered judgment in the Jefferson circuit court (law and equity division) against J. Esten Cooke on two promissory notes, aggregating \$1,000. Cooke made defense on the ground of payment, but, judgment going against him, he appealed to this court, in doing which he executed a supersedeas bond, upon which R. T. Jacob and Mary F. Cooke became his sureties. Upon the appeal this court reversed the judgment of the lower court because of an error in the matter of interest allowed, but remanded the case, with directions to the lower court to correct the error, which left the judgment in other respects as originally entered. After the correction of the judgment in the lower court, execution was issued thereon and returned "No property found." Hill, as committee of Clark, then brought suit upon the supersedeas bond against the sureties therein, and defense was interposed by R. T. Jacob upon the ground that the notes for which the judgment was rendered against Cooke in the first suit had been given for a gaming consideration, which rendered them, as well as the judgment into which they had been merged, void. A demurrer to Jacob's answer was sustained by the lower court, and judgment then went against him for the amount due on the supersedeas bond. From that judgment an appeal was prosecuted by Jacob, but the judgment of the lower court was affirmed by this court in an opinion which is reported in 65 S. W. 21. Jacob thereupon paid the judgment in full, with costs. Something over six months after such payment, one W. J. Jacob, a stranger, brought suit against W. W. Hill, as committee of Wm. Clark, to recover three times the amount of the notes which Cooke had executed to Clark. A demurrer was filed to the petition by Clark's committee, which was sustained by the lower court, and, Jacob refusing to

plead further, his petition was dismissed, from which judgment this appeal was prosecuted.

This court on December 11, 1901, reversed the judgment of the lower court, in a majority opinion, which on June 14, 1902, was withdrawn, and the judgment of reversal set aside; and the court thereupon ordered a reargument of the case, which reargument took place on February 4th of the present term. The case is therefore again before us for adjudication.

The action was instituted under sections 1956 and 1958 of the Kentucky Statutes, which are as follows:

"Sec. 1956. If any person shall lose to another at one time, or within twenty-four hours, five dollars or more, or property or other thing of that value, and shall pay, transfer or deliver the same, such loser or any creditor of his may recover the same, or the value thereof, from the winner, or any transferee of the winner, having notice of the consideration, by suit brought within five years after the payment, transfer or delivery.

"Sec. 1958. If such loser, or his creditor, does not sue for the money or thing lost within six months after its payment, or delivery, and prosecute the suit to recover with due diligence, any other person may sue the winner and recover treble the amount or value of the money or thing lost, if suit be so brought within five years from the delivery or payment."

The action here allowed is in the nature of a penalty for a violation of the law; otherwise the Legislature would have had no constitutional power to enact the statute which authorizes it. That body may not take private property for private use, except by way of punishment for an offense. All gaming statutes are necessarily penal, and the one under which appellant seeks a recovery in this case is highly so. It is therefore to be strictly construed, especially when its harsh provisions are invoked by a mere stranger and informer to enforce a penalty against the estate of a lunatic who is as helpless as if he were dead. We find a delivrance of this court, made as far back as 1881, which announced the rule of construction herein expressed. We refer to the case of *Greathouse v. Throckmorton*, 7 J. J. Marsh. 28, in which Chief Justice Robertson said: "We cannot think that any of the statutes against gaming can be made available to the plaintiff in error. These statutes have hitherto been, and should ever be, construed strictly. Such was the judicial interpretation of the statutes of Charles II and of Anne of England, and the statutes of Virginia and of this state have never been constructively extended beyond their direct and obvious import. * * * We are clearly of opinion that the petition of appellant is defective and insufficient, in that it fails to aver that the alleged gaming transactions between Cooke and Clark out of which the

were executed or delivered in this state. We quite agree with counsel for appellee that these omissions were not unintentional, in view of the refusal of appellant to employ the necessary averments when his attention was called to these defects, by appellee's motion to make the petition more specific. The statute *supra* is only operative in Kentucky, and the extraordinary right of action conferred by it can only be applied to gaming transactions occurring within the territorial limits embraced by the terms of the statute. The law has been so held by this court in the case of *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039, 19 L. R. A. 692, 42 Am. St. Rep. 353, which was an action to recover a lottery ticket which had been purchased by Richardson of Martin, as the law of this state then as now forbade the sale or purchase of lottery tickets. Martin relied upon the illegality of the sale of the ticket in controversy as a defense to the action, but failed to allege in his answer that the ticket had been bought in Kentucky. Upon these facts, this court said: "We must assume, in the absence of anything to the contrary, that this purchase or exchange of ticket No. 93,262 occurred in some place where it was legal and lawful to purchase or exchange it." So we conclude that it must be taken as true, in the absence of an averment in the petition to the contrary, that the transaction by reason of which the notes held by Clark upon Cooke were executed occurred at a place where the law would have permitted the enforcement of their payment, and that the legality of the transactions carried into the notes will be presumed. Certainly a recovery will not be allowed in a purely penal action unless every fact essential to such recovery be alleged and proved with the same particularity that would be required in a proceeding by indictment or information, except that in a civil action the plaintiff will not be required to make out his case to the exclusion of a reasonable doubt, as in a criminal prosecution. *Enc. Pleading & Practice*, vol. 1, p. 248; *Manz v. St. Louis, etc., Ry. Co.*, 87 Mo. 278; *Cole v. Smith*, 4 Johns. 193.

Under the statute *supra* the informer can recover only of the winner in a gaming transaction, and the winner must have received or collected the money or property won by him. Until he has done so, he does not become liable to the informer, or any one else, in an action for reimbursement or to recover the statutory penalty. The fact, if it be one, that the notes in question were taken for gaming debts which Clark had won of Cooke, did not make the former liable in an action brought by the informer. In order to constitute the offense for which the penalty may be exacted under the statute, it is necessary that the winner must have collected the money or received the property from the

Clark or Cooke or any one else, or any part thereof, represented by the notes. What is true of Clark is likewise true of his committee, Hill, who took no part in the games of chance alleged to have been played. The money paid Hill was received by him as a fiduciary; and by judgment of the lower court, and this court as well, he was bound to take the money, as he was not the winner of it. The statute gives the informer no right of action against him.

We are also of opinion that no cause of action exists in appellant's behalf against Hill, as committee of Clark, because of the payment by R. T. Jacob of the amount due on the supersedeas bond. Neither the notes nor judgment were ever merged in the supersedeas bond, and they constituted no part of the consideration of the bond. The bond was based upon an entirely different consideration. It was given solely to stay proceedings on the judgment of the lower court pending the appeal, and was executed nearly 20 years after the execution of the notes. By the execution of the bond, R. T. Jacob did not, in any sense, become a party to the original notes or their consideration; nor did the supersedeas bond merge the judgment against Cooke, or take the place of it as a replevin bond. *Hughes' Adm'r v. Hardesty*, 13 Bush, 367. In the suit which Hill, as committee of Clark, brought against R. T. Jacob on the supersedeas bond, this court held that, though the notes executed by Cooke to Clark may have been given for a gaming consideration, yet the judgment rendered on them was not void, nor was the supersedeas bond void, and that the stay of proceedings on the judgment constituted a valid consideration for the bond; and so R. T. Jacob was compelled to pay it by the judgment of the lower court and of this court, not because he was bound in any way on the notes, but because his bond was his own obligation, and it imposed a liability independent of the notes, notwithstanding the vicious and illegal consideration for which the notes were given. So it is clear that the payment made by R. T. Jacob in satisfaction of the supersedeas bond was not money paid for a gaming consideration at all. Neither he nor Cooke has ever paid any more upon any of the transactions embraced sections 1956-1958 of the statute *supra*. That Cooke ever lost to Clark was his notes, and they were given to Clark 2^d before this suit was brought. If there ever existed in any one to sue for either these notes, or their value, that barred by limitation more than 1st before this suit was brought. The heretofore held that R. T. Jacob go behind the judgment rendered by Cooke to show that the notes were for a gaming consideration, and to see why a stranger and in

facts of this case, should be permitted to do so.

For the reasons given, the judgment of the lower court is affirmed.

MORGAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1903.)

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT—IMPEACHMENT.

1. Defendant in a prosecution for felony, after testifying in her own behalf, was asked on cross-examination if she had not been convicted and sentenced to the penitentiary for a similar offense, and was compelled to answer. *Held*, that the evidence was competent for impeachment purposes.

2. Defendant in a prosecution for felony, after testifying in her own behalf, was asked on cross-examination if she were not the daughter of old Squire S., and the sister of the "notorious M. L. S." *Held*, that the use of the word "notorious" was improper.

3. In a prosecution for felony, after defendant testified in her own behalf, a witness called for impeachment purposes testified that defendant was a notorious blackmailer and thief, a daughter of Squire S., and a sister of M. L. S., and "the whole push was bad"; that defendant's business was "doing everybody she could." *Held*, that the evidence was irrelevant, and prejudicial.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Anna Morgan was convicted of felony, and appeals. Reversed.

C. J. Pratt and M. B. Todd, for the Commonwealth.

O'REAR, J. Appellant, on her trial under a charge of felony, offered herself as a witness in her own behalf. She was asked on cross-examination if she was not the daughter of old Squire Spalding, and the sister of "this notorious Mary Lou Spalding," to which she was, over objection, required to answer. She was also asked if she had not been convicted and sentenced to the penitentiary for a similar offense to that for which she was being tried. The court is of opinion that it was competent to cross-examine this witness on the points above named, except that the commonwealth attorney should not have used the expression "notorious" in describing Mary Lou Spalding. A witness for the commonwealth, introduced for the purpose of impeaching appellant, was permitted, over her objection, to state that she was a notorious blackmailer and thief, and in answer to the question, "She is a daughter of Squire Spalding, and the sister of Mary Lou Spalding, is she not?" answered, "Yea, the whole push is bad." In answer to the question what business appellant was engaged in, he answered, "Doing everybody she can." All the foregoing answers were irrelevant and improper, and the court erred to the prejudice of appellant in suffering them to be considered by the jury. *Welsh v. Common-*

wealth (Ky.) 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262; *Howard v. Com. (Ky.)* 61 S. W. 756.

For the errors indicated, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

FARLEY v. GILBERT.

(Court of Appeals of Kentucky. March 25, 1903.)

SCHOOL DISTRICTS—ALTERATION OF BOUNDARIES—OUSTER OF TRUSTEES—ACTS OF COUNTY SUPERINTENDENTS—PRESUMPTION OF VALIDITY.

1. It will be presumed that the action of the county superintendent in changing the boundaries of school districts was based on a proper reason.

2. Ky. St. § 4428, provides that no school district shall contain less than 45 or more than 100 pupil children, and that the county superintendent shall from year to year equalize, in school population, the districts of his county. *Held*, that the action of the superintendent in changing the boundaries and numbers of districts does not oust the district trustees, where they live in the territory embraced within their districts as rearranged.

Appeal from Circuit Court, Harlan County.

"Not to be officially reported."

Action between Nancy Farley and Lavinia Gilbert. From a judgment for the latter, the former appeals. Affirmed.

W. F. Hall and Forester & Forester, for appellant. H. C. Clay, for appellee.

O'REAR, J. This appeal involves the power of the county school superintendent of schools to abolish two adjacent school districts in his county, and immediately re-establish them by different numbers, comprising substantially the same territory, and thereby remove from office the trustees holding in the former district. The power is supposed to be derived from the authority contained in article 7, c. 113, Ky. St., embraced in sections 4427-4433, inclusive.

Section 4427 provides that school districts shall remain, until altered or abolished pursuant to that chapter, as then described and numbered. Section 4428 looks to uniformity, as far as practicable, of the number of children within each district, so as to provide all, as near as may be possible, with the same facilities for education. It requires that all districts should be made to contain not less than 45 pupil children, and not more than 100, "except in cases of extreme emergency," and in incorporated towns and cities.

In this case the district in question contained 60 pupil children. By the change it was reduced so as to contain but 45. The necessity for the superintendent's action is not shown, but the court will presume that there was a proper reason for it. At the time of the change there were acting trustees whose terms of office had not expired. It was supposed that the change of the districts and the change of the numbers was

an abolishment of the old districts, and, therefore, of the offices. The mere alteration of the boundary of a district by adding territory or taking from it territory would not abolish the district so as to remove its trustees from office, nor could the change of the numbers of the districts have such effect. For, if that were so, it would be within the legal power of the county superintendent to remove every trustee in his county from office by simply changing the numbers of the districts, or by slight and immaterial alterations of their boundaries, thereby substituting his selection of trustees for that of the patrons and voters of the county. Such an arbitrary and unlimited power in that officer is not conferred by any section of the statute, and ought not to be. It would be out of harmony with the whole spirit of our system of government, which looks to local control of such matters by the constituents of the respective localities.

The old trustees in this case do not appear to have been without the territory of their district by the change referred to. The circuit court adjudged that they continued in office, and that their contract bound the school district. In this conclusion we concur, and the judgment is therefore affirmed.

BLUE GRASS INS. CO. v. COBB.

(Court of Appeals of Kentucky. March 25, 1903.)

CO-OPERATIVE FIRE INSURANCE—MEMBERSHIP—ATTACHMENT OF RISK—DELIVERY OF POLICY—PAYMENT OF PREMIUM.

1. Insured testified that, when his application was taken, defendant's agent stated that he did not know that defendant had been chartered, but that, as soon as it was chartered, plaintiff was insured; but he further testified that when he made the application he was told that when the policy came he would not have to take it, unless it was as represented. It was the company's custom to issue a policy and send it to the insured for acceptance or rejection, and, if accepted, the insured paid the fees, and the contract was then consummated. *Held*, that the evidence was insufficient to warrant a finding that the insurance was in force before the policy was delivered or the premium paid.

2. Under Ky. St. § 702, relating to co-operative fire insurance companies, and providing that "every person insured who shall sign an application for insurance, shall thereby become a member of the company," a person who signed an application, but whose policy was not delivered or the premium paid before loss, was not insured, and was therefore not a member of the company, within such section.

Appeal from Circuit Court, Owen County. "Not to be officially reported."

Action by J. T. Cobb against the Blue Grass Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jno. S. Gaunt, C. Strother, and F. C. Greene, for appellant. Lindsey & Botts, for appellee.

SETTLE, J. This case is now before this court on second appeal. The opinion rendered on the former appeal is reported in 58 S. W. 981.

The appellant is an assessment or co-operative fire insurance company, organized under section 702, Ky. St., and doing business in the 10 counties of this state named in its articles of incorporation. The form of policy in use by appellant is framed in accordance with the terms and meaning of the statute supra, and it contains, among other provisions, one to the effect that "any person owning property in territory embraced by our charter, who shall sign an application and hold a policy in this company, shall thereby become a member of the same." It appears that appellee, J. T. Cobb, on March 28, 1897, signed a written application for a policy of insurance upon his dwelling house and contents in the appellant company, pursuant to its rules and regulations, which required that the application should be forwarded to the company's office, in the city of Lexington, and, if accepted by the company, a policy was to be written and delivered to appellee, through the agent of appellant residing in his county, upon the payment by appellee of \$1.50. The application also provided that certain assessments to meet losses were to be paid the company by appellee, in common with all of its members, from time to time as called for. It further appears that the policy applied for by appellee was placed by appellant in the hands of its agent to be delivered to appellee, but that, before it could be so delivered, the latter's house, named in the application, was totally destroyed by fire, and the agent did not, therefore, offer to deliver the policy. The appellee then brought suit in the Owen circuit court against the appellant to recover of it the loss sustained by reason of the destruction of his house. The ground of recovery, as set forth in the petition, is that when he made his written application for insurance in the appellant company the latter accepted the application and wrote the policy, and that appellee became thereby a member of the company, and entitled to the rights of such membership, and that the company became liable for the loss sustained by him in the destruction of his house by fire, notwithstanding the nondelivery of the policy, and his failure to pay the premium or membership fee. In the answer of appellant all liability was denied, and the further defense made that the policy to be obtained on the application was, when issued by the company, to be submitted to the appellee for his approval, when he was to have the right to either accept or refuse it, as he pleased; that he was not to become a member of the company by virtue of his application, and the policy was to have no force until and unless accepted by appellee, and the \$1.50 was paid by him. On the trial, which took place before the lower court without the intervention of a jury, judgment was given, allowing appellee the sum claimed by him. The

case was appealed to this court by the appellant, and the judgment of the lower court was reversed. In the opinion delivered it was held by this court that "there was no payment of premium and no delivery of the policy, and we think the rule laid down in May on Insurance (section 56) is correct: If there has been no payment of the premium, and no delivery, in fact, of the policy, the contract is prima facie incomplete, and he who claims under it must show that it was the intention of the parties that it should be operative notwithstanding these facts. The presumption of law is that the delivery of the policy and the payment of the premium are dependent upon each other, but this presumption may be rebutted," etc. Upon the return of the case to the circuit court, reply was filed by appellee, in which it was averred that, when the application was made and signed by him, it was with the agreement between himself and appellant's agent that his property was to become and remain insured from that time until the policy should be issued and sent to him, and, if he then desired to continue the insurance, he was to accept the policy and pay the \$1.50; otherwise the insurance would cease upon his refusal to accept the policy. The court sustained a demurrer to the reply, and thereafter, on July 10, 1901—more than three years after the institution of his suit, and over four years after the making of the application—appellee filed an amended reply, whereby a new cause of action was attempted to be set up, differing in whole from the contract as originally claimed. In other words, in the amended reply it is averred, in substance, that, by the terms of the contract made between appellee and the agent of appellant, it was agreed that the contract of insurance was to become effective and operative when the company was chartered, and that the company was chartered at the time of the making of the contract, which fact was, however, then unknown to both appellee and appellant's agent. The reply as thus amended was controverted by the rejoinder thereafter filed, and, the case having proceeded to the second trial without the intervention of a jury, a second judgment was rendered in appellee's behalf by the court, allowing him the full amount of the loss sued for. From that judgment, and the subsequent refusal of the court to grant it a new trial, appellant prosecutes this appeal.

Waiving the question of whether the new cause of action could have been set up in a reply, instead of by amended petition, we are unable to see how the facts testified to on the trial by appellee could have authorized the judgment rendered by the lower court. His testimony was to the effect that, when his application was taken, appellant's agent, Kenny, said to him that he did not know whether the company was chartered or not, but that as soon as it was chartered he (appellee) was insured. It does not ap-

pear from the statements of appellee whether this statement was made by the agent before or after the application was signed; nor does he say that he was induced by such statement of the agent to sign the application, or that he would not have done so but for same. Upon the contrary, he further testified on cross-examination that when he gave his application to the agent the latter told him that, when the policy came, he would not have to take it unless it was as he represented it. It would seem, therefore, from appellee's own statements, that the signing of the application by him did not complete the contract; and, whatever else may be in doubt, there can be no question, from the evidence, that he had the right to reject the policy, and to refuse payment of the membership fee upon the tender of the policy to him. In other words, it is shown by the evidence that it was and is the custom of the insurance company to issue the policy after receiving at its Lexington office the application, and the policy is then sent to the person to be insured, through the agent residing in the county, who submits it to him; and he then has the right to accept, or reject the policy, and, if accepted, he pays the agent the membership fee of \$1.50, and thus the contract is consummated. The evidence further shows that the uniform rule of the company was to insure in this manner, and no other, the property of those seeking membership with it.

We will not undertake to comment in detail upon the findings of fact made by the lower court, but, after a careful examination of the evidence found in the record, we are unable to reach the conclusion, as did the lower court, that the contract between appellant and appellee was to be operative upon the appellant's becoming incorporated, for the incorporation had been accomplished nearly a month before, nor are we able to conclude, either, that it was understood by the parties that this insurance was a part of the \$100,000 which it was necessary for the appellant to obtain before it could secure a charter, or that the alleged assistance which appellee rendered appellant in raising the requisite amount to enable it to commence business was the consideration for the contract, as there was no evidence tending to establish these propositions. Upon the contrary, we think it is shown by the evidence that the \$100,000 had been made up before the appellee signed his application for membership, and we have been able to find nothing in the evidence conducing to prove that he rendered any assistance to appellant in raising the sum necessary to secure its charter. We are therefore of the opinion that the conclusions of fact reached by the lower court are not sustained by the evidence. Consequently the judgment was unauthorized.

We think the case, on the facts now presented, by the record, stands practically as

it did when this court decided the former appeal; and, in addition to the quotation already made herein from the opinion in that case, we also quote the following, which expresses the mind of this court as to the meaning of the statute from which the appellant derives its corporate existence: "The person [insured] must not only sign the application for insurance, but must be insured in such corporation; and while the language of the section is awkward, in disregarding the order of the two events in point of time, it seems undoubtedly to require two things to concur in order to make such person a member of the company—videlicet, that he shall sign the application for insurance, and shall become insured." This view of the statute is embodied in one of the provisions of the policy set out in the petition, to wit, "any person owning property embraced by our charter, who shall sign an application and hold a policy in this company, shall thereby become a member of the same."

Being of the opinion, from the facts presented by the record, that the contract between appellant and appellee was never completed, the judgment of the lower court is reversed, and the cause remanded, with directions to set aside the judgment and grant appellant a new trial, and for such further necessary proceedings as may not be inconsistent with the opinion herein.

LOUISVILLE & E. MAIL CO. v. GILLILAND.

(Court of Appeals of Kentucky. March 20, 1903.)

SHEPPING—LANDING STEAMBOAT—INJURY TO PERSON ON SHORE—NEGLIGENCE—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

1. A steamboat, in making a landing at a customary place, struck a tree, knocking it over and injuring plaintiff. The river was "bank full," and there was an eddy in front of the landing, which necessitated an approach bow on. The only evidence of negligence was that the steamboat was being driven with more than usual speed. *Held*, that the issue of negligence was properly submitted to the jury.

2. Defendant's evidence showed that extra speed was necessary to overcome the eddy; that a stiff wind was blowing; that the accident occurred through the eddy driving the bow of the boat upstream and against the tree, and that, while a still higher speed might have avoided this, due care of passengers prevented a greater speed. *Held*, that a verdict for plaintiff, based on defendant's negligence, was unsupported.

Appeal from Circuit Court, Breckinridge County.

"Not to be officially reported."

Action by Minnie Gilliland against the Louisville & Evansville Mail Company. Judgment for plaintiff, and defendant appeals. Reversed.

Ohas. F. Taylor and David R. Murray, for appellant. B. H. Young, N. M. Mercer, and E. C. Waite, for appellee.

PAYNTER, J. The appellant, Louisville & Evansville Mail Company, owned and operated a line of steamers on the Ohio river between Louisville and Evansville, among which was a steamer known as the "Tell City," which carried passengers, freight, and the United States mail. She was about 200 feet long and 35 feet wide. On April 25, 1901, the river was "bank full" when the boat was landed at a place well known as "Addison's Landing." At this landing there was an eddy with a considerable current upstream. It was caused by some timber at the lower, and by other conditions at the upper, end. The eddy was 80 or 90 feet wide. The space between the lower and upper ends of the eddy was too short to admit the boat to land, except by approaching it from the current of the river, bow foremost. There was a sycamore tree standing at the upper end of the eddy, and near it was some cord wood, to be taken on board. The high waters had washed away nearly all of the dirt from around the roots of the tree. In making the landing the boat struck the tree and knocked it over, and it seems to have fallen on a stump and against a distillery which stood upon the bank, and which seem to have prevented it from falling to the ground. The appellee and her husband were on the bank, to watch the boat make the landing. As the tree began to fall, they endeavored to make their escape, but the small limbs of the tree caught them and knocked them down, and the appellee claims she was injured in consequence thereof. This action was instituted to recover damages upon the ground that those in charge of the boat were guilty of gross negligence in handling it upon the occasion in question.

The evidence offered by the appellee conduced to show that, in landing the boat, it was done with greater speed than was usual in landing boats. There was no other fact proven which tended to show negligence upon the part of those in charge of the boat.

The court permitted the case to go to the jury. Under the rule of this court, if there is any evidence from which a jury might infer negligence, it is the duty of the court to submit the question to the jury. Under this rule, we are of the opinion that the court properly submitted the question to the jury.

The appellant offered evidence of those in charge of the boat which showed that there was a current upstream in the eddy, and on the outside of it there was a strong down current; that the only way the boat could be landed was to go in with considerable speed, so as to overcome the down current, which swept the stern of the boat, and the up current, which tended to force the bow of the boat from the shore; that on the occasion in question there was a stiff wind blowing, which also contributed to make the landing a difficult one. The evidence further conduced to show that the boat was han-

dled in the usual way in making the landing, and that the cause of the boat striking the tree was that the down and up currents forced the bow of the boat against the tree. There is evidence, also, to the effect that, had the boat come in faster than it did, it might have avoided striking the tree; but those in charge of the boat had the lives of the passengers within their keeping, and they had to guard against the boat striking the shore with too much force, and therefore the boat, after attaining the speed that was thought to be necessary to overcome the force of the currents, was backing when the tree was struck. The testimony of the appellant showed that there was no negligence in the handling of the boat, and fully explained the evidence introduced by the appellee, which, unexplained, the jury might have inferred negligence from. Even when steamers do not encounter high water, high winds, and troublesome currents, as in this case, they cannot be handled with mathematical precision. The fact that they may approach the shore with more speed at one time than another may be easily explained, so as to show it was not the result of negligence. Our opinion is that the verdict of the jury is palpably against the evidence, and for that reason a new trial should be granted.

The judgment is reversed for proceedings consistent with this opinion.

LYON v. LYON et al.

(Court of Appeals of Kentucky. March 24, 1903.)

MARRIED WOMEN—SEPARATE ESTATE—REALTY IN WIFE'S NAME—SOURCE OF PURCHASE MONEY—EVIDENCE—SUFFICIENCY.

1. In a suit to subject real estate purchased by a married woman to a debt of her husband, it appeared that on a certain day defendant gave birth to five children, and she testified that this remarkable occurrence caused many persons to send her contributions, amounting to nearly the price paid for the property, and this testimony was corroborated. For plaintiff there was evidence that the husband was at the time hard pressed for money, and attempted to borrow several small sums, and that defendant had stated at one time that she had only a small sum of money. *Held* to justify a finding that the property was purchased with money which the wife received in contributions.

2. Ky. St. § 2127, provides that marriage shall give to the husband, during the life of the wife, no interest in the wife's property owned at the time, or acquired after marriage; and section 2128 provides that a married woman may acquire and hold property by gift as if she were unmarried. *Held*, that contributions given to a married woman on account of her having at one time given birth to five children became her separate estate, and could not be subjected to the claims of her husband's creditors.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by M. F. Lyon against O. D. Lyon and others. From a judgment in favor of

G. R. Allen and another, defendants, plaintiff appeals. Affirmed.

R. H. Johnston, for appellant. D. G. Park, for appellees.

BARKER, J. The appellant, Mrs. M. F. Lyon, sold to her son, the appellee O. D. Lyon, a tract of land containing about 30 acres, near the town of Mayfield, Graves county, Ky.; retaining a lien for the sum of \$350, the unpaid purchase money. Subsequently O. D. Lyon, desiring to borrow money from the Globe Building & Loan Association of Louisville, Ky., applied to his mother to release her vendor's lien, and in lieu thereof to accept a new note secured by a mortgage second to that of the building and loan association on the same property. This arrangement was necessary in order to obtain the money from the building and loan association, and was carried into effect; M. F. Lyon accepting O. D. Lyon's note for the sum of \$350, secured by a second mortgage, as before stated. Not having been able to pay off the debt due the building and loan association, and that corporation having begun to press him for payment, he applied to appellee G. R. Allen for the loan of sufficient money to discharge it. This Allen seems to have been willing to do, provided Lyon could obtain the release of his mother's lien secured by the mortgage to her. Lyon again applied to his mother for the release of her lien. She appears again to have been willing to accommodate him, and executed to one Coulter a power of attorney for her, and in her name, to release her lien in accordance with the wish of her son, which was done; and thereupon Allen loaned O. D. Lyon the sum of \$400, which was secured by first mortgage on the property in question, and the debt of the building and loan association was paid. M. F. Lyon contends that O. D. Lyon promised and agreed to give her a second mortgage on the land to secure her debt of \$350, which had never been paid. This he denies. Afterwards O. D. Lyon and his wife, Elizabeth, conveyed 11 acres of the land to G. R. Allen, for \$440 cash, and still later they conveyed the remainder of it to him for the sum of \$540 cash. About the time of this last conveyance, Elizabeth S. Lyon purchased from Mary Albrighton a tract of land for \$600 cash, a part of which was borrowed by her from G. R. Allen, and a lien upon the property was given him to secure the payment thereof. On the 14th day of February, 1900, the appellant, M. F. Lyon, instituted an equitable action in the Graves circuit court against O. D. Lyon and his wife and G. R. Allen, in which she sought a personal judgment against O. D. Lyon for her debt of \$350, and set up his verbal promise to reinstate her mortgage lien against the land in question. She did not claim priority over the mortgage of G. R. Allen for the sum of \$440, but admitted that her rights only ex-

tended to have her debt secured by second mortgage. She charges in her petition that the absolute conveyances of the property from O. D. Lyon and wife to G. R. Allen were fraudulent, and made for the purpose of cheating, hindering, and delaying her in enforcing her lien and the collection of her debt. By an amended petition she set up the lien retained in the original deed from her to O. D. Lyon; claiming that it had never been released, and asking its enforcement against the land, thereby giving her a priority over G. R. Allen. She further charged that G. R. Allen had notice of the arrangement between herself and O. D. Lyon, by which her lien was to be reinstated, and that, when he purchased or pretended to purchase the land in question, he well knew of the arrangement. She prayed in her petition that the conveyances from O. D. Lyon and wife to Allen be set aside and held for naught, that the land be sold, and that out of the proceeds G. R. Allen should first be paid the sum of \$440; then that her debt should be paid, and, if there was any balance, it should be applied to the extinguishment of Allen's remaining debt, of \$540. Both Allen and O. D. Lyon filed answers. G. R. Allen denied that he had any notice of the verbal arrangement between M. F. Lyon and her son, O. D. Lyon; denied that the conveyances to him were made for the purpose of cheating, hindering, or delaying M. F. Lyon in the collection of her debt; and alleged that the sales were made to him bona fide, upon a valuable consideration, without notice of appellant's equity, if any she had. O. D. Lyon, in his answer, denied that he had ever made his mother a promise to reinstate her lien, or that the conveyances were made for the purpose of defrauding, cheating, or hindering her, and reiterated the allegations of G. R. Allen that the sales were made in good faith and upon a valuable consideration. Pending this litigation in regard to the liens and conveyances on the land, M. F. Lyon was on March 17, 1900, awarded a personal judgment against O. D. Lyon for the sum of \$290, with interest from May 5, 1893, until paid, and her costs. This execution came to the hands of S. R. Douthitt, the sheriff of Graves county, and was by him levied upon the 40 acres of land purchased by Elizabeth S. Lyon from Mary Albrighton, as the property of her husband, O. D. Lyon, and he was proceeding to sell it to satisfy the execution. On the 31st day of March, 1900, Elizabeth S. Lyon filed a petition in equity in the Graves circuit court against the execution creditor, M. F. Lyon, and the sheriff, S. R. Douthitt, setting up the facts as to the levy of the execution by the officer, her ownership of the land, the advertisement for sale, and prayed for an injunction restraining the officer from selling her land, that it be adjudged to be her property, and that her title thereto be quieted. To this M. F. Lyon filed an answer, de-

nying that the land belonged to Elizabeth S. Lyon, or that it was purchased with her money, and alleging affirmatively that it was purchased by the money of her husband, O. D. Lyon, and that the conveyance thereof to the wife, Elizabeth S. Lyon, was a fraudulent arrangement to cheat, hinder, and delay her and the other creditors of O. D. Lyon. The affirmative allegations of this answer were controverted of record by agreement of the parties, and by an order of court the two actions were consolidated under the style of "M. F. Lyon v. O. D. Lyon," etc. After the evidence had all been taken, the action came on for trial, and on the 25th day of November, 1900, having been heard and submitted, the chancellor rendered a judgment, in substance as follows: "It is adjudged that the action of M. F. Lyon against O. D. Lyon and others be, and the same is hereby, dismissed absolutely as against G. R. Allen and Elizabeth S. Lyon, and as against the land herein, and that each of said defendants recover of her their costs herein, the expense for which is awarded. It is further adjudged, in the action of Elizabeth S. Lyon against M. F. Lyon, etc., that plaintiff, Elizabeth Lyon, paid for, and is the owner and in possession of, the land described in her petition, to wit, west half of the north half of the northeast quarter of section 9, T. 3, R. 2 E., containing forty acres, more or less, in Graves county, Kentucky, purchased from Mary Albrighton, and that defendant M. F. Lyon acquired no lien thereon by virtue of the execution in her favor against O. D. Lyon, which was levied thereon by Sheriff S. R. Douthitt, and that such levy and such subsequent proceedings are illegal and in violation of Elizabeth S. Lyon's rights, and constitute a cloud upon her title; and the defendants M. F. Lyon and Sheriff S. R. Douthitt are perpetually enjoined from further proceeding under the execution or levy thereof against the land, and the title of the plaintiff Elizabeth S. Lyon is quieted thereto against all parties herein, except the unpaid purchase money of G. R. Allen, and that she recover her costs herein expended against M. F. Lyon, for which execution is awarded." From this judgment, M. F. Lyon has appealed.

The vendor's lien of M. F. Lyon retained in the deed to O. D. Lyon was paid off and discharged by the execution of the note and the mortgage, in the arrangement by which the Globe Building & Loan Association obtained a first mortgage securing the amount loaned by it to O. D. Lyon. Appellant subsequently released this mortgage in order to permit O. D. Lyon to borrow the money from G. R. Allen to pay off the debt of the Globe Building & Loan Association. The evidence wholly fails to sustain appellant's allegations that G. R. Allen knew of the verbal arrangement between her and O. D. Lyon, by which her released lien was to be reinstated, and it also fails to sustain her

allegation as to the fraud of G. R. Allen. The chancellor's judgment, therefore, dismissing her petition, as against him, being clearly sustained by the testimony, must be affirmed.

The claim of Elizabeth S. Lyon to have owned the money with which the land from Mary Albrighton was purchased has given us more difficulty. It appears that on the 29th day of April, 1896, she gave birth to five children, which extraordinary freak created a great deal of interest, not only in the immediate community in which she lived, but, as an item of news, was heralded by the press throughout the country. She claims that many persons came to see her babies, and made contributions of money to her; that she also received many contributions of money by mail from persons living at distant points, who had read of her interesting case. These contributions, she said, amounted to about \$500, and they were all given to her; that her husband not only did not claim any interest in them, but specifically declined to claim any interest therein, or to exert any control or ownership over them. These facts were not only testified to by the appellee herself, but they were established by the testimony of her nurse, Mrs. Senter, who appears in the record as a woman of unimpeachable character, and without interest in the subject-matter of the litigation. There is in the record, on the other side, some evidence tending to show declarations on the part of O. D. Lyon that he was hard pressed for money, and of his attempting to borrow small sums from several people; also declarations of appellee Elizabeth S. Lyon that she had only a small sum of money; but these declarations may all be harmonized with the truth of her claim as to the contributions made to her. The declaration made at her sister-in-law's, that she only had \$5, evidently related to the money that she then had in her purse, and had no necessary connection with the fund which she claimed to have been saving for the purpose of purchasing a home. Her statement that she made little or no money on the children referred to the exhibition she made of them after their death, they having been embalmed for this purpose. This evidence cannot be permitted to outweigh the positive statements of the disinterested witness Mrs. Senter, and the evidence of Fred Lyon, the son of O. D. Lyon and appellee. Assuming, then, the truth of this testimony relative to the contributions of strangers to the appellee, it only remains to be determined what her rights were with reference thereto. Section 2127 of the Kentucky Statutes (the Weissenger act) provides as follows: "Marriage shall give to the husband, during the life of the wife, no estate or interest in the wife's property, real or personal, owned at the time or acquired after marriage. During the existence of the marriage relations, the wife shall hold and own all her estate, to her separate

and exclusive use, and free from the debts, liabilities or control of her husband." Section 2128 provides: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may, in her own name, as if she were unmarried, sell and dispose of her personal property." If contributions were made by visitors to Elizabeth S. Lyon under the circumstances detailed, it is clear that, under the statute, it became her separate estate, which she could hold, or, at her pleasure, invest in real property, free from the debts or liabilities of her husband.

The question as to whether or not the burden of proof in this action was upon Elizabeth S. Lyon is immaterial. Assuming it to be true that such burden was upon her, we think that the evidence abundantly sustained the judgment of the chancellor. Wherefore the case is affirmed.

NELSON COUNTY v. BARDSTOWN & L. TURNPIKE CO.

(Court of Appeals of Kentucky. March 20, 1903.)

APPEAL—SCHEDULE—TRANSCRIPT—TIME FOR FILING SCHEDULE—DISMISSAL.

1. Rev. Civ. Code Prac. § 737, subd. 4, provides that, if a schedule showing what parts of the record is desired is not filed within 90 days after the granting of the appeal in the lower court, the appeal shall be dismissed. *Held*, that where a complete transcript of the record is not filed, and the schedule was not filed within 90 days, the appeal will be dismissed.

Appeal from Circuit Court, Nelson County. "Not to be officially reported."

Suit between Nelson county and the Bardstown & Louisville Turnpike Company. From the judgment, the county appeals. Dismissed.

W. S. Fryor, Eli H. Brown, M. Yewell, and Nat W. Halstead, for appellant. Geo. S. & Jas. A. Fulton and Jas. S. Kelly, for appellee.

PAYNTER, J. The judgment appealed from was rendered June 12, 1902. The appeal was granted in the lower court. On the 11th day of December, 1902, a schedule for a partial record was filed in the clerk's office of the clerk of the circuit court, six months after the judgment was rendered. The transcript made pursuant to the schedule was filed herein December 16, 1902. On this state of facts, a motion was made to dismiss the appeal.

By subsection 4, § 737, Rev. Civ. Code Prac., it is provided that, if a schedule showing what parts of the record is desired is not filed within 90 days after the granting of the appeal in the lower court, the appeal shall be dismissed. If the appellant had filed a complete transcript of the record, instead of the partial one, then the motion, by authority of Louisville & Nashville Railroad Co. v.

ASHER et al. v. HOWARD.

(Court of Appeals of Kentucky. March 25, 1903.)

"Not to be officially reported."

On rehearing. Overruled.

For former opinion, see 70 S. W. 277.

HOBSON, J. The calls of the older survey owned by Maria Mott Davis are as follows: "Beginning on Crank's creek on two beeches and two sugar trees, beginning corner to said Smith fifteen hundred acre survey; thence S., 70 W., 664 poles, to three beeches, beginning corner to Smith's six hundred acre survey; thence S., 28 W., 400 poles, to a stake on the top of the Cumberland Mountain; thence S., 60 W., 8,320 poles to a stake near Cumberland Gap; thence N., 15 E., 3,200 poles, to a stake; thence N., 50 E., 8,820 poles, to a stake; thence S., 5 W., 3,150 poles, to the beginning."

The beginning corner is undisputed, and the second and third corners are also established without trouble. But when we run from the third corner by the patent call "S., 60 W., 8,320 poles," it takes us out across the state of Virginia, and stops in the state of Tennessee seven miles from Cumberland Gap. The patent calls for the land in the county of Harlan, Ky. It also calls for the corner as a stake near Cumberland Gap. We know, therefore, that the point in Tennessee seven miles from Cumberland Gap cannot be the patent corner. But if we locate the corner at Cumberland Gap, or near it, on the state line, and then run out the other calls of the patent from that corner, it takes in a large number of older grants, including the county seat of the county and the town of Harlan. Besides, the last line of the patent has in this event to be run twice as long as it calls for to make it close. On the other hand, if we start at the beginning corner of the patent and reverse its calls, stopping the fourth line when we reach the state line near Cumberland Gap, and then run with the state line to the stake on top of the Cumberland Mountain, the patent will close; and, as one line of a patent is entitled to as much regard ordinarily as another, whether the patent should be run out in this manner or in the manner first indicated would depend upon the evidence that might be adduced as to its actual location. This case was not prepared by appellants with a view to locating the patent or furnishing the court with any intelligent data to pass upon the question. Appellee, B. F. Howard, testified as a witness that the 350 acres in controversy lies within the boundary of the older patent, and, while he has never seen it surveyed, he seems to be familiar with the

72 S.W.—70

witness on his behalf L. K. Rice, who had never surveyed the patent himself, but was present as a chainman when it was surveyed by Gen. Duffield. He seems simply to have carried the chain on that survey, and to know little more about it. He testified that, if the patent is run out in the manner first indicated, it will include all the Howard survey, and if the calls of the patent are reversed, and the patent is run out in the second way above indicated, it is a close question, and he is unable to say whether it will include, or not, the 350 acres in controversy. Appellants took no testimony as to the actual location of the patent, or as to how the lines will run if surveyed in either manner, or as to what land the patent includes. The clear equity of the case is with appellee. The entire conduct of the parties from the beginning to the end tends to sustain his statement that the land in controversy lies within the senior grant, and, without committing ourselves in any way as to the proper location of this patent on other and better evidence, we simply decline to disturb the chancellor's judgment under the facts of this case.

The petition for rehearing is therefore overruled.

ALEXANDER v. PARKS.

(Court of Appeals of Kentucky. March 25, 1903.)

BOUNDARY—AGREEMENT FIXING—VALIDITY—DEED—RESERVATION—EJECTMENT—JUDGMENT.

1. Where, in ejectment to recover a strip of land, plaintiff did not claim anything for the use by defendant of a certain party wall, and the evidence did not show that defendant had used it, it was error to give plaintiff judgment for the value of the use thereof.

2. An agreement as to the boundary line between two lots of land is binding on the parties thereto and their vendees.

3. Reservation, by the grantor in a deed, of "the right to attach a building to the lower wall of the building herein sold, if he should choose to do so, or to sell the right to so build to another," is a reservation for the individual use of the grantor or for the use of his grantees.

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Ejectment by R. M. Parks against Alexander. Judgment for plaintiff, defendant appeals. Reversed.

Kennedy & Williamson, for Owens & Burroughs, for appellee

NUNN, J. On the 7th day of March, 1903, R. M. Parks, the appellee here, as the sole owner of lot No. 23, in the 1st ward, Nicholas county, Ky., at the same time a member of the

¶ 2. See Boundaries, vol. 8, C

Dorsey & Co., a copartnership composed of the appellee, T. A. Dorsey, M. A. Glenn, and A. J. Banta. This firm was the owner of lot No. 26 in said city, which lay in the same block as lot No. 23, and the northern line of lot No. 26 was the southern line of lot No. 23. On this date there was then, as now, standing upon lot No. 23 a brick building, known as the "Handley Building." On the 7th day of June, 1882, R. M. Parks and wife, by deed, conveyed lot No. 23, or that part covered by a brick building known as the "Handley Building," to Templeman & Mathers. Templeman & Mathers afterwards conveyed the same property, and it finally came to the hands of I. N. Handley, the present owner. In his deed to Templeman & Mathers, Parks inserted this clause, viz.: "The said Parks reserves the right to attach a building to the lower wall of the building herein sold, if he should choose to do so, or to sell the right to so build to another." Thereafter Parks, Dorsey & Co. conveyed that portion of lot No. 26 which abuts upon the southern boundary of lot No. 23 to the Deposit Bank of Carlisle, Ky., and the bank, in July, 1896, conveyed the same portion of lot No. 26 to the appellant, J. M. Alexander, who erected a building on it, and extended his building northward to the south wall of the Handley Building, on lot No. 23, claiming that by reason of the reservation of the right to attach a building to the wall of the Handley Building, contained in the deed from Parks to Templeman & Mathers, he, as the remote grantee of R. M. Parks, had the right to attach the northern extremity of his building to the southern wall of the Handley Building. Before appellant erected his building, appellee Parks notified him that he, Parks, owned a three-foot strip of ground lying between the southern wall of the Handley Building and the northern margin of appellant's lot No. 26. Notwithstanding this notice, appellant erected his building, and extended it across this strip, but not into the southern wall of the Handley Building. On the 19th day of January, 1901, appellee filed his suit in ejectment against appellant, in which he claimed to be the owner of a strip of $2\frac{1}{2}$ feet wide, afterwards amended to 3 feet, and about 81 feet long, lying between the northern line of lot No. 26 and the south wall of the Handley Building on lot No. 23, and asked judgment for the recovery of the land, and \$300 damages for the detention of it, and all proper relief. Appellant answered, denying that appellee was the owner of the land in controversy, and claiming it himself; and by an amended answer set out the facts above stated with reference to the reservation contained in the deed from appellee to Templeman & Mathers, and claimed that as the remote grantee of appellee, he was entitled to attach his wall to the south wall of the Handley Building. The affirmative allegations of the answer were controverted. On the issues thus formed, proof was taken,

and upon submission of the case for judgment, the case having been transferred to the equity side of the docket by agreement the court rendered the following judgment: "This cause coming on to be heard, and the court advised, it is adjudged that plaintiff is entitled to recover the strip of land or alleyway in contest in this action; but, the defendant having erected a house thereon, it is further adjudged that he pay to plaintiff the sum of \$450, with legal interest from this date, February 1, 1902, until paid, as the value of the property taken, that is, \$300 for the alleyway, and \$150, the value of one-half of the wall of the Handley Building; and that plaintiff recover of defendant his costs herein expended; and he may have execution upon this judgment. * * * The defendant, R. M. Parks, is ordered to convey the property in controversy upon the payment to him of the amount of the judgment herein, and the parties are hence dismissed." From this judgment appellant has appealed.

This court is of opinion that the lower court erred in giving judgment against the appellant for \$150, the value of one-half of the wall of the Handley Building. Under the evidence he had not used it nor purchased it from appellee, and the appellee's pleading showed that he did not claim anything therefor, and the court had no power to enforce a sale thereof.

Appellant contends that the true line between lots 23 and 26 is the south line of the Handley Building; also that the agreed line made some $2\frac{1}{2}$ or 3 feet south of the Handley Building, in 1879, by the owners of the two lots, was not binding, and was invalid.

As to the last proposition of appellant, we differ with him. The testimony shows that in 1879 appellee was the owner of the southern part of lot No. 23, on which was located the Handley Building. That appellee, Dorsey, Glenn, and Banta were the joint owners of the northern part of lot No. 26, adjoining lot No. 23. These parties desired to and did erect a carpenter's shop on the northeast corner of lot No. 26, but, before erecting it, they met, took measurements, and agreed upon the line between the two lots, which line was about $2\frac{1}{2}$ or 3 feet south of the Handley Building, and ever after that they recognized that as the true line between the two lots. This agreed line was and is binding upon the parties thereto, and their vendees, immediate and remote.

The case of Grigsby, &c. v. Combs, &c. (Ky.) 21 S. W. 37, was a case where the parties owned adjoining surveys of land, and, not knowing the true line between them, they verbally agreed that the true division line should be the top or ridge of the mountain between Lot and Second creeks. It was insisted by the appellants in that case that this agreement between the owners of the land was merely in the nature of an exchange of land, it being conceded that the calls of each patent ran over and beyond the

ridge onto his neighbor's side, and that this exchange could not be maintained because of the statute of frauds. The court in that case said: "We are of opinion, however, that, both in principle and by authority, an agreement of this nature can be upheld. It is no more a swap of lands than results by reason of agreed corners between neighbors, or agreed division fences, and these amicable arrangements have been sanctioned by repeated adjudications." To the same effect see *Trustees v. Lauder*, 8 Bush, 679; *Thacker v. Crawford*, 5 Ky. Law Rep. 770; *Duff v. Cornett* (Ky.) 62 S. W. 895; *Taylor v. Arnold* (Ky.) 17 S. W. 361; *Young v. Woollett* (Ky.) 29 S. W. 879. We do not mean that such an agreement is irrevocable. Any party to the agreement may renounce it, within the proper time, or avoid it by the institution of proper proceedings, by allegation and proof of fraud or mistake, and establish the true line.

We are of the opinion that the reservation in the deed from appellee to Templeman & Mathers was a reservation for his individual use, or for the use of his vendee, and there is nothing in the record showing that he has ever parted with the rights secured by this reservation.

If the proof is correct with reference to the agreed line referred to, then the appellee is entitled to recover this strip of land, together with the damages for its detention.

Wherefore the judgment of the lower court is reversed, and the cause remanded with directions to grant appellant a new trial, and for further proceedings consistent herewith.

TOWN OF CENTRAL COVINGTON v. BELLONBY.

(Court of Appeals of Kentucky. March 20, 1903.)

APPEAL—EVIDENCE—CONFLICT—DISPOSITION.

1. Where the evidence is conflicting, the verdict will not be disturbed on appeal.

"Not to be officially reported."

Petition for rehearing. Overruled.

For former opinion, see 70 S. W. 622.

HOBSON, J. On the original hearing this case was exhaustively considered by the whole court, and on the petition for rehearing the record has been re-examined and the case again considered by the whole court. The evidence for appellee tended to show that the sidewalk was not in a reasonably safe condition, and that by reason of this appellee received the injury complained of, while walking along in the dark, in ignorance of the danger. While the proof is conflicting, on the whole case we cannot disturb the verdict of the jury; for they saw and heard the witnesses, and the credibility of the testimony is for them. The proof for appellee, if true, took the case out of the rule

laid down in the authorities relied on for appellant. We are unable to see that there was any error in the instructions, and, while the verdict is large, we cannot disturb it on this ground, under the evidence.

Petition overruled.

BELL v. SMITH et al.

(Court of Appeals of Kentucky. March 24, 1903.)

APPEAL—OVERRULING OF MOTION—REVIEW.

1. On appeal the action of the court in overruling a motion cannot be reviewed, where the movant is not an appellant, but an appellee.

"Not to be officially reported."

On petition for rehearing. Denied.

For former opinion, see 71 S. W. 433.

PER CURIAM. The action of the court on the motion of Porter & Jackson is not a final order. The question as to how the proceeds of the sale shall be distributed is still before the lower court, since this court did not consider the action of the court in overruling the motion. Besides, it could not have considered the question, because Porter & Jackson were not appellants, but were made appellees.

MCINERNEY et al. v. TARVIN, Judge.

(Court of Appeals of Kentucky. March 18, 1903.)

JUDGES—DECISION OF CAUSES—MANDAMUS.

1. Where the return on an application for mandamus against a circuit judge to compel the decision of a case showed that the case had been on submission on a full record but two judicial days before the application was made, the writ will be denied.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Application by M. I. McInerney and others against James P. Tarvin, Judge, to compel respondent to render a final decision in an action pending before him. Writ denied.

Plaintiffs alleged that on September 15, 1902, an action was brought by J. B. Huelefeld against M. D. McInerney, as sheriff of Kenton county, to restrain defendant from collecting taxes for the year 1902, on the ground that such taxes were void; that a temporary injunction was denied after hearing, and that on motion to rehear on January 21, 1903, the court set aside the order overruling a motion for a temporary injunction, and held that the tax levy was illegal and void, and that the fiscal court of such county was an illegal body and without power; that, immediately after this decision, final judgment was applied for, but that on February 10th plaintiff in the action was granted leave to file amended petitions; and that respondent refused to dispose the case. The return alleged that the case was submitted for judgment on February 18, 1903,

and that on March 5th an agreed statement of facts was filed, to be considered as though filed before submission, and therefore on the day of the filing of the application for mandamus respondent had had the case on submission on the full record but two judicial days.

F. M. Tracy, for appellant. J. P. Tarvin, for appellee.

HOBSON, J. In view of the important public interests affected by this case, its determination should not be delayed further than is unavoidable. But considering the short time elapsing since the record was completed, and being satisfied the learned circuit judge will duly dispose of the case, the court is of opinion that the motion for the writ should be denied.

Motion overruled.

DARNALL v. JONES' EX'RS et al.

(Court of Appeals of Kentucky. March 20, 1903.)

IMPROVEMENTS ON REAL ESTATE—MISTAKE AS TO TITLE—RECOVERY BY LANDOWNER—EQUITY—HARMLESS ERROR.

1. Where one in good faith, and under belief of title, makes improvements on the land of another, the owner is not entitled to them, whether he seeks a remedy at law or in equity.

2. Where one in good faith, and under belief of title, makes improvements on the land of another, and, on discovery of mistake, removes the improvements, and the owner sues for damages, claiming the value of the improvements, and defendant, as he does not trace title to the commonwealth, cannot recover under the occupying claimant's act, his only relief is in equity.

3. Where a cause was such that it should have been transferred to the equity side of the docket, but the jury, by their verdict, found the same as the chancellor would have found, failure to so transfer the cause was not prejudicial error.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Suit by Sallie Darnall against Thomas Jones' executors and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hobbs & Farmer, for appellant. Forman & Forman, for appellees.

BARKER, J. The executors of Thomas Jones, deceased, and W. T. Sellers, the surviving partner of the firm of Jones & Sellers, recovered a judgment in the Fayette circuit court against J. R. Darnall, the husband of appellant, for the sum of \$162.81, with interest from May 18, 1893, until paid, and their costs of action. Upon this judgment they caused an execution to be issued, which coming into the hands of the sheriff of Fayette county, was by him levied upon two vacant lots of land in Forrest Hill addition

to the city of Lexington, Ky., as the property of J. R. Darnall. Both of these lots were sold by the sheriff under the execution, and the property purchased by the executors of Thomas Jones. Afterwards the sheriff executed and delivered to the purchasers a conveyance of the two lots sold by him, and on the 8th day of August, 1900, they conveyed the eastern lot to appellee Charles W. Clark by a deed of general warranty; Clark, having caused his deed to be recorded, took possession of the lot, and erected thereon a small frame cottage, which he occupied as a home for himself and family. The lot thus sold by the executors to Charles W. Clark did not belong to J. R. Darnall, the defendant in the execution, but was the property of his wife, the appellant, Sallie Darnall, who, ascertaining that appellee Clark had taken possession of, and built a house upon, her lot, instituted this action in the Fayette circuit court against him for its recovery. Upon the institution of the action, appellee Clark seems, for the first time, to have learned the true condition as to his title, and reported the facts to his vendors, the executors, who at once conveyed to him another lot in lieu of the one first sold to him; and he thereupon removed his house from the lot belonging to appellant to the second lot conveyed to him. Appellant then amended her petition, alleging the facts of the removal of the house by Clark, and praying for a judgment for recovery, in addition to her lot, of the sum of \$300 damages for the wrongful removal of the house from her property. Appellees the executors of Thomas Jones defended the action thus instituted, both for themselves and for their codefendant and vendee, Clark. Their answer admits the title of appellant to the lot in question, alleging that the sale by the sheriff of it as the property of J. R. Darnall was made under the mistaken belief that the property belonged to him; that they bought the same at the sheriff's sale, believing in good faith that they were acquiring a valid title thereto; and that, upon receipt of the sheriff's deed, they, in good faith, conveyed the lot to their codefendant, Clark, who, also in good faith, believed that he was obtaining a valid title to it, and, so believing, erected thereon a small frame cottage. They allege that the lot in question was a part of an uninclosed and vacant commons in the suburbs of Lexington, and that the rental value thereof amounted to practically nothing; that after the institution of appellant's action they discovered that the title to the lot was in appellant, and at once secured the vacation thereof by their codefendant, Clark, by giving him another lot, to which was removed the frame cottage which Clark had erected on appellant's lot. They alleged that the removal was made without injury or damage to appellant's lot, and denied that she was damaged in any sum whatever by the removal thereof from her property. They ad-

¶ 1. See Improvements, vol. 27, Cent. Dig. § 7.

mit the appellant's title to the lot in question to be paramount to theirs, and allege that they had tendered her a quitclaim deed from their vendees. Charles W. Clark and his wife, to the property sold by them to him, and also a quitclaim deed, from themselves to the remainder of the lot purchased by them at the sheriff's sale; and they paid into court the sum of \$3.50, subject to appellant's order, for the purpose of paying for the recording of the deeds. Appellant filed a reply to this answer, denying its affirmative allegations, and thus making up the issues. There were two trials had in the case. On the first trial the jury returned a verdict in favor of appellant for the recovery of her lot and the sum of \$250, as damage for the removal of the house by Clark. The court, upon motion of the appellees, set aside this judgment and granted them a new trial. Upon the second trial the jury found a verdict for the appellant for the recovery of her lot, and the sum of \$1 for the rental thereof during the time it was held adversely to her. Her motion for a new trial having been overruled, she has appealed to this court.

There was practically no contrariety in the evidence heard upon the trial of the case in the circuit court. The title of the lot in appellant was admitted. The value of the house removed by Clark was agreed by the parties to be \$234.50, and the evidence established the fact that there was no injury to the lot by Clark's having built the cottage thereon, or in removing it, except in the loss of the value of the house so removed, and that the rental value of the lot for the short time that it was occupied by appellee Clark was merely nominal. There was then before the court only one question—whether, as a matter of law, appellant was entitled to recover the lot, with the improvements made by Clark, who mistakenly, but in good faith, believed that he was the owner. We do not think that there is any question of the good faith of any of the appellees in their taking possession and occupying appellant's property. They could have had no motive in taking possession of it, except the belief that it belonged to J. R. Darnall, appellant's husband, and that they obtained a valid title by the proceedings had in reference thereto; and their evidence establishes their good faith beyond question. This being the case, what were the rights of the respective parties with reference to the improvements thus made upon appellant's lot?

Appellees cannot recover for the improvements in question under the occupying claimant's statute, as they cannot trace their title back to the commonwealth of Kentucky. *Fairbairn v. Means*, 4 Metc. 323; *Wintersmith v. Price* (Ky.) 66 S. W. 2; and *Shiveley v. Glipin* (Ky.) 66 S. W. 763. This being the rule with reference to the occupying claimant's statute, must appellee Clark lose entirely the value of the improvements erected upon the lot, in good faith, under the mistak-

en belief that he had a good title to it? Undoubtedly he has no remedy at common law, and, if he is to have relief he must seek it in the principles of equity. The rule on this subject is stated as follows in the *American & English Encyl. of Law*, vol. 10, tit. "Ejectment": "By the ancient common law, the owner of land recovered it in ejectment, without any liability to pay for improvements which had been made by the occupant without title. Every occupant made improvements at his peril, although he acted under a bona fide belief of ownership, and the law would not compel the true owner to pay for improvements which he had never authorized. The rule of the civil law, however, was more equitable. By it the bona fide occupant was entitled to be reimbursed the expenses of beneficial improvements so far as they augmented the property in value, on the ground that no one ought to be enriched at the expense of another; and the English court of chancery, adopting this rule as it own, applied it whenever the real owner was for any reason compelled to come into a court of equity. This equity of the bona fide possessor who made lasting and permanent improvements upon the land which turned out to be another's was so strong and persuasive as eventually to force its recognition upon courts of law without the aid of statutes, and it came to be held that the occupant might set off or recoup the value of his permanent improvements against the rents and profits demanded by the owner, but in some of the states statutes allowing the value of improvements as a set-off have been passed. This rule still left the occupant without redress if the value of his improvements exceeded the mesne profits due the owner, and, to supply this deficiency, statutes have been passed in some of our states making such excess a charge on the land." In the case of *Parker v. Stephens*, 3 A. K. Marsh. 202, it is said, speaking of an occupant without title who had been ejected: "He appears to have entered under a claim in the name of Thomas Reed, by virtue of a bond from Alexander Reed, but is unable to show a connected title, in law or equity, with Thomas Reed's claim, although, supposing, by his bond, the land to be his, he made improvements. He is therefore not entitled under the act of the Assembly concerning occupying claimants of land, but is, we conceive, entitled, on equitable principles, to relief on this ground, to pay for all improvements made by himself. * * *" In the case of *Barlow v. Bell*, 1 A. K. Marsh. 246, 10 Am. Dec. 731, the court said: "As the labor bestowed in improving the land is sunk in the land, and was not done at appellee's request, it is plain that she cannot, upon any common-law proceedings, be subjected to the appellant's claim for compensation. Nor have we been able to find any adjudged case where the English courts of equity have, under such circumstances, de-

cided upon the right to compensation; but regarding courts of equity, in supplying the defects of the common law, as being governed by the principles of natural justice, in the absence of all precedent, we should have no hesitancy in relieving the purchaser for improvements made upon the land while he bona fide considered it as his own. The possessor, by bestowing his money and labor in mellorating the land, advances its value; and consequently the rightful owner, unless liable to the claim of compensation, is so much gainer by the loss of the possessor. But to bring himself within the influence of this principle, it is not enough that the possessor shows himself to have mellorated the land, but his money and labor must be bestowed upon an honest conviction of his being the rightful owner of the land. For, if he takes possession without title, and knowing the land belongs to another, he is himself guilty of a wrong, and, although he may have expended his money and bestowed his labor, his claim for compensation ought not to be sanctioned by a court of equity." In the case of *Chiles v. Patterson*, 1 A. K. Marsh. 444, the court fully recognized the principle that a bona fide occupant under a claim of title, who makes lasting and beneficial improvements, will, upon ejectment, be entitled to pay for his improvements; but in this case the occupying claimant knew that he had no claim to the property in question, and was not, therefore, entitled, either under the principles of equity or the occupying claimant's law, to be reimbursed for his improvements. In the case of *Thomas v. Thomas' Executor*, 16 B. Mon. 420, it is said: "In *Bell's Heirs v. Barnet*, 2 J. J. Marsh. 516, the principle is laid down, broadly, that a person acquiring title to land, and entering it bona fide, supposing it to be his own, must be paid for his improvements. And the same general doctrine is recognized throughout the books." The court then goes on to show that the occupants in the case occupied a position that entitled them to the favorable consideration of a court of equity: "They were certainly bona fide purchasers, and the fact that the defective certificate of acknowledgment to the deed of 1824 was of record should not, by construction, and for the purpose of cutting off their equity, be regarded as affecting them with notice of her right to the land. An immediate vendee might be thus affected, but not so with a remote vendee for a full consideration, for what they innocently, though erroneously, regarded as an absolute estate in the land. The appellee occupying, then, the attitude of a person acquiring land and entering upon it in good faith, we can perceive no valid reason why he should not be paid for his improvements, at least to the extent that he increased the vendible value of the land at the time recovered." In *Bell's Heirs v. Barnet*, 2 J. J. Marsh. 521, the rule is thus stated: "But as one man should not be benefited by

another's labor and money, without making an adequate return, and as *Bell's heirs* should do what is just before they exact equity from *Barnet*, they should be held accountable for the amelioration. If their land, when they receive it, shall be enhanced in value, or in its vendible price, by the improvements put upon it since 1816, to the extent of such augmented value they should be charged." The rule thus laid down is fully sustained by the cases of *Proctor v. Smith*, 8 Bush, 82; *Burton v. Little*, 9 Bush, 308; *Hawkins v. Brown*, 80 Ky. 186; *Pomeroy's Equity* (2d Ed.) § 1241. In the case of *Floyd v. Mackey* (Ky.) 66 S. W. 518, the court said: "But in view of the fact that appellee has acted in good faith through this transaction, and has expended considerable sums of money in improvements upon the land, which will probably add to its vendible value, we are of opinion that he is equitably entitled to have refunded to him such an amount as these improvements have permanently increased the salable value of the property. [Citing *Pomeroy's Equity Jurisprudence* (2d Ed.) § 1241.] And as suggested by counsel for appellant, the chancellor, upon the return of the case, should require appellee either to surrender the land upon the conditions mentioned, or pay the purchase money, with interest from the day of sale; the rents being equivalent to the interest."

Undoubtedly there is authority for the principle that one making improvements upon the land of another, under the mistaken belief that he is the owner, is only entitled to recoup the value of his improvements against the claim for rent; but this has never been the rule in this state, and there is no foundation in reason for such limitation. The principle upon which the rule is based is the equitable one that a bona fide occupying claimant should not suffer for the consequence of his innocent mistake as to the title, to any greater extent that will fully repay the owner for any damage done by the mistake.

There is also authority for the contention that this equitable principal for the relief of the occupant can only be administered when the owner comes into equity to recover his property. But we can perceive no reason for holding that the right to relief under such circumstances should be limited by the fact that the owner happens to seek his remedy in equity. Under the Civil Code of Practice, equitable defenses may be pleaded in common-law actions, and when necessary for their proper adjudication the case may be transferred to the equity side of the docket. This should have been done in this case; but, as there was no practicable contrariety in the evidence, the jury found by their verdict what the chancellor would necessarily have to adjudge, under the principles herein announced, if the case was reversed and transferred to equity. No injury, therefore,

MAYES v. KARN et al.

(Court of Appeals of Kentucky. March 25, 1903.)

**WILLS—CONSTRUCTION—ESTATE OF DEVISEE—
PRESUMPTION—DEVISE OF PROFITS.**

1. It is presumed that a testator's intention was that his property should pass according to the will, and not according to the statute of distributions.

2. A devise of the rents and profits of land passes title to the land itself.

3. A testator provided in his will that his wife and child should be supported from the income of his estate, and his money invested in real estate for their benefit. There was a further provision that the wife should not have the power of disposing of any part of the estate, but that her support and the education of the child should come from the income thereof. *Held*, that the wife took a life estate in one half of the property, with remainder to testator's daughter in fee, and the daughter took an estate in fee to the other half.

Appeal from Circuit Court, Daviess County.

"To be officially reported."

Action by Virginia Mayes against J. B. Karn and others. Judgment rendered, and plaintiff appeals. Reversed.

Sweeney, Ellis & Sweeney and W. E. Aud, for appellant. Wilfred Carico, for appellees.

NUNN, J. On the 15th day of August, 1900, Virginia Mayes, the appellant, filed this suit in the Daviess circuit court against appellees, Eva L. Hardwick and J. B. Karn, to obtain a construction of the will of John P. Fuqua, the former husband of appellant. John P. Fuqua died in 1864. He left surviving him his widow, the appellant, and only one child, Sallie Lee Fuqua, who intermarried with appellee J. B. Karn, and afterwards died and left one child, appellee Eva L. Hardwick, the wife of H. S. Hardwick. The following is the will of John P. Fuqua:

"In the name of God. Amen.

"I, John P. Fuqua, being of sound mind and disposing memory, but being aware of the uncertainty of life and the certainty of death, do make this my last will and testament.

"Item 1st. I bequeath my body to the tomb and my soul to God who gave it.

"Item 2nd. It is my will and desire that my wife and children shall be supported from the proceeds or income of my estate, and that the sum of \$1,145.00 which I have in money shall be invested in real estate for the benefit of my wife and children.

"Item 3rd. Having purchased of my brother, R. C. Fuqua, a tract of one hundred acres of land, it is my will that he convey the same to my wife and children.

and the education of the children shall be from the income of the estate and from the notes on hand.

"Item 5th. My executor shall have discretion as to any sum or surplus that may be on hand at any time.

"Item 6th. I constitute and appoint my brothers, R. C. Fuqua and William M. Fuqua, executors of this my last will and testament."

It appears from the record that the executors have long since settled their accounts as such, and ceased to act. The only question for the court's consideration is what interest, right, or title did the appellant and Sallie Lee Karn, née Fuqua, take under the will? It appears from the record that the testator left real estate in the city of Owensboro, and the 100 acres of land that he purchased from R. C. Fuqua, and the executors purchased 102 acres of land at about the price of \$4,000, with the cash and notes left by the testator. The lower court construed the will to have force and effect only until his child, Sallie Lee, was educated and arrived at the age of 21 years, and then the property to pass by descent under the statute; his widow, the appellant, taking one-third for life, and his daughter, Sallie Lee, taking two-thirds in fee, and the other one-third in remainder. The appellant contends that a proper construction of the will gives to her the whole estate for her natural life, subject only to the support and education of the daughter, Sallie Lee, until she arrived at the age of 21 years.

We cannot concur in either construction. We have been unable to find one word or sentence in the will limiting the force and effect of it to the time of the majority of his daughter, Sallie Lee, or that he intended that after such time his estate should descend according to the statute. It is the presumption of law that the testator intended that his property should pass by virtue of his will, and not by the statute. The authorities referred to by counsel for appellant do not meet the case at bar. In the case of *Arnold's Ex'rs v. Arnold's Adm'r*, 17 Mon. 81, the language of the testator in substance, this: "I give and bequeath unto my beloved wife the farm on which I now reside, containing 300 acres, and during her natural life, to be by her for the benefit of," etc. In the case etc., v. Jones, 93 Ky. 532, 20 S. W. testator used this language: "I give and devise all my property of every description, real, personal and mixed, unto my beloved wife, Nancy M. Jones, to be managed and controlled during her life and for the joint benefit of my six children." In the case of *Kraft* (Ky.) 7 S. W. 622, this language: "I give and bequeath unto my beloved wife, Nancy M. Jones, the farm on which I now reside, containing 300 acres, and during her natural life, to be by her for the benefit of," etc.

beloved wife, Elizabeth Kraft, all my real, personal and mixed estate of which I may be possessed at the time of my demise for her and her child, Emma Kraft's, sole use and benefit." In all these cases the whole of the estate is given to the wife for her natural life, to be used by her for the benefit of herself and children. We have not been cited to, and have not been able to find, any case construing a will like the one before us. In Jarman on Wills (5th Ed.) § 797, the author uses this language: "A devise of rents and profits or of the income of land passes the land itself, both at law and in equity." In 29 Am. & Eng. Enc. of Law (1st Ed.) 404, this language appears: "A devise of rents and profits passes the title to land, or incumbers or burdens the title with the use." In the case before us the testator devised the whole of the proceeds or income of his estate, if necessary for the support of his wife and child and for the education of his child, which, under the ordinary rule of construction, made his wife and child joint tenants of his estate, and, under the authorities cited, passed the estate to them. And but for the fourth clause of the will the wife would own one half, and the daughter the other half, of the estate, in fee. It appears that under the fourth clause of his will the testator was of the opinion that by the second clause he had devised one-half of his estate to his wife in fee, for he expressly prohibits his wife from disposing of any part of his estate; thereby limiting her half to a life estate. It also appears from the fourth clause that he had failed to make any provision for the education of his daughter, and in this clause incumbers his estate with her education. In our opinion, the testator intended by his will to devise his estate to his wife and child jointly—one half thereof to his wife for life, with remainder to his daughter, and the other half in fee to his daughter. In 7 S. W. 622, the court said: "While gifts and conveyances to a wife and her children under the ordinary rule would create a joint tenancy, the courts, in the construction of such instruments, executed by the husband to the wife and children, are always inclined to construe the instrument as an estate for life in the wife, remainder to the children; and, where there is any language used in the instrument from which an inference of such an intention appears, the chancellor will decline to follow the ordinary rule making them joint tenants." In this case the testator willed his estate to his wife and child, and we have been unable to find in the instrument any language from which an inference may be deduced that it was the intention of the testator that his wife should have the whole estate for life, and his child to take it in remainder. And we conclude that the ordinary rules of construction should prevail, making them joint tenants—the wife for life in her half.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

WILHOIT v. MUSSELMAN.

(Court of Appeals of Kentucky. March 18, 1903.)

FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—LIMITATIONS—FAILURE TO DISCOVER FRAUD—EXCUSE—SUFFICIENCY OF PLAINTIFF'S ALLEGATIONS.

1. A creditor suing to set aside a fraudulent conveyance alleged that he had not discovered the fraud till within the year, but failed to allege that with reasonable care he could not have done so. The answer averred that by reasonable diligence he could have discovered it more than five years before. *Held*, that any defect in the petition was cured by the answer, in reply to which a denial was made.

2. A creditor suing to set aside as fraudulent a judicial sale and recorded conveyance of his debtor's property was 80 years old, and unable to give personal attention to his business. The grantee, the debtor's son-in-law, was never in possession till within a year of suit, until which the debtor had used and cultivated the land. *Held*, that the creditor could not by reasonable diligence have discovered the fraud, and that his suit was not barred.

Appeal from Circuit Court, Grant County.

"Not to be officially reported."

Suit by J. H. Musselman against Reuben Wilhoit. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Wm. Carnes and C. C. Cram, for appellant. W. W. Dickerson, for appellee.

PAYNTER, J. The question for review is whether the court properly adjudged that the 122½ acres claimed by the appellant, Reuben Wilhoit, should be subjected to the payment of the appellee's debt against Dudley Starnes. The question discussed by counsel is as to the statute of limitation.

The land was bought at judicial sale and bid in by Starnes in the name of one Alphin. Subsequently the property was conveyed to Wilhoit. Less than ten, but more than five, years had elapsed after the conveyance to Wilhoit before the institution of the action by the appellee to set aside, as fraudulent, the deed made to him. The plaintiff averred in his petition that he did not discover the fraud until within the past year, but he failed to aver that he could not have, with the exercise of reasonable diligence, discovered it sooner.

If there was any defect in the petition, it was cured by the answer, because it is therein averred that "plaintiff by reasonable diligence could have discovered said fraud more than five years before the institution of plaintiff's action." Besides, the plaintiff denied in his reply that he "could by ordinary or any reasonable diligence have discovered the fraud herein complained of in said conveyance," etc. It is also averred in the reply that plaintiff was 80 years of age, and was unable to give personal attention to his busi-

ness, etc.; and he alleged that Wilhoit was never in possession of the land, but William Starnes kept, used, and cultivated it, and thus misled plaintiff until within a year before the suit was instituted. The substance of plaintiff's pleadings is that he did not discover the fraud until within a year before the suit was instituted, and that he could not have discovered it sooner by the exercise of reasonable diligence.

The averments in plaintiff's pleadings to which we have referred are sufficient. *Fritschler, etc., v. Koehler, etc.*, 83 Ky. 80; *Cavanaugh v. Britt*, 90 Ky. 273, 13 S. W. 922.

Counsel for appellee relies upon *Fritschler v. Koehler*, because the court held the facts stated by the plaintiff in that case were not sufficient to avoid the statutory bar of five years, as the plaintiff held the note which was the basis of the action as assignee, and therefore the averment that he did not discover the fraud within five years before the commencement of the action, or could not have done so by the exercise of ordinary diligence, was not sufficient, because "the cause of action might have accrued by reason of the discovery of his assignee of the alleged fraud before he assigned the note to plaintiff."

Counsel for appellant relies upon *Cavanaugh v. Britt*, wherein it was held that the averment in the reply that he "did not discover the fact until within five years before the bringing of the action was insufficient." It was then held that it was incumbent upon him to make the additional averment that he could not have made the discovery by the exercise of reasonable diligence.

Where a person fraudulently conveys his property to another, the deed which is made and placed upon record is not constructive notice to creditors. *Chinn v. Curtis* (opinion delivered Feb. 10, 1903) 71 S. W. 923.

In this case Wilhoit never lived upon the land or exercised ownership over it until within less than a year before the institution of the suit. Title had been taken to Allphin, who conveyed it to Wilhoit, and there was nothing to put the appellee on inquiry.

We think, under all of the circumstances in this case, that it should be held that appellee could not by the exercise of reasonable diligence have sooner discovered that Starnes had paid for the land, and had the deed made to his son-in-law, Wilhoit.

Judgment is affirmed.

LANGDON-CREASY CO. v. ROUSE.

(Court of Appeals of Kentucky. March 24, 1903.)

SERVANT — INJURY — DEFECTIVE GASOLINE LAMP — EVIDENCE — ADMISSIBILITY — SUFFICIENCY — ABSENT WITNESS — CONTINUANCE — DUTY TO KEEP APPLIANCES SAFE.

1. In an action by a servant for injuries from being burned by a gasoline lamp furnished by the employer, evidence by the president of the employing corporation that he had purchased a

large number of lamps of the same kind at the time he purchased the one causing the injury, and had been assured by many persons who were using them that they were safe, that he had tested them and found them so, and had no knowledge that they were dangerous, was admissible.

2. In an action by a servant for injuries from being burned by a gasoline lamp, furnished by the employing corporation and alleged to be defective, defendant's attorney made affidavit, in support of a motion for a continuance, that the president of defendant intended to appear as a witness and testify that he had made investigations, before purchasing the lamp, leading him to believe that the lamp was safe, but had been called to the bedside of his dying mother. *Held*, that the refusal of a continuance was error.

3. In an action by a servant for injuries from being burned by a gasoline lamp furnished by the employer, evidence considered, and *held* to require submission to the jury of the issue whether the lamp was defective.

4. It appeared that plaintiff was the manager of one of a large number of retail stores owned by the employer, and had full charge thereof, being visited only occasionally by defendant's auditing agent to take stock, etc. *Held*, that it was not defendant's duty to maintain the lamp in a safe condition.

Appeal from Circuit Court, Grant County.
"Not to be officially reported."

Action by Ella Rouse against the Langdon-Creasy Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. G. De Jarnette, Wade Cushing, and T. L. Edelen, for appellant. W. W. Dickerson and O. H. Hogan, for appellee.

BURNAM, C. J. This suit was brought by the appellee, Ella Rouse, against the appellant, the Langdon-Creasy Company, to recover damages for injuries sustained by her in lighting a gasoline lamp in the storehouse of appellant at Williamstown, Ky., on the 22d day of March, 1901.

The record discloses that appellee had been in the employ of Langdon & Creasy, a partnership, as manager of their grocery store located at Williamstown, in Grant county, from some time in October, 1900, until the 7th day of March, 1901. On that day the store was transferred from the partnership of Langdon & Creasy to the Langdon-Creasy Company, a corporation organized under the laws of this state. After the transfer of the store to the new corporation, appellant continued in its employ as general manager, having authority to employ a porter, and, when the necessities of the business required it, additional clerical assistance. The headquarters of the corporation was in Cincinnati, Ohio, and they owned and operated quite a number of similar stores located at different points in the state of Kentucky. The gasoline lamp which it is charged occasioned the injury had been used for lighting the store for several months previous to the date of the accident, and had been under the special management of the appellee. It also appears that she had clerked in the store belonging to Langdon & Creasy at Eminence,

Ky., for some months previous to her transfer to Williamstown as manager of the store there. The Eminence store was lighted in the same way, and she had observed the operation of the lamp there, although not specifically charged with any duty in connection therewith. It was also shown that some time in November, shortly after taking possession of the store as manager, she complained to appellant that the lamp would not light, and at their instance it was forwarded to the manufacturers at Cincinnati for examination; and that on November 25th it was returned by them to her, with a letter in which they say they could find no trouble with the lamp, and at the same time inclosed to her printed instructions as to its management. This letter wound up with these words:

"The instruction on the first page of the circular carefully followed will give you perfect success. The whole thing in a nutshell is just this: Put two quarts of gasoline in the bowl, screw the filler tap on tight, attach the pump to the air valve, open the thumb screw two or three turns, and pump in twenty-five or thirty strokes of the pump. Before pumping in the air, see that the light valve is firmly closed. Now heat the generator with the alcohol torch as directed, then open the light valve, still holding the lighted torch above the top of the chimney. In about fifteen seconds the gas will form; pass around the gas tube to the burner, where it will light from the torch you are holding at the top of the chimney. All this is only a brief repetition of the directions on the circular, which if you will read and carefully follow, you will have no trouble.

"Very truly yours,

"The Perfection Burner Co.,

"A. B. Tremer, Manager."

Whilst these instructions appear somewhat confusing, it is very easy to understand them when we have the lamp itself before us, and for purposes of illustration a photographic copy of the lamp, filed with the brief of counsel for appellant, is filed with the opinion. The bowl of the lamp holds about six quarts of gasoline. It has two openings, one indicated by the letter B, the other by the letter C. The lower end of the gasoline tube at the left of the lamp is open near the bottom of the bowl. At A is a valve, which permits the gasoline to flow into the metal tube, D. The funnel encircles the end of the gas tube, and into which vaporized gas flows, which furnishes the fuel for the light. The instructions require two quarts of gasoline to be poured into the opening in the side of the bowl at B. At C is a valve which is closed by a screw, and upon the tube projecting therefrom the air pump is attached. The instructions direct that the gasoline should always stand below the opening at C. The air pressure forces the gasoline up the gas-

oline tube to the valve at A. The directions require that the hollow tube, D, should be heated by a lighted sponge saturated with alcohol, before the valve at A is opened. When the liquid gasoline is forced into the hot tube it is converted into gas, which is carried across the open space between the tube, D, and the gas tube at the right of the lamp, and from this point finds its way through the gas tube to the burner, where it is ignited.

The negligence in connection with this lamp with which appellant is charged by appellee is that the appliance was new to her, and that she was not familiar with its operation and management; that she did not know that it was dangerous; that appellant knew it was unsafe and dangerous and likely to explode, and failed to acquaint her with these facts and the risks and hazard attending its lighting and use. Appellant denied that the lamp was dangerous, or that its management was difficult to understand, or that appellee did not thoroughly understand its management, and had not received full instruction with reference thereto, and alleges that she had been carefully instructed with reference to its management; that she was their manager in conducting the store; and charged that the injury resulted from her own negligence in disregarding the instruction given her with reference to its management, and also charged that it was the duty of the porter to light the lamp. A trial before a jury resulted in a verdict for plaintiff for \$2,500, which we are asked to reverse upon several grounds: First, upon the calling of the cause for trial the appellant moved for a continuance, and in support of the motion filed the affidavit of one of the attorneys, in which he says that H. C. Langdon, the president of the corporation, and who resided in Cincinnati, had expected to attend the trial and testify as a witness, but that on the day before he had been called to the bedside of his sick mother, who was reported to be dying; "that he would testify that he purchased the lamp, with about 60 others, for the use of the various stores owned by Langdon & Creasy; and that, previous to and at the time of the purchase, he had been assured by large numbers of persons who were using them that they were perfectly safe and free from danger; and that he had tested and used them in many places and by many employees, and had always found them perfectly safe; and that neither he nor any member of the firm had been advised of any danger or hazard in lighting them previous to the accident complained of." The trial judge struck out of the affidavit the facts recited above, and permitted the rest of the affidavit to be read as the deposition of the absent witness, and then overruled the motion for a continuance. We are of the opinion that the trial court erred in refusing to allow evidence to show that

appellant, before purchasing the lamps for use in the store, had acquainted himself with its character, operation, and safety; and he was also entitled to show exactly what steps he had taken in this regard. Besides, we think it is apparent that the presence of appellant before the jury to explain these facts would have been very much more effectual than the mere affidavit of his attorney. And it seems to us that the dying condition of his mother was a good cause for his nonattendance at the trial. As said by this court in *Peebles v. Ralls*, 11 Ky. 26, in deciding the diligence necessary to be observed by suitors: "We should not altogether lose sight of the sympathies of our nature, and require a father or husband to abandon his child or wife at the moment of apprehended death for the purpose of attending the trial of a pecuniary contest." The rule, it seems to us, also applies to the case of the mother. We are therefore of the opinion that the trial court erred in not granting the continuance, and also in excluding, as incompetent evidence, the portions of the affidavit which were stricken out.

It is difficult to determine from the testimony whether the accident was the result of some defect in the lamp or negligence on the part of appellee. No one was in the store when it occurred. She testifies, in substance, that when she attempted to pump air into the reservoir, she discovered that the cylinder was too full, as the gasoline ran out of the pump tube; and that she thereupon poured out of the lamp two pints of gasoline, and took them upstairs, and poured them into the gasoline reservoir, and that when she returned she wiped the gasoline off the lamp; that she then pumped air into the lamp as directed, and applied the alcohol torch to the generator until it was hot; then opened the lighting valve at A to let the gasoline flow into the generator, and continued to hold the torch under the generator until it was burned out, but that it did not light; that she then turned the gas off, waited until the generator got cold, and took the same steps over again; that again the lamp failed to light; that, for the third time after the generator got cold, she pumped in air, heated the generator, and, when she attempted to light it, a quantity of "stuff" came out, and a little blaze fell on her jacket and skirt; that she did not know what caused it, but began to scream for help and try to extinguish the flame. Those who ran to appellee's assistance found the lamp burning all right on the counter, and the alcohol torch lighted upon the floor. Different theories are advanced as to the cause of the accident. Counsel for appellee says that it is clear from her testimony that the liquid gasoline had free passage to and through the generator, but that the gas tube on the right of the cylinder was so obstructed that the gas could not pass through it to the burner,

and was therefore set free and permeated the atmosphere until it reached the torch, when it ignited. The fact, however, that the lamp was burning all right after the accident seems inconsistent with this theory, as no sufficient explanation is given why the gas, immediately after the accident, should have passed through the gas tube all right to the burner, if, as contended, it was obstructed. Besides, it is perfectly apparent from an examination of the lamp that it is easy to remove this gas tube and to have it cleaned out, if it was so obstructed. Counsel for appellant, on the other hand, in speculating as to the probable cause of the accident, says that appellee either failed to pump in enough air to force the gasoline through the gasoline tube, or that she allowed the gasoline to be forced into the generator before it was hot enough to convert it into gas, and that, when the generator did get hot enough to vaporize the gasoline, it blew the liquid gasoline through the tube, D, in liquid form, and some of this gasoline fell upon the clothes of appellant and was ignited with the alcohol torch. This theory is, however, directly contrary to the sworn testimony of appellant. Under this state of fact, the question of negligence was for the jury, and we think the court properly refused the motion for a peremptory instruction.

Upon the trial, defendant produced before the jury as an expert witness one of the officers of the corporation engaged in the manufacture of the lamp, and asked that he be permitted to practically demonstrate before the jury the manner of filling and lighting the lamp. This testimony was objected to on the ground that the witness had had the possession of the lamp for several hours before the proposed experiment, and that it might not be in the same condition as when the accident occurred. For this reason the court refused to allow the experiment to be made in the presence of the jury. The admissibility of testimony of this character is one that should be left largely to the sound discretion of the trial court. Judge Thompson, in his work on *Trials*, vol. 1, § 620, says that: "Experiments in the presence of the jury are generally discountenanced, owing to the liability of the jurors being imposed upon by skillful manipulation or jugglery. But experiments coming within the range of ordinary knowledge may well be permitted." In the note to *Leonard v. Southern Pacific Co.*, 15 L. R. A. 221, the annotator says: "This may be, perhaps, regarded as a correct theoretical statement of the rule, and, if it is adopted, the conflict will come in determining what matters come within the range of ordinary knowledge or experience, and what not." In view of all the testimony in this case, we are not prepared to say that the trial court erred in refusing to allow this demonstration to be made by the expert in this particular case.

In instruction "a," given to the jury, they were told: "That it was the duty of the defendant to furnish the plaintiff a reasonably safe lamp and appliance for lighting the store, and that the plaintiff had the right to rely upon the defendant to provide a reasonably safe and suitable appliance for that purpose, and to maintain it in a reasonably safe condition, and to instruct the plaintiff in the proper use of same, and to warn her of any danger to her in lighting it, if there was any; and it was the duty of the plaintiff to exercise ordinary care in lighting and using the same to avoid danger. But if the jury shall believe from the evidence before them in this case that the defendant negligently and carelessly furnished to the plaintiff a lamp or appliance for lighting their store that was not reasonably safe to light or use, and failed to instruct her in the proper use of the same, or to warn her of the danger, if any, to her in lighting same; and that the plaintiff did not know, and could not by ordinary care discover, the danger in lighting same; and that, while the plaintiff was exercising ordinary care in attempting to light the same, said lamp did expel from it burning gas or gasoline, which ignited and burned the face, hand, neck, and clothing of the plaintiff—then the law is for the plaintiff, and the jury should find for the plaintiff such damages as will compensate for the burning, suffering, loss of time, any permanent impairment of her ability to earn money, and such sum as she was compelled to expend for medical attention, nursing, and board, not exceeding in all \$5,000, the amount claimed in the petition."

It was the duty of the defendant to have furnished a reasonably safe lamp for lighting their store, and if the lamp furnished was unusual in its operation, or dangerous in its possibilities, to have instructed the plaintiff as to its proper use, and warned her of possible danger that might arise in lighting it. The instruction quoted supra was misleading in requiring them to have maintained the lamp in good condition. Appellee was the manager of appellant's business at Willamstown, and it was her duty to see that the lamp was kept in good condition, and, if it failed to perform its office, to have it set aside and use the coal-oil lamp provided for such an emergency. The testimony shows that it was only at intervals that the auditing agent of the defendant corporation visited the store for the purpose of taking stock and auditing the accounts of appellee as manager. All responsibility for the proper management of the store was upon her, and she should not be allowed to shift this responsibility to her employers, who lived in a distant city, and could have had no personal knowledge as to whether the lamp was maintained in good condition or not. Their duty was discharged when they furnished a safe appliance. Her duty required that it should be

maintained in the same order, or its use discontinued. This principle is fully illustrated in the following cases: Sullivan's Adm'r v. Louisville Bridge Co., 72 Ky. 81; Alexander v. L. & N. R. R. Co., 83 Ky. 589; Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578; Kelly v. Barber Asphalt Co., 93 Ky. 363, 20 S. W. 271; the Lexington and Carter County Mining Co. v. Stephens' Adm'r, 104 Ky. 502, 47 S. W. 321; Hood v. Argonaut Cotton Mill Co. (Ky.) 62 S. W. 1043.

It therefore follows that the judgment appealed from must be reversed, and cause remanded for proceedings not inconsistent with this opinion.

ILLINOIS CENT. R. CO. v. WALDROP.

(Court of Appeals of Kentucky. March 25, 1903.)

RAILROADS—PERMISSIVE USE OF RIGHT OF WAY—REVOCATION OF LICENSE—NOTICE—SUFFICIENCY—TRESPASSERS—INJURY—LIABILITY OF COMPANY.

1. The permissive use of right of way of a railroad company as a passway does not confer on the public a right to its use for such purpose, but the company may close the passway at any time.

2. Where a railroad company had for some years allowed the public to use its right of way as a roadway, but subsequently obstructed such roadway by a fence near one end, and two wires strung across the road, attached to posts at the sides and middle, at the other, such obstructions were sufficient notice to the public that the license to use the road had been withdrawn.

3. After a railroad company had given notice of a revocation of a license to use its right of way as a road, by obstructing the same, it was not bound to continue the obstructions in a safe and suitable condition, beyond such time as was reasonable for the purposes of notice.

4. Those who use a roadway over a railroad company's right of way after permission for its use has been withdrawn, and sufficient notice of the withdrawal has been given, are trespassers.

5. Where obstructions erected by a railroad company across its right of way, which had been used by the public as a road, had remained in place for four months, and three months more elapsed when plaintiff was injured in attempting to ride over the former road, sufficient time had elapsed to constitute notice to the public of the revocation of the license to use the road, and so preclude a recovery.

Appeal from Circuit Court, Graves County.

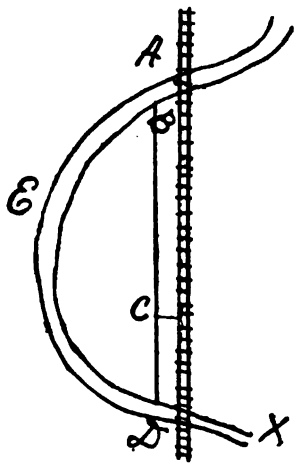
"Not to be officially reported."

Action by W. F. Waldrop against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. Dickerson, Pirtle & Trabue, and Robertson & Thomas, for appellant. J. C. Speight and M. B. Hollfield, for appellee.

HOBSON, J. The county road leading from Mayfield to Pryorsburg crosses the track of the Illinois Central Railroad Company about a half mile from Pryorsburg in a direct line, and makes a considerable crook to the west. To avoid this, for many years.

persons drove along the right of way of the railroad from the point where the road crossed the track to the point where it struck the limits of Pryorsburg. The situation is illustrated by the following map:



The dotted line indicates the railroad track; the curved line, A-E-X, the county road; the straight line, B-C-D, the traveled passway over the railroad right of way.

The proof for appellant showed these facts: With a view to stop this passway, the railroad company in May, 1900, erected a substantial fence across it at the point C, built of wire, with plank at the top. The fence was plainly visible to those entering the passway at the south, but it could not be seen so plainly by those entering it at the north end, although it could be seen by one on horseback, if he looked; the distance being something like a half mile. To keep people from going down in there, the company at the same time placed two wires across the passway at the point B, near the north end. One of the wires was fastened to the garden fence of the adjoining proprietor, and ran across the passway to a telegraph pole, and was fastened to it. This wire was 4 feet high, and in the passway a small cedar post was planted 3 feet deep, and the wire was also fastened to it. The distance from the telegraph pole to the post was 16 feet, and from the post to the garden fence was also about 16 feet. Another wire was then fastened to the telegraph pole, about 2 feet lower down, and also fastened to the post in the passway. The end of this wire was not fastened to the fence, but the bale of wire was just dropped over the fence, on the idea that the weight of the bale would hold it at that end. The top wire was fastened with a staple, and the other with a wire nail (No. 6 or 8) driven in and bent over to make a kind of staple out of it. The wires remained up as they were fastened until some time in September, 1900. After this, from the trespassing of stock, or some other cause,

both the wires were mashed down near the ground; and persons occasionally, not knowing that the passway was closed, drove over them, and when they got further down, and saw the fence at C, turned around and came back. In this way the wires were mashed pretty close to the ground. A cow could step over them without trouble. The proof for appellant showed that the distance from the cedar post to the fence was 30 feet or more; that a nail was driven into the post straight, and the wire was simply laid upon it; and that by reason of a rise in the ground the fence at C could not be seen from B. It also showed that on December 22d appellee, who was an officer riding in pursuit of a fugitive whom he wished to arrest, undertook to pass along the passway from A to D, not observing the wires at B or the fence at C. There was another man with him, who was riding in front. They were going in a gallop or lope, and appellee's horse stumbled over the wire, throwing him to the ground and falling on him, so as to inflict a serious injury, to recover for which he brought this suit against the railroad company.

The acquiescence on the part of a railroad company in the use of its right of way as a passway does not confer authority or right. The use is merely permissive, and the company may close up the passway at any time. *Brown's Adm'r v. L. & N. Railroad*, 97 Ky. 228, 30 S. W. 639; *Embry v. L. & N. Railroad* (Ky.) 36 S. W. 1123; *Thornton v. L. & N. Railroad* (Ky.) 39 S. W. 694; *C. & O. Railroad v. Perkins* (Ky.) 47 S. W. 259. Appellant, therefore, is not liable for placing the obstructions across the passway for the purpose of closing it up, unless in doing so it violated some duty to appellee. The passway ran over its property, and in closing it up it had the same right and was under the same obligation as any other landowner. The two wires placed across the passway at B, with the cedar post set firmly in the traveled way, and the wires fastened to it, were sufficient, as originally put up, to apprise any one that this way was closed. But for something like three months before the injury these wires had been down, and it is insisted for appellee that it was incumbent on the railroad company to put the wires up and keep them up. We are referred to authorities holding that where the owner, after allowing the public to drive across his property for several years, stretches a barbed wire across the track, without other notice that the license to use the road has terminated, he is liable for an injury to a traveler who is injured after dark. *Carskadon v. Mills*, 5 Ind. App. 22, 31 N. E. 559; *Morrow v. Sweeney*, 10 Ind. App. 626, 38 N. E. 187. Authorities are also cited to the effect that, while mere permission to cross the premises will not place any duty upon the owner to make them safe for this

purpose, still, if they are safe, and he makes any change, rendering them unsafe, after they have been used for a long time by the public, those using it are entitled to be protected from such dangers created by him, in so far as ordinary care on his part should provide. *Graves v. Thompson*, 95 Ind. 364, 48 Am. Rep. 727; *Vanderbeck v. Hendry*, 34 N. J. Law, 471; *Lepnick v. Gaddis* (Miss.) 16 South. 213, 26 L. R. A. 686, 48 Am. St. Rep. 547. In an exhaustive note to the last case the rule is thus stated: "The decisions are not entirely harmonious upon this question. But the weight of authority is in favor of the following rules: The owner of private property is not obliged to make it safe for trespassers, or even for mere licensees. If, however, the circumstances have been such as to amount to a devotion of the property temporarily to the public use, care must be taken not to make it unsafe until proper notice of the change has been given. Nothing which amounts to a trap can be placed where the public has been in the habit of resorting, and excavations cannot be made so near the line of an existing highway as to render travel on the highway unsafe."

In this case the accident happened in the forenoon of a bright day. If the two wires had remained at the height at which they were placed, with the cedar post standing in the road, they would have given reasonable warning that the passway was closed. They remained in this condition for something like three months, and the question is, was appellant liable to appellee because they afterwards got down, and were allowed to remain down? In *Louisville & Portland Canal Company v. Murphy, Adm'r*, 72 Ky. 522, it was held that the owner of a private bridge was not liable for the death of a child from a defect in the bridge, although it permitted the public to walk over the bridge. This decision is rested on the ground that the mere acquiescence of the owner of the property in the use of the bridge by the public did not impose any obligation on him to keep it in repair for those so using it.

It is insisted for appellee that this case has no application to the one before us, for the reason that the complaint here is not that the railroad company allowed the passway to get out of repair, but that the complaint is that, after it had allowed the public for years to use the passway, it placed an obstruction across it, which was dangerous, and not proper to be used to give notice that the passway was closed, and that it failed to maintain in a safe condition for a reasonable time the obstruction so placed in the passway, and thus did not give the traveling public notice of the closing of the passway, but, on the contrary, in substance, set a trap for the unwary.

In considering whether the proper obstruction was placed across the passway to give

notice to the public that the license to use it was withdrawn, we must bear in mind not only the two wires and the post at B, but the fence at C. Considering the fence at C, and the post in the traveled passway, with the two wires fastened to it, one two feet from the ground, and the other four feet from the ground, and extending from the garden fence to the telegraph pole, we are of opinion the structure was reasonably sufficient, as it originally stood, to notify the traveling public that the passway was closed. Appellant was not bound to keep this obstruction in its original condition permanently, but only to use ordinary care in its construction to make it safe and sufficient for a reasonable time to give notice to the traveling public that authority to use the passway had been withdrawn. After this those who used the passway were not licensees, but trespassers, for the fact that the passway had once been used by consent did not authorize its continued use after the permission to use it had been withdrawn. As the obstruction across the passway at B was maintained in its original condition from the time it was erected until September following, and as the accident to appellee did not occur until three months later, in December, we are of opinion that a reasonable time for such notice had elapsed. In 1 *Thompson on Negligence*, § 046, it is said: "As a general rule, the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who came upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." Again, in section 1016, it is said: "It is a sound and just conclusion that an owner or occupier of land, who has given to the public, or to a particular person or corporation, a license to come upon or to cross his premises, or to establish a private way, or even a railway, thereon, must, before exercising his power to revoke such license, anticipate that danger may accrue therefrom to those who have been accustomed to use the license, and is therefore bound to notify them of such revocation, and to warn them of any fence, obstruction, or other dangerous means to which he may have resorted to exclude them from his premises. So, if the public have been accustomed to drive, though without right, across the land of a proprietor, who, in order to stop them from doing so, stretches across the traveled way, without any warning to the public, a barb wire fence, which is invisible after dark, and, not knowing the existence of the obstruction, a traveler drives upon it, injuring his horse, he will have an action for damages against the landowner. On the other hand, if an old road on private property within the limits of a city has been fenced for three months, the landowner will not be

liable to one injured by driving upon the fence while attempting to use the road, especially where there were other streets regularly laid out for such public use, along which he might have driven to his destination. The reason is that the open and notorious fencing up of the private way for such a length of time is of itself tantamount to a public warning of the fact, and creates a presumption that the fact is known."

In the case before us, if the passway had run over a farm, and the owner had constructed a fence of logs across the passway, and this after three months had been thrown down, so that appellee, while galloping over it in the dark, had been thrown to the ground by reason of his horse stumbling over one of the logs, it would hardly be maintained that the farmer would be answerable for the injury. The wire was no more likely to throw a horse down than a log or pole, after dark, and the case seems to us to rest, in the end, on the idea—that cannot be maintained—that it was the duty of the railroad company to keep the fence up.

For the reasons indicated, the court, under all the evidence, should have instructed the jury peremptorily to find for the defendant. Judgment reversed and cause remanded for a new trial.

CHICAGO, ST. L. & N. O. RY. CO. et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 25, 1903.)

TAXATION — RAILROAD BRIDGE — SEPARATE FRANCHISE VALUE — VALUATION OF STATE BOARD — CONCLUSIVENESS — OMITTED PROPERTY — LIMITATIONS — REMOVAL OF CAUSES — ACTION BY STATE.

1. Where a railroad bridge is part of one system, built and operated under one charter, and owned by the same company as the railway line with which it is connected, it does not have a separate franchise value for the purpose of assessment for taxation.

2. Action of the State Board of Assessment and Valuation in fixing the valuation of property liable to assessment for taxation is conclusive alike on the state and on the property owner, after the expiration of the time allowed for hearing complaints.

3. Act May 23, 1890, which gives the right to the commonwealth to institute actions to recover all taxes which have accrued or may accrue, and which cannot be collected by the ordinary methods of distraint and sale, but provides that no action shall be instituted upon any claim for taxes that have been assessed more than five years, deals more directly with actions to recover taxes, where the assessment and levy have been made, than with cases of omitted assessments.

4. It is the policy of the law to put at rest stale demands, of whatever character, including demands for taxes.

5. Ky. St. § 2523, provides that "the limitations prescribed in this chapter" shall apply to actions by the commonwealth, as well as to actions by private persons, except where a different time is otherwise prescribed. One of the actions mentioned in the chapter is section 2515—"an action upon a liability created by statute,

when no other time is fixed by the statute creating the liability." Section 469 declares that the term "action," shall include all proceedings in any court in the commonwealth. Section 4021 provides, *inter alia*, that "when any lands or improvements shall not be assessed in any one year it may be assessed retrospectively, in the manner provided by law, for that year, at any time not later than five years thereafter." *Held*, that a proceeding to compel a taxpayer to list property for any one year, if not begun within five years from the time when it could first have been instituted, is barred.

6. A state is not a citizen, and an action by it is not removable into the federal courts under Act Cong. Aug. 13, 1888, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which provides for removal of a suit "wholly between citizens of different states."

7. A proceeding commenced in the county court to cause the assessment for taxation of omitted property is not such an action as might have originally been commenced in the United States Circuit Court, and is not removable thereto.

Appeal from Circuit Court, Ballard County.

"To be officially reported."

Proceeding by A. L. Shelbourne, auditor's agent, on behalf of the commonwealth of Kentucky, against the Chicago, St. Louis & New Orleans Railway Company and another, to compel the assessment for taxation of certain omitted property. Judgment assessing the property, except for certain years, and the defendants appeal, and the commonwealth and Shelbourne bring a cross-appeal. Reversed on defendants' appeal, and affirmed on cross-appeal.

J. M. Dickinson, Pirtle & Trabue, and Corbett & White, for appellants. Jno. W. Ray, for appellees.

O'REAR, J. This proceeding was instituted June, 1900, in the Ballard county court, by A. L. Shelbourne, auditor's agent, on behalf of the commonwealth, against the Chicago, St. Louis & New Orleans Railway Company and its lessee, the Illinois Central Railroad Company, to cause the assessment, as omitted property, of the franchise of the first-named railway company, represented by the net value of the intangible property in its bridge across the Ohio river, near Cairo, and known as the "Cairo Bridge." The taxes claimed were for the years 1893 to 1899, inclusive.

By an act of the Legislature of 1885-86 (page 1088, c. 446), the railroad companies named were authorized to build the bridge. It was done by the Chicago, St. Louis & New Orleans Railway Company, and became part of its line of road, the whole of which is being operated by the Illinois Central Railroad Company under a 400-year lease.

It is the contention of appellee that this bridge has a franchise value separable from the general franchise of the railway company. We think not. When a bridge is a part of one system, built and operated under one charter, and owned by the same company as the railway line with which it is connected

it does not have a separate franchise value for the purpose of assessment for taxation. The whole scheme of such assessment, under our statute, contemplates the valuation of the franchises of railway companies as entireties.

It was shown by the facts in this case that the State Board of Assessment and Valuation had included the earning capacity and earnings of this bridge, together with appellant's other property and earnings, in arriving at the valuation placed upon the franchises of the companies for each of the years 1895 to 1899, inclusive. The record of the board's action was kept in a uniform manner during those years, and the taxes levied upon the valuation of the franchisees, fixed as stated, were paid to the state by appellants before this proceeding was begun. Under the authority of *Coulter, Auditor, v. Louisville Bridge Co. (Ky.) 70 S. W. 29*, we hold that the action of the board was conclusive, and, after the expiration of the time for hearing complaints for reduction, was binding alike upon the state and the railway companies.

For the years 1893 and 1894 the plea of the statute of limitation interposed by appellants must prevail. The act of May 23, 1890, held by this court, in *Louisville Water Company v. Commonwealth, 34 S. W. 1064*, and *Commonwealth v. City of Louisville, 47 S. W. 865*, to be yet in force, and not repealed by the chapter on "Revenue and Taxation" adopted November 11, 1892, is cited in argument by appellants as being applicable in part. It is as follows: "That the right and power is hereby vested in the commonwealth to institute and maintain its action to recover all taxes which may heretofore have accrued to the commonwealth, or which may hereafter accrue, and which cannot be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisdiction for the purpose of enforcing the state's lien on property which, for any reason, cannot be sold, or for the purpose of reaching intangible property which cannot be otherwise reached; but no action shall be instituted or maintained under the provisions of this act upon any claims for taxes that have been assessed, or might have been assessed, more than five years before the commencement of the same." Railroad and other public service property had been held not subject to ordinary distraint for taxes. *Louisville Water Co. v. Commonwealth, 89 Ky. 244, 12 S. W. 300, 6 L. R. A. 69*; *Same v. Hamilton, 81 Ky. 517*; *Clark v. Louisville Water Co., 90 Ky. 515, 14 S. W. 502*. It was to meet this precise condition that the act quoted was enacted. This act really deals more directly with actions to recover taxes, where the assessment and levy have been made. Although it says that no action shall be instituted or maintained, under the provisions of the act, upon any claim for taxes which have been or might have

been assessed more than five years before, the words "might have been assessed" are merely a recognition of the limitation elsewhere provided by the statute law of the state. What the Legislature was providing by the act just quoted was a means of coercing the payment of taxes by that class of property not subject to distraint. It is the policy of the law to put at rest stale demands, of whatever character. This applies as well to taxes as to other matters.

On the subject of limitations generally it is declared by section 2523, Ky. St.: "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision." One of the actions mentioned in that chapter is (section 2515) "an action upon a liability created by statute, when no other time is fixed by the statute creating the liability." By section 469, Ky. St., in the chapter on "Construction of Statutes," it is provided: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this commonwealth." By section 4021 it is provided: "The commonwealth, and each county, incorporated city, town, and taxing district, shall have a lien on the property assessed for the taxes due them respectively, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively, in the manner provided by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime." The section of the general statute (the act of 1886) of which section 4021 is a re-enactment of and amendment to reads: "The commonwealth shall have a lien for all taxes, and the counties for the county levy and other taxes due the county, on the property assessed, and on all other property of each person which shall not be defeated by gift, devise, sales, alienation, or by any means whatever, provided, the lien herein provided for shall not exist longer than five years." Chapter 92, art. 1, § 2, Gen. St. It will be noted that the subject in hand and under treatment by the sections last quoted is the one of the lien of the taxing district or state, even after the property has passed into the hands of others than the person owning it when it should have been assessed. The last clause of section 4021, referring to the power of the state to assess omitted property for back taxes for five years, must be under-

stood as referring to that class of property. That section recognizes, as does the act of 1890, that the right to assess omitted property is limited to five years from the time when it should have been assessed. This limitation is found in sections 2523, 2515, and 469 of Kentucky Statutes, above quoted.

The cases of Louisville & Nashville R. Co. v. Commonwealth, 1 Bush, 250, McAllister's Executor v. Commonwealth, 6 Bush, 581, Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164, and Louisville & Nashville R. Co. v. Commonwealth, 85 Ky. 211, 3 S. W. 139, arose under statutes having different provisions, and when the policy of the state appears to have been different from that embodied in our present statutes. In the case of Louisville & Jeffersonville Ferry Co. v. Commonwealth (Ky.) 57 S. W. 626, the question of the limitation applicable to proceedings to list omitted property was not involved, and, of course, was not intended to be decided.

We are of opinion that a proceeding to compel a taxpayer to list property for any one year is such a proceeding as is embraced by the statutes, supra, and, if not begun in the proper court within five years from the time when the action could first have been instituted, the state is barred of her right to thereafter maintain the action.

A question of practice is presented upon the record and argued, that we deem of importance to notice. After the service of the summons on appellants, they tendered their petition and bond to the county court, and moved to transfer the proceeding to the Circuit Court of the United States for the Western District of Kentucky, upon an allegation of diverse citizenship. It was asserted that the only necessary and actual parties to the litigation were Shelbourne, auditor's agent,

a citizen of K the Illinois Cer zen of the sta The value of t \$2,000. We a Congress provi from a state t apply to this Kentucky is th one beneficiall state is not a not removable 1888, 25 Stat. 508]. Stone v. 6 Sup. Ct. 799. 123 U. S. 443, Ferguson v. R R. A. 322; Pos 155 U. S. 482, 231. Further the county cou lsterial as well the matter of assessment. B 2 S. W. 164; F 11 S. W. 803. might have be United States fore an action jurisdiction. T properly overru

The judgmen cult courts, as appellants' bri 1894, is revers commonwealth agent, because list the propel 1897, 1898, and is remanded, proceeding.

MORGAN v. WICKLIFFE.

(Court of Appeals of Kentucky. March 24, 1903.)

MORTGAGES—FORECLOSURE—PARTIES—DOWER.

1. A mortgage is a deed, within Ky. St. § 2135, providing that the wife shall not be endowed of land sold to satisfy a lien or incumbrance created by deed in which she joined.

2. Under Ky. St. § 2135, providing that the wife shall not be endowed of land sold to satisfy an incumbrance created by deed in which she joined, but that, if there is a surplus after satisfying the lien, she may have dower out of such surplus, a wife who joins with her husband in a mortgage on the husband's land has no interest therein, and is not a necessary party to a suit to foreclose the mortgage.

Burnam, C. J., and O'Rear, J., dissenting.

"To be officially reported."

On rehearing. Affirmed.

Former opinion (70 S. W. 680) withdrawn.

Thos. A. Morgan and L. P. Little, for appellant. Jep C. Jonson, for appellee.

PAYNTER, J. The appellant, Morgan, executed to appellee, Wickliffe, a note for the sum of \$2,127.40, and, to secure the payment of it, executed a mortgage upon a tract of land in Daviess county, Ky. The property belonged to Morgan, but his wife joined in the execution of the mortgage. This action was instituted to enforce it, to which the wife was made a party, and was proceeded against as a nonresident. The husband appeared and made a defense to the action. A warning order was made against the wife, but she never answered. The court rendered judgment decreeing a sale of the land to satisfy the mortgage debt, but made no reference to the wife's rights in the land; nor was a bond executed to her as a nonresident, under section 410 of the Civil Code of Practice. A reversal is sought upon the ground that such bond was not executed.

The wife was not a necessary party to the action. The effect of the mortgage which she executed was to release her potential right of dower in the land, except the surplus proceeds arising from the sale of the land, if any. Section 2135, Ky. St., reads as follows: "The wife shall not be endowed of land sold, in good faith, but not conveyed by the husband before marriage, nor of land sold, in good faith, after marriage, to satisfy a lien or incumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for the purchase money; but if there is a surplus of the land or proceeds of the land after satisfying the lien she may have dower out of such surplus of the proceeds, unless they were received or disposed of by the husband in his life time." In this section it is expressly stated "that the wife is not entitled to dower in land

which is sold in satisfaction of a lien or incumbrance created before marriage, or created by deed in which she joined, except, if there is a surplus of the land, or proceeds of the land, after satisfying the lien, she may have dower out of such surplus of the proceeds, unless they were received or disposed of by the husband in his lifetime.

In *Schweltzer v. Wagner*, 94 Ky. 458, 22 S. W. 883, the court had under consideration the construction of the statute above quoted. In that case it appeared that the wife joined in the mortgage. In the proceedings to sell the land she was not made a party. Afterwards she brought a suit to have dower assigned her out of the land. It was claimed that she was not a party to the proceeding to enforce the lien, and therefore was entitled to recover dower. The court held that the mortgage in which she joined was a deed, within the meaning of the statute. In effect, the court held that she by the mortgage divested herself of any interest in the land; her interest being in the surplus proceeds which the statute gave her, and only in this if the husband did not dispose of it during his lifetime. In that case the court said: "It is urged by the appellee that by the term 'deed,' in this statute, is meant 'mortgage,' or, rather, that the former embraces the latter, and that the appellant, having joined in the mortgage or deed creating the lien, to satisfy which the sale was made, is not endowed of the land. There is much plausibility in this construction. The intention certainly seems to be that if the wife joins in a conveyance creating a lien, and the land so incumbered be sold to satisfy it, she shall not be endowed thereof, but may have compensation out of the surplus, etc. A deed, in the ordinary sense of that term, is not what is meant in the statute, as by it no lien is created against the grantors, to satisfy which a sale of the land can be made. A mortgage of land is a conveyance of it for the purpose of securing the payment of debt. It is a deed creating a lien, and seems to be the very instrument designated in the statute, in which, if the wife joins, she is divested of dower, save in the surplus proceeds of the sale, if one be made, to satisfy the lien so created. Such has been the construction of this statute in cases of sales for purchase money. * * * So it would seem, if it be sold in good faith, because there is a lien for debt created by deed or mortgage, in which the wife has joined, and with a view to satisfy it, she should not be entitled to dower, in the absence of any design to deprive her of her inchoate right. The statute makes no distinction between sales made under an order of court and those made by the owner, and liens for purchase money are placed in the same class with liens created by deed in which the wife joined. She occupies the same relation to the one class as to the other. In neither case

¶ 2. See *Mortgages*, vol. 35, Cent. Dig. § 1281.

has the husband or wife any beneficial interest in the lands not subordinate to the liens." There is no distinction between a lien for purchase money and a lien created by mortgage or deed. The wife has a potential right of dower in the land in the one case as in the other. In each case it is subordinate to the lien.

In *Melone, etc., v. Armstrong*, 79 Ky. 248, it is said: "This statute evidently contemplated that a sale might be made by the husband, and that he might sell the whole, or only so much as would satisfy the lien; but whether sold by the husband, or under the judgment of a court, if the whole be sold bona fide, because there is a lien for the purchase money, and with a view to satisfy it in the manner deemed by the husband to be most beneficial to him, and with no design to deprive the wife of her potential right of dower, she will not be entitled to dower, although less than the whole would have satisfied the lien."

In *Ratcliffe v. Mason*, 92 Ky. 190, 17 S. W. 438, it was held that, where land of the husband is sold in good faith to satisfy a lien for purchase money, the wife is not entitled to dower in the land, although it may have been sold for more than the amount of the lien, and that this is true whether the sale was made directly by the husband, or under direction of the court, and it must be regarded as a sale in good faith, whether it is made pursuant to a deed or assignment, or directly by the husband, as that which a person is legally bound to do cannot be said to have been done in bad faith.

It was held in *Johnson v. Cantrill*, 92 Ky. 59, 17 S. W. 206, that a widow is not entitled to dower in the land of the husband which has been sold to satisfy a lien for the purchase money.

These opinions relating to a case where land was sold to satisfy a lien for purchase money are identical in principle with the case where a mortgage lien is enforced because the statute is made to apply where sales are made directly by the husband, or under a judgment of court, to satisfy a lien or incumbrance, whether it is created by deed or mortgage in which she joins, or to satisfy a lien for purchase money. The only difference between the rights of the wife in land which the husband owns, and incumbers by mortgage in which she joins, and land which the husband has purchased, and which is incumbered by lien for purchase money, is that the lien for purchase money is created by the operation of law, as it attaches when the land is conveyed and the purchase money remains unpaid, while in the case of a mortgage the potential right of dower exists, except when the wife has waived it by joining in the mortgage. When either of the two transactions take place, the wife's rights in the land are exactly the same; the difference being that in the one

case she waives her right, and makes it subordinate to the lien, and in the other the law determines it, and makes it subordinate to the lien. The fact that the wife is not a party to the suit is immaterial, because at the time of the enforcement of the lien she has no present interest in the land which can be sold to satisfy the lien. In *Tisdale v. Risk*, 7 Bush, 141, the court expressly held that the widow's title cannot be extended to the land purchased by a party, from a court, and conveyed to him by the court without incumbrance of lien in her favor. The statute was intended to protect purchasers under such circumstances, but the wife loses her dower and compensation therefor in the surplus if it is received or disposed of by the husband in his lifetime. This is true whether the surplus proceeds are received by the husband as a result of a private or judicial sale of the property to satisfy a lien or incumbrance on it. The plaintiff has no right to the surplus proceeds, because his demand has been satisfied when the lien or incumbrance has been discharged by the appropriation of enough of the proceeds of the sale to pay his debt. He is not compelled to look to the application of the surplus proceeds; hence he has no liability for its application. Neither is the purchaser compelled to look to the application of any part of the purchase money.

The plaintiff asserted no cause of action against the wife. He did not seek to appropriate her property for the payment of the debt, but only sought to subject the husband's property, in which she, by the mortgage, had waived her potential right of dower, and, in effect, had consented that the husband might directly sell it, without her joining with him, to satisfy the debt; and what he could do, and failed to do, the court had a right to do for him. Had the plaintiff given the wife a bond, it could not have protected her against the act of the husband in getting the surplus proceeds, if any. It would have been an idle thing to have executed it.

In this case only so much of the land was ordered sold as was necessary to satisfy the judgment, and under which there could be no surplus proceeds; and, of course, no question could arise as to their application.

It is a useless thing to make the wife a party to an action, because her potential right to dower may never ripen into a dower interest, as she may not survive her husband. One desiring to purchase land at a judicial sale can examine the record to see whether the wife has joined in the deed or mortgage, and made her potential right of dower subordinate to the lien to satisfy which it is being sold. The purchaser must take notice of the condition of the record with reference to her action.

It has been suggested that she should have a right to show whether or not she

joined in the mortgage before the land was ordered to be sold. So far as her rights are concerned, that is immaterial. If she has not executed a mortgage, and her potential right has ripened into a dower interest, it will then be time enough to show that she did not join in the mortgage waiving it.

It is suggested that the husband is interested in having the land bring as much as possible, and that it will bring more if there is a judgment barring her right to dower. As she signed the mortgage, the purchaser is presumed to have examined the record, and to have concluded, under the opinions of this court, that her rights were subordinate to the plaintiff's lien. If she had filed an answer, and successfully shown that she did not execute the mortgage, it would not have helped the husband, because the land would have brought less at the sale than it did bring.

Doubtless there are cases of other courts which hold the wife is a necessary party to an action to enforce a lien upon the husband's property. They are not based upon a statute, as are the opinions of this court.

The previous opinion delivered herein is withdrawn. Judgment is affirmed.

O'REAR, J. (dissenting). The petition for rehearing relied upon the cases of Tisdale v. Risk, 7 Bush, 141; Melone v. Armstrong, 79 Ky. 248; Ratcliffe v. Mason, 92 Ky. 190, 17 S. W. 438; Johnson v. Cantrill, 92 Ky. 59, 17 S. W. 206. Those cases were not overlooked on the former consideration of the case. But a reference to them will disclose that every one of them involved a sale of lands to satisfy a purchase-money lien. The statute being construed and applied provided that the wife should not be endowed of land of her husband, sold in good faith to satisfy a purchase-money lien thereon. Section 2135, Ky. St. Nor is she endowed of land sold by him, but not conveyed, before the marriage. No right of hers was or could be affected by the proceedings if either the land had been sold by the husband before the marriage, but not conveyed, nor if it was sold in good faith to satisfy a purchase-money lien. For her right as potential dowress had never attached to the land. However, we apprehend that

even in such state of case it would not be improper to join the wife as a party defendant, under proper allegations, so that the complete title might be assured to the purchaser. But in the matter of a mortgage in which she has joined, or which purports to be signed by her, the case admits that she had a right in the premises, but asserts that she has divested herself of it by an act which, under the statute, when executed by her before certain officials and under certain formalities, extinguishes her right as against the plaintiff's debt. That is true, but it is no truer than that the husband is by a similar act alone divested of his right in the land as against that debt. Why should not she have her day in court, as well as he, before their rights shall be foreclosed? Perchance, she did not sign the mortgage, or that she did so under duress, or by reason of the fraud or deceit of the mortgagee, or she may have been non compos at the time, or an infant, or she may have executed it for a certain consideration from the mortgagee to her, which had failed. Can it be said that she should be precluded, by a judgment in an action to which she is not a party, from making any such defense? There is an obvious distinction between one's never having had a title, and having conveyed it as pledge or security for a debt. In the first instance the person may well be ignored. In the second there is always, under our practice, such an interest as permits the person whose property is to be taken in satisfaction of the debt to be heard and to redeem. The case of Helm v. Board (decided on the same day as was this case) 70 S. W. 679, was likewise a case where a purchase-money lien had been enforced. The statute gave the wife, in that event, dower only in the surplus of land or its proceeds at the sale to enforce the lien. Helm v. Board merely followed Tisdale v. Risk, supra, and the other cases cited, and was cited in the opinion in this case as being in harmony with its doctrine.

For these reasons, and those stated in the original opinion, I cannot concur in the opinion now filed by the majority of the court in this case.

BURNAM, C. J., concurs in this dissent.

SOMERSET NAT. BANKING CO.'S RECEIVER et al. v. ADAMS.

(Court of Appeals of Kentucky. March 20, 1903.)

CORPORATIONS — STOCK — OVERISSUE — PAROL SUBSCRIPTIONS — VALIDITY.

1. Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, the burden of proof was on the receiver to show that the purchase of stock was actually made.

2. The fact that the depositor proved his deposit account before the receiver, without including the part sued for, did not estop him from denying that he subscribed for the stock.

3. The pendency of an action by the receiver against the depositor as a stockholder was not a bar to the action.

4. To facilitate the reorganization of a state bank as a national bank, it was agreed that certain stockholders should subscribe for all the stock, which was afterwards to be apportioned among those stockholders of the state bank who desired to take it. Subsequently one of the stockholders in the state bank subscribed for shares, and certificates were issued to him. Held, that there was no overissue, invalidating the last subscription.

5. Subscription for shares of stock in a corporation may be made by parol.

6. Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, evidence that the president and cashier, who made the alleged sale to the depositor, had been given parol authority by the board of directors to sell the stock, was admissible.

7. As the original subscriber for the shares transferred to the purchaser held the stock as a trustee, it was not necessary to show any authority from such original subscriber for the transfer to the purchaser.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Napier Adams against Christopher L. Williams, as receiver of the Somerset National Banking Company, and another. From a judgment for plaintiff, defendants appeal. Reversed.

O. H. Waddle, and F. F. Oldham, for appellants. J. N. Sharp, V. P. Smith, and W. A. Morrow, for appellee.

BARKER, J. This action was instituted by the appellee, Napier Adams, who was the plaintiff below, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Company, and the Somerset National Banking Company, to recover the sum of \$500, alleged to have been deposited by him in the bank and never repaid.

In the spring of 1900 the stockholders of the Somerset Banking Company, a corporation doing a banking business in Somerset, Ky., concluded that it would be to their interest to change their bank, which was a state institution, into a national bank; and

to that end, at a stockholders' meeting, in which a large majority of the stock was represented, a resolution was passed authorizing the directors to place the Somerset Banking Company in liquidation, for the purpose of organizing a national bank, and further authorizing them to fix such time as they might deem best for such liquidation to go into effect, and to take all necessary steps to perfect the liquidation, and to organize a national bank, to be called the Somerset National Banking Company, the capital stock of which was to be \$50,000; the stockholders of the old bank to have the privilege of taking stock in the new bank in an amount equal to fifty per cent. of their holdings in the old. Afterwards the board of directors of the Somerset Banking Company met, and elected the following board of directors for the new institution: L. D. S. Patton, Will C. Curd, George W. Wait, M. D. Huffaker, and Samuel Tate—who were to serve until the next annual election, to be held on the second Tuesday in January, 1901. At a subsequent meeting the board of directors of the Somerset Banking Company fixed the 30th day of June, 1900, as the time at which it should go into liquidation. On the 11th day of June, 1900, the directors of the Somerset National Banking Company held a meeting, at which they elected George W. Wait, president; Will C. Curd, vice president; and R. G. Hale, cashier. On motion it was ordered that the president, George W. Wait, and the cashier, R. G. Hale, "be, and they are hereby, authorized to proceed with the organization of this banking company, to purchase the required books and stationery, procure the issue of the currency, and, if possible, get matters in shape to begin business on the 2d day of July, 1900 [the 1st coming on Sunday], and inasmuch as the proposed stockholders are scattered over the country, and in order to facilitate the organization, it is further ordered that the capital stock be taken and subscribed for by a limited number of stockholders, who will, after the organization is completed, apportion the same on a basis of fifty per cent. to the stockholders in the Somerset Banking Company desiring the same; however, subject to the law requiring the directors of this banking company to hold a certain number of shares so as to qualify and make themselves eligible to hold said offices as directors." In pursuance of this authority, application was made to the United States Comptroller of the Currency for the organization of the Somerset National Banking Company. In order to comply with the national bank act, and the rules and regulations of the Comptroller of the Currency, formal application papers were made out; and, in pursuance of the agreement that a limited number of persons should subscribe for all the stock, L. S. D. Patton, Samuel Tate, M. D. Huffaker, George W. Wait, R. G. Hale, Will C. Curd, James Denton, A. M.

¶ 2. See Corporations, vol. 12, Cent. Dig. § 198.

Girdler, H. Clay Newell, and B. G. Newell, all residing in Somerset, Ky., subscribed for the whole capital stock of the proposed bank, each taking 50 shares, whereupon the Somerset National Banking Company was duly and legally organized under the national bank act, and empowered to carry on a banking business at Somerset, Ky. The subscriptions of the 10 persons mentioned were only intended to effect the organization of the bank expeditiously, and to facilitate the arrangement by which the stockholders in the Somerset Banking Company should have the privilege of subscribing for the new stock to the extent of 50 per cent. of their holdings of stock in the old bank, and also that at least \$10,000 worth of the stock in the new bank should, if possible, be sold to new subscribers, for the purpose of interesting them in the proposed bank. It was never intended that these subscriptions should be anything more than formal, the subscribers being practically trustees for the proposed new subscribers.

The new bank, being thus organized, was started in business. Among its depositors was appellee, Napier Adams, who entered into negotiations with the officers of the bank for the purchase of five shares of stock. He having agreed to subscribe for this number, it was paid for by charging his deposit account with the sum of \$500, and crediting him on the stock ledger with that sum; and in pursuance of this subscription a certificate of stock was made out to him for the five shares of stock, and, in the expectation that he would call for it, was laid aside in the bank for him, but was never delivered. The new bank seems to have had an exceedingly short career. It commenced business on the 2d day of July, 1900, and was placed in the hands of a receiver by the Comptroller of the Currency on the 17th day of August, 1900—for what reason, does not definitely appear, but presumably because it assumed the payment of the deposits of the old bank, which must have been insolvent. It having been found necessary by the Comptroller of the Currency, in order to pay the indebtedness of the appellant bank, to make an assessment upon all the stockholders, this was done; and in default of payment an action was instituted by the receiver in the United States District Court for the Eastern District of Kentucky against a large number of stockholders, among whom was the appellee, whereupon the appellee instituted this action in the circuit court of Pulaski county in order to test the question in the state court as to whether or not his subscription to the stock of the defunct bank was valid. To this action the receiver filed an answer containing four paragraphs, in which he respectively denies the indebtedness as set out in the petition, pleads the subscription by appellee of the stock, the application of the \$500 deposited by appellee in the bank in

payment therefor, the pendency of this action in the federal court as a bar to this, and that the plaintiff is estopped to deny that he was a subscriber.

The burden of proof was upon the defendant. An examination of all the pleadings shows that the money sued for was placed on deposit in the bank, and the plea that it was used in paying appellee's stock subscription is a plea of payment; nor do we think that the fact that plaintiff proved his deposit account before the receiver, without including the \$500 in question, or the fact that he paid several assessments on his stock, estopped him from denying that he was a stockholder, if the truth justified his so doing, as these acts did not place the receiver in any worse position than if they had not occurred. The pendency of the action by the receiver against the plaintiff in the federal court was not a bar to the prosecution of this action.

When the case came on for trial the circuit judge held that the burden of proof was on the appellee, whereupon he testified in his own behalf and rested. The appellants then moved the court for a peremptory instruction to the jury to find for them, which being overruled, they then introduced their testimony. At the close of all the evidence, both sides moved for peremptory instructions to the jury to find for them, respectively. The motion of the appellants was overruled, and that of the appellee was sustained, whereupon, in obedience to the instructions of the court, the jury found for the appellee in the sum of \$500, as prayed for in his petition. The appellants' motion for a new trial having been overruled, they have brought the case here on appeal.

We are of the opinion that the appellants' motion for a peremptory instruction should have been sustained, and that of appellee should have been overruled. The appellee admitted that he had agreed to subscribe for the stock, that he knew and acquiesced in his deposit account being charged with the sum of \$500 to pay for it, and that he regarded himself as a stockholder for a considerable time after the bank went into the hands of a receiver. We do not think that the arrangement made for the organization of the bank, whereby ten men nominally subscribed for all of the stock, made the subscription of the appellee for five shares an overissue, which would invalidate the subscription. The arrangement was merely one of convenience; it never being the intention, either of the subscribers or the bank, that they should really take it, but, on the contrary, they were looked upon simply as trustees for such new stockholders as could be induced to subscribe. The arrangement was a beneficial one, as it would have been impracticable to have organized the bank, so as to give the old stockholders the privilege of subscribing for the new stock in the proportion agreed on, except by adopting this

plan, or some similar one. The stockholders of the Somerset Banking Company were scattered over the country at various places. It was necessary, under the national bank act, that the subscribers should be named, their residences given, and that they should acknowledge the articles of incorporation. It would have been an interminable labor to have procured this from the old stockholders, and therefore we think that the plan adopted, under the circumstances, was entirely reasonable. This very question arose in the case of Talure Savings Bank v. Talbot, 131 Cal. 45, 63 Pac. 172. In that case, in order to expedite the organization of the corporation, one Linder subscribed for 183 shares, not with the intention of actually taking them, but in order to effect the incorporation, and to hold them in trust for future subscribers. In a suit against the stockholders for their subscriptions, this action of Linder's was charged as being an overissue of stock, rendering the subsequent subscriptions invalid. To this the court made answer: "The contention that the stock of these appellants was an overissue, and therefore void, is based upon figures, rather than upon facts, for in truth there was never issued by the organization a single share more than the five hundred authorized by its articles of incorporation. The argument of appellants here is that the aggregate subscription list showed more than five hundred shares; that Linder, in the article of incorporation, was down for one hundred and eighty-three shares; that the subscribers and incorporators acquired rights to this stock, of which they could not be deprived without their consent and without the unanimous consent of the stockholders; and that, casting up the total of the subscription list and the amount set down in the articles of incorporation, the result is a sum far exceeding five hundred shares. The facts appear to be that, at the time the articles of incorporation were drawn, all the subscription lists were not at hand, and that Linder, the organizer and promoter of the organization, put his name down for one hundred and eighty-three shares, to make up the full total of five hundred shares. In so doing he constituted and regarded himself as the self-appointed agent of other subscribers, whose names were not at hand, and the fact is that no subscriber was refused the amount of stock which he demanded, but such stock was issued to him directly by the corporation; it being taken in some instances from the amount of Linder's one hundred and eighty-three shares. In this there was complete acquiescence upon the part of Linder and the other stockholders. * * * There is not the slightest suggestion that Linder was acting, or attempting to act, in fraud of the rights of any one. Before the organization of the corporation, Pope and Talbot had agreed to take stock in it. The amount had not been definitely

decided upon. The stock subsequently taken by Pope and Talbot concluded the agreement, and, in this subscription of one hundred and eighty-three shares, Linder may be regarded as having acted as their agent, as well as the agent of others to whom stock was afterwards issued." Citing *San Joaquin, etc., v. Beecher*, 101 Cal. 79, 35 Pac. 349; *Burr v. Wilcox*, 22 N. Y. 551; *Terwilliger v. Great Western Tel. Co.*, 59 Ill. 249; *Bates v. Great Western Tel. Co.*, 134 Ill. 536, 25 N. E. 521. This doctrine is also upheld in the case of *Burt v. Bailey and others*, 19 C. C. A. 651, 73 Fed. 693.

No certificate was issued, or contemplated being issued, to the 10 original subscribers, for the full amount of their subscriptions. They were merely conduits through whom the bank was to distribute its stock to its future subscribers in the manner contemplated by the original resolution of the stockholders of the Somerset Banking Company.

It was not necessary that the subscription should have been made by appellee in writing. Subscriptions for the stock of corporations are made according to the principles governing contracts generally, and we know of no principle which forbids them being made by parol. In the *American & English Encyl. of Law*, c. 23, tit. "Stockholders," 786, it is said: "No particular form is essential to the validity of a contract of subscription. Any form by which an intent to effect a contract of membership is manifest will suffice, and even without a formal subscription, or where it is irregular, the contract may be inferred from acquiescence and acceptance of the benefits of membership." In *Cook on Corporations*, vol. 1, § 52: "The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the court is inclined, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, a question of intent. Formal rules are, for the most part, disregarded. And in general a contract of subscription may be made in any way in which other contracts may be made. Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties, and claims the rights, privileges, and emoluments, of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the formal manner of his subscription, or there may have been no formal subscription at all. * * * There have been various dicta to the effect that a subscription cannot be entered into by parol, but the later and better opinion is that such a subscription is valid and binding." A

verbal subscription for stock in a corporation was expressly upheld by this court in the case of *Tabler, etc., v. The Anglo-American Association, Limited*, 32 S. W. 602. We quote the following from the opinion: "The testimony shows that this was a verbal subscription of stock, and no written evidence is exhibited, except a writing evidencing a subscription by others, and to which neither of the appellants' names are attached. It is plain, however, that the appellant either purchased the stock or subscribed for it, and on this issue the testimony is so conflicting as not to justify a reversal on that ground for want of evidence to support the judgment. In fact, it clearly appears that this stock at the time of purchase was in great demand, and it is scarcely to be supposed that a sale would be made so much below the market value, and by one, as he states, having no authority to dispose of the stock. The discrepancy in the testimony has arisen, no doubt, from the confidence the parties had in the success of the enterprise, and their inattention, therefore, to what actually transpired with reference to the transaction. It does appear singular that a verbal subscription involving so much should have been made, and equally so that the stock should have been purchased, and the money paid, and no certificate of stock ever issued or demanded; and this loose manner of doing business has caused this difficulty between the parties."

The trial court erred in refusing to allow appellants to show parol authority from the board of directors to the president and cashier to sell this stock to appellee, although we do not think it material in this case, as the acquiescence in the sale by the board of directors conclusively evidences their ratification of the transaction, even if there should be any doubt as to the original au-

thority to make the sale. The directors are presumed to be informed of the ordinary business of the bank, and they would not be permitted, if they so desired, after receiving appellee's money in payment for his stock, to repudiate the transaction.

The contention of appellee that the stock issued to him belonged to B. G. Newell, who was one of the 10 original subscribers for all of the capital stock, and that, as no authority was shown by appellants from him for the sale and transfer, it was void, cannot be maintained. The evidence conclusively shows, as said before, that B. G. Newell did not own all the stock which stood in his name under his original subscription. As to future subscribers, he was simply a trustee, and could not refuse to transfer, if he would. A refusal on his part to permit the transfer would have been a gross breach of the original agreement under which he subscribed. There was no necessity of any special authority from him to issue the certificate to appellee. He had no certificate for the stock, and never intended to accept one, and could not have required the bank to transfer it to him if he had so desired. His subscription was only a matter of organization, and he and the bank so understood it. The issuance of the certificate to appellee was perfectly regular, and in conformity with the original resolution for the placing of the stock. There can be no doubt that appellee subscribed for it, or that he knew it was paid for out of his money on deposit in the bank; and, as said before, he regarded himself as a stockholder until long after the failure of the bank.

The court should have sustained appellants' motion for a peremptory instruction at the close of all the testimony. Wherefore the case is reversed for proceedings consistent with this opinion.

SOMERSET NAT. BANKING CO.'S RECEIVER et al. v. BRINKLEY.

(Court of Appeals of Kentucky. March 20, 1903.)

CORPORATIONS—STOCK SUBSCRIPTIONS—EVIDENCE—SUFFICIENCY.

1. In an action by a depositor against the receiver of a bank to recover a deposit, where defendant pleaded that the deposit had been used to pay for stock subscribed for by plaintiff, evidence considered, and *held* insufficient to show that plaintiff purchased the stock.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Susie Brinkley against Christopher L. Williams, as receiver of the Somerset National Banking Company, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

O. H. Waddle, for appellants. J. N. Sharp, V. P. Smith, and W. A. Morrow, for appellee.

BARKER, J. This action was instituted in the Pulaski circuit court by the appellee, Susie Brinkley, against the appellants, Christopher L. Williams, receiver of the Somerset National Banking Company, and the Somerset National Banking Company, to recover the sum of \$1,000, which she placed on deposit in the Somerset National Banking Company, and which has never been repaid to her, as she alleges. All of the facts as to the organization of the appellant bank, the appointment of a receiver, and the pleadings involved in this case, are substantially the same as in the case of *The Somerset National Banking Company's Receiver v. Napier Adams* (heretofore decided) 72 S. W. 1125, of which it is a counterpart, and reference is now had to that opinion for the facts necessary to illustrate this case.

Upon the trial in the circuit court, the judge, as we think, properly ruled that the burden of proof was on the defendants, who are the appellants here, and at the close of their testimony sustained the motion made by appellee for a peremptory instruction to the jury to find for her in the sum of \$1,000, which they did. Appellants' motion for a new trial being overruled, they have appealed to this court. The correctness of this ruling of the circuit judge, under the principles enunciated in the *Somerset National Banking Co.'s Rec'r v. Napier Adams*, depends upon the question as to whether or not the appellants established the contract of purchase of the stock in question by appellee of the appellant bank.

After the organization of the Somerset National Banking Company, the appellee, Susie Brinkley, entered into negotiations with its officers, looking to the purchase of 10 shares of stock. She had on deposit in the bank \$1,265. No contract for the purchase

of the stock was finally consummated by appellee, although the matter was discussed between her and the bank officers. The talk that she had concerning the stock was with R. G. Hall, the teller and cashier. Mr. Hall was introduced as a witness for appellants, and on cross-examination said there was no agreement between him and appellee as to the number of shares that she would take, and made it perfectly clear that there was no contract for the sale of the stock closed between him and appellee; but he says that, after his conversation with appellee, her brother-in-law, W. F. Tomlinson, told him that she would take 10 shares, and that he settled the matter with Mr. Tomlinson. Mr. Tomlinson was also introduced as a witness by appellants, and admitted that he told R. G. Hall that his sister-in-law would take the 10 shares of stock, but said that he had no authority from her to close the contract, and that he was not her agent in any way, and had no right to act for her; that the talk he had with her concerning the stock was just a family matter, and when he told Hall that she would take the stock he assumed that she would accept his advice in the matter. The evidence did not show that the appellee ever knew that the contract was closed, or that her money had been taken to pay for the stock in question, or that a certificate for it had been issued to her. It was never delivered, and there was a total failure to show that she ever made any contract with appellant bank for the purchase of the stock, or authorized any one so to do for her, or that she ever knew that her name was on the stockbook.

We think the court properly instructed the jury at the close of the appellants' testimony to find for the appellee. Wherefore the judgment is affirmed.

THOMAS et al. v. SCOTT et al.

(Court of Appeals of Kentucky. March 18, 1903.)

WILL—EXTENT OF DEVISE—CONSTRUCTION—EXTRINSIC EVIDENCE—ADMISSIBILITY.

1. Testatrix devised a certain house and lot, and to T. "the lot adjoining with two storied frame house on it." Extrinsic evidence showed that the latter lot had been purchased by testatrix together with a third tract, there being a stone fence between the two. She placed T. in the two-story house, and referred to those premises as "T.'s lot," while referring to the third tract as "my lot." Some one desiring to use the third tract, she referred him to her agent, who gave him permission to fence three sides, which, with the stone fence, completely inclosed the tract. *Held*, that the devise to T. did not include the third tract.

2. Extrinsic evidence was admissible to explain the latent ambiguity in the will.

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

Action by George Scott and another against Allen M. Thomas and others. Judge

ment for plaintiffs, and defendants appeal. Reversed.

McMillen & Talbott and T. N. Lindsey, for appellants. H. O. Howard and Buckner Clay, for appellees.

PAYNTER, J. Louisa A. Keiningham departed this life in September, 1890, leaving a will, which, among others, contained the following provisions:

"If Eliza Baker (col.) stays with and takes care of me as long as I live, I wish my executors to give her five shares of my Northern Bank Stock for life, the dividends to be paid her by her trustee, and after her death go to pay taxes on her brick house on Pleasant Street; also on the two houses given to servants on Georgetown Hill. The house and lot on Georgetown road to be given to Ellen Hurndon's four girls, namely, Bettie, Laura, Carrie and Mary Eliza Hurdon.

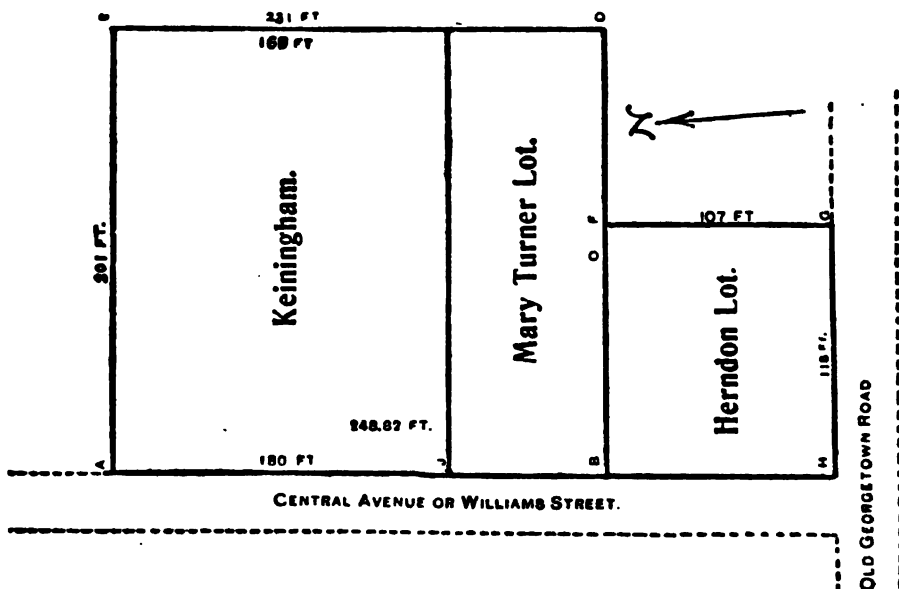
"The lot adjoining, with two storied frame house on it, given to Mary Turner (col.) for her sole use and benefit, her husband, who she is separated from, to have no interest in it, and at her death, without children, to go to her sister, Eliza Baker and brother, George Scott. These were the children of my faithful servant, William Scott, who when freedom came never left me, and never did or would receive one cents of wages.

"All the rest of my estate, including home place, after payment of my debts, if any, with charges and expenses of administration, including a plain monument for my grave, I give to my dear brother, Landon A. Thomas."

At the time of her death the testatrix was the owner of the lots shown by the following plot:

The lot designated on the plot as the "Herndon lot" was devised to the Herndon girls; a house of two stories was on the lot designated as the "Mary Turner lot." The lot designated as the "Keiningham lot" is what is known as the "vacant lot" in this record.

After the death of the testatrix, the widow and heirs of Landon A. Thomas, the residuary legatee, sold it to a party, and afterwards it was divided into lots, and upon it seven houses were built. Mary Turner died in 1891. George Scott and Eliza Baker, who took the remainder interest in the lot devised to Mary Turner, instituted this action to recover of appellants the several lots in their respective possessions. The right to recover depends upon the construction of the clause of the will devising the lot to Mary Turner. The testatrix bought the property consisting of the Mary Turner lot and the vacant lot from James O'Keefe, after doing which she placed Mary Turner in the house which was situated on what is known as the "Mary Turner lot." After this was done, Pete Mason, desiring to use the vacant lot, approached the testatrix with a view of obtaining her permission to fence and use it. She referred him to Mr. Alexander, her agent, who gave Mason permission to erect the fence around the lot, except on the back part of it, where there was a stone fence. There seems to have been an old fence between the Mary Turner lot and the vacant lot, which was either rebuilt or repaired by Mason, inclosing the vacant lot. The testimony conduces to show that the testatrix claimed the vacant lot as her own after she had placed Mary Turner in possession of the house. She often referred to it as "my lot," and to the other one as "Mary Turner's lot."



The evidence is conclusive that the property purchased from O'Keefe was divided by a fence as represented on the plot, and the small lot is the one that testatrix referred to as the "Mary Turner lot."

It will be observed that the testatrix gives to the Herndon girls a lot on the Georgetown road, and Mary Turner is given the lot adjoining, with a frame house, of two stories, on it. The testatrix referred to the Herndon property as a "lot," and designated the property given to Mary Turner as a "lot" adjoining the Herndon "lot."

When we consider the extrinsic facts which we have detailed, there is no escaping the conclusion that the testatrix only intended to devise to Mary Turner the lot upon which her house was situated. Where the ambiguity in a will is patent, testimony is inadmissible to aid the court in interpreting it; but where the intention of a testator is clearly expressed, and a doubt exists, not as to the intention, but as to the nature or state of facts in the country, any legitimate evidence of which the facts are susceptible is admissible from that quarter to remove the doubt. *Breckenridge v. Duncan*, 2 A. K. Marsh. 50, 12 Am. Dec. 359. In *Haydon v. Ewing's Devisees*, 1 B. Mon. 113, it was held, in case of a latent ambiguity arising from the application of the devise to the subjects described in it, it might be solved, not only by the facts both in and out of the will, but also by parol evidence of intention, for it is a question, not of power, but of intention. This court, in *Allen v. Vanmeter's Devisees*, 1 Metc. 264, said: "It is now well settled that evidence of extrinsic facts is admissible in aid of the exposition of wills, although they are by our statute required to be in writing, and are for that reason peculiarly within the general principle which excludes parol evidence which tends to contradict, add to, or explain the contents of written instruments. But this extrinsic evidence must always be such as, in its nature and effect, simply explains what

the testator has written, and not what he intended to have written. In other words, the question, in expounding a will, is not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words used." In this the evidence to which we have referred simply goes to explain what the testatrix had written, not what she intended to have written. If the language of the will had purported to convey both lots, it would not have been admissible to show that the testatrix did not intend to devise but one of them. Had that been true, the testimony of Mrs. Shackelford and others as to what the testatrix claimed with reference to the vacant lot would not have been admissible to show that she did not intend to devise both of them. Their testimony serves to explain what the testatrix had written, not what she intended to have written. The case of *Allen v. Vanmeter's Devisees*, cited by appellees, does not lay down a rule different from the one in the cases of *Haydon v. Ewing's Devisees* and *Breckenridge v. Duncan*. We might call attention to the fact that Mary Turner, after the death of the testatrix, recognized Keiningham estate as the owner of the vacant lot, and expressed her gratification to one of the persons who had bought a lot in the subdivision that she was going to have a neighbor. Mary Turner saw the parties engaged in dividing the lots, and persons engaged in building houses thereon, and never made a complaint to any of them that they were building houses upon her land. Neither did Eliza Baker or George Scott do so. Mary Turner lived upon the adjoining lot, and the other parties lived in the city of Paris. While this does not tend to aid the court in interpreting the will, it shows a contemporaneous construction of the will by the parties who are now asking a different construction to be placed upon it.

Judgment is reversed for proceedings consistent with this opinion.

MEMORANDUM DECISIONS.

COMMONWEALTH v. JOERGER. (Court of Appeals of Kentucky. March 19, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Information by the auditor's agent of Mason county against Lewis Joerger. Judgment for defendant sustaining a demurrer to the information, and the commonwealth appeals. Reversed. G. A. Cassidy, for the Commonwealth. L. W. Robertson, Garret S. Wall, E. L. Worthington, and W. D. Cochran, for appellee.

NUNN, J. The same question is presented in this record as in the case of Commonwealth of Kentucky, by, etc., v. Laura G. Collins (this day decided) 72 S. W. 819. Upon authority of that case, and for the reasons therein stated, the judgment is reversed, and the cause remanded for further proceedings consistent with that opinion.

COMMONWEALTH v. LONGNECKER et al. (Court of Appeals of Kentucky. March 19, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Information by the auditor's agent of Mason county against Sallie Longnecker and another. Judgment for defendants sustaining a demurrer to the information, and the commonwealth appeals. Reversed. G. A. Cassidy, for the Commonwealth. L. W. Robertson, Garret S. Wall, E. L. Worthington, and W. D. Cochran, for appellees.

NUNN, J. The same question is presented in this record as in the case of Commonwealth of Kentucky, by, etc., v. Laura G. Collins (this day decided) 72 S. W. 819. Upon authority of that case, and for the reasons therein stated, the judgment is reversed, and cause remanded for further proceedings consistent with that opinion.

COMMONWEALTH v. WILLIAMS' ADM'X. (Court of Appeals of Kentucky. March 19, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Information by the auditor's agent of Mason county against Ezekiel Williams' administratrix. Judgment for defendant sustaining a demurrer to the information, and the commonwealth appeals. Reversed. G. A. Cassidy, for the Commonwealth. L. W. Robertson, Garret S. Wall, E. L. Worthington, and W. D. Cochran, for appellee.

NUNN, J. The same question is presented in this record as in the case of Commonwealth of Kentucky, by, etc., v. Laura G. Collins (this day decided) 72 S. W. 819. Upon authority of that case, and for the reasons therein stated, the judgment is reversed, and the cause remanded for further proceedings consistent with that opinion.

COMMONWEALTH v. ZWEIGART. (Court of Appeals of Kentucky. March 19, 1903.) Appeal from Circuit Court, Mason County. "Not to be officially reported." Information by the auditor's agent of Mason county against John G. Zweigart. Judgment

for defendant sustaining a demurrer to the information, and the commonwealth appeals. Reversed. G. A. Cassidy, for the Commonwealth. L. W. Robertson, Garret S. Wall, E. L. Worthington, and W. D. Cochran, for appellee.

NUNN, J. The same question is presented in this record as in the case of Commonwealth of Kentucky, by, etc., v. Laura G. Collins (this day decided) 72 S. W. 819. Upon authority of that case, and for the reasons therein stated, the judgment is reversed, and the cause remanded for further proceedings consistent with that opinion.

LENZ v. SOUTH COVINGTON & C. ST. RY. CO. (Court of Appeals of Kentucky. March 4, 1903.) Appeal from Circuit Court, Campbell County. "Not to be officially reported." Action by Martha Lenz against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed. Geisler & Lockhart, for appellant. L. J. Crawford, for appellee.

PAYNTER, J. The facts in this case are substantially the same as in the case of Herman Dierig v. The South Covington & Cincinnati Street Railway Company (this day decided) 72 S. W. 355, and our conclusions are the same in this as in that case. Judgment is affirmed.

WRIGHT v. SHIPP. (Court of Appeals of Kentucky. March 17, 1903.) Appeal from Circuit Court, Bourbon County. "Not to be officially reported." Action of forcible entry by P. E. Shipp against C. J. Wright. Judgment for plaintiff, and defendant appeals. Affirmed. N. C. Fisher, for appellant. C. Arnsperger and Denis Dundon, for appellee.

NUNN, J. Appellee rented 98 acres of land belonging to appellant for the term of one year from March, 1901, to March, 1902. This land was all in grass, and was to be used for grazing purposes. Appellee afterwards sold to one Redmond the grazing privilege for a limited number of cattle on this land. Appellant served notice on Redmond to vacate the premises, claiming that appellee had sublet the premises to Redmond without his written consent, and thereby forfeited his lease. Redmond vacated, and appellant then moved on and took charge of the premises. Appellee had issued a writ of forcible entry against the appellant, and upon the trial of this writ appellant was found guilty. He then filed a traverse thereof, and took his case to the circuit court, and was again found guilty, and is here now on appeal. The proof in the case clearly showed, and without contradiction, that the sale of the grazing privilege to Redmond by appellee was not a subletting as contemplated by the statute, and the lower court should have given a peremptory instruction to find appellant guilty of the forcible entry. For these reasons we do not deem it necessary to discuss the other questions raised by counsel for appellant in their brief. Wherefore the judgment of the lower court is affirmed.

STATE v. SPAETH. (Supreme Court of Missouri, Division No. 2. Feb. 3, 1903.) Appeal from St. Louis Circuit Court; Walter B. Douglas, Judge. Fred Spaeth was convicted of crime, and appeals. Affirmed. John A. Porter, for appellant. Edward C. Crow, Atty. Gen., and O. D. Corum, for the State.

BURGESS, J. Defendant was convicted in the circuit court of the city of St. Louis of burglary and larceny, and his punishment fixed at three years' imprisonment in the penitentiary for the burglary and two years for the larceny. He appeals. Defendant is not represented in this court. The indictment is well enough. The instructions cover every phase of the case, and are free from objection. There was no error in the admission or exclusion of evidence, and the verdict well warranted by the evidence. The judgment should be affirmed. It is so ordered. All concur.

BARBER v. STATE. (Court of Criminal Appeals of Texas. Feb. 18, 1903.) Appeal from District Court, Llano County; M. D. Slator, Judge. Underwood Barber was convicted of burglary, and appeals. Reversed. McLean & Spears, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal. This is the second appeal of this case; the former appeal being reported in 70 S. W. 210, 5 Tex. Ct. Rep. 936. The only question that we deem necessary to consider is the sufficiency of the evidence. After a very close scrutiny of the evidence, we see no material difference between the testimony on this trial and the evidence adduced on the former. We there held that the evidence was insufficient to corroborate the accomplice, and an inspection of this record does not cause us to change our opinion. And we hold that the accomplice is not corroborated by evidence tending to connect defendant with the commission of the crime alleged.

The judgment is reversed, and the cause remanded.

BEAL v. STATE. (Court of Criminal Appeals of Texas. Feb. 11, 1903.) Appeal from Dallas County Court; Ed. S. Lauderdale, Judge. Henry Beal appeals from a conviction. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of keeping a disorderly house, and his punishment assessed at a fine of \$150; hence this appeal. There is no statement of facts or bill of exceptions in the record. The motion for new trial does not raise any question that can be revised in the absence of statement of facts or bill of exceptions. No error appearing in the record, the judgment is affirmed.

BOUYER v. STATE. (Court of Criminal Appeals of Texas. Feb. 11, 1903.) Appeal from Parker County Court; D. M. Alexander, Judge. Rob Bouyer was convicted of malicious mischief, and appeals. Affirmed. R. B. Hood, for the State.

HENDERSON, J. Appellant was convicted of malicious mischief, and fined \$25. The record is without statement of facts, bill of exceptions, or motion for new trial. There is nothing before us showing that any error was committed on the trial in the court below. The judgment is affirmed.

BRADLEY v. STATE. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from Knox County Court; G. B. Landrum, Judge. Sam Bradley was convicted of a misdemeanor, and appeals. Dismissed. Jas. A. Stephens, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The recognizance is defective, because it does not conclude with the phrase "in this case," as required in article 887, Code Cr. Proc. § 1895, laying down the form of recognizance to be given on appeal. See *Cryer v. State*, 38 Tex. Cr. R. 621, 37 S. W. 753, 38 S. W. 208; *Duffer v. State* (Tex. Cr. App.) 38 S. W. 997; *Brock v. State* (just decided) 72 S. W. 599. The motion of the Assistant Attorney General is sustained, and the appeal is accordingly dismissed.

BRANNAN v. STATE. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from Hill County Court; L. C. Hill, Judge. Mark Brannan was convicted of aiding a prisoner to escape, and appeals. Reversed. J. E. Clarke, for appellant. B. Y. Cummings, Asst. Co. Atty., C. F. Greenwood, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This is a conviction under article 229, Pen. Code 1895, for aiding a prisoner to escape, appellant's punishment being assessed at a fine of \$50. The questions involved in this appeal are exactly similar to those in cause No. 2,547, *W. C. Brannan v. State* (decided at the present term) 72 S. W. 184. We see no reason for changing our opinion, and upon the authority of that case the judgment is reversed, and the cause remanded.

CATES v. STATE. (Court of Criminal Appeals of Texas. Feb. 18, 1903.) Appeal from Tarrant County Court; M. B. Harris, Judge. O. G. Cates was convicted of theft and embezzlement, and he appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The information contains two counts, to wit, theft and embezzlement of property under the value of \$50. On trial before the court appellant was adjudged guilty, and his punishment assessed at a fine of \$25 and one day's confinement in the county jail. We find no statement of facts or bill of exceptions in the record. The information is in proper form, and the judgment is in accord with the law on the question of punishment. No error appearing in the record, the judgment is affirmed.

CUMMINGS v. STATE. (Court of Criminal Appeals of Texas. Feb. 18, 1903.) Appeal from Tarrant County Court; M. B. Harris, Judge. Cal Cummings was convicted of exhibiting a gaming table and bank, and he appeals. Reversed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of exhibiting a gaming table and bank, and his punishment assessed at a fine of \$100 and 90 days' confinement in the county jail. This is a companion case to those of *George Campbell v. State* (No. 2,691) 72 S. W. 396, and *Cal Cummings v. State* (No. 2,689, just decided) 72 S. W. 395. In our opinion the evidence does not support the finding of the jury, under the authority of these cases and *Stearnes v. State*, 21 Tex. 692. For this reason the judgment is reversed, and the cause remanded.

HALL v. STATE. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from

District Court, Eastland County; N. R. Lindsey, Judge. Will Hall was convicted of crime, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal. The record is without bill of exceptions or statement of facts. The charge of the court is applicable to a state of facts provable under the indictment. No error appearing, the judgment is affirmed.

HARRIS v. STATE. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from Stephens County Court; W. C. Veale, Judge. C. H. Harris was convicted of grave robbery, and appeals. Reversed. W. P. Sebastian and Calhoun & Webb, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted under article 367, Pen. Code 1895, for disintering and removing a dead body, and his punishment assessed at a fine of \$250. Appellant filed a motion to quash the information because it failed to allege the name of the deceased person whose body was disinterred. This motion should have been sustained. This is a companion case to that of Leach v. State, 72 S. W. 600, and Williamson v. State (No. 2,610, this day decided) Id., and reference is made to that opinion for a fuller discussion of this question. Accordingly the judgment is reversed, and the prosecution ordered dismissed.

MARSHALL v. STATE.* (Court of Criminal Appeals of Texas. Jan. 14, 1903.) Appeal from District Court, Tarrant County; Irby Dunklin, Judge. Floyd Marshall was convicted of crime, and appeals. Affirmed. A. J. Baskins and Thomas, Spellman & Richardson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' confinement in the penitentiary. Appellant insists that the verdict of the jury is contrary to the law and the evidence, and that the court erred in refusing various special charges. We have reviewed all of these errors assigned, and are of opinion that there was no error in the action of the court. The special charges, so far as applicable, were given in the main charge. The evidence amply supports the verdict of the jury. Appellant also complains in his charge to the jury upon manslaughter the court erred, in that the same is too restrictive, and confined the jury to only a part of the evidence indicating manslaughter. The charge is as follows: "If, under other instructions given in this charge, you find that the defendant killed Henry Tillerson, and that such killing was an unlawful killing, but further believe from the evidence that on any occasion prior to the occasion upon which defendant shot and killed deceased he, the said Henry Tillerson, had made to the defendant insulting remarks concerning the mother of defendant, and if you further believe that thereafter, and upon the occasion of the killing, the deceased used any language or did any acts which would not of themselves constitute an adequate cause for sudden passion on the part of the defendant, as those terms 'sudden passion' and 'adequate cause' are explained above, but which, coupled with said previous insulting remarks concerning the defendant's mother, if any, did

constitute such adequate cause for such sudden passion, and that the defendant killed the deceased under the immediate influence of sudden passion arising therefrom, then you will find that said killing was not murder, but manslaughter only." We think this charge was correct, and is not subject to appellant's criticism. It covers every phase of the evidence adduced. The judgment is affirmed.

PAGE v. STATE. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from Knox County Court; G. B. Landrum, Judge. George Page was convicted of crime, and appeals. Appeal dismissed. L. W. Dalton and George Page, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Motion is made by the Assistant Attorney General to dismiss this appeal, because the recognizance is defective, in that it fails to conclude with the phrase, "in this case," as required by article 887, Code Cr. Proc. 1895, and because it states that appellant is to abide the judgment of "Criminal Court of Appeals," instead of the "Court of Criminal Appeals," as required by said article. We have examined the record, and are of opinion that the motion is well taken. See Lee Adams v. State (just decided) 72 S. W. 588; Cryer v. State, 36 Tex. Cr. R. 621, 38 S. W. 203. The appeal is dismissed.

Ex parte PETTUS. (Court of Criminal Appeals of Texas. Feb. 11, 1903.) Appeal from District Court, Taylor County; Harry Tom King, Special Judge. Petition for habeas corpus by G. R. Pettus to obtain bail. From an order denying the writ, petitioner appeals. Affirmed. J. M. Wagstaff, D. G. Hill, and S. P. Hardwicke, for appellant. B. A. Cox and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted for murder, and resorted to the writ of habeas corpus to obtain bail. Upon a hearing he was remanded to the custody of the sheriff, and prosecutes this appeal. In cases of this character we refrain from a discussion of the evidence. But, after a careful review of the facts, we are of opinion that the court did not err in refusing bail, and the judgment is affirmed.

Ex parte RICKS. (Court of Criminal Appeals of Texas. Feb. 25, 1903.) Appeal from District Court, De Witt County; James C. Wilson, Judge. Application by Steve Ricks for admission to bail under a writ of habeas corpus. From an order refusing bail, the petitioner appeals. Reversed. Bell & Browne, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The homicide for which appellant was refused bail under the writ of habeas corpus occurred in Karnes county. The trial under the writ was before the district court at Cuero, in De Witt county, prior to being indicted. We have carefully reviewed the facts adduced, and are of opinion that the court erred in refusing bail. The judgment is therefore reversed, and bail granted in the sum of \$10,000, upon the giving of which in the terms required by law relator will be released by the sheriff of Karnes county, who, the record shows, has him in custody; and it is so ordered.

WATTS v. STATE. (Court of Criminal Appeals of Texas. March 4, 1903.) Appeal from District Court, De Witt County; James C.

*Rehearing denied February 25, 1903.

Wilson, Judge. Cal Watts appeals from a conviction. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at six years' confinement in the penitentiary; hence this appeal. There is neither statement of facts nor bill of exceptions in the record. We discover no error in the record, and the judgment is accordingly affirmed.

FT. WORTH & R. G. RY. CO. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO. (Court of Civil Appeals of Texas, Feb. 4, 1903.) Appeal from Brown County Court; R. P. Conner, Judge. Condemnation proceedings by the Southwestern Telegraph & Telephone Company against the Ft. Worth & Rio Grande Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed on answers by the Supreme Court to certified questions. 71 S. W. 270. Geo. H. Fearons and N. L. Lindsley, for appellant. McLaurin & Wozencraft, for appellee.

KEY, J. The controlling question in this case has been certified to and decided by the Supreme Court (71 S. W. 270), and that decision is in favor of the appellee. Judgment affirmed.

SAN ANTONIO BREWING ASS'N v. PARKS et al. (Court of Civil Appeals of Texas, Feb. 11, 1903.) Appeal from Milam County Court; R. B. Pool, Judge. Action between the San Antonio Brewing Association and W. J. Parks and others. From the judgment the brewing association appeals. Affirmed. J. C. Oxenford and Henderson & Freeman, for appellant. R. Lyles, Chambers & Sharp, and Mouta J. Moore, for appellees.

FISHER, C. J. We find no error in the record, and the judgment is affirmed. Affirmed.

SINGER MFG. CO. v. RIOS. (Court of Civil Appeals of Texas, Feb. 4, 1903.) Appeal from Travis County Court; Geo. Calhoun, Judge. Action by Frank Rios against the Singer Manufacturing Company. Judgment for plaintiff. Judgment below reversed and rendered in favor of appellant on answer by Supreme Court to question certified. Faulk & Fatter-

son, for appellant. Brooks & Shelley, for appellee.

FISHER, C. J. The opinion of the Supreme Court upon the certified question settles this case. 71 S. W. 275. It conclusively appears from the facts in the record that a balance was due from appellee to the appellant, as a part of the purchase price of the sewing machine, at the time it was taken possession of by appellant's agents. The written contract authorized the appellant to take possession of the machine, if the appellee failed to pay any installment of the purchase price that might be then due. No force, fraud, or violence was used by the appellant when it took possession of the machine by virtue of the provision in the contract noticed. Judgment reversed, and rendered in favor of appellant.

SOUTHERN COTTON OIL CO. v. STATE.* (Court of Civil Appeals of Texas, Feb. 4, 1903.) Appeal from District Court, Travis County; F. G. Morris, Judge. Action by the state against the Southern Cotton Oil Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. Baker, Botts, Baker & Lovett, for appellant. C. K. Bell, Atty. Gen., for the State.

STREETMAN, J. The state instituted this proceeding to forfeit the permit of the Southern Cotton Oil Company, a foreign corporation, to do business in Texas, on account of certain alleged allegations of the anti-trust laws of Texas. No other relief was sought, except the forfeiture of said permit. Appellant presented several special exceptions, assailing as unconstitutional the several acts of the Legislature relied upon by the state. These exceptions were overruled, and, appellant declining to amend, judgment was entered for the state cancelling the permit, from which this appeal is prosecuted. The only questions presented relate to the constitutionality of the various anti-trust laws of our state. In the case of State v. Shippers' Compress & Warehouse Co., 69 S. W. 58, 5 Tex. Ct. Rep. 182, the Supreme Court decides that the acts in question are constitutional in so far as they relate to a proceeding to forfeit the charter of a domestic corporation or to cancel the permit of a foreign corporation, and, that being the only relief sought or obtained in this case, the judgment is accordingly affirmed. Affirmed.

*Rehearing denied March 4, 1903.

END OF CASES IN VOL. 72

INDEX.

ABANDONMENT.

Of garnishment, see "Garnishment," § 3.
Of homestead, see "Homestead," § 4.
Of insurance, see "Insurance," § 4.
Of right of way see "Railroads," § 3.

ABATEMENT.

Pleas in abatement, see "Pleading," § 1.

ABATEMENT AND REVIVAL.

Judgment as bar to another action, see "Judgment," § 9.
Pleas in abatement, see "Pleading," § 1.
Right of action by or against personal representative, see "Executors and Administrators," § 6.

§ 1. Another action pending.

That plaintiff sued originally in the United States court, and dismissed her action without prejudice, *held* no bar to a subsequent suit on the same cause of action in the state court.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'x* (Ky.) 22.

Where a depositor sued the receiver of a bank for a deposit, and he pleaded that the deposit was used to pay the depositor's subscription to capital stock, the pendency of an action by the receiver against the depositor as a stockholder was not a bar to the action.—*Somerset Nat. Banking Co.'s Receiver v. Adams* (Ky.) 1125.

§ 2. Death of party and revival of action.

Under Sayles' Ann. Civ. St. art. 3353a, part of claim for personal injuries *held* assignable, before suit, to plaintiff's attorneys.—*Galveston, H. & S. A. Ry. Co. v. Ginther* (Tex. Sup.) 168.

ABSTRACTS.

Of record on appeal or writ of error, see "Appeal and Error," § 9.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 7.
Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," §§ 1, 3.
Rights in streets in cities, see "Municipal Corporations," § 9.

ACCEPTANCE.

Of guaranty, see "Guaranty," § 1.

ACCESSION.

Annexation of personal to real property, see "Improvements."

ACCESSORIES.

Criminal responsibility, see "Criminal Law," § 2.

ACCIDENT.

Accident insurance, see "Insurance," §§ 8, 9.
Cause of death, see "Death," § 1.

ACCOMPLICES.

Criminal responsibility, see "Criminal Law," § 2.
Instructions as to testimony of, see "Criminal Law," § 22.

ACCORD AND SATISFACTION.

See "Compromise and Settlement"; "Payment"; "Release."

ACCOUNT.

Accounting between partners, see "Partnership," § 5.
Accounting between tenants in common, see "Tenancy in Common," § 1.
Accounting by assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
Accounting by executor or administrator, see "Executors and Administrators," § 7.

ACCRUAL.

Of right of action, see "Limitation of Actions," § 2.

ACKNOWLEDGMENT.

Of deed of separate property of married woman, see "Husband and Wife," § 3.
Operation and effect of admissions as evidence, see "Criminal Law," § 10; "Evidence," § 4.

§ 1. Taking and certificate.

Official character of officer taking acknowledgment of deed *held* to be sufficiently shown in certificate.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

Acknowledgment of a deed *held* not to require seal prior to Act May 12, 1846.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

ACQUIESCENCE.

As grounds of estoppel, see "Estoppel," § 3.

ACTION.

Abatement, see "Abatement and Revival."
Accrual, see "Limitation of Actions," § 2.
Bar by former adjudication, see "Judgment," § 9.
Commencement within period of limitation, see "Limitation of Actions," § 2.
Jurisdiction of courts, see "Courts."
Laches, see "Equity," § 2.
Limitation by statute, see "Limitation of Actions."
Malicious actions, see "Malicious Prosecution."
Pendency of action, see "Abatement and Revival," § 1.

Review of proceedings, see "Appeal and Error"; "Exceptions, Bill of"; "Judgment," § 5; "Justices of the Peace," § 2; "New Trial."

Set-off, see "Set-Off and Counterclaim."

Actions between parties in particular relations.

See "Attorney and Client," § 2; "Master and Servant," §§ 2, 10-12; "Partnership," §§ 2, 5.

Co-tenants, see "Partition," § 1.

Actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 1-7; "Corporations," § 3; "Counties," § 4; "Executors and Administrators," § 6; "Husband and Wife," § 4; "Infants," § 1; "Insane Persons," § 1; "Partnership," § 3; "Railroads," §§ 4, 11; "Receivers," § 2; "States," § 3; "Street Railroads," § 1.

Grantee of mortgaged property, see "Mortgages," § 2.

Stockholders, see "Corporations," § 2.

Surviving partners, see "Partnership," § 4.

Telegraph companies, see "Telegraphs and Telephones," § 2.

Trustees in bankruptcy, see "Bankruptcy," § 1.

Particular causes or grounds of action.

See "Bills and Notes," § 2; "Death," § 1; "False Imprisonment," § 1; "Fraud," § 2; "Insurance," §§ 14-17, 22; "Judgment," § 13; "Libel and Slander," § 3; "Malicious Prosecution," § 1; "Nuisance," §§ 1, 3; "Reveries," § 1; "Torts," § 1; "Trespass," § 1; "Trove and Conversion," § 1.

Bail bonds, see "Bail," § 1.

Bond of insurance agent, see "Insurance," § 1.

Breach of contract, see "Contracts," § 5;

"Sales," § 6; "Vendor and Purchaser," § 4.

Breach of warranty, see "Sales," § 6.

Compensation of broker, see "Brokers," § 2.

Delay in delivery of telegram, see "Telegraphs and Telephones," § 2.

Discharge from employment, see "Master and Servant," § 1.

Distress, see "Landlord and Tenant," § 3.

Enforcement of vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

Fires caused by operation of railroad, see "Railroads," § 11.

Foreclosure of lien, see "Liens."

Foreign judgment, see "Judgment," § 13.

Injuries from discharge of surface water, see "Waters and Water Courses," § 1.

Injuries from maintenance of railroad, see "Railroads," § 4.

Injuries to passengers' baggage, see "Carriers," § 7.

Loss of goods, see "Carriers," § 2.

Money collected by attorney, see "Attorney and Client," § 2.

Nuisance on demised premises, see "Landlord and Tenant," § 2.

Personal injuries, see "Carriers," § 5; "Master and Servant," §§ 10-12; "Municipal Corporations," § 10; "Railroads," §§ 9, 10; "Street Railroads," § 1.

Price of goods, see "Sales," § 5.

Recovery of penalties for overcharges by carriers, see "Carriers," § 1.

Recovery of penalty for violation of gaming laws, see "Gaming," § 2.

Rent, see "Landlord and Tenant," § 3.

Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Wages, see "Master and Servant," § 2.

Wrongful attachment, see "Attachment," § 4.

Wrongful execution, see "Execution," § 4.

Particular forms of action.

See "Ejectment"; "Replevin"; "Trespass," § 1; "Trespass to Try Title"; "Trove and Conversion."

Particular forms of special relief.

See "Divorce"; "Injunction"; "Partition," § 1; "Quieting Title"; "Specific Performance."

Cancellation of written instrument, see "Cancellation of Instruments."

Determination of adverse claims to real property, see "Quieting Title."

Enforcement or foreclosure of lien, see "Mechanic's Liens," § 1; "Railroads," § 6.

Establishment of boundaries, see "Boundaries," § 2.

Foreclosure of mortgage, see "Mortgages," § 5; "Railroads," § 6.

Reformation of written instrument, see "Reformation of Instruments."

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Trial"; "Venue."

Default, see "Judgment," § 3.

Notice of action, see "Process," § 1.

Offer of judgment, see "Judgment," § 2.

Verdict, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Suits in justices' courts, see "Justices of the Peace," § 1.

§ 1. Joinder, splitting, consolidation, and severance.

Consolidation of ejectment suit with suit to redeem from foreclosure held erroneous.—*Robinson v. United Trust (Ark.)* 992.

In an action against a railway company, held that, if complaint was framed to recover for breach of contract and illegal arrest, two separate causes of action were stated.—*Dierig v. South Covington & C. St. Ry. Co. (Ky.)* 355.

Under Rev. St. 1899, § 593, held, that there may be united in the same petition a count in ejectment, and, under section 650, to have the title to the land ascertained and declared.—*Lane v. Dowd (Mo. Sup.)* 632.

ACTION ON THE CASE.

See "Trespass," § 1.

ADEMPMENT.

Of legacy, see "Wills," § 5.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

ADJOINING LANDOWNERS.

See "Boundaries"; "Party Walls."

ADJUDICATION.

Operation and effect of former adjudication, see "Judgment," §§ 9, 10.

ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 11.

ADMINISTRATION.

Of estate of decedent, see "Executors and Administrators."
Of estate of ward, see "Guardian and Ward," § 2.
Of trust property, see "Trusts," § 3.

ADMISSIONS.

As evidence in civil actions, see "Evidence," § 4.
As evidence in criminal prosecutions, see "Criminal Law," § 10.
In pleading, see "Pleading," § 1.
To prevent continuance, see "Continuance."

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."
Grant of lands held adversely as champertous, see "Champerty and Maintenance."
Of right of way, see "Easements," § 1.

§ 1. Nature and requisites.

To acquire title by adverse possession, it must be continuous and unbroken.—Rowland v. Wadly (Ark.) 994.

Occasional entries on land and occasional cutting of timber *held* insufficient to set limitations in motion, so as to give the entryman title by adverse possession.—Combs v. Combs (Ky.) 8.

A widow in possession of land, under a destroyed will of her deceased husband, for more than 15 years, claiming title in fee, *held* to have acquired title by adverse possession.—Reno v. Blackburn (Ky.) 775.

Railroad company using bridge *held* to occupy the position of a tenant to the owner of the bridge so as not to be entitled to plead limitations under a void deed.—Pittsburg, C. & St. L. R. Co. v. Dodd (Ky.) 822.

Plaintiff, having acquired adverse possession to land devised by the entryman to plaintiff's remote grantor, *held* to have absolute title, under Rev. St. art. 3347, as against the entryman's heirs, to whom the land was patented.—Burton's Heirs v. Carroll (Tex. Sup.) 581.

Where land was patented to an entryman's heirs, the fact that they held possession for three years after plaintiff had acquired title by adverse possession *held* no defense to plaintiff's title.—Burton's Heirs v. Carroll (Tex. Sup.) 581.

In an action for the recovery of real estate, evidence considered, and *held* not to establish the ten-year possession by plaintiffs necessary to give them title under the ten-year statute.—Watts v. Bruce (Tex. Civ. App.) 258.

The five-year statute of limitation does not apply, where those claiming thereunder fail to show a deed of record or a payment of taxes.—Watts v. Bruce (Tex. Civ. App.) 258.

The three-year statute of limitations as to those in possession under "color of title" does not apply to one purchasing at execution sale after the title had passed from the judgment debtor to his wife.—Watts v. Bruce (Tex. Civ. App.) 258.

One adversely in possession of land may prescribe under a recorded deed to one who devised the land to him, without having recorded the will.—McLavy v. Jones (Tex. Civ. App.) 407.

One adversely in possession of land which has been set apart to her in partition of the estate of an ancestor may prescribe under deed to the ancestor, without there having been a

record of the probate order.—McLavy v. Jones (Tex. Civ. App.) 407.

The possession of the real estate by an executor *held* not a break in the possession of land as between ancestor and devisee, being authorized by Rev. St. arts. 1867, 1869.—McLavy v. Jones (Tex. Civ. App.) 407.

Where acts done on land give notice of an adverse claim, accompanied by actual possession exclusive in character, limitations run in favor of the adverse possessor from the time occupancy commenced, whether the land be inclosed or not.—Zepeda v. Hoffman (Tex. App.) 443.

§ 2. Operation and effect.

Under the direct provision of Rev. St. art. 3344, the ten-year statute of limitation against one in possession cannot include more than 160 acres, in the absence of a recorded muniment of title fixing larger boundaries.—Watts v. Bruce (Tex. Civ. App.) 258.

Limitations *held* not to have run in favor of an adverse possessor.—Zepeda v. Hoffman (Tex. Civ. App.) 443.

§ 3. Pleading, evidence, trial, and review.

The giving of an instruction not supported by any evidence *held* reversible error.—Cochran v. Moerer (Tex. Civ. App.) 1031.

ADVERTISEMENT.

Publication of process, see "Process," § 1.

AFFIDAVITS.

See "Depositions."

For order for publication of process, see "Process," § 1.

AFFRAY.

Self-defense is available as a defense in a prosecution for an affray.—Coyle v. State (Tex. Cr. App.) 847.

In a prosecution for an affray *held* error to refuse to instruct on the issue of self-defense.—Coyle v. State (Tex. Cr. App.) 847.

AGE.

Opinion evidence, see "Evidence," § 9.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AIDER BY VERDICT.

In civil actions, see "Pleading," § 6.
In criminal prosecutions, see "Indictment and Information," § 6.

ALIBI.

Instructions, see "Criminal Law," § 22.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

ALTERATION.

Of geographical or political divisions, see "Municipal Corporations," § 1; "Schools and School Districts," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

Evidence in an action on promissory notes *held* sufficient to justify a verdict for defendant on the ground of alteration.—Paul v. Leeper (Mo. App.) 715.

Interlineation in a promissory note is presumed to be contemporaneous with its execution.—Paul v. Leeper (Mo. App.) 715.

Alterations by agent of seller of machine of the written contract for sale of the machine *held* not to have impaired its validity as it originally stood.—Deering Harvester Co. v. White (Tenn.) 962.

AMBASSADORS AND CONSULS.

Under Rev. St. U. S. § 5498 [U. S. Comp. St. 1901, p. 3707], a minister to a foreign country is not entitled to recover any fee for the prosecution of a claim against the government.—Fox v. Willis (Ky.) 330.

A minister to a foreign country, having, previous to assuming his post, agreed to assist another in the prosecution of claims against the government, can recover from his associate attorney fees and costs advanced during his incumbency of office.—Fox v. Willis (Ky.) 330.

AMENDMENT.

Of particular legal proceedings.

See "Indictment and Information," § 4.

Pleading in equity, see "Equity," § 3.
Record on appeal or writ of error, see "Appeal and Error," § 11.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 2.

ANCILLARY ADMINISTRATION.

See "Executors and Administrators," § 8.

ANIMALS.

Carriage of live stock, see "Carriers," § 8.

ANNEXATION.

Of territory to municipal corporation, see "Municipal Corporations," § 1.

ANSWER.

In pleading, see "Pleading," § 1.

APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 2.

Review of proceedings of justices of the peace, see "Justices of the Peace," § 2.

Review in particular civil actions.

See "Divorce," § 2.

For personal injuries, see "Municipal Corporations," § 10.

Review in special proceedings.

See "Partition," § 1; "Quo Warranto," § 2.

Accounting by executor or administrator, see "Executors and Administrators," § 7.

Assessment of taxes, see "Taxation," § 4.

Review of criminal prosecutions.

See "Criminal Law," §§ 28-32; "Homicide," § 14.

§ 1. Nature and form of remedy.

The rule providing that, in the absence of a bill of exceptions, the overruling of applications for continuance will not be reviewed, *held* not in conflict with the statute.—St. Louis S. W. Ry. Co. of Texas v. Bowles (Tex. Civ. App.) 451.

Proceedings *held* parts of one and the same effort to obtain a writ of error, and not the abandonment of one writ and the suing out of another.—Western Union Tel. Co. v. Wofford (Tex. Civ. App.) 620.

§ 2. Decisions reviewable.

The court of appeals has jurisdiction to review a suit on a purchase-money note, in which is sought the enforcement of a vendor's lien, though the amount in controversy is less than \$200.—Carter v. Farthing (Ky.) 745.

Under Ky. St. 1899, § 950, no appeal lies from a judgment of the circuit court allowing a separate recovery of claims of less than \$200.—Albany Mill Co. v. Huff Bros. (Ky.) 820.

Abandonment of appeal by defendant *held* not abandonment of plea in reconviction, so as to reduce amount in controversy below jurisdiction of appellate court.—Benchoff v. Stephenson (Tex. Civ. App.) 106.

Under Const. art. 5, § 6. Sayles' Rev. St. art. 996, and Act 22d Leg. 1891, p. 12, an appeal *held* not to lie to the Court of Civil Appeals from the district court of Roberts county, where the cause originated in justice court, but involved less than \$100.—Southern Kansas Ry. Co. v. Cooper (Tex. Civ. App.) 409.

A judgment for plaintiff against one defendant, but not disposing of the case as to the other defendant, *held* not a final judgment, and therefore not appealable.—Stewart v. Lenoir (Tex. Civ. App.) 619.

§ 3. Presentation and reservation in lower court of grounds of review.

It is too late on appeal to object to depositions as taken without notice.—Hall v. Metcalfe (Ky.) 18.

Objection to incomplete pleading *held* not open to objection on appeal in view of allegation of answer, and admission of proof on the issue raised without objection.—Clay v. Kennedy (Ky.) 815.

Defendant, in action by servant for injuries, *held* not entitled to complain that plaintiff had recovered on facts at variance with allegations of petition.—Black v. Missouri Pac. Ry. Co. (Mo. Sup.) 559.

On appeal from a judgment on the report of a referee, an objection that the evidence is insufficient is not available, where not made in exceptions to the referee's report.—Tufts v. Latshaw (Mo. Sup.) 679.

Technical objections to evidence of title in ejectment cannot be considered on appeal, no specific objections thereto or rulings thereon having been made below.—Comer v. Statham (Mo. Sup.) 1074.

A defendant's failure to except to evidence will preclude the review on appeal of the admission of such evidence.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

Objection to a charge eliminating the issue of spoliation of promissory notes cannot be raised by plaintiff on appeal, when on the trial he proceeded on the theory that there had been no change in the notes.—Paul v. Leeper (Mo. App.) 715.

Where an affirmative defense was pleaded, and the case was tried as if a reply had been filed, an objection for failure to reply cannot be first raised on appeal.—Childers v. R. C. Stone Milling Co. (Mo. App.) 1077.

An assignment of error presented to the Supreme Court on a writ of error *held* to differ

Bill of exceptions *held* too indefinite.—Freeman v. State (Tex. Cr. App.) 1001.

Statement by counsel for defendant *held* not equivalent to a motion to take the case from the jury on account of improper conduct of one of the jurymen.—Freeman v. State (Tex. Cr. App.) 1001.

Where no exception was filed to a plea in abatement, an objection to the judgment rendered thereon, on the ground that the plea was not filed in due order, will not be entertained in the appellate court.—Hayden v. Kirby (Tex. Civ. App.) 198.

An objection to a certified copy of the record of a deed as evidence, that the original deed was not accounted for and no notice was given of the intent to use copies, is untenable in the appellate court, where no such objection was made at the trial.—Moody v. Ogden (Tex. Civ. App.) 253.

If one objects to court's charge, he should request a proper charge.—Reichert v. International & G. N. Ry. Co. (Tex. Civ. App.) 1031.

§ 4. Parties.

Appeal from a judgment confirming the sale of land by an executrix should be dismissed without prejudice, where the purchasers were not made appellees.—Phillips v. Keel (Ky.) 272.

Plaintiff having died, defendants in defendant's writ of error should be designated in the petition and bond by name, and not as "heirs of" deceased, and should be served.—Western Union Tel. Co. v. Wofford (Tex. Civ. App.) 620.

§ 5. Record and proceedings not in record.

Where a map attached to the record was not shown to have been introduced in evidence, or to be the one used at the trial, it could not be considered.—Hays v. Ison (Ky.) 733.

Record *held* to show that a note was lost at the time judgment was rendered thereon.—Pinnell v. Meaks (Mo. App.) 461.

The striking out of a statement of facts which was incorrect, and which the judge was misled into signing by misrepresentations of appellant's attorney, *held* not error.—Corralitos Co. v. Mackay (Tex. Civ. App.) 624.

§ 6. — Matters to be shown by record.

An abstract of record is insufficient which fails to show a motion for a new trial.—Greenwood v. Parlin & Orendorff Co. (Mo. App.) 138.

An abstract of record is insufficient which does not recite any order granting an appeal.—Greenwood v. Parlin & Orendorff Co. (Mo. App.) 138.

The abstract of the record proper must show that a motion for a new trial was filed, or the time for filing a bill of exceptions extended.—Edwards v. Kelso (Mo. App.) 726.

Bill of exceptions, not affirmatively appearing to have been filed in the reasonable time limited, cannot be considered.—Hinton v. Sun Life Ins. Co. (Tenn.) 118.

§ 7. — Scope and contents of record.

Where a motion for judgment is not set out in the bill of exceptions, nor the court's attention called to it in the motion for a new trial, it is not properly before the court on appeal.—Rock Island Implement Co. v. Sloan (Mo. App.) 728.

Where a motion to quash a deposition is not set out in the bill of exceptions, nor the court's attention called to it in the motion for a new trial, it is not properly before the court on appeal.—Rock Island Implement Co. v. Sloan (Mo. App.) 728.

erred.—St. Louis S. W. Ry. Co. of Texas v. McArthur (Tex. Civ. App.) 76.

§ 8. — Necessity of bill of exceptions, case, or statement of facts.

Exceptions to rulings on matters in pais can only be preserved in the bill of exceptions.—Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.

Certain assignment of error *held* not reviewable on appeal, in absence of statement of facts.—Renfro v. Harris (Tex. Civ. App.) 237.

§ 9. — Abstracts of record.

Where appellant's abstract failed to show the filing of a motion for a new trial, the judgment will be affirmed.—Opp v. Kohler (Mo. App.) 128.

An abstract of record is insufficient which fails to show an affidavit that the appeal is not prosecuted for vexation or delay.—Greenwood v. Parlin & Orendorff Co. (Mo. App.) 138.

An abstract of record *held* insufficient for failing to show an order entered of record extending the time for filing the bill of exceptions.—Greenwood v. Parlin & Orendorff Co. (Mo. App.) 138.

An abstract on appeal, which does not show the filing of a motion for a new trial, is defective.—McCormick Harvesting Mach. Co. v. Crawford (Mo. App.) 491.

§ 10. — Transmission, filing, printing, and service of copies.

Where the bill of exceptions and statement of evidence are not filed and signed during the term, they will be stricken from the files.—Illinois Cent. R. Co. v. Glasscock (Ky.) 769.

The evidence showing no sufficient excuse for not filing the transcript for appeal in time, it will not be allowed to be filed as an appeal.—Western Union Tel. Co. v. Wofford (Tex. Civ. App.) 620.

§ 11. — Defects, objections, amendment, and correction.

The record of the filing of a motion for new trial or in arrest of judgment must be shown in the abstract, and cannot be shown by the bill of exceptions.—Parry v. Gordon Coffee & Spice Co. (Mo. App.) 130.

Where, on appeal, the original abstract was not such as required, the defect was cured by the filing of a sufficient supplemental one.—White v. Missouri Pac. Ry. Co. (Mo. App.) 716.

The admission in the answer to a petition to correct the record on appeal that the mistake alleged existed is sufficient to correct the record.—Hinton v. Sun Life Ins. Co. (Tenn.) 118.

Application to correct mistake as to date record on appeal *held* not too late, though filing of opinion holding the bill of exceptions was not filed in time.—Hinton v. Sun Life Ins. Co. (Tenn.) 118.

Certiorari *held* not to lie to bring up record on appeal from the dismissal of a motion proceedings.—Sullivan v. King (Mo. App.) 207.

§ 12. — Questions presented in view.

Where the court on appeal passes rejecting offers of evidence to be alleged in the pleading, it must take and for the proof itself.—Leitch (Mo. App.) 145.

Where evidence of a warrant is excluded as not within the necessary to a reversal on the defendant should have offered and damages.—Maugh v. I (Mo. App.) 153.

On appeal in divorce, *held*, that it must be presumed that the deposition of a certain witness was properly taken and certified.—Coe v. Coe (Mo. App.) 707.

The objection on appeal that the trial court should only have admitted that part of a witness' testimony which did not contradict his testimony at a former trial of the same case *held* not before the court.—Rock Island Implement Co. v. Sloan (Mo. App.) 728.

Unless it affirmatively appears by the record on appeal in equity that all the evidence offered has been preserved, the decision below will not be reviewed.—Heffernan v. Weir (Mo. App.) 1085.

An assignment of error based on an agreement and judgment claimed to create an estoppel, but which are not included in the transcript, cannot be considered.—Watkins v. Hopkins County (Tex. Civ. App.) 872.

§ 13. Briefs.

Appellant's brief *held* a noncompliance with Rev. St. 1899, § 863, and Court of Appeals Rule 15 (67 S. W. ix).—Southwick v. Southwick (Mo. App.) 477.

§ 14. Dismissal, withdrawal, or abandonment.

Under subsection 4, *held*, that where a complete transcript of the record is not filed, and the schedule was not filed within 90 days, the appeal will be dismissed.—Nelson County v. Bardstown & L. Turnpike Co. (Ky.) 1104.

Under 1 Rev. St. 1899, § 813, and Court of Appeals Rules 15, 18, an appeal to the court of appeals is not subject to dismissal for failure of the abstract to show the day of the month or of the term when the judgment appealed from was rendered.—State ex rel. Chicago, R. I. & P. Ry. Co. v. Smith (Mo. Sup.) 692.

Under Rev. St. 1899, § 863, and rule 15 of St. Louis Court of Appeals (67 S. W. ix), an abstract of record, containing neither pleadings, statement, nor any showing that a bill of exceptions has been filed, will be dismissed.—Ladd v. Williams (Mo. App.) 475.

§ 15. Hearing and rehearing.

Where the right of recovery depended on the construction of a contract, which was not discussed in argument on appeal, the case would be referred to counsel for written arguments.—Raymond v. Yarrington (Tex. Sup.) 580.

§ 16. Review.

Right to recover for wrongful attachment of property restrained through service of purported copies of writ on third persons *held* settled on former appeal.—Farmers' & Shippers' Tobacco Warehouse Co. v. Gibbons (Ky.) 12.

On an appeal of a suit to set aside a trust deed for duress, the cause is for hearing de novo in the supreme court.—Turner v. Overall (Mo. Sup.) 644.

§ 17. — Scope and extent in general.

On an appeal of a suit to set aside a trust deed for duress, error in the admission of testimony by the trial court is not ground for reversal.—Turner v. Overall (Mo. Sup.) 644.

Memorandum filed by trial court *held* not a declaration of law reviewable on appeal.—Jordan v. Davis (Mo. Sup.) 686.

No exception having been saved, except to the refusal of a new trial, and the evidence being conflicting, there can be no review.—Metz v. Blattner (Mo. App.) 489.

On appeal in equity, it is not necessary to review the declarations of law given or refused.—Heffernan v. Weir (Mo. App.) 1085.

Under Acts 1875, p. 189, c. 106, where a new trial was granted, and the judge in settling a

bill of exceptions refused to specify the error, the supreme court is required to examine all the grounds assigned for a new trial, and affirm the order if any of the grounds were well taken.—Citizens' Rapid Transit Co. v. Dozier (Tenn.) 963.

Where a judgment can be sustained on the facts found by the court, it is immaterial that the court gave an unsound reason for the judgment.—Denny v. Stokes (Tex. Civ. App.) 208.

§ 18. — Parties entitled to allege error.

Defendant *held* not entitled to object to the introduction of evidence by plaintiff, where witnesses for defendant testified to the same facts.—Marsden Co. v. Bullitt (Ky.) 32.

Evidence brought out by counsel for plaintiff on examination in chief *held* not subject to objection by him on appeal.—Early's Adm'r v. Louisville, H. & St. L. Ry. Co. (Ky.) 348.

The action of the court in overruling a motion cannot be reviewed where the movant is an appellee.—Bell v. Smith (Ky.) 1107.

Where defendant put in issue the validity of the indebtedness secured by a trust deed in a suit to set the deed aside, he cannot object on appeal to plaintiff's evidence on such issue.—Turner v. Overall (Mo. Sup.) 644.

Admission of conclusion of witness *held* not reversible error, in view of opposite party's failure to cross-examine.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

An objection to the introduction of evidence cannot be reviewed, where the same evidence was otherwise received without objection.—Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 78.

One who had not appealed from a judgment *held* in no position to ask to have the judgment reversed, and rendition of one in his favor on appeal.—Southwestern Telegraph & Telephone Co. v. Priest (Tex. Civ. App.) 241.

Where a guardian was sued in his personal and representative capacities, and pleaded in reconviction in his capacity as guardian only, he could not complain, on appeal, as to the disposition of such plea; no recovery being had against him as guardian.—Ferguson v. Slater, McMahon & Co. (Tex. Civ. App.) 422.

§ 19. — Presumptions.

Defendant, in action by servant for injuries, *held*, in view of instructions and evidence, not entitled to complain that plaintiff had been guilty of contributory negligence.—Black v. Missouri Pac. Ry. Co. (Mo. Sup.) 559.

Recital in the judgment, that "proof was adduced," is conclusive on appeal that evidence was introduced.—Lane v. Dowd (Mo. Sup.) 632.

Judgment in action on lost note sustained, on a presumption that note was not negotiable; there being no evidence to the contrary.—Pinnell v. Meaks (Mo. App.) 461.

In the absence of a contrary showing, it must be presumed that the mother had notice of proceedings to appoint a third party guardian for her children.—Beardsley v. Thomas (Tex. Civ. App.) 411.

An appellate court can disturb a verdict, where the evidence convinces it that injustice has been done.—Etna Ins. Co. v. Eastman (Tex. Civ. App.) 431.

An issue neither requested nor submitted will on appeal be presumed found so as to support the judgment.—Seaton v. McReynolds (Tex. Civ. App.) 874.

Where there is only a partial statement of facts in the record, all reasonable presumptions will be indulged in favor of the judgment of the lower court.—Voges v. Dittlinger (Tex. Civ. App.) 875.

In the absence of a complete statement of facts in the record, *held* that it would be presumed that evidence sufficient to sustain the judgment was given.—*Voges v. Dittlinger* (Tex. Civ. App.) 875.

§ 20. — Discretion of lower court.

A motion for a new trial for newly discovered evidence is addressed to the discretion of the court, which will not be disturbed unless abused.—*San Antonio & A. P. Ry. Co. v. Moore* (Tex. Civ. App.) 226.

The setting aside of a judgment by default is a matter largely in the discretion of the court, and will rarely be reviewed on appeal.—*Watts v. Bruce* (Tex. Civ. App.) 258.

§ 21. — Questions of fact, verdicts, and findings.

Where the evidence is conflicting, a verdict is conclusive on appeal.—*Town of Central Covington v. Bellonby* (Ky.) 1107; *Wertheimer-Swartz Shoe Co. v. United States Casualty Co.* (Mo. Sup.) 635; *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.* (Tex. Civ. App.) 1038.

Where the decree of the chancellor is not clearly against the weight of the evidence, it will not be reversed on appeal.—*Lacotta v. Dunn* (Ark.) 370.

Where the evidence in a suit in equity leaves the mind of the appellate court in doubt, weight will be given the finding of the chancellor.—*Taylor v. King* (Ky.) 309.

The rule that a judgment will not be reversed, unless flagrantly against the weight of the evidence, does not apply to suits in equity.—*Taylor v. King* (Ky.) 309.

The finding of facts by a referee *held* to stand as a verdict of a jury.—*Tufts v. Latshaw* (Mo. Sup.) 679.

§ 22. — Harmless error.

A continuance on account of popular prejudice *held*, under the circumstances, properly refused.—*Crabtree Coal Min. Co. v. Sample's Adm'r* (Ky.) 24.

A continuance for absence of witnesses *held*, under the circumstances, properly refused.—*Crabtree Coal Min. Co. v. Sample's Adm'r* (Ky.) 24.

A continuance on the ground of the inability of an officer of the defendant corporation to assist in the preparation of the case *held*, under the circumstances, properly refused.—*Crabtree Coal Min. Co. v. Sample's Adm'r* (Ky.) 24.

A continuance on the ground of the exhaustion of defendant's attorneys *held*, under the circumstances, properly refused.—*Crabtree Coal Min. Co. v. Sample's Adm'r* (Ky.) 24.

In an action against defendants, both of whom had died between first and second trial, *held* proper to allow testimony of one of defendants to be read at the second trial.—*Columbia Finance & Trust Co. v. Mitchell's Adm'r* (Ky.) 350.

Where there was no proof that any sum had been expended for medicines and medical treatment which were not specially claimed in the petition, an instruction authorizing the jury to consider the expense incurred therefor was harmless.—*Louisville, H. & St. L. Ry. Co. v. McCune* (Ky.) 756.

A certain instruction given in an action against partners *held* not to be prejudicial error.—*Summers Bros. v. Bland* (Ky.) 798.

Failure to transfer cause to equity side of the docket *held* not prejudicial error.—*Darnall v. Jones' Ex'rs* (Ky.) 1108.

In action against railroad for injuries to servant, question put to one of defendant's witnesses *held* not prejudicial error.—*Black v. Missouri Pac. Ry. Co.* (Mo. Sup.) 559.

In an action on a policy, defendant *held* not entitled to object on appeal to instructions more favorable than the law warranted.—*Wertheimer-Swartz Shoe Co. v. United States Casualty Co.* (Mo. Sup.) 635.

Permitting miner suing for injuries to testify that he was a married man *held* not reversible error, in view of similar evidence introduced without objection.—*Chambers v. Chester* (Mo. Sup.) 904.

Allowance of question calling for conclusion *held* not reversible error, in view of witness' answer.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

Where the evidence of a witness is objectionable as his conclusion, but no prejudice appears, it will not constitute reversible error.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

Under Rev. St. 1899, § 2640, a record on a criminal appeal, which does not show any objection by defendant to rulings on evidence, or exception to instructions, brings up nothing for review, except the record proper.—*State v. Back* (Mo. App.) 466.

Evidence that the defendant guaranteed to save plaintiff harmless, introduced in the course of proving suretyship, and not as the basis of the judgment, *held* not prejudicial error.—*Markham v. Cover* (Mo. App.) 474.

In an action for damages for breach of contract to convey land, and investment of title to certain land in plaintiff, an erroneous instruction as to measure of damages *held* harmless.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

In action for damages from nuisance, consisting of railroad roundhouse, erroneous admission of evidence *held* harmless in view of an instruction.—*Louisville & N. Terminal Co. v. Jacobs* (Tenn.) 954.

Error in refusing continuance for absent witnesses *held* cured.—*Louisville & N. Ry. Co. v. Voss* (Tenn.) 983.

The exclusion of certain evidence in an action against a carrier for failing to seasonably deliver freight *held* harmless error.—*Gulf, C. & S. F. Ry. Co. v. Harris* (Tex. Civ. App.) 71.

Where the court erroneously permitted improper evidence of damage to stand, and there was nothing which tended to withdraw it from the consideration of the jury, the error was not harmless.—*Gulf, C. & S. F. Ry. Co. v. Ryon* (Tex. Civ. App.) 72.

Where a husband and wife were erroneously joined in an action for injuries to the wife, but no objection was made thereto at the trial, a judgment in favor of plaintiff will not be reversed for such misjoinder of parties.—*Galveston, H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 78.

Where a verdict in an action for injuries showed on its face that nothing was awarded plaintiff for medicine and medical services, an objection to the charge in reference to such issue will not be reviewed.—*International & G. N. R. Co. v. Lister* (Tex. Civ. App.) 107.

Any error in instructions in action against railroad company for negligent injury to convict hired out to it *held* favorable to company, so as to preclude its assigning error therein.—*San Antonio & A. P. Ry. Co. v. Gonzales* (Tex. Civ. App.) 213.

Where the undisputed facts showed that plaintiff was entitled to recover in any event, judgment in his favor was not reversible for error in the submission of the cause.—*Houston Electric St. Ry. Co. v. Elvis* (Tex. Civ. App.) 216.

In an action of debt against a corporation, exclusion of evidence on an issue as to whether plaintiff had agreed to accept notes of two individual stockholders in satisfaction of the in-

debtless *held* harmless.—W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.) 260.

Denial of judgment for plaintiff by default cannot be complained of, where a trial subsequently had resulted in a judgment for defendant.—Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.) 432.

Error in admitting testimony in action on life policy *held* harmless.—Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.

In an action for damages to cattle en route to market, error in permitting plaintiff to testify from his account sales as to what he received for the cattle *held* harmless.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

A ruling that two defendants jointly sued were entitled to but six peremptory challenges *held* not prejudicial.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

§ 23. — Decisions of intermediate courts.

Under Acts 1895, p. 116, c. 76, § 41, supreme court *held* bound by the finding of facts made by the court of chancery appeals, and also by its inferences of fact from the evidentiary facts found.—Brown v. Timmons (Tenn.) 958.

Where the chain of title, in trespass to try title, is set out in the statement of facts, the court will not make a finding of fact as to the sufficiency of the deeds to pass title.—Rountree v. Thompson (Tex. Civ. App.) 69.

In trespass to try title, the Court of Civil Appeals will not make a finding of fact that a deed in the chain of title embraces the land sued for.—Rountree v. Thompson (Tex. Civ. App.) 69.

The Court of Civil Appeals is not required to make a finding of fact based on testimony consisting of written instruments.—Rountree v. Thompson (Tex. Civ. App.) 69.

§ 24. Determination and disposition of cause.

The court, on appeal from a judgment rendered on a second trial of the case, will not, under the circumstances, direct the entry of the judgment rendered on the first trial.—E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co. (Ky.) 20.

Where finding that a will was procured by undue influence was found on appeal to be unsupported by evidence, but it was also decided that certain evidence of undue influence was erroneously excluded, the case must be remanded for a new trial.—Wall v. Dimmitt (Ky.) 300.

Where a party had possession of lands under a judgment which was reversed, and judgment entered against him, he should be required to pay reasonable rent, less the taxes paid and repairs made.—Fisher v. Musick's Ex'r (Ky.) 787.

Evidence after judgment of restitution, to ascertain the rent due from defendant, examined, and *held* that he was not in possession during a year for which rent was awarded.—Fisher v. Musick's Ex'r (Ky.) 787.

Where a judgment awarded restitution of premises with reasonable rent, it was error to include rent for a period for which it was disclaimed in the amended petition.—Fisher v. Musick's Ex'r (Ky.) 787.

Where a judgment awards restitution of premises with reasonable rent, the value of such rent may be determined in such action on an amended petition.—Fisher v. Musick's Ex'r (Ky.) 787.

Where while a cause was in the court of appeals the plaintiff died, the action was properly revived in circuit court after remand thereto.—Fisher v. Musick's Ex'r (Ky.) 787.

Where plaintiff recovered judgment for all he asked, in an action to set aside a deed and for ejectment, he cannot, by an amended petition, recover rent for a period prior to that claimed in the original petition.—Fisher v. Musick's Ex'r (Ky.) 787.

Where the time for which a liquor license was applied for expired before the hearing of the appeal from a judgment refusing mandamus to compel the issuance of the license, the judgment will be affirmed.—State ex rel. Williams v. Harrison (Mo. Sup.) 1072.

Where, on appeal, an issue is referred back for trial, such issue is a proper one to be submitted by the trial court to the jury for a finding.—Huber Mfg. Co. v. Hunter (Mo. App.) 484.

Where, in a case in which there are findings by the court on request, under Shannon's Code, § 4684, resort can be had to the bill of exceptions only to see if they cover all the facts, or there is evidence to support them; or there has been error in rulings on evidence; and, error in any of these matters appearing, the case will be remanded for a new trial.—Hinton v. Sun Life Ins. Co. (Tenn.) 118.

A judgment dismissing an action on sustaining a plea in abatement should not be affirmed on the ground that a general demurrer filed at the same time as the plea, but not passed on by the trial court, should be sustained.—Hayden v. Kirby (Tex. Civ. App.) 198.

Where the evidence of the value of property sued for was conflicting, on reversal, a judgment absolute for plaintiff could not be rendered.—Low v. Moore (Tex. Civ. App.) 421.

Case *held* not to authorize affirmance on certificate filed after the term at which the transcript should have been filed.—Western Union Tel. Co. v. Wofford (Tex. Civ. App.) 620.

APPEARANCE.

Appeal of one defectively served *held* a general appearance in the action.—Louisville & N. R. Co. v. S. D. Chestnut & Bro. (Ky.) 351.

A failure to comply with Gen. Laws 1901, p. 31, regulating the venue of suits against railroad companies, may be waived by defendant's voluntary appearance.—Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 78.

The filing of a demurrer and general denial constitutes a waiver of all questions of venue.—Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 78.

Objection to suit as commenced on Sunday *held* waived by filing plea in reconvention.—Benchoff v. Stephenson (Tex. Civ. App.) 106.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPLICATION.

Of payment, see "Payment," § 1.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of guardian, see "Guardian and Ward," § 1.

Of public officers in general, see "Officers," § 1.

ARBITRATION AND AWARD.

See "Reference."

ARGUMENT OF COUNSEL

In civil actions, see "Trial," § 3.
In criminal prosecutions, see "Criminal Law," § 20.

ARRAIGNMENT.

See "Criminal Law," § 6.

ARREST.

See "Bail"; "Escape"; "Prisons."
Illegal arrest, see "False Imprisonment."

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 3.

§ 1. Criminal responsibility.

Evidence *held* not to show an assault.—Barnes v. State (Tex. Cr. App.) 168; Fuller v. State, Id. 184.

An instruction that the use of any object with intent to alarm another, and under circumstances calculated to do so, constitutes an assault, *held* not warranted by Pen. Code, art. 592, subd. 3.—Barnes v. State (Tex. Cr. App.) 168.

Evidence *held* to show an assault.—Fortenberry v. State (Tex. Cr. App.) 593.

In an action for aggravated assault, an instruction limiting defendant's rights as to self-defense, on the action of another in provoking the difficulty, without reference to whether defendant knew thereof, *held* error.—Kees v. State (Tex. Cr. App.) 855.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 2.
Of damages, see "Damages," § 6.
Of expenses of public improvements, see "Municipal Corporations," § 7.
Of loss on insured, see "Insurance," § 6.
Of tax, see "Taxation," § 4.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 1.

Transfers of particular species of property, rights, or instruments.

See "Insurance," § 3.

Admeasurement or assignment of dower, see "Dower," § 2.

Corporate shares, see "Corporations," § 1.

§ 1. Requisites and validity.

Assignment of part of recovery to plaintiff's attorneys before suit *held* not to contravene public policy by preventing compromise.—Galveston, H. & S. A. Ry. Co. v. Ginther (Tex. Sup.) 166.

Under Sayles' Ann. Civ. St. art. 4647, partial assignment of claim to attorneys before suit *held* valid, and not required to be filed and noted in docket, to charge defendants having actual notice.—Galveston, H. & S. A. Ry. Co. v. Ginther (Tex. Sup.) 166.

Rev. St. art. 308, authorizes a railway company to assign its interest in a contract empowering it to take water from a spring and to lay pipes and erect pumping works necessary therefor.—Houston & T. C. Ry. Co. v. Cluck (Tex. Civ. App.) 83.

§ 2. Rights and liabilities of parties.

Contract between attorneys and client *held* a present assignment of part of claim, and not

agreement for conditional fee, so as to charge defendant having notice and compromising directly with client.—Galveston, H. & S. A. Ry. Co. v. Ginther (Tex. Sup.) 166.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

§ 1. Accounting, settlement, and discharge of assignee.

Ky. St. § 93, *held* not to authorize the county court to discharge an assignee for the benefit of creditors on the day a motion was entered.—Kniedler v. Teegarden (Ky.) 268.

Subsequent arrangement of assignor with assignee *held* not to defeat direct allowance to attorneys employed to surcharge the trustee's accounts.—Mattingly's Trustee v. Mattingly (Ky.) 802.

Allowance to attorneys employed to surcharge accounts of assignee *held* proper.—Mattingly's Trustee v. Mattingly (Ky.) 802.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 18.

The assets of a defunct voluntary association do not constitute a trust fund for the benefit of creditors in the hands of purchasers of such assets.—Industrial Lumber Co. v. Texas Pine Land Ass'n (Tex. Civ. App.) 875.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 8.

ATTACHMENT.

See "Execution"; "Garnishment"; "Sequestration."

Exemptions, see "Exemptions"; "Homestead."

§ 1. Nature and grounds.

Testimony *held* to show an intent on the part of appellee to dispose of his property, so as to defeat any judgment that appellant might recover against him, and therefore to authorize appellant in issuing an attachment.—Blewett v. Sprague (Ky.) 317.

§ 2. Levy, lien, and custody and disposition of property.

Under Rev. St. art. 4640, the lien of an attachment levy is superior to a prior unrecorded deed, of which the attaching creditor has no notice.—R. E. Bell Hardware Co. v. Riddle (Tex. Civ. App.) 613.

§ 3. Proceedings to support or enforce.

Allegation that neither defendant had sufficient property in the state subject to execution to satisfy plaintiff's demand *held* unnecessary in attachment under Civ. Code, § 237, though required in action under section 194, subsec. 8.—Marks & Stix v. Gause (Ky.) 732.

§ 4. Wrongful attachment.

Defendants *held* not entitled to an award of damages caused by the wrongful attachment of their plant.—Hume v. S. Netter, A. Geismar & Co. (Tex. Civ. App.) 865.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 20.

Attorney fees as costs in action against administrator, see "Executors and Administrators," § 6.

Attorneys as public officers, see "District and Prosecuting Attorneys."

Attorney's fees as costs in action for conversion, see "Trove and Conversion," § 1.

Attorney's fees as costs in action on note, see "Bills and Notes," § 2.

Attorney's fees as damages for wrongful execution, see "Execution," § 4.

Attorneys in fact, see "Principal and Agent."

Competency of attorneys as witnesses, see "Witnesses," § 1.

§ 1. Retainer and authority.

On revival of action after death of the plaintiff, where the subsequent proceedings were in the name of the executor by the former attorney for plaintiff, the defendant could not object to his authority to so act.—*Fisher v. Mueck's Ex'r* (Ky.) 787.

§ 2. Duties and liabilities of attorney to client.

Requested declaration of law in action by client against attorney *held* properly refused as fixing erroneous measure of attorney's damages.—*Jordan v. Davis* (Mo. Sup.) 686.

Requested declaration of law in an action by client against attorney, in which attorney counterclaims loss of contingent fee in other suit, *held* properly refused, as injecting collateral issues.—*Jordan v. Davis* (Mo. Sup.) 686.

§ 3. Compensation and lien of attorney.

An attorney's fee of \$500 certain, and \$1,000 additional in case of success, for the collection of a claim of \$19,017.05 by suit, *held* to be reasonable.—*Fox v. Willis* (Ky.) 330.

Attorneys prosecuting a suit for a contingent fee cannot prevent a dismissal by plaintiff, nor prosecute the suit on their own motion, under Acts 1899, c. 243, § 1.—*Tompkins v. Nashville, C. & St. L. Ry.* (Tenn.) 116.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.

Of attorney, see "Attorney and Client," § 1.

AVOIDANCE.

Pleading matter in avoidance, see "Pleading," § 1.

BAGGAGE.

Of passenger, see "Carriers," § 7.

BAIL.

§ 1. In criminal prosecutions.

A judgment of forfeiture of recognizance entered against the surety is good, though it does not show that the court had jurisdiction over the principal, nor that the proceedings were dismissed as to him.—*State v. Eyermann* (Mo. Sup.) 539.

The presumption is in favor of the regularity of the proceedings of the circuit court leading to the taking of a recognizance.—*State v. Eyermann* (Mo. Sup.) 539.

Original bail bond being abrogated by giving new bond, it was not necessary, in declaring a forfeiture, to specify which bond was forfeited.—*State v. Eyermann* (Mo. Sup.) 539.

Under Rev. St. 1899, § 2800, an order of court declaring a forfeiture of a recognizance is good, though it does not state the amount of the forfeiture.—*State v. Eyermann* (Mo. Sup.) 539.

Original bail bond *held* abrogated by giving a new bond.—*State v. Eyermann* (Mo. Sup.) 539.

Where the court is of the opinion that a bail bond is insufficient, it may order a new bond to be given.—*State v. Eyermann* (Mo. Sup.) 539.

Under Rev. St. 1899, § 2543, the failure of defendant, after having been admitted to bail, to object to giving higher bail, on the ground he is not under arrest, *held* a waiver of arrest.—*State v. Eyermann* (Mo. Sup.) 539.

Relator *held* entitled to bail, the proof not being evident that he is guilty of a capital offense.—*Ex parte Locklin* (Tex. Cr. App.) 585.

Recognizance *held* fatally defective as failing to charge an offense.—*Anderson v. State* (Tex. Cr. App.) 593.

Recognizance on appeal from convictions of misdemeanor, failing to show punishment, *held* fatally defective.—*Anderson v. State* (Tex. Cr. App.) 593.

Recognizance on appeal *held* not to satisfy requirement of Code Cr. Proc. art. 887, that it state that appellant was convicted of a misdemeanor.—*Mitchell v. State* (Tex. Cr. App.) 594.

A recognizance on appeal binding defendant not to depart without leave of "the" court *held* sufficient.—*Kees v. State* (Tex. Cr. App.) 555.

A recognizance on appeal, reciting that defendant was convicted of an aggravated assault, *held* not objectionable for failure to recite that he was convicted of a misdemeanor.—*Kees v. State* (Tex. Cr. App.) 555.

BAILMENT.

See "Carriers," § 2.

One who repairs a machine has a right to possession until the repairs are paid for.—*Henderson v. Mahoney* (Tex. Civ. App.) 1019.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Under the Bankruptcy Act of 1898, the jurisdiction of the federal court over property in the hands of a trustee is exclusive.—*Mishawaka Woolen Mfg. Co. v. Powell* (Mo. App.) 723.

Rev. St. 1899, § 4463 et seq., does not authorize a sheriff, acting under a writ of replevin, to take property in the possession of the federal court under bankruptcy proceedings.—*Mishawaka Woolen Mfg. Co. v. Powell* (Mo. App.) 723.

Under the bankruptcy act of 1898, property in possession of trustee cannot be reached by replevin issuing out of a state court.—*Mishawaka Woolen Mfg. Co. v. Powell* (Mo. App.) 723.

Bankrupt after discharge *held* entitled to recover penalty for usurious interest paid by him before bankruptcy.—*Lasater v. First Nat. Bank* (Tex. Sup.) 1057.

A cause of action for the recovery of a penalty for the receiving of usurious interest, on bankruptcy of the owner of the claim, passes to the trustee in bankruptcy.—*Lasater v. First Nat. Bank* (Tex. Sup.) 1057.

Under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], a bankrupt after discharge may recover usury paid national bank where his trustee in bankruptcy did not reduce the claim to possession.—*Lasater v. First Nat. Bank* (Tex. Civ. App.) 1054.

§ 2. Rights, remedies, and discharge of bankrupt.

Judgment creditor *held* not entitled, under Bankr. Act 1898, § 17 [U. S. Comp. St. 1901,

p. 3428], to go back of judgment for price of goods to show that sale was induced by purchaser's fraud, so as to avoid discharge in bankruptcy.—Harrington & Goodman v. Herman (Mo. Sup.) 546.

Fiduciary relation *held* not to exist between buyer and seller of goods, so as to prevent buyer's discharge in bankruptcy, releasing a judgment for purchase price, under Bankr. Act 1898, § 17 [U. S. Comp. St. 1901, p. 3428], though sale was induced by buyer's fraud.—Harrington & Goodman v. Herman (Mo. Sup.) 546.

BANKS AND BANKING.

§ 1. Banking corporations and associations.

Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that it was used to pay the depositor's subscription to the capital stock, the burden of proof was on him.—Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.) 1125.

A depositor suing the receiver of a bank for the amount of a deposit *held* not estopped from denying that he subscribed for stock in the bank.—Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.) 1125.

When all the stock of a bank was subscribed for by certain persons, under an agreement to transfer it to others, express authority from the original subscriber for such a transfer *held* not necessary to a valid sale.—Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.) 1125.

Where a depositor sued the receiver of a bank for a deposit, and he pleaded that deposit was used to pay subscription to capital stock, evidence that the president and cashier had been given parol authority by the board of directors to sell the stock *held* admissible.—Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.) 1125.

Facts in action involving the validity of a subscription to the capital stock of a bank *held* not to show an overissue of stock.—Somerset Nat. Banking Co.'s Receiver v. Adams (Ky.) 1125.

In an action by a depositor against the receiver of the bank to recover a deposit, evidence *held* insufficient to show that plaintiff used the deposit to purchase the stock of the bank.—Somerset Nat. Banking Co.'s Receiver v. Brinkley (Ky.) 1129.

§ 2. National banks.

Under U. S. Rev. St. § 5136 [U. S. Comp. St. 1901, p. 3455], prescribing the powers of national banks, such a bank has no power to bind itself that a draft drawn on its customer will be paid.—First Nat. Bank v. American Nat. Bank (Mo. Sup.) 1059.

A national bank *held* estopped to plead ultra vires to a contract of guaranty.—First Nat. Bank v. American Nat. Bank (Mo. Sup.) 1059.

Under the statute giving one who pays usurious interest a cause of action for the recovery of a penalty from the one to whom payment is made, or of "his legal representative," such a claim is subject to assignment.—Lasater v. First Nat. Bank (Tex. Sup.) 1057.

Payment of usurious interest by one other than maker of note, calling for such interest, *held* a payment by maker.—Lasater v. First Nat. Bank (Tex. Sup.) 1057.

Continuing partner *held* entitled to recover penalty for payment of interest on firm note.—Lasater v. First Nat. Bank (Tex. Sup.) 1057.

The right of action to recover usurious interest from national banks, under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], *held* assignable.—Lasater v. First Nat. Bank (Tex. Civ. App.) 1054.

Payment of notes and interest by surety in consideration of sale of cattle to surety by principal *held* a payment by principal.—Lasater v. First Nat. Bank (Tex. Civ. App.) 1054.

Under Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], right to recover usurious interest is barred after two years from payment of interest.—Lasater v. First Nat. Bank (Tex. Civ. App.) 1054.

BAR.

Of action by former adjudication, see "Judgment," § 8.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 18.

Under Rev. St. 1899, § 1408, no one can become a member of a fraternal association without first being initiated into a local lodge.—Hiatt v. Fraternal Home (Mo. App.) 463.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

BETTERMENTS.

Impairment of vested rights to improvements, see "Constitutional Law," § 2.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 3.

Of witness, see "Witnesses," § 5.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 2.

BILLS AND NOTES.

Parol or extrinsic evidence, see "Evidence," § 8.

§ 1. Rights and liabilities on indorsement or transfer.

Where the maker of notes has been insolvent ever since their execution, suit against an indorser need not be brought at the next term of court after the right of action accrues.—Norton v. Wochler (Tex. Civ. App.) 1025.

§ 2. Actions.

Pleas of non est factum and no consideration for the notes sued on are not inconsistent.—Storey v. First Nat. Bank (Ky.) 318.

On an issue whether defendant had paid certain notes, the admission of the notes in evidence when produced by him was not error.—Chouteau Land & Lumber Co. v. Chrisman (Mo. Sup.) 1062.

In an action on a note, a verdict in favor of defendant *held* not contrary to the weight of

evidence.—*Van Buren County Sav. Bank v. Mills* (Mo. App.) 497.

Plaintiff *held* not shown to have placed the note sued on in the hands of attorneys for collection, so as to be entitled to the collection fee stipulated in such case.—*Ashburn v. Evans* (Tex. Civ. App.) 242.

Evidence *held* to show that plaintiff did not pay the note for the maker, but bought it, so that his cause of action was governed by the statute of limitations as to notes, and not as to loans.—*Ashburn v. Evans* (Tex. Civ. App.) 242.

The unauthorized stamping of the note sued on as "Paid" may be shown without pleading, there being no effort to reform for mutual mistake.—*Ashburn v. Evans* (Tex. Civ. App.) 242.

BONA FIDE PURCHASERS.

At execution sale, see "Execution," § 3.
Of lands, see "Vendor and Purchaser," § 2.

BONDS.

Sureties on bonds, see "Principal and Surety."
Trial of right of property as condition precedent to action on delivery bond, see "Execution," § 2.

Bonds for performance of duties of trust or office.

See "Clerks of Courts"; "Guardian and Ward," § 1.

County officers, see "Counties," § 1.
Insurance agents, see "Insurance," § 1.

Bonds in legal proceedings.

See "Bail."

On appeal, see "Criminal Law," § 30.

BOUNDARIES.

Of municipality, see "Municipal Corporations," § 1.

Of school district, see "Schools and School Districts," § 1.

Validity of parol agreement as to boundary, see "Frauds, Statute of," § 2.

§ 1. Description.

Where, in a description of land in a deed by metes and bounds, the boundaries overlap a former grant by the same grantor, the former grant will prevail.—*Sandy River Cannel Coal Co. v. White House Cannel Coal Co.* (Ky.) 298.

§ 2. Evidence, ascertainment, and establishment.

Evidence in action for land *held* not to show it was within plaintiff's boundary, agreed on by the parties.—*Sherman v. King* (Ark.) 571.

An agreement as to the boundary line between two lots of land *held* binding.—*Alexander v. Parks* (Ky.) 1105.

BREACH.

Of condition, see "Insurance," §§ 5, 6.

Of contract, see "Contracts," § 4.

Of covenant, see "Insurance," § 6.

Of warranty, see "Insurance," §§ 5, 6; "Sales," §§ 4, 6.

BREACH OF THE PEACE.

See "Affray."

BRIBERY.

A prisoner *held* under an illegal arrest cannot be convicted of offering to bribe the officer to allow him to escape.—*Ex parte Richards* (Tex. Cr. App.) 838.

BRIDGES.

§ 1. Establishment, construction, and maintenance.

The approach to a bridge is a part thereof, so that an attempted conveyance by a company chartered to build and operate a bridge of an approach thereto is *ultra vires*.—*Pittsburg, O. & St. L. R. Co. v. Dodd* (Ky.) 822.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 13.

BROKERS.

See "Principal and Agent."

Insurance brokers, see "Insurance," § 1.

§ 1. Compensation and lien.

A promoter of a corporation to purchase mineral land *held* to sustain a fiduciary relation to the corporation; and hence his partners in the enterprise to sell the land were not entitled to recover an additional sum beyond the amount agreed to be paid to the owner.—*Tegarden Bros. v. Big Star Zinc Co.* (Ark.) 989.

In action by real estate broker for commissions, act of prospective purchaser in mailing letter of acceptance *held* to bind him, notwithstanding interception of letter before its delivery.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

Real estate broker, sued for commissions, *held* not negligent in notifying vendor of purchaser's acceptance, so as to preclude recovery.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

A broker, entitled to commissions only in the event of an actual sale, *held* not entitled to recover commissions where failure to consummate the sale was due to no fault of his principals.—*Owen v. Kuhn, Loeb & Co.* (Tex. Civ. App.) 432.

§ 2. Actions for compensation.

Burden *held* on vendor, sued by a real estate broker for commissions, to show materiality of broker's misrepresentations, on discovering which purchaser refused to consummate sale.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

Evidence in action by real estate broker for commissions *held* not to show such misrepresentations by broker, defeating sale, as to preclude recovery.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

§ 3. Rights, powers, and liabilities as to third persons.

Facts *held* to show no meeting of the minds on a sale attempted to be made by a broker from plaintiffs to defendants, so that plaintiffs were entitled to recovery of the goods or their value.—*Frye v. Keller* (Tex. Civ. App.) 228.

BUILDING AND LOAN ASSOCIATIONS.

A stockholder in an insolvent building and loan association *held* not to have become a creditor, so as to be entitled to preference over other stockholders.—*Manheimer v. Henderson Building & Loan Ass'n's Assignee* (Ky.) 313.

In a suit against a building association to recover usury, plaintiff *held* entitled to be credited for everything paid in in excess of 6 per cent. interest on the loan.—*Olliges v. Kentucky Citizens' Building & Loan Ass'n's Assignee* (Ky.) 747.

Fines for delinquent payments *held* waived by a building and loan association, so as not to be chargeable against borrower in action by him to cancel note and trust deed.—*Arbuthnot v*

Brookfield Loan & Building Ass'n (Mo. App.) 132.

By-law fixing minimum premium for loan *held* to remove loan from protection of Rev. St. 1889, § 2812, and render it subject to defense of usury; the by-law having been enforced at competitive bidding, though premium actually received was in excess of minimum fixed.—*Arbuthnot v. Brookfield Loan & Building Ass'n* (Mo. App.) 132.

By-law fixing minimum premium *held* not to conform to Rev. St. 1899, § 1302, varying the provisions of Rev. St. 1889, § 2812, and hence loan made under by-law was subject to defense of usury.—*Thudium v. Brookfield Loan & Building Co.* (Mo. App.) 134.

Notice of intention to pay usurious loan *held* unnecessary, under Rev. St. 1899, § 1368, before bringing suit to cancel note and trust deed, though balance was found due the association.—*Thudium v. Brookfield Loan & Building Co.* (Mo. App.) 134.

Where a member of a mutual building and loan association adjusted and settled a loan, and made a new loan, such settlement should not be disturbed, in determining the rights of the parties under the new loan.—*Callison v. Trenton Building & Loan Ass'n* (Mo. App.) 477.

A loan, made in 1897 by a building and loan association, which had not reorganized under the act of 1895 (Rev. St. 1899, c. 12, art. 10), under a by-law, adopted prior to 1895, fixing the rate of premium to be charged, must be adjusted under Rev. St. 1889, c. 42, art. 9, and all payments made by the borrower in excess of 6 per cent. interest be credited on the principal.—*Callison v. Trenton Building & Loan Ass'n* (Mo. App.) 477.

BURIAL

See "Dead Bodies."

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 3.

§ 1. Proceedings and relief.

On cancellation of deed, the rights of the vendee, with respect to the return of the money paid by him for the land and in improving it, determined.—*Stephenson v. Stephenson* (Ky.) 742.

Evidence *held* to justify a finding that a deed of trust by a married woman, to secure her husband's debt, and save him from prosecution for forgery, was obtained by duress.—*Turner v. Overall* (Mo. Sup.) 644.

CANDIDATES.

For office, see "Elections," § 1.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

§ 1. Control and regulation of common carriers.

Under Const. § 215, an indictment for discriminating in charges must allege the services were on the same conditions.—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 360.

An indictment against a carrier for discrimination, in violation of Const. § 215, must allege the hauling was under the same condi-

tions.—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 361.

An indictment against a carrier for discrimination, in violation of Const. § 215, *held* bad; it charging the hauling "on different conditions."—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 361.

A joint traffic arrangement, by which connecting carriers haul between a point on one road and a point on the other for less than one hauls from the same point on its road to its terminus, between the points, *held* not to violate Ky. St. § 820.—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 361.

Under Cr. Code, § 124, an indictment against a carrier for violation of Const. § 215, *held* defective for failing to allege the goods discriminated against were to be hauled "upon the same conditions" as those favored.—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 758.

Under certain facts, *held*, that a shipment of freight would be an interstate shipment, and not subject to the commission rates of Texas.—*Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.* (Tex. Civ. App.) 419.

In a suit against a carrier to recover the penalty for overcharges, consisting in the excess of the interstate rate over the commission rates of Texas, the burden of proving that the shipment was a domestic shipment was on the plaintiff.—*Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.* (Tex. Civ. App.) 419.

§ 2. Carriage of goods.

Where the amount recovered against a carrier for the loss of corn shipped, after deducting the value of the corn recovered and the freight, was less than he was entitled to under the evidence, an objection that the freight should have been deducted from the judgment was not sustainable.—*Marsden Co. v. Bullitt* (Ky.) 32.

Indefiniteness in the allegations of negligence in the petition *held* cured by the answer and reply.—*Marsden Co. v. Bullitt* (Ky.) 32.

In an action for the loss of goods by the sinking of a barge, allegations of negligence *held* sufficiently specific.—*Marsden Co. v. Bullitt* (Ky.) 32.

Receiving carrier *held* not liable for negligence of connecting carrier.—*Louisville & N. R. Co. v. S. D. Chestnut & Bro.* (Ky.) 351.

A railroad company has the right to require its consignees to unload their freight within a reasonable time or pay demurrage charge.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

Railroad company *held* to have converted certain shipment of lumber.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

A consignee of freight was not excused from noncompliance with his duty to unload it from the cars within the time stipulated in the bill of lading by reason of the extreme condition of the weather.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

Railroad company *held* not to have lost its control over certain shipment of lumber which it had left in its cars to be unloaded by consignee.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

A railroad company may have a lien for demurrage charges, even without express stipulation therefor.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

A railway company, limiting its liability to its own line in a contract of shipment, is liable for the negligence of its agent in billing the property to a wrong place on the connecting carrier's line.—*Gulf, C. & S. F. Ry. Co. v. Harris* (Tex. Civ. App.) 71.

Railroad company, erroneously delivering wheat to another than the consignee, *held*,

immediately liable to the consignor for the value of the wheat.—Missouri, K. & T. Ry. Co. of Texas v. Seley (Tex. Civ. App.) 89.

Bills of lading for cotton, pledged as security for money advanced to pay the accompanying drafts for the purchase price, *held* not functus officio because the drafts were paid.—First Nat. Bank v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 1033.

A sale of cotton by the pledgor of the bills of lading, pursuant to the uniform custom with the pledgee, *held* to release the carrier issuing the bills from liability to the pledgee.—First Nat. Bank v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 1033.

§ 3. Carriage of live stock.

In an action against carrier for injuries to stock due to defective condition of the car, certain evidence *held* properly excluded.—Burnside & C. R. Ry. Co. v. Tupman (Ky.) 786.

Ky. St. § 2516, *held* not to bar an action against a carrier for injuries to stock due to the defective condition of the car, which the carrier had guaranteed to be sufficient.—Burnside & C. R. Ry. Co. v. Tupman (Ky.) 786.

Carrier guarantying safety of car used to transfer stock *held* liable for injuries due to its defective condition, though received on connecting line.—Burnside & C. R. Ry. Co. v. Tupman (Ky.) 786.

Verdict in action for delay in shipment of live stock *held* conjectural and excessive.—Helm v. Missouri Pac. R. Co. (Mo. App.) 148.

Written contract for shipment of live stock *held* to have superseded oral contract, so as to entitle defendant carrier to submission of damage suit on its provisions.—Helm v. Missouri Pac. R. Co. (Mo. App.) 148.

In an action against a railroad company to recover damages to stock shipped over defendant's road, a charge as to degree of care required of carrier *held* erroneous.—International & G. N. R. Co. v. Young (Tex. Civ. App.) 68.

In an action against a railroad company for injuries to stock in transit, the measure of damages was the market value of the stock at the point of destination.—International & G. N. R. Co. v. Young (Tex. Civ. App.) 68.

Where a railroad company's contract for the shipping of stock limited its liability to its own line, instructions should be given that defendant would not be liable for injuries after the stock passed out of its possession.—International & G. N. R. Co. v. Young (Tex. Civ. App.) 68.

In an action for injury to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock.—International & G. N. R. Co. v. Young (Tex. Civ. App.) 68.

The act of an agent of a railway company in billing a shipment of property to a place other than that stated in the contract of shipment *held* the proximate cause of the shipper's losing the benefit of the market.—Gulf, C. & S. F. Ry. Co. v. Harris (Tex. Civ. App.) 71.

A railroad company *held* not liable to a shipper of cattle for damages from insufficient bedding.—Texas Cent. R. Co. v. O'Laughlin (Tex. Civ. App.) 610.

A subsequent agreement between a cattle shipper and carrier *held* to constitute a complete contract based on a sufficient consideration.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

In an action for damages to cattle en route to market, a requested instruction that, if the shipments were made under any other than an

oral contract, plaintiff could not recover, was properly refused.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

In an action for injuries to live stock against two connecting carriers, an instruction *held* not error as permitting an assessment of damages against the carriers sued which in part occurred on the line of another.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

In an action for injuries to stock by two connecting carriers, an instruction *held* not error as tending to minimize the injuries sustained on one of the lines.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

Where plaintiff repudiated the making of a joint contract for stock transportation, and such issue was not submitted, a peremptory instruction on the ground that the petition declared on a joint contract was properly denied.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

In an action for delay in the delivery of live stock, whether a connecting carrier could have delivered the same at the time agreed on *held* a question for the jury.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

§ 4. Carriage of passengers—Performance of contract of transportation.

In an action against a railway company, a complaint alleging refusal to accept plaintiff's fare *held* not to state a cause of action.—Dierig v. South Covington & C. St. Ry. Co. (Ky.) 355.

§ 5. — Personal injuries.

Evidence in an action against a carrier for negligent injuries *held* to show defendant not guilty of negligence.—Brinegar v. Louisville & N. R. Co. (Ky.) 783.

Evidence in an action for injury to person on shore from landing of steamboat *held* sufficient to take issue of negligence to jury.—Louisville & E. Mail Co. v. Gilliland (Ky.) 1101.

Evidence, in an action for injuries to person on shore from landing of steamboat, *held* not to support verdict for plaintiff, based on defendant's negligence.—Louisville & E. Mail Co. v. Gilliland (Ky.) 1101.

Even if one accompanying live stock on train had no right under the contract to be in the car with the stock at the time he was injured, railroad company *held* liable.—Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.

Clause in contract of shipment *held* no defense to action for injuries to one accompanying live stock on a train.—Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.

Certain defense to action for injuries to one accompanying live stock on a train *held* admissible under the general denial.—Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.

An instruction in an action for injuries to one accompanying live stock on a train *held* not misleading.—Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.

In action by passenger for an assault by carrier's servant, evidence of servant's statements *held* admissible.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

Starting a train before plaintiff got off, after assisting a passenger to a seat, *held* not the proximate cause of his injury.—Saxton v. Missouri Pac. Ry. Co. (Mo. App.) 717.

The ordinary jerking of a train in starting and taking up the slack *held* not negligence as to a person alighting from the train while in slow motion.—Saxton v. Missouri Pac. Ry. Co. (Mo. App.) 717.

Refusal to give an instruction which gave undue prominence to certain evidence *held* not

error.—*Saxton v. Missouri Pac. Ry. Co. (Mo. App.) 717.*

A switching crew, doing yard work at a connecting point for defendant and another railroad, which employs and pays them, collecting half the cost from defendant, *held* to be equally the servants of both companies, and defendant is liable for their acts, the same as if it employed them.—*Gulf, C. & S. F. Ry. Co. v. Shelton (Tex. Sup.) 165.*

Proof that lurching of the car from negligent operation of the train, charged to have caused a passenger's death, was sidewise, instead of backward and forward, as alleged, *held* not to prevent recovery.—*Hicks v. Galveston, H. & S. A. Ry. Co. (Tex. Sup.) 835.*

In an action for injuries to a passenger in a freight car, an instruction *held* not erroneous in assuming that the injury occurred while a train was being made up.—*Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 81.*

In an action against a railway company for injuries to a passenger, evidence *held* to warrant a finding that defendant was negligent in not assisting her to alight from train.—*Missouri, K. & T. Ry. Co. of Texas v. Buchanan (Tex. Civ. App.) 96.*

Whether failure of a carrier to provide a stool for passengers in getting on and off trains is negligence is a question for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Sherrill (Tex. Civ. App.) 429.*

Evidence *held* to justify a finding that the proximate cause of the injuries to a child was a carrier's failure to keep its cars properly heated.—*St. Louis S. W. Ry. Co. v. Duck (Tex. Civ. App.) 445.*

Allowing a passenger to board a car when there is no seat for him *held* not negligence per se.—*Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 885.*

Allegations of the death of a person, while a passenger, by defendant's negligence, *held* sufficiently specific.—*Galveston, H. & S. A. Ry. Co. v. Contreras (Tex. Civ. App.) 1051.*

§ 6. — Contributory negligence of person injured.

Plaintiff, in an action against a carrier for negligent injuries, *held* guilty of contributory negligence.—*Brinegar v. Louisville & N. R. Co. (Ky.) 783.*

In action for injuries to one accompanying live stock on train, certain evidence *held* immaterial.—*Bolton v. Missouri Pac. Ry. Co. (Mo. Sup.) 530.*

A declaration in an action for injuries to a passenger while riding *held* demurrable for failure to allege that his position on the car platform was not voluntarily taken.—*Meyere v. Nashville, C. & St. L. Ry. (Tenn.) 114.*

That a passenger transported in a freight car was standing, when injured by the violent jerking of the car, *held* not to constitute contributory negligence as a matter of law.—*Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 81.*

A passenger transported in a freight car *held* not guilty of contributory negligence in failing to leave the car while it was being switched in the yard at a junction point, during which he was injured.—*Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 81.*

In an action for injuries to a passenger on a freight train, an instruction that he could not recover if the jerking by which he was injured was only such as was "necessary" *held* not erroneous.—*Texas & P. Ry. Co. v. Adams (Tex. Civ. App.) 81.*

If a passenger would not have fallen from a car platform but for his drunkenness, it was the proximate cause of the accident.—*Houston*

& T. C. R. Co. v. Bryant (Tex. Civ. App.) 885.

Customary violation of rule against passengers riding on car platform *held* not to avail one requested to go inside.—*Houston & T. C. R. Co. v. Bryant (Tex. Civ. App.) 885.*

§ 7. — Passengers' effects.

Liability of a traveler to the owner of goods carried by him *held* to render it proper to treat him as their owner in an action against a carrier for damages to the goods while checked as baggage.—*Illinois Cent. R. Co. v. Matthews (Ky.) 302.*

The paying of overweight charges on baggage is not of itself such notice that the trunk contains other articles than ordinary baggage as to render the company liable as a carrier for such articles.—*Illinois Cent. R. Co. v. Matthews (Ky.) 302.*

Under Ky. St. § 783, a carrier's liability, in the absence of contract, in relation to baggage, extends only to articles for the personal use and convenience of the traveler.—*Illinois Cent. R. Co. v. Matthews (Ky.) 302.*

The passenger having delayed 84 hours to call for his trunk, the carrier's liability therefor *held* only that of a warehouseman.—*St. Louis & S. F. Ry. Co. v. Terrell (Tex. Civ. App.) 430.*

Evidence *held* insufficient to show that the carrier was responsible for loss of articles from a passenger's baggage.—*Galveston, H. & S. A. Ry. Co. v. Schafermeyer (Tex. Civ. App.) 1037.*

CARRYING WEAPONS.

See "Weapons."

CATTLE GUARDS.

See "Railroads," § 4.

CAUSE OF ACTION.

See "Action."

CENSUS.

A city *held* authorized to take a census for determining population, and so the limit of indebtedness, though a federal census had been taken two months before.—*Lancaster v. City of Owensboro (Ky.) 731.*

The ordinance under which a census was taken not having confined the enumerators to be appointed by the mayor to any particular territory, *held*, that one of them could, at direction of the mayor and council, recanvass territory canvassed by the others.—*Lancaster v. City of Owensboro (Ky.) 731.*

CERTIFICATE.

Certified copies, see "Evidence," § 7.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

Of membership in mutual insurance association, see "Insurance," § 19.

CHALLENGE.

To juror, see "Jury," § 3.

CHAMPERTY AND MAINTENANCE.

A purchase of land at auction *held* not champertous as to one entering after sale.—*Percifull v. Coleman (Ky.) 29.*

Where defendant held actual possession of a part of certain land, claiming title to a larger tract specified in its conveyance, a deed by plaintiff during such possession was champertous.

tous as to the entire tract.—*Green v. Cumberland Coal & Coke Co. (Tenn.)* 459.

A conveyance of lands held adversely may be disregarded by the vendor, in ejectment to recover the land from a third party, without pleading the invalidity of such conveyance.—*Green v. Cumberland Coal & Coke Co. (Tenn.)* 459.

A sale of lands held under a perfect title, but in adverse possession of another, *held* champertous, within Shannon's Code, §§ 3171, 3172, without regard to the length of such possession.—*Green v. Cumberland Coal & Coke Co. (Tenn.)* 459.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 8.

CHARACTER.

Evidence as to, in criminal prosecutions, see "Homicide," § 5.

Of accused in criminal prosecutions, see "Criminal Law," § 8.

Of witness, see "Witnesses," § 4.

CHARGE.

By carrier, see "Carriers," § 2.

To jury in civil actions, see "Trial," § 5.

To jury in criminal prosecutions, see "Criminal Law," § 22.

CHARTER.

Of municipal corporations, see "Municipal Corporations," § 1.

CHATTEL MORTGAGES.

Parol or extrinsic evidence, see "Evidence," § 8.

§ 1. Requisites and validity.

A chattel mortgage, otherwise properly executed, is not insufficient, by reason of the absence of a scroll or seal.—*Burkamp v. Healey (Ky.)* 759.

§ 2. Rights and remedies of creditors.

Where a chattel mortgage was given to secure a present debt, a subsequent oral agreement that it should cover future advances *held* void as to creditors of the mortgagor.—*F. Groos & Co. v. First Nat. Bank (Tex. Civ. App.)* 402.

A chattel mortgage on a tenant's property *held* not filed "forthwith," as required by Rev. St. art. 3328, and therefore subsequent to a landlord's lien provided for by article 3251.—*Austin v. Welch (Tex. Civ. App.)* 881.

§ 3. Foreclosure.

A chattel mortgagee *held* to have waived his right to take possession and sell as provided therein.—*F. Groos & Co. v. First Nat. Bank (Tex. Civ. App.)* 402.

In an action on a note and to foreclose a chattel mortgage in which L. was joined merely as a joint possessor of the property mortgaged, a judgment against him for the debt or value of the property was error.—*McLain v. McCollum & Frazier (Tex. Civ. App.)* 1027.

CHEAT.

See "Fraud."

CHILD.

See "Guardian and Ward"; "Infants."

CHOSE IN ACTION.

Assignment, see "Assignments."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes,"

CIVIL RIGHTS.

See "Constitutional Law," § 1.

The overruling of a motion by a negro, to quash an indictment against him on the ground of discrimination, because there were no negroes on jury, *held* not error.—*Martin v. State (Tex. Cr. App.)* 886.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against county, see "Counties," § 3.

Against estate of decedent, see "Executors and Administrators," § 4.

To property levied on, see "Execution," § 2.

CLERKS OF COURTS.

County court clerk, selling forged warrant at a discount, *held* not to be acting in his official capacity, so as to render his bondsmen liable to purchaser.—*State ex rel. Livesay v. Harrison (Mo. App.)* 469.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 8.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 7.

COLLATERAL INHERITANCE TAXES.

See "Taxation," § 8.

COLLATERAL UNDERTAKING.

See "Guaranty."

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSION.

To take testimony, see "Depositions."

COMMISSIONS.

Of broker, see "Brokers," § 1.

COMMITMENT.

On charge of crime, see "Criminal Law," § 5.

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.
For services, see "Master and Servant," § 2.
Of attorney, see "Attorney and Client," § 3.
Of broker, see "Brokers," § 1.
Of county attorney, see "District and Prosecuting Attorneys."
Of county officers, see "Counties," § 1.
Of guardian ad litem, see "Infants," § 1.

COMPETENCY.

Of evidence in criminal prosecutions, see "Criminal Law," § 9.
Of experts as witnesses, see "Evidence," § 9.
Of jurors, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In criminal prosecution, see "Criminal Law," § 5; "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPOUND INTEREST.

See "Usury," § 1.

COMPROMISE AND SETTLEMENT

See "Payment"; "Release."

That a compromise agreement between an insolvent corporation and one of its creditors contemplated the giving of the individual notes of two of the corporate stockholders for a part of the indebtedness held no objection to its validity.—*W. F. Taylor Co. v. Baines Grocery Co.* (Tex. Civ. App.) 260.

In an action of debt against a corporation, an agreement of compromise, not entirely executed, held a complete defense.—*W. F. Taylor Co. v. Baines Grocery Co.* (Tex. Civ. App.) 260.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCLUSION.

Of witness, see "Evidence," § 9.

72 S.W.—78

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 3.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 7.

CONDITIONS.

In contracts, see "Contracts," § 2.
In insurance policies, see "Insurance," §§ 5, 6.
Precedent to suit to set aside fraudulent conveyance, see "Fraudulent Conveyances," § 3.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 14.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONFIRMATION.

Of tax sale, see "Taxation," § 5.

CONFLICT OF LAWS.

Judicial notice of laws of other states, see "Evidence," § 1.
What law governs actions against employers for personal injuries, see "Master and Servant," § 3.
What law governs actions for causing death, see "Death," § 1.
What law governs contracts for sale of goods, see "Sales," § 1.

CONNECTING CARRIERS.

See "Carriers," § 2.

CONSIDERATION.

Of contract, see "Contracts," § 1.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.
Parol or extrinsic evidence, see "Evidence," § 8.

CONSOLIDATION.

Of actions, see "Action," § 1.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
Evidence of acts and declarations of conspirators, see "Criminal Law," § 11.

§ 1. **Criminal responsibility.**

On a prosecution, under Ky. St. § 1241a, subd. 1, for confederating to injure, though by subsection 10 one by testifying to the crime is relieved from liability therefor, another may be convicted on proof that he and the one testifying conspired together.—*Weber v. Commonwealth* (Ky.) 30.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Protection of civil rights, see "Civil Rights."

Provisions relating to particular subjects.

See "Highways," § 1; "Judges," § 2; "Jury," § 1; "Monopolies," § 1; "Municipal Corporations," § 2; "Taxation," § 2.

Enactment and validity of statutes, see "Statutes," § 1.

Special or local laws, see "Statutes," § 2.

Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Personal, civil, and political rights.

A city ordinance providing that one in possession of premises on which liquor is sold or furnished in violation of law shall be fined *held* in violation of Bill of Rights, § 2, as an arbitrary exercise of power over the liberty and property of citizens.—*City of Campbellsburg v. Odewalt* (Ky.) 314.

§ 2. Vested rights.

Acts 1895, taking away husband's right to alienate homestead, *held* not defensible as merely affecting wife's remedy to preserve homestead.—*Gladney v. Sydnor* (Mo. Sup.) 554.

The statute permitting an occupant of land, who has been ejected, to recover for improvements made in good faith, *held* not in violation of Const. art. 2, § 20.—*Tice v. Fleming* (Mo. Sup.) 689.

§ 3. Retrospective and ex post facto laws.

Act 1895, taking away husband's right to alienate homestead, subject to Rev. St. 1889, § 5435, *held* to violate Const. art. 2, § 15, protecting vested rights.—*Gladney v. Sydnor* (Mo. Sup.) 554.

CONSULS.

See "Ambassadors and Consuls."

CONTEMPT.

By administrator, see "Executors and Administrators," § 1.

Violation of injunction, see "Injunction," § 2.

CONTEST.

Of election, see "Elections," § 3.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 16.

Where plaintiff alleged that his injuries resulted from the negligence of P., and proved that any negligence was that of D., defendant was entitled to a continuance on the ground of surprise.—*Choctaw, O. & G. R. Co. v. Doravan* (Ark.) 48.

In an action by a servant for injuries, refusal of a continuance for an absent witness *held* error.—*Langdon-Creasy Co. v. Rouse* (Ky.) 1113.

To defeat a continuance for absent witnesses, the party must admit the truth of the facts which it is claimed they would testify to.—*Louisville & N. R. Co. v. Voss* (Tenn.) 983.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Damages for breach, see "Damages," § 2.

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of gaming laws, see "Gaming," § 1.

Operation, and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 8.

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Carriers," § 2; "Husband and Wife," §§ 2, 3; "Master and Servant"; "Municipal Corporations," § 6.

Guardians, see "Guardian and Ward," § 2.

Life tenants, see "Life Estates."

Contracts relating to particular subjects.

See "Logs and Logging"; "Mines and Minerals," § 1.

Carriage of live stock, see "Carriers," § 3.

Labor of convicts, see "Convicts."

Making bequest or devise, see "Wills," § 2.

Traffic contracts between railroads, see "Railroads," § 5.

Transportation of goods, see "Carriers," § 2.

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Guaranty"; "Indemnity"; "Insurance"; "Liens"; "Partnership"; "Rewards"; "Sales"; "Subscriptions."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 2.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Mutual benefit insurance, see "Insurance," § 19.

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

Particular modes of discharging contracts.

See "Compromise and Settlement"; "Payment"; "Release."

§ 1. Requisites and validity.

Compliance with an agreement between the commonwealth's attorney and a railroad's attorney to compromise 14 indictments returned *held* within the discretion of the trial court.—*Spalding v. Hill* (Ky.) 307.

A contract by an administrator to pay his surety on a new bond one-half of his commissions *held* not invalid as a trafficking in the appointment of the administrator.—*May v. Moore* (Mo. App.) 476.

Voluntary payment by plaintiff of a judgment recovered against defendant by a third party would constitute a sufficient consideration for a subsequent promise by defendant to repay the amount paid.—*Wright v. Farmers' Nat. Bank* (Tex. Civ. App.) 103.

Evidence in an action for conversion of goods *held* to justify a finding that plaintiff's intestate was not of unsound mind when he ratified a sale of the goods to defendant.—*Denny v. Stokes* (Tex. Civ. App.) 209.

§ 2. Construction and operation.

A contract for the sale of a doctor's practice and the relinquishment of his office *held* simply to require a vacation of the office.—*Wallingford v. Aitkins* (Ky.) 794.

Promise by defendant to pay money "as soon as he could" was conditional, and could not be enforced without proof of subsequent ability.—*Wright v. Farmers' Nat. Bank* (Tex. Civ. App.) 103.

§ 3. Modification and merger.

A valid contract made in substitution of a former one annuls the obligations of the former.—*Howard v. Scott* (Mo. App.) 709.

§ 4. Performance or breach.

In an action for breach of a contract, an instruction that a letter amounted to a renunciation, justifying suit for breach of the contract, *held* proper.—*Wallingford v. Aitkins* (Ky.) 794.

Plaintiff cannot recover on a contract by proving a part performance, without an allegation seeking to recover on a quantum meruit.—*Felton v. Tally* (Tex. Civ. App.) 614.

§ 5. Actions for breach.

In an action for the breach of a contract for failure to renew loans, and thereby causing a forced sale of plaintiff's property at a loss, *held* that, though defendant had the right to terminate the contract after the expiration of a reasonable time, the question whether a reasonable time had elapsed between the making of the contract and the forced sale was for the jury.—*E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co.* (Ky.) 20.

In an action for the breach of a contract for failure to renew loans, and thereby causing a forced sale of plaintiff's property at a loss, an instruction as to defendant giving plaintiff reasonable notice that the loan would not be renewed *held* inapplicable.—*E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co.* (Ky.) 20.

Petition in an action for damages from a breach of agreement as county judge to withhold an amount due from the county to plaintiff's debtor sufficient to satisfy plaintiff's claim *held* not to state a cause of action.—*Huffman v. Ahl* (Ky.) 843.

CONTRIBUTION.

Promises to contribute, see "Subscriptions."

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Conveyances by or to particular classes of parties.

See "Corporations," § 3; "Husband and Wife," § 2.

Married women, see "Husband and Wife," § 3.

Conveyances of particular species of property.

See "Homestead," § 2.

Mortgaged property, see "Mortgages," § 2.

Separate property of married women, see "Husband and Wife," § 3.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CONVICTS.

Where a convict bond is given, and a prisoner released from custody by virtue thereof, he may nevertheless be returned to custody by agreement between the hirer and the judge.—*Ex parte Miller* (Tex. Cr. App.) 183.

Convict hired out to railroad company *held* entitled to recover for negligent injury.—*San Antonio & A. P. Ry. Co. v. Gonzales* (Tex. Civ. App.) 213.

Fact that convict was working for state *held* not to preclude recovery for negligent injury by railroad company.—*San Antonio & A. P. Ry. Co. v. Gonzales* (Tex. Civ. App.) 213.

Disobedience of state officer *held* not to prevent recovery by convict for negligent injury by railroad company to which he was hired.—*San Antonio & A. P. Ry. Co. v. Gonzales* (Tex. Civ. App.) 213.

CORPORATIONS.

Quo warranto, see "Quo Warranto."

Taxation of corporations and corporate property, see "Taxation," § 4.

Particular classes of corporations.

See "Banks and Banking," § 1; "Beneficial Associations"; "Building and Loan Associations"; "Municipal Corporations."

Insurance companies, see "Insurance," § 18. Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.

§ 1. Capital, stock, and dividends.

A note secured by paid-up policy is the equivalent of money, within Ky. St. § 568.—*Clarke v. Lexington Stove Works* (Ky.) 286.

Under Ky. St. 1890, § 545, a transaction whereby the vendors of corporate stock held the same until it was paid for, the transfer on the books to be then made, was not a complete sale.—*Albany Mill Co. v. Huff Bros.* (Ky.) 820.

Subscription for shares of stock in a corporation may be made by parol.—*Somerset Nat. Banking Co.'s Receiver v. Adams* (Ky.) 1125.

§ 2. Members and stockholders.

In an action by minority stockholders of a corporation owning a bridge, against certain railroads using the bridge, to recover capital stock of the bridge company, alleged to have been wrongfully appropriated by the railroad companies, the evidence *held* to show no misappropriation.—*Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 822.

Minority stockholders of a corporation *held* entitled to sue on behalf of the corporation to enforce a contract.—*Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 822.

Right of minority stockholders to sue on behalf of the corporation to enforce a contract with another corporation having the same officers *held* to entitle them to join a third corporation, which was also a party to the contract.—*Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 822.

In a suit by a judgment creditor of a corporation to reach a stockholder's unpaid stock subscription, burden *held* to be on defendant to show the validity of certain notes claimed by him as an offset.—*Shields v. Hobart* (Mo. Sup.) 669.

Under Rev. St. 1889, § 2773, notes of a corporation, paid by a stockholder as indorser, *held* invalid, so that the indorser was not entitled to set off the amount of the notes against his unpaid stock subscriptions.—*Shields v. Hobart* (Mo. Sup.) 669.

In an equitable suit by a judgment creditor of a corporation against a stockholder, to subject the stockholder's liability for an unpaid balance on his stock to the satisfaction of plaintiff's claim, the stockholder may set off a demand which he has against the corporation.—*Shields v. Hobart* (Mo. Sup.) 669.

A holder of corporate stock is liable to creditors of the corporation for any unpaid portion of his stock subscription.—*Shields v. Hobart* (Mo. Sup.) 669.

In a suit in equity by a creditor of a corporation to enforce a stockholder's liability for unpaid stock subscriptions, it is not necessary to show fraud.—*Shields v. Hobart* (Mo. Sup.) 669.

§ 3. Corporate powers and liabilities.

A stockholder, under certain facts, *held* entitled to a credit on his stock subscription.—*Clarke v. Lexington Stove Works* (Ky.) 286.

On the issue as to the duties of a third party as general manager of the plaintiff corporation, certain parol testimony *held* improperly rejected.—*Clarke v. Lexington Stove Works* (Ky.) 286.

On the issue whether third party, in taking defendant's note, secured by paid-up policy, and agreeing to raise money thereon, was acting as plaintiff's agent, the evidence *held* to make a case for the jury.—*Clarke v. Lexington Stove Works (Ky.)* 286.

President of land company *held* to have authority to release railroad company from contract to supply water to town.—*Louisville & N. R. Co. v. Dickey (Ky.)* 332.

Attempted service on railroad corporation *held* not sufficient, under Civ. Code Prac. § 51, subsecs. 3, 4.—*Louisville & N. R. Co. v. S. D. Chestnut & Bro. (Ky.)* 351.

Where a chattel mortgage is executed by the president and secretary of a corporation, such officers' authority will be presumed.—*Burkamp v. Healey (Ky.)* 759.

Corporation *held* liable for debts contracted by one to whom the property had been turned over.—*Albany Mill Co. v. Huff Bros. (Ky.)* 820.

Where a railroad company acquired the property and franchises of another company, a conveyance of land to the latter company vested the title therein in the former company.—*Smith v. Frankfort & C. Ry. Co. (Ky.)* 1088.

An agreement for the compromise of a claim against a corporation, made on behalf of the corporation by two of its stockholders, *held* binding upon both parties.—*W. F. Taylor Co. v. Baines Grocery Co. (Tex. Civ. App.)* 260.

Under Rev. St. 1895, art. 1194, § 23, the president of a corporation *held* its "representative," so that suits against it could be brought against it in the county where he lived.—*Sharp v. Damon Mound Oil Co. (Tex. Civ. App.)* 1042.

Representative capacity of president of corporation, as fixing venue of suits, *held* not affected by fact that he performed very few official acts.—*Sharp v. Damon Mound Oil Co. (Tex. Civ. App.)* 1043.

Representative capacity of president of corporation, as fixing venue of suits, *held* not affected by private understanding that the other officers were to do all the work.—*Sharp v. Damon Mound Oil Co. (Tex. Civ. App.)* 1043.

§ 4. Insolvency and receivers.

Though a going corporation may prefer one creditor to another, a corporation whose assets are insufficient to pay its debts cannot pay its debts to its own officers as against existing creditors.—*Shields v. Hobart (Mo. Sup.)* 669.

§ 5. Foreign corporations.

A foreign corporation, organized to obtain the benefit of less rigorous laws than those of Kentucky, *held* nevertheless entitled to sue in Kentucky.—*Cumberland Telephone & Telegraph Co. v. Louisville Home Tel. Co. (Ky.)* 4.

A foreign corporation may sue on a note given for machinery sold, where the transaction was one of interstate commerce, without having a permit to do business in the state.—*Lane & Bodley Co. v. City Electric Light & Waterworks Co. (Tex. Civ. App.)* 425.

CORRECTION.

Of assessment of taxes, see "Taxation," § 4.
Of record on appeal or writ of error, see "Appeal and Error," § 11.

COSTS.

In particular actions or proceedings.

By or against executors or administrators, see "Executors and Administrators," § 6.
Condemnation proceedings, see "Eminent Domain," § 2.

For accounting between partners, see "Partnership," § 5.

For accounting by assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

CO-TENANCY.

See "Tenancy in Common."

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

County attorney, see "District and Prosecuting Attorneys."

§ 1. Government and officers.

Gen. St. c. 28, art. 17, providing for enforcing the attendance of the justices of the peace, by attachment, on sessions of the court of claims, of which they are members, has no application to the fiscal court.—*Stephens v. Wilson (Ky.)* 336.

A county health officer cannot recover from the county for medicines and services furnished during an epidemic to persons able to pay therefor.—*Hudgins v. Carter County (Ky.)* 730.

Under Rev. St. 1899, c. 149, §§ 9130, 9131, 9133, 9135, 9136, county clerk *held* not entitled to fees for clerical services performed as member of board of equalization.—*State ex rel. Linn County v. Adams (Mo. Sup.)* 655.

Sureties on bond of county clerk *held* liable for certain moneys received by him and not accounted for.—*State ex rel. Linn County v. Adams (Mo. Sup.)* 655.

§ 2. Fiscal management, public debt, securities, and taxation.

Assignee under county court clerk's assignment of forged warrant, not in statutory form, *held* not to acquire rights enabling him to sue clerk's bondsmen.—*State ex rel. Livesay v. Harrison (Mo. App.)* 469.

§ 3. Claims against county.

After presentation of a claim to, and its partial disallowance by, the county fiscal court, the claimant may bring his action, and is not confined to an appeal from the court's judgment.—*Hudgins v. Carter County (Ky.)* 730.

§ 4. Actions.

A claimant suing on a claim presented to and disallowed by the county fiscal court cannot recover a greater amount than that claimed before that court.—*Hudgins v. Carter County (Ky.)* 730.

COUNTY BOARD.

See "Counties," § 1.

COURTS.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Judicial notice of terms of court, see "Evidence," § 1.

Justices' courts, see "Justices of the Peace."
Mandamus to inferior courts, see "Mandamus," § 2.

Province of court and jury, see "Trial," § 5.
Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Trial by court without jury, see "Trial," § 7.

Jurisdiction of particular actions, proceedings, or subjects.

By or against trustees in bankruptcy, see "Bankruptcy," § 1.

Disputed claims against decedents' estates, see "Executors and Administrators," § 4.

§ 1. Nature, extent, and exercise of jurisdiction in general.

Where a stranger to an action files a motion to intervene which is subsequently withdrawn on leave of court, he has not submitted to the jurisdiction of the court so as to be barred from pleading personal privilege.—*Sites v. Lane* (Tex. Civ. App.) 873.

Where defendant moved to quash a writ of sequestration, he thereby submitted himself to the jurisdiction of the court.—*McLain v. McCollum & Frazier* (Tex. Civ. App.) 1027.

§ 2. Courts of appellate jurisdiction.

An action to set aside deeds to real estate as fraudulent as to the grantor's creditors held an action involving title to real estate, of which the Supreme Court has appellate jurisdiction.—*Balz v. Nelson* (Mo. Sup.) 527.

The question of the power of a national bank to guaranty a draft on its customer is a federal question, and hence an appeal involving that question is properly transferred to the supreme court.—*First Nat. Bank v. American Nat. Bank* (Mo. Sup.) 1059.

The supreme court has no jurisdiction of a direct appeal to determine an issue as to when an act of the legislature took effect, the validity of the act not being questioned.—*Hilgert v. Barber Asphalt Pav. Co.* (Mo. Sup.) 1070.

No constitutional question held to have been raised so as to give supreme court jurisdiction of an appeal direct from the circuit court.—*Hilgert v. Barber Asphalt Pav. Co.* (Mo. Sup.) 1070.

Court of Appeals held to have jurisdiction of appeal from judgment in action for investment of title to certain land in plaintiff.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

§ 3. Concurrent and conflicting jurisdiction, and comity.

Act April 19, 1895, relative to transfer of causes from one court of civil appeals to another, held authorized by Const. art. 5, § 6, as amended.—*Bond v. Carter* (Tex. Sup.) 1059.

COVENANTS.

In insurance policies, see "Insurance," § 6.

COVERTURE.

See "Husband and Wife."

CRAPS.

See "Gaming," § 3.

CREDIBILITY.

Of witness, see "Witnesses," §§ 3-6.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Remedies against surety, see "Principal and Surety," § 3.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 2.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 3.

CRIMINAL LAW.

Bail, see "Bail," § 1.

Conviction of offense included in that charged, see "Indictment and Information," § 5.

Couverts, see "Convicts."

Indictment, information, or complaint, see "Indictment and Information."

Prisons, see "Prisons."

Prosecuting officers, see "District and Prosecuting Attorneys."

Particular offenses.

See "Affray"; "Assault and Battery," § 1; "Bribery"; "Conspiracy," § 1; "Escape"; "Forgery"; "Gaming," § 3; "Homicide"; "Larceny"; "Libel and Slander," § 4; "Malicious Mischief"; "Obstructing Justice"; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Trespass," § 2.

Attempt to kill by poison, see "Poisons."

Offenses relating to weapons, see "Weapons."

Pursuing occupation without license, see "Licenses," § 1.

Removal of dead body, see "Dead Bodies."

Violation of liquor laws, see "Intoxicating Liquors," §§ 2-8.

§ 1. Capacity to commit and responsibility for crime.

Voluntary drunkenness, or temporary insanity caused by getting drunk, is no excuse for the commission of homicide.—*Wright v. Commonwealth* (Ky.) 340.

§ 2. Parties to offenses.

One who keeps watch while another burglarizes a house is an accomplice.—*Winfield v. State* (Tex. Cr. App.) 182.

Under the direct provisions of Pen. Code, art. 407, the fact that a person purchased liquor from one selling in violation of the law does not constitute him an accomplice.—*Walker v. State* (Tex. Cr. App.) 401.

Defendant held guilty of the larceny of certain mules as a principal, without regard to whether he advised or encouraged the taking at the time.—*Bynum v. State* (Tex. Cr. App.) 844.

That prosecutrix agreed with defendant not to disclose a rape held not to make her an accomplice.—*Miller v. State* (Tex. Cr. App.) 996.

§ 3. Venue.

Under Ky. St. § 1110, change of venue in prosecution for manslaughter held to have been properly denied.—*Bohannon v. Commonwealth* (Ky.) 322.

§ 4. Former jeopardy.

In a prosecution for gaming, evidence held to show two separate offenses, and not the same transaction within contemplation of the law of jeopardy.—*Miller v. State* (Tex. Cr. App.) 856.

§ 5. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], 29 Stat. 184 [U. S. Comp. St. 1901, p. 499] and Act Cong. May 2, 1890, § 41, held, that a United States commissioner appointed for a district in a state may issue a warrant for the arrest of a person in such district for an offense committed in the Indian Territory against the laws of the United States for trial before a United States court for a district of such territory.—*Douglass v. Stahl* (Ark.) 568.

The warrant for arrest, issued by a United States commissioner, held not void, so as to make the marshal serving it liable for false imprisonment because of the clerical error in the designation after his signature, "commissioner of the circuit court of the United States,"

which office had been abolished.—*Douglass v. Stahl* (Ark.) 568.

Examining court *held* justified in holding defendant on charge of bribery to answer action of grand jury.—*Ex parte Richards* (Tex. Cr. App.) 838.

§ 6. Arraignment and pleas, and nolle prosequi or discontinuance.

Code Cr. Proc. art. 567, providing that defendant shall be allowed two entire days, exclusive of all fractions of a day, after his arrest, to file written pleadings, is mandatory.—*McFadin v. State* (Tex. Cr. App.) 172.

§ 7. Evidence—Facts in issue and relevant to issues, and res gestæ.

Evidence of the reputed insanity of an ancestor of accused *held* not competent.—*Wright v. Commonwealth* (Ky.) 340.

Evidence of defendant's business habits *held* to be proper rebuttal in a criminal prosecution.—*Wright v. Commonwealth* (Ky.) 340.

On the issue whether one selling liquor to a minor knew he was a minor, certain testimony *held* part of the res gestæ.—*Gray v. State* (Tex. Cr. App.) 169.

Statements of prosecutrix, in assault with intent to rape, *held* res gestæ.—*Berry v. State* (Tex. Cr. App.) 170.

Evidence of a previous altercation *held* admissible as part of the res gestæ, in a prosecution for assault with intent to murder.—*Thomas v. State* (Tex. Cr. App.) 178.

Evidence of absent witness *held* material in prosecution for theft, justifying continuance.—*Martin v. State* (Tex. Cr. App.) 386.

To show venue of a prosecution for rape, prosecutrix may testify that she showed her father the place, and he may testify that it is in a certain county.—*Knowles v. State* (Tex. Cr. App.) 398.

§ 8. — Other offenses, and character of accused.

In a prosecution for homicide a witness to defendant's reputation for peaceableness *held* properly cross-examined as to particular acts tending to show that defendant was not a peaceable citizen.—*State v. Parker* (Mo. Sup.) 650.

In a prosecution for homicide, a question asked a witness to defendant's reputation *held* objectionable, in so far as it stated certain particulars of the act inquired about.—*State v. Parker* (Mo. Sup.) 650.

In a prosecution for rape, it was competent to show that defendant had made previous attempts to commit the crime.—*State v. Scott* (Mo. Sup.) 897.

On the issue whether one selling liquor to a minor knew he was under age, testimony that two other minors drank with him was relevant.—*Gray v. State* (Tex. Cr. App.) 169.

Evidence, in prosecution for rape, of subsequent assaults on prosecutrix, *held* erroneously admitted.—*Ball v. State* (Tex. Cr. App.) 384.

In a prosecution for violating the local option law, evidence of sales other than those alleged *held* inadmissible.—*Walker v. State* (Tex. Cr. App.) 401.

Evidence of other illegal sales than the one charged *held* not admissible in a prosecution for violation of the local option law, unless part of the res gestæ.—*Walker v. State* (Tex. Cr. App.) 861.

§ 9. — Materiality and competency in general.

Where it was in evidence that a certain person had said, after the killing, that he did not know who did it, evidence that a witness had heard this same person say that it was done by

defendant was admissible in rebuttal.—*Cecil v. State* (Tex. Cr. App.) 197.

§ 10. — Admissions, declarations, and hearsay.

In a prosecution for murder, evidence that deceased stated, after he was shot, that defendant was not to blame, *held* inadmissible as hearsay.—*State v. Terry* (Mo. Sup.) 513.

Petition for divorce, executed and sworn to by defendant, though not filed or published, *held* admissible as his declaration, on a prosecution for bigamy.—*Crow v. State* (Tex. Cr. App.) 392.

A letter from defendant to his first wife is admissible, on a prosecution for bigamy, though written several years before his second marriage.—*Crow v. State* (Tex. Cr. App.) 392.

Testimony of defendant, on trial for violation of the local option law, *held* not an admission that local option was legally in effect in the county.—*Lively v. State* (Tex. Cr. App.) 393.

Testimony that prosecutrix told her age to defendant's brother, and that he told this to defendant, *held* hearsay.—*Knowles v. State* (Tex. Cr. App.) 398.

In a prosecution for violation of the liquor law, evidence that a person, employed to secure evidence against violators of the law, had turned over to witness some whisky, which he had purchased, was improperly admitted.—*Walker v. State* (Tex. Cr. App.) 401.

In a trial for rape, certain evidence as to reports circulated in regard to criminal intimacy between prosecutrix and the defendant *held* inadmissible as hearsay.—*Lee v. State* (Tex. Cr. App.) 1006.

In a trial for rape, testimony of a witness as to statements made by another *held* inadmissible as hearsay.—*Lee v. State* (Tex. Cr. App.) 1006.

§ 11. — Acts and declarations of conspirators and co-defendants.

On prosecution for murder, evidence as to declarations made by others charged with the same crime, on the occasion of a difficulty between them and deceased, *held* erroneously admitted.—*Mosley v. Commonwealth* (Ky.) 344.

Statements of a member of a crowd, in which person killed was, *held* inadmissible, as statements of a co-conspirator, in a prosecution for the murder.—*State v. Schaeffer* (Mo. Sup.) 518.

§ 12. — Documentary evidence and exclusion of parol evidence thereby.

It is not error to refuse the admission in a criminal trial of a family tree of defendant, with statements in red ink of what members had been insane, unless such statements are omitted.—*Wright v. Commonwealth* (Ky.) 340.

In a prosecution for homicide, an original indictment, found against defendant shortly after the killing, which was subsequently dismissed, was inadmissible.—*Cecil v. State* (Tex. Cr. App.) 197.

Stub book, from which retail liquor licenses were issued, *held* inadmissible in prosecution for selling liquor on Sunday.—*Earl v. State* (Tex. Cr. App.) 376.

Evidence in prosecution for selling liquor on Sunday, produced to show ownership of saloon, *held* inadmissible.—*Earl v. State* (Tex. Cr. App.) 376.

§ 13. — Opinion evidence.

Expert testimony *held* not competent as to the comparative effect of excessive use of liquors on minds tainted with hereditary insanity, and those not so tainted.—*Wright v. Commonwealth* (Ky.) 340.

Witnesses who are acquainted with a person accused of a crime are competent to give their opinion as to his mental condition.—*Wright v. Commonwealth* (Ky.) 340.

It is not error to exclude the testimony of a former teacher of a person charged with murder as to the cause of defendant's violent conduct in school described by him.—*Wright v. Commonwealth* (Ky.) 340.

It is not error to exclude the testimony of a nonexpert as to the cause of difficulties between the accused and deceased, detailed by him.—*Wright v. Commonwealth* (Ky.) 340.

In a prosecution for murder, certain statements of deceased *held* inadmissible as being merely conclusions.—*State v. Terry* (Mo. Sup.) 513.

In a prosecution for selling liquor to a minor, it was not error to allow witnesses for the state to give their opinions as to the age of the prosecutor, judging from his appearance.—*Earl v. State* (Tex. Cr. App.) 175.

In a prosecution for assault with intent to murder, a witness' opinion as to who fired the shot was inadmissible.—*Terry v. State* (Tex. Cr. App.) 382.

Testimony of one not an expert that certain liquor was alcohol *held* admissible.—*Sebastian v. State* (Tex. Cr. App.) 849.

§ 14. — Confessions.

Confession of murder, procured by artifice of officer who arrested defendant, *held* admissible.—*State v. Wilson* (Mo. Sup.) 696.

Confession may be looked to with the other evidence in determining whether the corpus delicti is established.—*Gray v. State* (Tex. Cr. App.) 858.

State *held* not required to show that defendant's confession was made in view of and in connection with the previous warning.—*Gray v. State* (Tex. Cr. App.) 858.

§ 15. — Weight and sufficiency.

Insanity as a defense to a criminal charge must be proven to the "satisfaction" of the jury.—*Wright v. Commonwealth* (Ky.) 340.

On criminal prosecution, a charge on reasonable doubt *held* sufficient.—*Winfield v. State* (Tex. Cr. App.) 182.

Evidence in a criminal case *held* insufficient to prove the venue.—*Guiles v. State* (Tex. Cr. App.) 187.

§ 16. Time of trial and continuance.

Want of diligence *held* to warrant refusal of continuance of criminal prosecution to obtain absent witness.—*Berry v. State* (Tex. Cr. App.) 170.

Refusal of new trial of prosecution for rape, asked on account of refusal of continuance to secure absent witness, *held* error.—*Ball v. State* (Tex. Cr. App.) 384.

On motion for continuance for sickness of witness, proof of the service of process on her on the day of or the day before the trial shows sufficient diligence.—*Martin v. State* (Tex. Cr. App.) 386.

Defendant, on trial for bigamy, *held* not entitled to continuance for absence of a witness who would testify that, before his second marriage, he received a letter saying his first wife was dead.—*Crow v. State* (Tex. Cr. App.) 392.

Refusal of a second continuance for cumulative testimony *held* not error.—*Knowles v. State* (Tex. Cr. App.) 398.

Denial of continuance of murder prosecution, on the ground of detention of defendant's witness in jail, under charges as an accessory, *held* not error.—*Moore v. State* (Tex. Cr. App.) 595.

Tender of a witness, with privilege of private examination, *held* to be a sufficient answer to a motion for continuance of a murder prosecution, based on the detention of the wit-

ness in jail.—*Moore v. State* (Tex. Cr. App.) 595.

Continuance for absent witnesses *held* to have been properly refused.—*Hays v. State* (Tex. Cr. App.) 598.

Motion for continuance for want of testimony of witness *held* properly overruled.—*Wilson v. State* (Tex. Cr. App.) 862.

A denial of a continuance for want of certain testimony *held* proper.—*Dodd v. State* (Tex. Cr. App.) 1015.

§ 17. Trial—Preliminary proceedings.

Under Rev. St. 1899, §§ 2477, 2483, 2515, *held*, that the name of the prosecuting witness must be indorsed on an information for assault and battery; it being sworn to by the prosecuting attorney on information and belief only.—*State v. Jacobs* (Mo. App.) 482.

It is too late after verdict to complain that the statute giving accused the right to a two-day service of a copy of the indictment before trial has not been complied with.—*Burrows v. State* (Tex. Cr. App.) 848.

§ 18. — Course and conduct of trial in general.

The court's announcement from the bench in ruling on an objection to evidence, that the question was with respect to an immaterial matter, *held* not error.—*State v. May* (Mo. Sup.) 918.

Remark of court as to immateriality of evidence of defendant's good reputation, it being admitted, *held* not prejudicial.—*Wilson v. State* (Tex. Cr. App.) 862.

§ 19. — Reception of evidence.

On prosecution for murder, certain evidence *held* erroneously admitted in rebuttal.—*Mosley v. Commonwealth* (Ky.) 344.

It was not error for the prosecuting attorney to ask the jury why accused did not produce his son as a witness on a second trial.—*State v. Parker* (Mo. Sup.) 650.

Exclusion of witness' answer cannot be held error, it not being shown what it would have been.—*Knowles v. State* (Tex. Cr. App.) 398.

On a prosecution for theft, *held* error to refuse to allow defendant to be recalled after the county attorney had begun his argument.—*Lewandowski v. State* (Tex. Cr. App.) 594.

Exclusion of evidence of good reputation of defendant *held* proper; it being admitted.—*Wilson v. State* (Tex. Cr. App.) 862.

§ 20. — Arguments and conduct of counsel.

Under Code Cr. Proc. 1895, art. 705, that defendant's counsel was sick and declined to make an argument did not deprive the state of its right to two addresses.—*Wilson v. State* (Tex. Cr. App.) 862.

§ 21. — Province of court and jury in general.

Where the evidence conclusively shows that a certain witness is an accomplice, an instruction that such witness is an accomplice is not erroneous, as on the weight of the evidence.—*Winfield v. State* (Tex. Cr. App.) 182.

For the court to orally tell the jury, "You must not arrive at your verdict by lot or chance, but only by considering the evidence," is but an admonition, and not prejudicial.—*Lankster v. State* (Tex. Cr. App.) 388.

A requested charge that, while prosecutrix in a rape case need not be corroborated, still the jury should carefully consider her testimony, is on the weight of evidence.—*Knowles v. State* (Tex. Cr. App.) 398.

A charge that the jury cannot convict on the testimony of the accomplice unless corroborat-

ed *held* to be on the weight of testimony.—*Jones v. State* (Tex. Cr. App.) 845.

A charge that alcohol is an intoxicant is not on the weight of evidence.—*Sebastian v. State* (Tex. Cr. App.) 849.

§ 22. — Necessity, requisites, and sufficiency of instructions.

Where, on prosecution for murder, state sought to impeach its own witness, under Civ. Code Prac. § 596, and answers of witness might have been construed as an admission that he had made contradictory statements, *held* error not to instruct that such admission only affected his credibility.—*Mosley v. Commonwealth* (Ky.) 344.

A requested instruction that if the jury entertained a "doubt" as to the degree of the murder they should convict of murder in the second degree was properly refused.—*State v. May* (Mo. Sup.) 918.

An instruction on drunkenness as a defense to homicide *held* not prejudicial, though there was no evidence to support it.—*State v. May* (Mo. Sup.) 918.

Where the evidence shows that one was an accomplice, and the court tells the jury that he was such, it is not necessary to give a charge defining the law of accomplice.—*Winfield v. State* (Tex. Cr. App.) 182.

A charge on alibi *held* sufficient.—*Winfield v. State* (Tex. Cr. App.) 182.

Evidence *held* not to warrant a charge on aggravated assault.—*Turner v. State* (Tex. Cr. App.) 187.

Instruction, in prosecution for theft, as to identity of guilty person, *held* not objectionable, as permitting finding of identity from sources other than evidence.—*Ellison v. State* (Tex. Cr. App.) 188.

An instruction that, if one inflicting an injury fails to call aid necessary to preserve life, he is as guilty as if the injury inevitably produced death, *held* proper.—*Lee v. State* (Tex. Cr. App.) 195.

On a prosecution for murder, an instruction that, if deceased died from neglect at hands of defendant after the injury, defendant was guilty, *held* not warranted by the evidence.—*Lee v. State* (Tex. Cr. App.) 195.

On a prosecution for murder, an instruction *held* not erroneous because the indictment did not allege the weapon a deadly one.—*Lee v. State* (Tex. Cr. App.) 195.

On a prosecution for murder, an instruction *held* warranted by the facts.—*Lee v. State* (Tex. Cr. App.) 195.

An instruction given by the court should not be given undue prominence by repetition.—*Lee v. State* (Tex. Cr. App.) 195.

Where a witness' affidavit, taken in defendant's absence, was used to contradict the witness, it should be limited by the court to that purpose.—*Terry v. State* (Tex. Cr. App.) 382.

In a prosecution for an aggravated assault claimed to have been committed in furtherance of a conspiracy, it was error for the court to fail to charge that if the assault was not committed in pursuance of the conspiracy the evidence thereof should not be considered as against defendant.—*Kees v. State* (Tex. Cr. App.) 855.

§ 23. — Requests for instructions.

It was not error to refuse instructions requested, the subject of which was fully covered by those given.—*State v. Parker* (Mo. Sup.) 650.

It is not error to refuse to give requested instructions covered by the general charge.—*Bynum v. State* (Tex. Cr. App.) 844.

§ 24. — Custody, conduct, and deliberations of jury.

Under Rev. St. 1889, § 4209 (Rev. St. 1879, § 1909), and Rev. St. 1879, §§ 1910, 1966, the separation of the jury in a capital case during trial will not vitiate their verdict, where the state affirmatively shows that no improper influence was exerted.—*State v. Schaeffer* (Mo. Sup.) 518.

An examination of the Code by a juror in the jury room *held* ground for reversal.—*Henson v. State* (Tenn.) 960.

Verdict in prosecution for murder *held* not to have been reached by lot.—*Burrows v. State* (Tex. Cr. App.) 848.

§ 25. Verdict.

A verdict *held* not objectionable for failure to sufficiently identify defendant.—*Albert v. State* (Tex. Cr. App.) 846.

§ 26. Motions for new trial and in arrest.

A new trial will not be granted for newly discovered evidence merely cumulative.—*Black v. Commonwealth* (Ky.) 772.

Showing on motion for new trial of a murder case *held* not sufficient to disturb the ruling of the trial court.—*State v. Gray* (Mo. Sup.) 698.

Denial of application for a new trial for newly discovered evidence, in a prosecution for gaming, *held* proper.—*Simmons v. State* (Tex. Cr. App.) 586.

An affidavit showing that a juror was acquainted with accused, though he did not state such fact when the jurors were asked if they knew accused, *held* no ground for a new trial.—*Dodd v. State* (Tex. Cr. App.) 1015.

§ 27. Judgment, sentence, and final commitment.

A document in a criminal case *held* not to constitute a judgment.—*Herbert v. State* (Tex. Cr. App.) 587.

§ 28. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

Under Cr. Code Prac. § 281, the denial of a motion for a new trial for newly discovered evidence cannot be reviewed.—*Cook v. Commonwealth* (Ky.) 283; *Black v. Same* (Ky.) 772.

§ 29. — Presentation and reservation in lower court of grounds of review.

Under Rev. St. 1899, § 2689, a conviction will not be reversed for errors in the exclusion of evidence, where no complaint was made on motion for a new trial.—*State v. Terry* (Mo. Sup.) 513.

Where alleged misconduct of a juror occurred in the presence of the court, and counsel for defendant did not then except, the finding of the court that there was no misconduct cannot be disturbed on appeal.—*State v. Gleason* (Mo. Sup.) 676.

Objection on appeal, in a prosecution under White's Ann. Pen. Code, art. 380, that the evidence showed the crime of renting to another a room in a hotel for gaming purposes, *held* untenable, when defendant requested no instruction to that effect.—*Hodges v. State* (Tex. Cr. App.) 179.

The matter of surprise at testimony cannot be complained of on appeal, in the absence of an exception.—*Latham v. State* (Tex. Cr. App.) 182.

Under Code Cr. Proc. art. 723, an objection that the court erred in failing to apply the law to a certain issue *held* not available for the first time on appeal.—*Windom v. State* (Tex. Cr. App.) 193.

Alleged error in permitting prosecuting attorney to read the testimony taken in the grand

jury room cannot be considered on appeal, when it was not excepted to at the time.—*Tackaberry v. State* (Tex. Cr. App.) 384.

On appeal in a criminal case, the admission of evidence will not be reviewed where it was objected to without any reason assigned.—*Clark v. State* (Tex. Cr. App.) 591.

Misconduct of the district attorney in argument cannot be reviewed, where defendant did not request a special charge that the jury should disregard the argument.—*McAnally v. State* (Tex. Cr. App.) 842.

On an appeal in criminal case, appellant *held* not entitled to complain of certain argument of counsel.—*Dodd v. State* (Tex. Cr. App.) 1015.

§ 30. — Proceedings for transfer of cause, and effect thereof.

Until the motion for new trial is overruled, there is no judgment, within the meaning of Cr. Code, § 348, relating to the time for taking appeals.—*Commonwealth v. Tarvin* (Ky.) 13.

Under White's Ann. Code Cr. Proc. art. 887, a recognizance on appeal in a case of misdemeanor, which fails to show the punishment assessed, is insufficient.—*Lee v. State* (Tex. Cr. App.) 186.

Where the recognizance does not state the amount of the punishment assessed, as required by Code Cr. Proc. art. 887, the appeal will be dismissed.—*Doran v. State* (Tex. Cr. App.) 585.

Recognizance on appeal *held* defective, under Code Cr. Proc. art. 887.—*Fortenberry v. State* (Tex. Cr. App.) 586.

A recognizance on appeal, which does not conclude with the clause "in this case," as required by statute, is defective.—*Herbert v. State* (Tex. Cr. App.) 587.

A recognizance on appeal, in which the names of the sureties are omitted, is defective.—*Herbert v. State* (Tex. Cr. App.) 587.

A recognizance on appeal *held* defective.—*Fortenberry v. State* (Tex. Cr. App.) 588.

Recognizance on appeal *held* bad for misdescribing the court.—*Adams v. State* (Tex. Cr. App.) 588.

Under Code Cr. Proc. art. 887, recognizance on appeal *held* bad for not concluding with "in this case."—*Adams v. State* (Tex. Cr. App.) 588.

A recognizance, not concluding with the final clause "in this case," as required by Code Cr. Proc. art. 887, *held* insufficient.—*Brock v. State* (Tex. Cr. App.) 599.

§ 31. — Record and proceedings not in record.

An exception to evidence, not reserved by bill, cannot be reviewed.—*McComas v. State* (Tex. Cr. App.) 189.

A bill of exceptions in a criminal appeal, signed by the county attorney, but not indorsed by the judge, cannot be considered.—*Tackaberry v. State* (Tex. Cr. App.) 384.

Where a charge given does not appear of record, a bill of exceptions should be taken to it, to present the question for review.—*Lankster v. State* (Tex. Cr. App.) 388.

In a criminal case, the appellate court cannot look into the bill of exceptions to complete the statement of facts.—*Lively v. State* (Tex. Cr. App.) 393.

The overruling of an application for a continuance, the rejection and admission of evidence, and the argument of the district attorney, cannot be reviewed on appeal in the absence of a statement of facts.—*McAnally v. State* (Tex. Cr. App.) 842.

The indictment, charge, and sentence being in conformity with law, and there being in the

record neither bill of exceptions nor statement of facts, a conviction cannot be disturbed.—*Wright v. State* (Tex. Cr. App.) 847.

Refusal of motion to strike out evidence cannot be reversed in absence of statement of facts.—*Caddell v. State* (Tex. Cr. App.) 1015.

On appeal in criminal case, appellant *held* not entitled to complain that jury separated, and walked in the street, and were not kept together in charge of an officer.—*Dodd v. State* (Tex. Cr. App.) 1015.

§ 32. — Review.

On a prosecution, under Ky. St. § 1241a, subd. 1, for confederating to injure a person, *held*, that a defendant could not complain that another defendant was not charged that he need not answer unless he voluntarily desired to do so.—*Weber v. Commonwealth* (Ky.) 30.

In the absence of prejudicial error, a conviction will not be reversed on appeal.—*Wright v. Commonwealth* (Ky.) 340.

In the absence of prejudicial error, a verdict is conclusive as to the question of defendant's insanity.—*Wright v. Commonwealth* (Ky.) 340.

Failure of the court in a criminal prosecution to instruct that defendant was a competent witness in his own behalf *held* harmless, where defendant testified without objection.—*State v. Terry* (Mo. Sup.) 513.

In a criminal case, a verdict rendered on conflicting evidence will not be disturbed on appeal.—*State v. Gleason* (Mo. Sup.) 676.

A finding on conflicting evidence that charges of prejudice against jurors had not been proven will not be reversed on appeal.—*State v. May* (Mo. Sup.) 918.

Denial of an application for a change of venue for local prejudice, on conflicting evidence, will not be reversed on appeal.—*State v. May* (Mo. Sup.) 918.

A complaint for violation of local option law *held* presumably signed as required by Code Civ. Proc. art. 277.—*Taylor v. State* (Tex. Cr. App.) 181.

A charge on reasonable doubt *held* not so erroneous as to authorize a reversal.—*Winfield v. State* (Tex. Cr. App.) 182.

An instruction that a certain witness is an accomplice *held* not prejudicial to the accused.—*Winfield v. State* (Tex. Cr. App.) 182.

In a prosecution for murder, questions on the cross-examination of accused as to whether he did not know that his wife had a bad reputation when he married her were not prejudicial to accused; the answers being in the negative.—*McComas v. State* (Tex. Cr. App.) 189.

On appeal from conviction of horse theft, the evidence being conflicting, judgment *held* not open to reversal.—*Windom v. State* (Tex. Cr. App.) 193.

In a prosecution for selling liquor, admission of evidence of a conversation *held* not to be erroneous, though defendant was not present.—*Martin v. State* (Tex. Cr. App.) 380.

In a prosecution for violation of the local option law, a recital in the record *held* not to show that the order for the election was in accordance with the statute.—*Lively v. State* (Tex. Cr. App.) 393.

The record in a prosecution for violating the local option law *held* insufficient to show result of the election.—*Lively v. State* (Tex. Cr. App.) 393.

Overruling challenge for cause to juror *held* harmless.—*Taylor v. State* (Tex. Cr. App.) 396.

In a prosecution of two persons for keeping a disorderly house, a charge that, if only one or either of the defendants rented the house,

they should find both not guilty, was not prejudicial to defendants.—*Marx v. State* (Tex. Cr. App.) 590.

CROSS-EXAMINATION.

Of witness for purpose of impeachment, see "Witnesses," § 4.

CRUELTY.

As ground for divorce, see "Divorce," § 1.

CURTESY.

See "Dower."

CUSTODY.

Of jury, see "Criminal Law," § 24.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," §§ 1, 3.

Damages for personal injuries.

See "Death," § 1; "Libel and Slander," § 3; "Nuisance," § 1.

Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 4.

Breach of warranty of goods sold, see "Sales," § 6.

Delay in shipment of live stock, see "Carriers," § 3.

Discharge from employment, see "Master and Servant," § 2.

Distress, see "Landlord and Tenant," § 3.

Loss of goods, see "Carriers," § 2.

Personal injuries, see "Husband and Wife," § 4.

Wrongful attachment, see "Attachment," § 4.

Wrongful discharge of surface waters, see "Waters and Water Courses," § 1.

Wrongful execution, see "Execution," § 4.

Recovery in particular actions or proceedings.

See "Ejectment," § 4; "Replevin," § 1; "Trove and Conversion," § 1.

For wrongful attachment, see "Attachment," § 4.

§ 1. Grounds and subjects of compensatory damages.

In an action for personal injuries, expenses incurred for medical treatment are proper elements of damage, though the money has not been actually paid.—*San Antonio & A. P. Ry. Co. v. Moore* (Tex. Civ. App.) 226.

§ 2. Measure of damages.

An instruction as to the measure of damages in an action for the breach of a contract for the sale of a doctor's practice *held* proper.—*Wallingford v. Aitkins* (Ky.) 794.

§ 3. Inadequate and excessive damages.

Verdict for \$1,000 for injuries to a servant *held* not excessive.—*Adams Exp. Co. v. Smith* (Ky.) 752.

In an action for injuries resulting to plaintiff from defendant's assault on a third party, a verdict of \$200 *held* only compensatory damages.—*Ezell v. Outland* (Ky.) 784.

A \$6,000 verdict for the loss of both the eyes of a miner 23 years old is not excessive.—*Bane v. Irwin* (Mo. Sup.) 522.

\$9,000 damages for injuries to one accompanying live stock on train *held* not excessive.—*Bolton v. Missouri Pac. Ry. Co.* (Mo. Sup.) 530.

\$5,000 damages for injuries to servant *held* not excessive.—*Black v. Missouri Pac. Ry. Co.* (Mo. Sup.) 559.

§ 4. Pleading, evidence, and assessment —Pleading.

A complaint for personal injuries *held* insufficient, in so far as it attempted to plead special damages in loss of time.—*Louisville & N. R. Co. v. Mason* (Ky.) 27.

In an action for injuries, an objection to the verdict, allowing for permanent injuries, that the permanency of such injuries was caused by his own fault, *held* not sustainable.—*Louisville, H. & St. L. Ry. Co. v. McCune* (Ky.) 756.

§ 5. — Evidence.

A requested instruction, in an action against a railroad for injuries to a servant, calling the attention of the jury, in computing damages, to the shorter expectation of life of men in the railroad business, *held* properly refused.—*Louisville & N. R. Co. v. Gordan* (Ky.) 311.

A requested instruction, failing to include mental and physical suffering as elements of damage for personal injuries, as required by a prior instruction, *held* properly refused.—*Louisville & N. R. Co. v. Gordan* (Ky.) 311.

In an action for personal injuries, evidence that plaintiff was in reasonable apprehension of blood poisoning was admissible to show mental suffering as an element of damage.—*Butts v. National Exchange Bank* (Mo. App.) 1083.

In an action against a city for injuries, evidence as to the possible future results of injuries *held* improperly admitted.—*Lents v. City of Dallas* (Tex. Sup.) 59.

It was competent to prove the bad character of persons residing in the same house with a party asking damages for injury to his general reputation.—*Collins v. Clark* (Tex. Civ. App.) 97.

Where the capacity of the party injured to earn money is partially, but permanently, impaired, mortality tables are admissible for the purpose of determining the damages.—*San Antonio & A. P. Ry. Co. v. Moore* (Tex. Civ. App.) 226.

Where, in an action to recover for property converted, plaintiff furnished the jury no basis on which to estimate the value, *held*, that a verdict for defendant was not error.—*First Nat. Bank v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 1033.

§ 6. — Proceedings for assessment.

An instruction *held* not to properly limit the jury on the question of damages in an action for personal injuries.—*Louisville & N. R. Co. v. Mason* (Ky.) 27.

An instruction, in an action for personal injuries, on the question of unskillful or improper treatment of the injuries, *held* not broad enough.—*Louisville & N. R. Co. v. Mason* (Ky.) 27.

In an action for personal injuries, an instruction that, if the injuries were permanent, the jury should estimate the value of such services as plaintiff would reasonably perform during the expectancy of her life, was misleading.—*International & G. N. R. Co. v. Clark* (Tex. Sup.) 584.

In an action for personal injuries, an instruction *held* not objectionable as authorizing double recovery.—*Gulf, C. & S. F. Ry. Co. v. Robinson* (Tex. Civ. App.) 70.

In a personal injury action, in which defendant alleged that plaintiff's trivial injury was aggravated by his negligence, failure to specifically instruct on that issue *held* error.—*Gulf, C. & S. F. Ry. Co. v. Denson* (Tex. Civ. App.) 70.

In an action for personal injuries, evidence *held* not to furnish sufficient basis for a charge authorizing damages for loss of time.—*Gulf, C.*

& S. F. Ry. Co. v. Robinson (Tex. Civ. App.) 70.

In an action for personal injuries, an instruction authorizing a recovery by plaintiff for his doctor's bill is not proper, where there is no evidence that the amount is reasonable.—*Gulf, C. & S. F. Ry. Co. v. Robinson* (Tex. Civ. App.) 70.

Evidence in an action to recover the value of water taken by defendant from a spring located on plaintiff's land, and the value of land occupied by defendant's pipes and pumping works, *held* insufficient to support a verdict for a designated sum.—*Houston & T. C. Ry. Co. v. Cluck* (Tex. Civ. App.) 83.

In an action for personal injuries, action of the court in submitting to the jury expenses incurred for medical treatment as element of damage *held* under the evidence erroneous.—*San Antonio & A. P. Ry. Co. v. Moore* (Tex. Civ. App.) 228.

DEAD BODIES.

An indictment under Pen. Code, art. 367, for removing a dead body, *held* insufficient; it not stating, or giving a reason for not stating, whose body was removed.—*Leach v. State* (Tex. Cr. App.) 600.

An indictment under Pen. Code, art. 367, declaring a penalty for one who, without authority, disinters a human body, should state the name of the person whose body was disinterred.—*Williamson v. State* (Tex. Cr. App.) 600.

DEATH.

Of partner, see "Partnership," § 4.

Of party pending appeal, see "Appeal and Error," § 4.

Of party to action ground for abatement, see "Abatement and Revival," § 2.

§ 1. Actions for causing death.

In action for death of father, instruction as to elements of damage *held* supported by evidence.—*St. Louis, I. M. & S. Ry. Co. v. Haist* (Ark.) 893.

Enforcement in Arkansas of action for wrongful death accruing in Louisiana *held* not to contravene public policy in view of the similarity between Civ. Code La. art. 2315, and Sand. & H. Dig. §§ 5908, 5911, 5912.—*St. Louis, I. M. & S. Ry. Co. v. Haist* (Ark.) 893.

Under Shannon's Code, §§ 4026, 4028, Acts 1871, p. 70, c. 78, amending Shannon's Code, §§ 4025, 4026, and Acts 1883, p. 259, c. 186, *held* that an instruction in an action for wrongful death, permitting a recovery for deceased's loss of earning capacity, and also for pecuniary damages sustained by his widow and child, was erroneous.—*Davidson Benedict Co. v. Severson* (Tenn.) 967.

Testimony as to dependency of daughters *held* admissible in action for death of their father.—*St. Louis S. W. Ry. Co. of Texas v. Bowles* (Tex. Civ. App.) 451.

An instruction as to measure of damages for death of plaintiff's father *held* not open to construction that they might recover all his future earnings.—*St. Louis S. W. Ry. Co. of Texas v. Bowles* (Tex. Civ. App.) 451.

Under the statute providing that in actions by two or more plaintiffs, the jury shall apportion a verdict among the plaintiffs, failure to do so is not error, where plaintiffs do not object.—*International & G. N. R. Co. v. Lehman* (Tex. Civ. App.) 619.

Failure to join husband's mother as plaintiff, in action by widow for negligently causing husband's death, *held* harmless error. Rev. St. arts. 3021, 3022, 3027.—*Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 626.

Whether a wife who had abandoned her husband was damaged by his death *held* a question for the jury.—*Houston & T. C. R. Co. v. Bryant* (Tex. Civ. App.) 885.

In suit by child for wrongful death of father as bearing on damages, the fact that there was a mother and other children may be shown.—*Galveston, H. & S. A. Ry. Co. v. Contreras* (Tex. Civ. App.) 1051.

In an action by a posthumous child for the recovery of damages sustained by reason of his father's death caused by defendant's negligence, the fact that the mother and other children have recovered damages for such death is immaterial.—*Galveston, H. & S. A. Ry. Co. v. Contreras* (Tex. Civ. App.) 1051.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 5.

As evidence in criminal prosecutions, see "Criminal Law," § 10.

Dying declarations, see "Homicide," § 6.

DECREE.

In equity, see "Equity," § 4.

DEDICATION.

§ 1. Operation and effect.

Where land along the bank of a navigable river is dedicated for a street, it will be presumed that all the land between the street and the river was dedicated to the public.—*City of Uniontown v. Berry* (Ky.) 295.

A map of a city addition, showing the termination of a street at a particular point, *held* to evidence an intention of the dedicators to reserve the land lying beyond such termination.—*City of Uniontown v. Berry* (Ky.) 295.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Cancellation, see "Cancellation of Instruments."

Copies as evidence, see "Evidence," § 7.

Estoppel by deed, see "Estoppel," § 2.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Judicial notice as to location of property described in deed, see "Evidence," § 1.

Of trust, see "Mortgages."

Reformation, see "Reformation of Instruments."

Wills distinguished from deeds, see "Wills," § 3.

Deeds by or to particular classes of parties.

See "Husband and Wife," § 2.

Married women, see "Husband and Wife," § 3.

Deeds of particular species of property.

See "Homestead," § 2.

Separate property of married women, see "Husband and Wife," § 3.

§ 1. Recording and registration.

Under the express provision of Hart. Dig. art. 2760, repealing article 2755, proof of a deed for record by one subscribing witness was sufficient; the deed being offered for record in 1843.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

§ 2. Construction and operation.

Deed construed, and *held* to convey to the grantee a life estate in the whole land, remainder to her surviving daughter, though the grantee's husband paid part of the purchase money.—*Clay v. Clay's Guardian* (Ky.) 810.

Reservation in a deed *held* to be for the individual use of the grantor and his vendee.—*Alexander v. Parks* (Ky.) 1105.

A deed *held* to have conveyed a life estate to the "second party," with remainder in fee to the grantor's heirs.—*Christ v. Kuehne* (Mo. Sup.) 537.

A deed from husband to wife for life *held* to have created a particular estate, sufficient to support a remainder in fee.—*Christ v. Kuehne* (Mo. Sup.) 537.

A grantor who has conveyed the same land to two persons *held* to become again seised by reconveyances from both, though another holds a void tax deed to the property.—*Wilson v. Fisher* (Mo. Sup.) 665.

A purchaser of land under tax judgment against one having no title *held* not to acquire title by a subsequently acquired title in the defendant under Rev. St. 1899, § 4591.—*Wilson v. Fisher* (Mo. Sup.) 665.

§ 3. Pleading and evidence.

Evidence, in a suit by a relative of the grantor to set aside his deed for fraud and undue influence, *held* insufficient to overcome the presumption of fairness.—*Chowning v. Howser* (Ky.) 748.

Record of deed, with extraneous evidence, *held* to show that it was filed for record.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

Evidence, in an action of trespass to try title, considered and *held* to show that an ancient deed, provided by certified copy of the record, was a genuine instrument, and not a forgery.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

Extraneous evidence of date of record of deed *held* admissible.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 3.

DELAY.

In delivery of telegram, see "Telegraphs and Telephones," § 2.

In transportation and delivery of live stock by carrier, see "Carriers," § 3.

In transportation or delivery of goods by carrier, see "Carriers," § 2.
Laches, see "Equity," § 2.

DELIVERY.

Of goods by carrier, see "Carriers," § 2.

Of live stock by carrier, see "Carriers," § 3.

DEMURRER.

In pleading, see "Pleading," § 2.

DENIALS.

In pleading, see "Pleading," § 1.

DEPOSITIONS.

See "Witnesses."

Refusal to suppress a deposition for failure of the witness to fully answer an interrogatory *held* not an abuse of discretion.—*Galveston, H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 78.

In an action for injuries, answers to direct interrogatories in the deposition of a witness *held* a sufficient predicate for the introduction of answers to certain cross-interrogatories.—*Galveston, H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 78.

Depositions taken by a person before he has properly become a party to the suit are rightly suppressed, especially where there are non-resident defendants who have only been served by publication, and have not appeared.—*Riviere v. Wilkens* (Tex. Civ. App.) 608.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Homestead," § 3; "Wills."

Inheritance and transfer taxes, see "Taxation," § 8.

§ 1. Persons entitled and their respective shares.

Act Jan. 2, 1851, providing that, where the whole of a decedent's estate did not exceed in value \$300, the same should be allowed to the widow, was repealed by Act Dec. 8, 1852.—*Rowland v. Wadly* (Ark.) 994.

DESCRIPTION.

Names of individuals, see "Names."

Of property conveyed, see "Boundaries," § 1.

Of property devised or bequeathed, see "Wills," § 4.

Of property for taxation, see "Taxation," § 4.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILATORY PLEAS.

See "Pleading," § 1.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, see "Bankruptcy," § 2; "Compromise and Settlement"; "Release."

From liability as assignee, see "Assignments for Benefit of Creditors," § 1.

From liability as surety, see "Principal and Surety," § 2.

Of judgment, see "Judgment," § 12.

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCRETION OF COURT.

As to granting quo warranto, see "Quo Warranto," § 1.

Review in civil actions, see "Appeal and Error," § 20.

Review in criminal prosecutions, see "Criminal Law," § 32.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 14.

Dismissal of suits in justices' courts, see "Justices of the Peace," § 1.

§ 1. Voluntary.

Where an action was instituted against a voluntary association for personal judgment and foreclosure of a lien, a dismissal as to the money judgment did not dismiss the action for foreclosure.—*Industrial Lumber Co. v. Texas Pine Land Ass'n* (Tex. Civ. App.) 875.

§ 2. Involuntary.

Where a petition in trespass to try title shows that plaintiffs seek to recover as foreign executors and also in their own right, their alleged right as executors should be stricken out on exceptions, but the suit should not be dismissed.—*Hayden v. Kirby* (Tex. Civ. App.) 198.

DISQUALIFICATION.

Of judge, see "Judges," § 2.

DISTRESS.

For rent, see "Landlord and Tenant," § 8.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of property of decedent sold under order of court, see "Executors and Administrators," § 5.

DISTRICT AND PROSECUTING ATTORNEYS.

Under Ky. St. § 133, the county attorney, whose term of office had expired prior to the rendition of judgment in certain prosecution instituted during his term, *held* not entitled to the 25 per cent. allowance prescribed by such section.—*Spalding v. Hill* (Ky.) 307.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 2.

DIVORCE.

Forgiveness by party having ground for divorce as consideration for contract to convey, see "Husband and Wife," § 2.

§ 1. Grounds.

Evidence in divorce *held* not to entitle plaintiff to a decree for cruelty.—*Coe v. Coe* (Mo. App.) 707.

§ 2. Jurisdiction, proceedings, and relief.

In divorce, evidence *held* such that a decree for defendant would not be disturbed.—*Coe v. Coe* (Mo. App.) 707.

Where a husband to whom a divorce has been granted dies pending an appeal, and the wife asserts no right to have the action reviewed to determine property rights, the appeal will be dismissed.—*Sperry v. Sperry* (Mo. App.) 1077.

§ 3. Custody and support of children.

Evidence in proceeding to modify divorce decree *held* to sustain finding that infant child, whose support by the father had been ordered, was his own, and not a foundling.—*Kraus v. Kraus* (Mo. App.) 130.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 12.

DOMICILE.

Of parties as affecting venue, see "Venue," § 1.

DOWER.

Taxation of dower interest, see "Taxation," § 3.

§ 1. Nature and requisites.

A mortgage is a deed within Ky. St. § 2135, providing that the wife shall not be endowed of land sold to satisfy a lien or incumbrance created by deed in which she joined.—*Morgan v. Wickliffe* (Ky.) 1122.

§ 2. Rights and remedies of widow.

Under the express provisions of Rev. St. 1899, § 2934, a widow's right to unassigned dower is alienable.—*Phillips v. Presson* (Mo. Sup.) 501.

DRUNKENNESS.

As defense to crime, see "Criminal Law," § 1.

DUPLICITY.

In indictment, see "Indictment and Information," § 3.

DYING DECLARATIONS.

See "Homicide," § 6.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

Citizens of a town *held* to have a mere license to take water from railroad company's waterworks, which could not ripen into an easement.—*Louisville & N. R. Co. v. Dickey* (Ky.) 332.

An adverse possession which will defeat a right of way acquired by adverse user must be such as would defeat a right of entry on real estate.—*Clay v. Kennedy* (Ky.) 815.

EJECTMENT.

See "Trespass to Try Title."

§ 1. Jurisdiction, parties, process, and incidental proceedings.

Recovery of land *held* not barred on the ground of state claim, where possession had not been long enough for the bar of the statute.—*Craig v. Conover* (Ky.) 2.

§ 2. Pleading and evidence.

Where a widow claimed title by adverse possession, the burden of proof that she occupied the property as a homestead only, as alleged by her deceased husband's heirs, was on them.—*Reno v. Blackburn* (Ky.) 775.

In ejectment by the widow and children of a decedent against one of his sons, to recover land, evidence *held* insufficient to establish defendant's claim that decedent had entered into a parol agreement to give him the land.—*Goodin v. Goodin* (Mo. Sup.) 502.

To establish a claim by a son that the father made an oral contract to give him a certain tract of land, the evidence must be so cogent as to leave no room for reasonable doubt.—*Goodin v. Goodin* (Mo. Sup.) 502.

Defendant in ejectment *held* not entitled, under his general denial, to attack regularity of prior decree in partition between the same parties.—*Bartley v. Bartley* (Mo. Sup.) 521.

§ 3. Trial, judgment, enforcement of judgment, and review.

A decree in ejectment, permitting defendant to withdraw from the record a deed to the land tendered by plaintiff with his reply, *held* a decree for specific performance.—*Smith v. Frankfort & C. Ry. Co.* (Ky.) 1088.

In ejectment, *held* error to give judgment to plaintiff for value of the use by defendant of a party wall.—*Alexander v. Parks* (Ky.) 1105.

A judgment, in an action of ejectment, *held* erroneous in that, if defendant was entitled to recover at all, he was entitled to relief as well as costs.—*Obouteau Land & Lumber Co. v. Chrisman* (Mo. Sup.) 1062.

§ 4. Damages, mesne profits, improvements, and taxes.

A city *held* not entitled to recover for the use of land dedicated for a street, in an action to recover the land, where it was useful for agricultural purposes only.—*City of Uniontown v. Berry* (Ky.) 205.

In action by defeated defendant in ejectment to recover compensation for improvements, a judgment for defendant *held* proper.—*Kobush v. Schmidt* (Mo. App.) 1087.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 3.

ELECTIONS.

Mandamus against governing committee of political party, see "Mandamus," § 2.
Submission of question of local option to voters, see "Intoxicating Liquors," § 1.

§ 1. Nominations and primary elections.

Ky. St. art. 12, §§ 1553, 1563, regulating primary elections, *held* to empower the governing committee of a political party to count the votes cast at a primary for nominating state officers.—*Young v. Beckham* (Ky.) 1092.

Ky. St. art. 12, §§ 1550, 1565, regulating primary elections, *held* to provide for a primary for the nomination of state officers.—*Young v. Beckham* (Ky.) 1092.

A political party resorting to a primary election for nominating candidates must conduct such election in accordance with Ky. St. art. 12, regulating primary elections.—*Young v. Beckham* (Ky.) 1092.

The governing committee of a political party, calling a primary for nominating candidates, pursuant to Ky. St. art. 12, regulating primary elections, has no right to question the eligibility of a candidate before the primary.—*Young v. Beckham* (Ky.) 1092.

The court will not enjoin the holding of a primary election called by the governing committee of the party, pursuant to Ky. St. art. 12, c. 41.—*Meacham v. Young* (Ky.) 1094.

§ 2. Conduct of election.

Under Laws Ex. Sess. 1900, c. 5, § 12, the circuit court may declare an election void on account of illegal voting.—*Stewart v. Rose* (Ky.) 271.

§ 3. Contests.

Evidence in an election contest *held* to disclose a case where, on account of illegal voting, "neither contestant nor contestee could be adjudged to have been fairly elected."—*Stewart v. Rose* (Ky.) 271.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," §§ 4-7.

§ 1. Compensation.

A property owner *held* entitled to recover the full value of land taken for right of way by a railroad.—*McElroy v. Kansas City & I. Air Line* (Mo. Sup.) 913.

In a suit against a railroad to recover for land taken for right of way *held* that the value of the land was to be determined as of the date of the company's entry thereon.—*McElroy v. Kansas City & I. Air Line* (Mo. Sup.) 913.

In assessing damages to property caused by the construction of a railroad, the erection of a depot in the vicinity of the property cannot be regarded as having especially benefited it, where the benefit affected all property located in its neighborhood.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

A general rise in the value of real estate, caused by the construction of a railroad, cannot be offset against the damage actually caused to an individual piece of property by the excavation of the street in front of it for the railroad's right of way.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

In an action for damages to property caused by the construction of a railroad, plaintiff *held* not required to show what part of the damage is attributable to the construction of the road and what part to other causes.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

In proceeding to condemn land, evidence that it is an old homestead, and, as such, possesses peculiar value to the owner, *held* inadmissible.—*Cane Belt Ry. Co. v. Hughes* (Tex. Civ. App.) 1020.

§ 2. Proceedings to take property and assess compensation.

In action to condemn land for railway purposes, defendant's evidence as to damages *held* too speculative to support a verdict.—*St. Louis, I. M. & S. Ry. Co. v. Vaughan* (Ark.) 575.

In condemnation proceedings for a road, the fact that after contest filed the county constructed the fences made necessary by the road, if pleaded, may be shown to prevent a recovery by the land owner of the expense of fencing.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

In condemnation proceedings for a road, the reception of evidence that the entire tract out of which the road was taken would sell for more if cut up into small tracts *held* error.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

In condemnation proceedings for a road, the reception of evidence that after contest filed the county constructed the fences made necessary by the road, there being no plea to that effect, *held* error.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

Where a landowner is a nonresident, notice of condemnation proceedings for a highway across his land is properly served on his agent.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

Landowner's right to costs in condemnation proceedings considered.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

On the trial of an appeal from an award in condemnation, *held* error to receive evidence that the railway company owned land adjacent which was equally suitable for such purpose.—*Cane Belt Ry. Co. v. Hughes* (Tex. Civ. App.) 1020.

§ 3. Remedies of owners of property.

Plaintiff's failure to prove allegations in a petition is a waiver of such part of his case.—

McElroy v. Kansas City & I. Air Line (Mo. Sup.) 918.

In an action for damages to certain property caused by the construction of a railroad, the burden is on defendants to show to what extent any special benefits resulting from the construction of a road affects the property.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

In an action against a railroad company for damages to certain property, caused by the construction of a railroad adjacent thereto, the fact that the plaintiff's possession extended into the street occupied by the railroad company, and that he had not acquired the right thereto, was a proper subject of consideration in determining the extent of the injury.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

In an action for damages caused by the construction of a railroad, an offer by the railroad company to grade down the street in front of the property, made some time after the action was instituted, was not admissible.—*Pochila v. Calvert, W. & B. V. Ry. Co.* (Tex. Civ. App.) 255.

The measure of damage to property by the construction of a railroad *held* to be the difference in value with and without the railroad.—*Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.* (Tex. Civ. App.) 1038.

EMPLOYES.

See "Master and Servant."

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ESTOPPEL.

See "Estoppel," § 3.

EQUITABLE LIENS.

See "Liens."

EQUITY.

Equitable estoppel, see "Estoppel," § 3.
Equitable liens, see "Liens."

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Relief against judgment, see "Judgment," § 6.

§ 1. Jurisdiction, principles, and maxims.

A cause *held* one of equity jurisdiction.—*Darnall v. Jones' Ex'rs* (Ky.) 1108.

§ 2. Laches and stale demands.

Where a widow conveyed her quarantine, the fact that the remaindermen did not assert title until the widow's death, over 50 years after her husband's death, did not constitute such laches as precluded a recovery of the land after the widow's death.—*Graham v. Stafford* (Mo. Sup.) 507.

§ 3. Pleading.

Amendment to bill to redeem from foreclosure sale, not presented until the cause was ready for hearing, *held* properly refused.—*Robinson v. United Trust* (Ark.) 992.

Amendment setting up irregularities in foreclosure sale to bill to redeem *held* properly refused.—*Robinson v. United Trust* (Ark.) 992.

In suit to recover balance of price of land, *held* error to refuse amendment asking to have

the deed of the land canceled.—*Stephenson v. Stephenson* (Ky.) 742.

§ 4. Decree and enforcement thereof.

Under Civ. Code Prac. § 90, one suing for balance of price of land *held* entitled to ask to have the deed canceled under the prayer for general relief.—*Stephenson v. Stephenson* (Ky.) 742.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

Under Pen. Code, art. 27, a person who has been convicted of a misdemeanor and is serving a sentence as a county convict is not "in custody on an accusation," within the statute, and assisting such a person to escape is not a violation of the statute.—*Brannan v. State* (Tex. Cr. App.) 184.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.

Of highways, see "Highways," § 1.

Of railroads, see "Railroads," § 4.

Of telegraphs and telephones, see "Telegraphs and Telephones," § 1.

ESTATES.

See "Dower"; "Life Estates."

Created by deed, see "Deeds," § 2.

Created by will, see "Wills," § 4.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Estates for years, see "Landlord and Tenant."

Tenancy in common, see "Tenancy in Common."

Trusts, see "Trusts," § 2.

ESTOPPEL.

By judgment, see "Judgment," § 9, 10.

To allege error, see "Appeal and Error," § 18.

To assert discharge from liability as surety, see "Principal and Surety," § 2.

To avoid or forfeit insurance policy, see "Insurance," § 7.

To dispute validity of foreclosure sale, see "Mortgages," § 5.

§ 1. By record.

Allegations in a petition to enforce an indorser's liability *held* not to estop plaintiff from insisting on validity of notes.—*Norton v. Wochler* (Tex. Civ. App.) 1025.

§ 2. By deed.

Where the owner in fee conveys land, a subsequent patent from the commonwealth to the grantee does not destroy a reservation in the deed of roads and mineral rights.—*Sandy River Cannel Coal Co. v. White House Cannel Coal Co.* (Ky.) 298.

§ 3. Equitable estoppel.

Acts of a town assessor in assessing taxes on dedicated land, and the payment of such taxes by defendant, *held* not to estop the town from claiming title thereto.—*City of Uniontown v. Berry* (Ky.) 296.

Where a city had no power to sell land dedicated for public use, it was not estopped to assert title thereto by reason of assessing taxes against the land, which were paid by defendants as owners.—*City of Uniontown v. Berry* (Ky.) 296.

Maker of note, in suit thereon, *held* not estopped to set up counterclaim against plaintiff's indorser.—*Stuart v. Harmon* (Ky.) 365.

Claimant against estate *held* not estopped from setting up claim on account of action in

former proceedings.—*Robertson v. Robertson* (Ky.) 813.

A ward *held*, under the facts, not equitably entitled to object that the probate court had no jurisdiction to partition land.—*Greer v. Ford* (Tex. Civ. App.) 78; *Same v. Morrison, Id.*

EVIDENCE.

See "Depositions"; "Witnesses."

Absence as ground for continuance, see "Criminal Law," § 16.

Applicability of instructions to evidence, see "Trial," § 5.

Harmless error in admission of evidence, see "Appeal and Error," § 22.

Harmless error in exclusion of evidence, see "Appeal and Error," § 22.

Presentation of objections for purpose of review, see "Appeal and Error," § 3.

Questions of fact for jury, see "Trial," § 4.

Reception at trial, see "Criminal Law," § 19; "Trial," § 2.

Review of rulings on evidence as dependent on presentation of questions by record, see "Appeal and Error," § 12; "Criminal Law," § 31.

Review on appeal or writ of error, see "Appeal and Error," § 21.

To aid construction of will, see "Wills," § 4.

As to particular facts or issues.

See "Adverse Possession," § 1; "Assault and Battery," § 1; "Boundaries," § 2; "Damages," § 5; "Deeds," § 3; "Forgery"; "Fraudulent Conveyances," § 3; "Partnership," § 1; "Payment," § 2.

Alteration of written instrument, see "Alteration of Instruments."

Authority of corporate officer, see "Corporations," § 3.

Grounds of attachment, see "Attachment," § 1.

Payment of judgment, see "Judgment," § 12.

Purchase of realty in good faith, see "Vendor and Purchaser," § 2.

Separate estate of married woman, see "Husband and Wife," § 3.

Testamentary capacity, see "Wills," § 1.

Testator's intention, see "Wills," § 4.

Undue influence, see "Wills," § 3.

Validity of assent, see "Contracts," § 1.

In actions by or against particular classes of parties.

See "Brokers," § 2; "Carriers," §§ 1, 3, 5, 7; "Executors and Administrators," § 6; "Railroads," §§ 9-11.

Grantee of mortgaged property, see "Mortgages," § 2.

Stockholders, see "Corporations," § 2.

Telegraph companies, see "Telegraphs and Telephones," § 2.

In particular civil actions or proceedings.

See "Cancellation of Instruments," § 1; "Ejectment," § 2; "Fraud," § 2; "Malicious Prosecution," § 1; "Negligence," § 3; "Quieting Title," § 1; "Torts"; "Trespass," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

Election contests, see "Elections," § 3.

For accounting between partners, see "Partnership," § 5.

For breach of contract of sale, see "Sales," § 6.

For breach of warranty, see "Sales," § 6.

For causing death, see "Death," § 1.

For compensation of broker, see "Brokers," § 2.

For damages for nuisance on demised premises, see "Landlord and Tenant," § 2.

For delay in delivery of telegram, see "Telegraphs and Telephones," § 2.

For fires caused by operation of railroad, see "Railroads," § 11.

For injuries to live stock, see "Carriers," § 3.

For injuries to passengers' baggage, see "Carriers," § 7.

For personal injuries, see "Carriers," § 5; "Master and Servant," § 10; "Municipal Corporations," § 10; "Railroads," §§ 9, 10.

For price of goods, see "Sales," § 5.

For taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

For wages, see "Master and Servant," § 2.

On bond, see "Bail," § 1; "Principal and Surety," § 3.

On insurance policy, see "Insurance," § 16.

On judgment, see "Judgment," § 13.

On note, see "Bills and Notes," § 2.

To recover penalties for overcharges by carriers, see "Carriers," § 1.

In criminal prosecutions.

See "Conspiracy," § 1; "Criminal Law," §§ 7-15; "Gaming," § 3; "Homicide," §§ 5-7; "Larceny," § 1; "Malicious Mischief," § 3; "Perjury," § 1; "Rape," § 2; "Receiving Stolen Goods."

For attempt to kill by poison, see "Poisons."

For violation of liquor laws, see "Intoxicating Liquors," § 5.

§ 1. **Judicial notice.**

Act April 11, 1901, p. 164, relating to judicial notice of laws of other states, *held* not to apply to the private statutes of those states.—*Miller v. Johnston* (Ark.) 371.

A deed of dedication *held* not defective in description because failing to state the county in which the land is located.—*Parker v. Burton* (Mo. Sup.) 663.

The court of appeals will take judicial notice of the terms of the district court of Galveston county.—*Emery v. League* (Tex. Civ. App.) 603.

§ 2. **Relevancy, materiality, and competency in general.**

In an action against a railroad company for killing plaintiff's intestate at a crossing, evidence of intestate's general reputation for sobriety was inadmissible.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'r* (Ky.) 22.

Evidence *held* inadmissible as not part of the res gestæ.—*Early's Adm'r v. Louisville, H. & St. L. Ry. Co.* (Ky.) 348.

Testimony as to what insured said insurer's agents said as to dividing the policy into smaller ones, the agents not being present when insured made the statement, is inadmissible, being no part of the res gestæ.—*New York Life Ins. Co. v. Johnson's Adm'r* (Ky.) 762.

A statement to a third person by the agent who issued an accident policy, after an accident in which insured was injured, *held* inadmissible as res gestæ.—*Standard Life & Accident Ins. Co. v. Holloway* (Ky.) 796.

Admissions of carrier's agent as to delay in shipment of live stock *held* not part of res gestæ.—*Helm v. Missouri Pac. R. Co.* (Mo. App.) 148.

In action by passenger for an assault by carrier's servant, statement of servant *held* admissible as part of the res gestæ.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

In action by passenger for assault by carrier's servant, evidence of occasion of trouble *held* admissible as res gestæ.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

In an action against a telegraph company for damages, owing to defendant's lines having been fraudulently tapped and a message sent to plaintiff authorizing the bank to cash a draft for a swindler, a conversation between the president of plaintiff and the swindler, properly admitted as part of the res gestæ.—*Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.) 232.

On the issue of whether meal sold plaintiff for his cattle was unsound and unwholesome, *held*, that evidence as to the effect on the cattle of others of the same kind of meal was admissible.

—Houston Cotton Oil Co. v. Trammell (Tex. Civ. App.) 244.

Testimony in action on life policy *held* admissible, as tending to show authority in local agents to extend premium.—Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.

§ 3. Best and secondary evidence.

A shipper, under the facts, *held* entitled to show by secondary evidence the contents of a waybill.—Gulf, C. & S. F. Ry. Co. v. Harris (Tex. Civ. App.) 71.

Where a party has lost the deeds of land to which he has asserted ownership for 40 years, evidence that deeds of the form and tenor claimed were recorded in another county *held* admissible, as tending to show that such deeds were in existence at that time.—Logan's Heirs v. Logan (Tex. Civ. App.) 416.

§ 4. Admissions.

In a will contest by a disinherited heir, evidence that testatrix's husband had told her to arrange her property so that one of contestants would not get any of it *held* improperly excluded, on an issue as to undue influence.—Wall v. Dimmitt (Ky.) 300.

Where a husband was a beneficiary under his wife's will, the fact that as tenant by curtesy he would have taken the same interest did not render his declarations bearing on the question of undue influence inadmissible as against his co-devisees.—Wall v. Dimmitt (Ky.) 300.

In an action against a railroad for injuries, a statement of plaintiff's brother, not replied to by plaintiff, *held* properly admitted in evidence as an implied admission.—Givens v. Louisville & N. R. Co. (Ky.) 320.

In an action for the sale of a doctor's practice, evidence of what plaintiff's agent said to defendant's father and mother concerning the contract and its breach *held* inadmissible.—Wallingford v. Atkins (Ky.) 794.

Evidence of agency for carrier *held* insufficient to warrant introduction of agent's admissions, in action for delay in shipping live stock.—Helm v. Missouri Pac. R. Co. (Mo. App.) 148.

Declarations of insured, made after issuance of benefit certificate, as to false statements in his application, *held* competent evidence in an action on the certificate.—Callies v. Modern Woodmen of America (Mo. App.) 713.

§ 5. Declarations.

Declarations of insured, before his death, to his attorney, not in the presence of insurer, *held* not admissible to show the policy was delivered to him.—New York Life Ins. Co. v. Johnson's Adm'r (Ky.) 762.

A policy holder in a mutual insurance company *held* not disqualified by interest, under Civ. Code Prac. §§ 605, 606, subsec. 2, to testify for it, in an action on a life policy.—New York Life Ins. Co. v. Johnson's Adm'r (Ky.) 762.

§ 6. Hearsay.

In an action for damages from nuisance, consisting of railroad roundhouse, *held* error to permit plaintiff to testify that the engines, by common reputation, belonged to defendant.—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 954.

In an action for injuries to cattle shipped, plaintiff *held* competent to testify as to the market value of the cattle.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

§ 7. Documentary evidence.

The burden of proving the copy of a record is on the one seeking to introduce it.—Miller v. Johnston (Ark.) 371.

The offered proof of the copy of the rules of a corporation *held* not sufficient.—Miller v. Johnston (Ark.) 371.

72 S.W.—74

Where the correctness of notes from which a map of land in dispute was made was not established, the map was inadmissible.—Hays v. Ison (Ky.) 733.

Evidence *held* insufficient to establish defendant's title to land under a destroyed will.—Reno v. Blackburn (Ky.) 775.

Under Rev. St. art. 4642, a certified copy of a deed recorded in a wrong county, when recorded in the proper county, is admissible as proof of the original deed, and also to show the record in the proper county.—Moody v. Ogden (Tex. Civ. App.) 253.

Under Rev. St. arts. 2312, 4692, a certified copy of a deed, which was recorded in a wrong county, after being recorded in the proper county, *held* admissible as proof of the original deed and of recording thereof.—Logan's Heirs v. Logan (Tex. Civ. App.) 416.

§ 8. Parol or extrinsic evidence affecting writings.

Parol evidence *held* admissible to show that, when the payees of an accommodation note indorsed it, it was under agreement that the maker should not sell it until he had obtained a third indorser.—Caudle v. Ford (Ky.) 270.

In action for malicious prosecution, plaintiff having been indicted for criminal libel by an insurance company, certain evidence as to statements made by defendant's agents in soliciting insurance *held* properly admitted.—Provident Sav. Life Assur. Soc. v. Johnson (Ky.) 754.

The doctrine that a written contract excludes parol evidence of the previous negotiations does not apply in an action based on fraud in procuring the contract.—Leicher v. Keeney (Mo. App.) 145.

It is competent to show by parol, when properly pleaded, that the makers of a note are partners and executed the same as a firm obligation.—Markham v. Cover (Mo. App.) 474.

Parol evidence is competent to show that one who appears from the face of a note to be a co-maker executed the note as surety.—Markham v. Cover (Mo. App.) 474.

Parol evidence *held* not admissible to show that it was not intended that written contract should supersede prior writing.—Howard v. Scott (Mo. App.) 709.

A chattel mortgage, in consideration of a debt in a sum stated, "more or less," may be shown to have been given to secure a present debt and future advances.—F. Groos & Co. v. First Nat. Bank (Tex. Civ. App.) 402.

§ 9. Opinion evidence.

Under the facts, *held* not necessary to prove the genuineness of the signatures produced for comparison with a disputed signature, as required by Civil Code Proc. § 604, as amended.—Storey v. First Nat. Bank (Ky.) 318.

Under the facts, *held* unnecessary to give notice of the intended production of other signatures for comparison with a disputed signature, as required by Civil Code Proc. § 604, as amended.—Storey v. First Nat. Bank (Ky.) 318.

Certain expert testimony *held* manifestly absurd, and properly stricken out.—Haviland v. Kansas City, P. & G. R. Co. (Mo. Sup.) 515.

Testimony by an insurance expert, that in his opinion all loans advanced by the company were on account of past premiums, cannot outweigh the established fact that part of the loans was cash advanced for other purposes.—Smith v. Mutual Ben. Life Ins. Co. (Mo. Sup.) 935.

In action by passenger for assault by carrier's servant, statement of plaintiff's witness as to injury *held* properly excluded as a conclusion.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

Where facts testified to by experts concerned the condition of a machine in particulars tending to show its permanent construction at time of sale, the fact that their examination was made a long time thereafter *held* not to render their evidence inadmissible.—Huber Mfg. Co. v. Hunter (Mo. App.) 484.

Testimony of nonexpert witnesses that they could have stopped a fire, but for an explosion of dynamite, *held* incompetent.—Cumberland Telegraph & Telephone Co. v. Dooley (Tenn.) 457.

In an action against a city for a defective walk, evidence by a nonexpert as to its construction *held* objectionable as conclusion.—Lentz v. City of Dallas (Tex. Sup.) 59.

An expert asked a hypothetical question may not give an answer based partly on his understanding of the evidence, and not solely on the facts supposed in the question.—Hicks v. Galveston, H. & S. A. Ry. Co. (Tex. Sup.) 835.

Answer of a physician that he believed plaintiff's injuries to have been caused by violence *held* not objectionable as resting on hearsay.—Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 78.

In an action for injuries, a hypothetical question asked of a physician *held* not objectionable, as not sufficiently specific and as assuming facts not sustained by the evidence.—Galveston, H. & S. A. Ry. Co. v. Baumgarten (Tex. Civ. App.) 78.

A physician *held* competent to give his opinion as to probable duration of plaintiff's injuries.—San Antonio & A. P. Ry. Co. v. Moore (Tex. Civ. App.) 226.

Opinions as to age of deceased, in action for his death, *held* admissible.—St. Louis S. W. Ry. Co. of Texas v. Bowles (Tex. Civ. App.) 451.

Testimony of a witness as to the difference in value of property before and after building a railroad *held* properly excluded, as calling for a conclusion.—Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co. (Tex. Civ. App.) 1038.

§ 10. Weight and sufficiency.

In a civil suit, it is not necessary to prove a contested point to the "satisfaction" of the jury.—Collins v. Clark (Tex. Civ. App.) 97.

EXAMINATION.

Of expert witnesses, see "Evidence," § 9.

Of person accused of crime, see "Criminal Law," § 5.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 3; "Criminal Law," § 29.

To pleading, see "Pleading," § 2.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 31.

Necessity for purpose of review, see "Appeal and Error," § 8.

§ 1. Settlement, signing, and filing.

Neither a bill of evidence nor a bill of exceptions can be considered on appeal where the latter is not signed, as required by Civ. Code, § 337.—Brineger v. Louisville & N. R. Co. (Ky.) 783.

Under Rev. St. 1899, § 728, a judge, having signed and settled a part of a bill of exceptions, thereby exhausted his jurisdiction, and had no authority to sign and settle the remainder on its subsequent presentation.—Atchison v. Chicago & A. Ry. Co. (Mo. App.) 489.

EXCESSIVE DAMAGES.

See "Damages," § 3.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions"; "Homestead."

§ 1. Stay, quashing, vacating, and relief against execution.

Rev. St. art. 2996, requiring writs of injunction to restrain the execution of a judgment to be made returnable to and tried in the court rendering the judgment, has no application to a writ issued to restrain the collection of a justice's judgment.—Foust v. Warren (Tex. Civ. App.) 404.

Defendant, proceeding to trial of an action to enjoin the execution of a judgment in a county other than that in which the judgment was rendered, waives the privilege given him by Rev. St. art. 1194, cl. 17, to have the action tried in such county.—Foust v. Warren (Tex. Civ. App.) 404.

In an action to enjoin the execution of a judgment, plaintiff, though not served with the summons, must show that he had a defense or other equity, or such relief will be denied.—Foust v. Warren (Tex. Civ. App.) 404.

In a suit to enjoin a judgment, the petition *held* sufficient to justify a decree enjoining the issuance of execution thereon.—Deleshaw v. Edelen (Tex. Civ. App.) 413.

§ 2. Claims by third persons.

An adjudication as to the ownership of property seized on execution *held* indispensable to the right to proceed on the delivery bond of a third party claiming the property.—Pepperdine v. Hymes (Mo. App.) 1078.

§ 3. Sale.

A voluntary parol agreement to allow an execution debtor to redeem land sold at execution sale, made after the statutory period for redemption has expired, is unenforceable by the debtor.—Herring v. Johnston (Ky.) 793.

A failure to show good faith and absence of notice in a purchaser at execution sale subsequent to deed by the debtor to his wife relieves those claiming through the wife from showing more than a vesting of title in her by the deed.—Watts v. Bruce (Tex. Civ. App.) 258.

Where defendant purchased land from the purchaser at an execution sale, knowing that such sale had been set aside by the court, he cannot claim the land as an innocent purchaser.—Day v. Johnson (Tex. Civ. App.) 426.

A purchaser of land from one who bought at execution sale *held* not to have had knowledge of the facts which rendered the judgment voidable.—Day v. Johnson (Tex. Civ. App.) 426.

A judgment and order for sale thereunder *held* to sufficiently show the judgment debtors.—Day v. Johnson (Tex. Civ. App.) 426.

An execution sale of lands *held* properly set aside.—Day v. Johnson (Tex. Civ. App.) 426.

§ 4. Wrongful execution.

In an action for the wrongful levy of an execution, an allowance of \$50 for attorney's fees as a part of vindictive damages allowed *held* not error.—Deleshaw v. Edelen (Tex. Civ. App.) 413.

A petition in an action for the wrongful levy of an execution *held* sufficient to justify submis-

sion of the loss of profits as the measure of damages.—*Deleshaw v. Edelen* (Tex. Civ. App.) 413.

In an action to enjoin collection of a judgment and for damages, a verdict in favor of plaintiff *held* sufficient.—*Deleshaw v. Edelen* (Tex. Civ. App.) 413.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Appointment, qualification, and tenure.

A county court *held* to have no jurisdiction to adjudge one guilty of contempt because after appeal to the district court from the order of the county court appointing him permanent administrator he in the district court signed an agreement as administrator to change the venue to another county.—*Ex parte Robertson* (Tex. Cr. App.) 859.

§ 2. Collection and management of estate.

An executor has no power to bind the estate by borrowing money for its use, unless he be authorized to do so by the will or an order of court.—*Rice v. Strange* (Ky.) 758.

Executors under a will and under a settlement between heirs *held* to have sufficient authority to sell testator's real estate to pay debts.—*Mersman v. Worthington's Ex'rs* (Ky.) 1094.

Where executors had power to sell real estate to pay debts, the fact that an action was pending against the estate by a creditor asking settlement of the estate did not deprive the executors of such power.—*Mersman v. Worthington's Ex'rs* (Ky.) 1094.

Under Rev. St. 1899, § 13, an administrator pendente lite during a will contest *held* to have no right to possession of the real estate, unless the probate court so orders or it is needed to pay debts.—*Union Trust Co. v. Soderer* (Mo. Sup.) 499.

§ 3. Allowances to surviving wife, husband, or children.

A widow's right of quarantine may be assigned, and an action of ejectment may be defended thereon.—*Phillips v. Presson* (Mo. Sup.) 501.

A conveyance by a widow of land previously owned by her husband, on which she resided after the husband's death, *held* a valid grant of the widow's quarantine, terminable on the assignment of dower or the widow's death.—*Graham v. Stafford* (Mo. Sup.) 507.

§ 4. Allowance and payment of claims.

The probate court, under Rev. St. 1899, § 192, has jurisdiction of a demand for money due under a contract by testator to hold plaintiff harmless from damage by fire.—*Wabash R. Co. v. Ordelheide* (Mo. Sup.) 684.

In view of the evidence in a suit by a decedent's daughter against his estate for services, *held* not error to instruct that she could recover for services from the time she began work.—*Shannon v. Carter* (Mo. App.) 495.

Instruction, in a suit by a decedent's daughter against his estate for services, as to the necessity of proving a contract, *held* sufficient.—*Shannon v. Carter* (Mo. App.) 495.

Where the maker of notes providing for attorney's fees died before maturity, and the holder presented the notes against his estate without claiming attorney's fees, and they were allowed to the extent of principal and interest, attorney's fees cannot subsequently be recovered.—*Nease v. James* (Tex. Civ. App.) 87.

§ 5. Sales and conveyances under order of court.

A widow *held* entitled to her \$1,000 homestead, though all the land of the intestate has been sold to pay debts.—*Shea v. Shea's Adm'r* (Ky.) 7.

Heirs seeking to require a master commissioner to account for the proceeds of land of the estate sold by him by order of the court cannot complain that the widow has not been paid her share in full.—*Harman v. Avritt* (Ky.) 751.

A settlement had between a master commissioner, who had sold lands of an estate, and the heirs, at which they were represented by their attorneys, should not be disturbed 11 years thereafter.—*Harman v. Avritt* (Ky.) 751.

Where, in proceedings to sell the land of a decedent and settle his estate, it is adjudged that his widow is entitled to a certain fractional part of the "amount" of the sale, she is entitled to such fraction of the gross amount, and not merely of the net proceeds.—*Harman v. Avritt* (Ky.) 751.

Administrator's sale *held* erroneously confirmed, a guardian ad litem having been appointed for an infant defendant, though no affidavit was filed, as required by Civ. Code Prac. § 38.—*Catlett v. Catlett's Adm'r* (Ky.) 781.

§ 6. Actions.

Costs only to date of payment *held* allowable in foreclosure against administrator.—*Hall v. Metcalfe* (Ky.) 18.

Fees to attorneys of mortgagee and administrator *held* improperly allowed in foreclosure of decedent's realty.—*Hall v. Metcalfe* (Ky.) 18.

A petition in an action by an administrator to recover personally from the heirs, which does not describe it, is fatally defective.—*Union Trust Co. v. Soderer* (Mo. Sup.) 499.

Evidence in a suit by a decedent's daughter against his estate for services examined, and *held* to warrant a finding that the services were rendered under a promise to pay.—*Shannon v. Carter* (Mo. App.) 495.

An instruction, in a suit by a decedent's daughter against his estate for services, as to the presumption that the services were gratuitous, *held* not to conflict with another instruction on the same subject.—*Shannon v. Carter* (Mo. App.) 495.

In trespass to try title, allegations that plaintiffs were executors of a will, and that they were lawfully seised and possessed of the lands, *held* to assert their right to recover in their individual capacity.—*Hayden v. Kirby* (Tex. Civ. App.) 198.

§ 7. Accounting and settlement.

Where a special allowance is made to executors by the Court of Appeals, the compensation cannot be properly apportioned, but the cause will be remanded for pleadings and proof on that subject.—*Glover v. Check* (Ky.) 302.

§ 8. Foreign and ancillary administration.

The probate court *held* to be without jurisdiction to consider the question of the general solvency of a nonresident decedent, and to order the ancillary administrator to pay over assets to the principal administrator, so that all creditors shall receive an equal per cent.—*Lewis v. Rutherford* (Ark.) 373.

EXEMPTIONS.

See "Homestead."

§ 1. Nature and extent.

Vendor taking purchase-money notes, giving him right to take possession of property in default of payment, *held* not to have waived right

to sell on execution, under Rev. St. 1899, § 3170, and section 3413 *held* therefore inapplicable.—*De Loach Mill Mfg. Co. v. Latham* (Mo. App.) 1080.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.
In criminal prosecutions, see "Criminal Law," § 13.

EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 3.

FACTORS.

See "Brokers."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil liability.

Where three justices of the peace, being a minority of the fiscal court, attempted to enforce the attendance of another justice by issuing a warrant for his arrest, they acted without jurisdiction, and were liable for damages.—*Stephens v. Wilson* (Ky.) 336.

In an action against a railway company, a complaint *held* not to state a cause of action for false imprisonment.—*Dierig v. South Covington & C. St. Ry. Co.* (Ky.) 355.

In an action against a railway company, complaint *held* not to state a cause of action for false arrest and imprisonment.—*Dierig v. South Covington & C. St. Ry. Co.* (Ky.) 355.

FALSE SWEARING.

See "Perjury."

FEEES.

In action on note, see "Bills and Notes," § 2.
Of attorney, see "Attorney and Client," § 3.
Of consuls, see "Ambassadors and Consuls."

FEE SIMPLE.

Creation by will, see "Wills," § 4.

FELLOW SERVANTS.

See "Master and Servant," § 7.

FILING.

Assignment, see "Assignments," § 1.
Chattel mortgage, see "Chattel Mortgages," § 2.
Pleading, see "Pleading," § 4.
Record on appeal or writ of error, see "Appeal and Error," § 10.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 21.

FINES.

For nonpayment of loans to building and loan association, see "Building and Loan Associations."

FIRES.

Caused by operation of railroad, see "Railroads," § 11.

FORCIBLE DEFILEMENT.

See "Rape."

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 1; "Railroads," § 6.
Of mortgage, see "Chattel Mortgages," § 3; "Mortgages," §§ 4, 5; "Railroads," § 8.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 8.

FOREIGN CORPORATIONS.

See "Corporations," § 5.

FOREIGN JUDGMENTS.

See "Judgment," § 13.

FORFEITURES.

For violation of gaming laws, see "Gaming," § 2.
Of homestead, see "Homestead," § 4.
Of insurance, see "Insurance," §§ 6, 20.
Of recognizance on appeal, see "Bail," § 1.
Of right of way, see "Railroads," § 3.

FORGERY.

Indictment for forgery *held* insufficient, for lack of adequate innuendo averments.—*Head v. State* (Tex. Cr. App.) 394.

An indictment for forging a bank check *held* not objectionable on the ground that it purported to be drawn against any First National Bank and not on the First National Bank of the city where drawn.—*Albert v. State* (Tex. Cr. App.) 846.

The failure to instruct on the necessity of intent to defraud in one part of a charge on forgery *held* not error, in view of its inclusion in other parts of the charge.—*Plemons v. State* (Tex. Cr. App.) 854.

An instrument purporting to be an order for money *held* to be the subject of forgery.—*Plemons v. State* (Tex. Cr. App.) 854.

The fact that prosecutor was owing defendant money when he signed prosecutor's name to a purported order on a third party *held* to be no defense to a prosecution for forgery.—*Plemons v. State* (Tex. Cr. App.) 854.

Indictment for forgery *held* not to require innuendo averments.—*Gray v. State* (Tex. Cr. App.) 858.

Evidence in a prosecution for forgery *held* to sufficiently establish the corpus delicti without the aid of defendant's confession.—*Gray v. State* (Tex. Cr. App.) 858.

FORMER ADJUDICATION.

See "Judgment," §§ 9, 10.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.

FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 1; "Trove and Conversion."

FRAUD.

See "Fraudulent Conveyances."

Effect on limitation, see "Limitation of Actions," § 2.

Ground for vacation of judgment, see "Judgment," § 5.

Parol or extrinsic evidence, see "Evidence," § 8.

In particular classes of conveyances, contracts, or transactions.

See "Insurance," §§ 5, 19.

Procuring contract of sale of realty, see "Vendor and Purchaser," § 1.

Procuring making of will, see "Wills," § 3.

§ 1. Deception constituting fraud, and liability therefor.

In an action for deceit, evidence *held* insufficient to require the submission of the case to the jury.—Perkins' Adm'x v. Embry (Ky.) 788.

§ 2. Actions.

In an action for deceit in the sale of stock, the rejection of evidence relating to a different proposition than that accepted *held* harmless.—Perkins' Adm'x v. Embry (Ky.) 788.

In an action for deceit in the exchange of land for corporate stock, evidence that landowner sent witness to the defendant to ask him to buy the land was admissible.—Perkins' Adm'x v. Embry (Ky.) 788.

A vendee, relying on the vendor's fraudulent representations as to some specific fact, may, on the discovery of the fraud, stand by the purchase and sue for the fraud.—Leicher v. Keeney (Mo. App.) 145.

Petition *held* to state a cause of action for fraudulent representations.—Leicher v. Keeney (Mo. App.) 145.

FRAUDS, STATUTE OF.

§ 1. Agreements not to be performed within one year.

A contract to furnish help for the care of a child *held* not within the statute of frauds.—Wynn v. Followill (Mo. App.) 140.

An administrator's contract to pay his surety on a new bond one-half of his commissions *held* not within the statute of frauds, as not performable within a year.—May v. Moore (Mo. App.) 476.

§ 2. Real property and estates and interests therein.

Owners of adjoining lands, the boundaries between which are indefinite or unascertained, may, by parol, establish a division line.—Sherman v. King (Ark.) 571.

§ 3. Requisites and sufficiency of writing.

A contract to convey a third of all one's property *held* to sufficiently describe the property to satisfy the statute of frauds.—Moayon v. Moayon (Ky.) 33.

Telegrams and letters construed to constitute a contract of sale, valid under the statute of frauds.—Peycke v. Ahrens (Mo. App.) 151.

§ 4. Operation and effect of statute.

Though one cannot, on account of the statute of frauds, recover for breach of a contract of employment, he, having sold a business for less than its value, may, on an implied contract, recover the difference between the amount paid and the value.—Bethel v. A. Booth & Co. (Ky.) 803.

A plaintiff in ejectment who, with his reply that the agreement under which defendant claimed possession was not in writing, and hence void within the statute of frauds, tendered a deed conveying the land to defendant, waived his right to rely on the invalidity of the contract.—Smith v. Frankfort & C. Ry. Co. (Ky.) 1088.

Acts of a purchaser of personal property in reliance on performance by defendant *held* not such part performance as would take the con-

tract out of the statute of frauds.—Jones v. National Cotton Oil Co. (Tex. Civ. App.) 248.

FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.

A conveyance by husband to his wife of property purchased with her money on an agreement that it should be conveyed to her *held* to be for a valuable consideration, so that it could not be sold on execution against him.—Craig v. Conover (Ky.) 2.

Transaction whereby a wife acquires lands *held* not fraudulent as to creditors of husband, who acts as her agent.—Bank of Tipton v. Adair (Mo. Sup.) 510.

Facts *held* to establish that deeds from a husband through a third person to his wife were fraudulent as against creditors.—Balz v. Nelson (Mo. Sup.) 527.

A conveyance of a debtor's homestead, in which he only had an equity of redemption of the value of \$1,200, *held* not fraudulent as to creditors; such amount being exempt from execution.—Balz v. Nelson (Mo. Sup.) 527.

§ 2. Rights and liabilities of parties and purchasers.

Where a debtor conveyed land to defraud his creditors, his devisee cannot impeach such conveyance by proof of such fraud.—Hunter v. Magee (Tex. Civ. App.) 230.

§ 3. Remedies of creditors and purchasers.

Under Ky. St. § 1907a, a suit may be maintained to set aside a deed as fraudulent, without first recovering a personal judgment against the grantor.—Smith v. Curd (Ky.) 744.

In a suit to set aside a conveyance to a wife as in fraud of her husband's creditors, evidence *held* insufficient to show that the consideration was derived from the wife's separate estate.—Smith v. Curd (Ky.) 744.

FREIGHT.

See "Carriers," § 2.

GAMING.

§ 1. Gambling contracts and transactions.

A member of a firm operating a gambling house is not a person invited to enter such place, within Ky. St. § 1969; and hence the creditors of such partner are not entitled to recover money lost there by such partner.—Stapp v. Mason (Ky.) 11.

§ 2. Penalties and forfeitures.

Petition of informer to recover treble the amount lost in a gaming transaction, as authorized by Ky. St. §§ 1956, 1958, must aver that the transaction occurred within the state.—Jacob v. Clark (Ky.) 1095.

Money paid *held* not to have been paid for a gaming consideration so as to entitle informer to recover treble the amount thereof.—Jacob v. Clark (Ky.) 1095.

Ky. St. §§ 1956, 1958, only makes the winner in a gaming transaction liable to the penalty imposed thereby when the amount won has been actually paid.—Jacob v. Clark (Ky.) 1095.

Ky. St. §§ 1956, 1958, only apply when the gaming transaction occurs within the state.—Jacob v. Clark (Ky.) 1095.

Ky. St. §§ 1956, 1958, relating to gaming transactions, must be strictly construed.—Jacob v. Clark (Ky.) 1095.

§ 3. Criminal responsibility.

An indictment under White's Ann. Pen. Code, arts. 379, 389, charging defendant with permit-

ting gambling in a hotel, *held* not defective for failing to describe the room used as a public room.—Hodges v. State (Tex. Cr. App.) 179.

An indictment under White's Ann. Pen. Code, arts. 379, 389, charging defendant with permitting gambling in a hotel, *held* not defective for failing to allege that the hotel was not a private residence.—Hodges v. State (Tex. Cr. App.) 179.

In a prosecution for permitting gambling in a hotel, evidence *held* to support a conviction.—Hodges v. State (Tex. Cr. App.) 179.

Information for card playing, under White's Ann. Pen. Code, art. 379, as amended, *held* sufficient, though not specifying place of game.—Russell v. State (Tex. Cr. App.) 190.

An indictment for gaming *held* sufficient, under Pen. Code, art. 379, as amended by Acts 27th Leg. p. 28.—Hankins v. State (Tex. Cr. App.) 191.

Instruction, in prosecution for gaming, as to nature of place, *held* properly refused.—Williams v. State (Tex. Cr. App.) 192.

A game of craps, in which the owner of the table did not bet, but took a commission, *held* not a banking game, for the keeping of which the owner of the table was liable to prosecution.—Cummings v. State (Tex. Cr. App.) 395.

The owner of a table on which persons play craps against each other *held* not guilty of keeping a banking game.—Campbell v. State (Tex. Cr. App.) 396.

In a prosecution for gaming, testimony of state's witness *held* sufficient to support a conviction.—Simmons v. State (Tex. Cr. App.) 586.

Under Pen. Code, art. 380, an indictment for gaming in a room attached to a public house *held* insufficient.—Osborn v. State (Tex. Cr. App.) 592.

An indictment charging a game at a hotel *held* sufficient, under Pen. Code, art. 379, as amended by Acts 27th Leg. c. 22, p. 26, though it did not negative the fact that the game was in a private residence.—Wilkerson v. State (Tex. Cr. App.) 850.

GARNISHMENT.

See "Attachment"; "Execution."

§ 1. Persons and property subject to garnishment.

Proceeds of life interest and remainder *held* not subject to garnishment.—Bank of Odessa v. Barnett (Mo. App.) 727.

§ 2. Proceedings to support or enforce.

Failure of a garnishee to anticipate that plaintiff would take judgment by default at the term preceding the one at which the statute would permit him to proceed, and to answer before such judgment, *held* not inexcusable neglect.—Heath v. Jordt (Tex. Civ. App.) 1022.

§ 3. Quashing, vacating, dissolution, or abandonment.

Under Bankr. Act 1898, § 67c [U. S. Comp. St. 1901, p. 3449], a garnishment *held* not dissolved by the mere filing of a petition in bankruptcy against defendant.—Sullivan v. King (Tex. Civ. App.) 207.

A plaintiff in garnishment does not waive such proceeding by petitioning in the federal court that defendant be declared a bankrupt.—Sullivan v. King (Tex. Civ. App.) 207.

Supplemental petition of petitioner in bankruptcy *held* not to have amounted to a waiver of garnishment proceedings previously instituted by him against the alleged bankrupt.—Sullivan v. King (Tex. Civ. App.) 207.

GIFTS.

To wife, see "Husband and Wife," § 8.

GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 2.
Of purchaser, see "Vendor and Purchaser," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity"; "Principal and Surety."

§ 1. Requisites and validity.

A waiver of notice of the acceptance of a guaranty *held* valid.—Hughes v. Roberts, Johnson & Rand Shoe Co. (Ky.) 799.

GUARDIAN AD LITEM.

See "Infants," § 1.

GUARDIAN AND WARD.

§ 1. Appointment, qualification, and tenure of guardian.

An order appointing a guardian under Ky. St. § 2022, for minor 14 years of age, *held* to be void.—Garth's Guardian v. Taylor (Ky.) 777.

Under Rev. St. art. 2600, which requires guardian's bond "in amount equal to double the estimated value of the property," the court *held* entitled to itself estimate the value.—Greer v. Ford (Tex. Civ. App.) 73; Same v. Morrison, Id.

A sale of land made by a guardian under order of the court *held* not avoidable on the ground that the oath described him as "guardian," without also reciting "of the person and estate."—Greer v. Ford (Tex. Civ. App.) 73; Same v. Morrison, Id.

§ 2. Custody and care of ward's person and estate.

Facts *held* not to authorize recovery against infants on a note given by their mother as their guardian in settlement of a merchant's account with her individually, payments on which, in excess for the articles bought for them, had been made with their money.—Moore v. Metz (Ky.) 294.

§ 3. Sales and conveyances under order of court.

An order confirming a guardian's sale *held* irregular, and not void.—Greer v. Ford (Tex. Civ. App.) 73; Same v. Morrison, Id.

Order for guardian's sale *held* irregular, and not void.—Greer v. Ford (Tex. Civ. App.) 73; Same v. Morrison, Id.

HABEAS CORPUS.

§ 1. Jurisdiction, proceedings, and relief.

Where one has been found guilty of a contempt of court, and applies to the supreme court for habeas corpus, if there is testimony in the record tending to show that the court had jurisdiction, and the court decides that it did have, its action cannot be reviewed.—Ex parte Stone (Tex. Cr. App.) 1000.

HANDWRITING.

Comparison, see "Evidence," § 9.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 22.
In criminal prosecutions, see "Criminal Law," § 32; "Homicide," § 14.

HEARING.

On appeal or writ of error, see "Appeal and Error," § 15.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6.
In criminal prosecutions, see "Criminal Law," § 10.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," §§ 9, 10.
Accidents at railroad crossings, see "Railroads," § 9.
Rights of railroads to use, see "Railroads," § 3.

§ 1. Establishment, alteration, and discontinuance.

Acts 1897, p. 87, providing a road system for certain specified counties, is constitutional, though the notice of intention to apply therefor was not given.—*Watkins v. Hopkins County* (Tex. Civ. App.) 872.

HOMESTEAD.

Conveyance of, in fraud of creditors, see "Fraudulent Conveyances," § 1.
Impairment of vested right to alienate homestead, see "Constitutional Law," § 2.
Rights of widow to homestead in surplus proceeds of administrator's sale, see "Executors and Administrators," § 5.

§ 1. Nature, acquisition, and extent.

A person supporting his widowed mother and single sister, and living with them on a farm, is entitled to the statutory homestead rights.—*Baldwin v. Thomas* (Ark.) 53.

Under Ky. St. §§ 1702, 1708, 2127, 2128, married woman *held* entitled to homestead exemption.—*Herring v. Johnston* (Ky.) 793.

It is not necessary that a debtor should hold an assignable interest in land to claim an exemption thereof as his homestead.—*Birdwell v. Burleson* (Tex. Civ. App.) 446.

Defendant's possession of land awarded to one of his minor children by a partition decree *held* to exempt that part of the tract inherited by him through the death of one child as his homestead.—*Birdwell v. Burleson* (Tex. Civ. App.) 446.

Three parcels of land constituting one tract of less than 200 acres, on which a debtor moved, intending to make the same his homestead, *held* not subject to execution.—*Schneider v. Dorsey* (Tex. Civ. App.) 1029.

§ 2. Transfer or incumbrance.

Sand. & H. Dig. § 3713, invalidating conveyances of a homestead unless the wife joined therein, *held* to apply to deeds as well as specific liens.—*Park v. Park* (Ark.) 993.

Deed of a homestead executed by a married man, in which the wife did not join, *held* void,

under Sand. & H. Dig. § 3713.—*Park v. Park* (Ark.) 993.

A husband alone cannot contract with a railway company, empowering it to use water from a spring located on his homestead and to enter on the homestead to erect necessary pumping works.—*Houston & T. C. Ry. Co. v. Cluck* (Tex. Civ. App.) 83.

§ 3. Rights of surviving husband, wife, children, or heirs.

Under Rev. St. 1899, § 3620, the right of infant heirs to the occupation of a homestead *held* not defeated by the alienation by the widow of her quarantine, dower, and homestead rights.—*Phillips v. Presson* (Mo. Sup.) 501.

§ 4. Abandonment, waiver, or forfeiture.

A debtor, by mortgaging his homestead, is not precluded from claiming it as exempt as against a judgment at law on the debt.—*Baldwin v. Thomas* (Ark.) 53.

A person, having once acquired a homestead right, is not deprived of it by the loss of his family.—*Baldwin v. Thomas* (Ark.) 53.

A temporary removal from a country homestead to the city to furnish children with educational advantages is not an abandonment of the homestead.—*Herring v. Johnston* (Ky.) 793.

A father's act in leaving his homestead and removing to a village to educate his children *held* not abandonment.—*Birdwell v. Burleson* (Tex. Civ. App.) 446.

The owner of a business homestead, by conveying to another, abandons his homestead exemption.—*R. E. Bell Hardware Co. v. Riddle* (Tex. Civ. App.) 613.

HOMICIDE.**§ 1. Murder.**

Evidence in a prosecution for homicide *held* to justify a conviction of murder in the second degree.—*State v. John* (Mo. Sup.) 525.

Accused, intentionally killing innocent person when in a rage against another, *held* guilty of murder in second degree.—*White v. State* (Tex. Cr. App.) 173.

§ 2. Manslaughter.

Instruction in prosecution for homicide, on reduction of crime to manslaughter, *held* proper.—*White v. State* (Tex. Cr. App.) 173.

§ 3. Assault with intent to kill.

Under what circumstances a jury in a prosecution for an assault with intent to kill are authorized to find that the instrument used was a deadly weapon determined.—*Cosby v. Commonwealth* (Ky.) 1089.

§ 4. Indictment and information.

An information charging murder in the first degree examined, and *held* to be in approved form and sufficient.—*State v. Reynolds* (Mo. Sup.) 39.

An indictment for murder is not fatally defective because alleging that the grand jurors say that defendant killed deceased "by the means aforesaid," instead of "in the manner and form aforesaid."—*State v. Gleason* (Mo. Sup.) 676.

The omission of the word "with" before an allegation "a certain pistol then and there charged," etc., *held* not to render an indictment for murder defective.—*State v. Gleason* (Mo. Sup.) 676.

Indictment for murder *held* sufficient.—*State v. Wilson* (Mo. Sup.) 696.

An indictment for murder *held* not defective, because not alleging the weapon a deadly one,

or that death was calculated to result from its use.—*Lee v. State* (Tex. Cr. App.) 195.

An indictment for murder *held* not defective, because it did not allege the striking which caused the death to have been done in a cruel, brutal, or inhuman manner.—*Lee v. State* (Tex. Cr. App.) 195.

There is no variance between an indictment charging the killing with a gun, and evidence that it was with a pistol.—*Taylor v. State* (Tex. Cr. App.) 396.

§ 5. Evidence—Admissibility in general.

In a prosecution for murder, an interrogatory propounded by the state's attorney as to the reason why witness was afraid of defendant *held* error.—*Black v. Commonwealth* (Ky.) 772.

Evidence that at the time witness heard deceased make a threat against defendant deceased had a knife in his hands *held* immaterial.—*State v. Parker* (Mo. Sup.) 650.

In a prosecution for murder, where defendant claimed that deceased had insulted his daughter, evidence of slanderous remarks made by deceased concerning various other young ladies was not admissible.—*McComas v. State* (Tex. Cr. App.) 189.

In a prosecution for murder, where defendant claimed that deceased made indecent proposals to defendant's daughter, evidence of the general reputation of deceased for lewdness was admissible.—*McComas v. State* (Tex. Cr. App.) 189.

Where it was shown that the person who committed the homicide ran past a certain street corner immediately thereafter, evidence that such person was not the person whom defendant claimed did the killing was admissible.—*Cecil v. State* (Tex. Cr. App.) 197.

Where it was claimed that the killing was done by another than defendant, a motion to dismiss a prosecution against such other person was not admissible to show insufficiency of evidence against him.—*Cecil v. State* (Tex. Cr. App.) 197.

Where defendant claimed that the killing was done by another party, it was not competent to show by an officer that he did not arrest such other party for the offense a day or two following the homicide.—*Cecil v. State* (Tex. Cr. App.) 197.

Where defendant claimed that a certain other person did the killing, it was not competent for the state to show the movements of such other person during the night of the homicide, the next day, and subsequent thereto.—*Cecil v. State* (Tex. Cr. App.) 197.

Evidence that defendant, in a murder case, four days before the killing, said, "I am going to do some devilment, and get my name in the paper," *held* admissible.—*Taylor v. State* (Tex. Cr. App.) 396.

In a prosecution for murder, testimony of a conversation *held* admissible, as showing animus of defendant.—*Moore v. State* (Tex. Cr. App.) 595.

Testimony showing the clandestine manner in which the pistol was procured for defendant by third person *held* inadmissible, unless a conspiracy between defendant and such person was shown.—*Moore v. State* (Tex. Cr. App.) 595.

In a prosecution for homicide, evidence that defendant had illegally sold liquor to the deceased *held* inadmissible to show a motive for the crime.—*Walker v. State* (Tex. Cr. App.) 997.

In a prosecution for homicide, a statement by defendant prior thereto, that he would rather have a murder case against him than a prosecution for illegally selling liquors, *held* in-

admissible.—*Walker v. State* (Tex. Cr. App.) 997.

§ 6. — Dying declarations.

Dying declaration *held* not inadmissible as mere expression of opinion.—*Henderson v. Commonwealth* (Ky.) 781.

In a prosecution for homicide, an instruction as to the weight of decedent's dying declaration *held* proper.—*State v. Parker* (Mo. Sup.) 650.

Statements in decedent's dying declaration, of facts which deceased observed just prior to the killing, and the colloquy between decedent and defendant, *held* admissible as *res gestae*.—*State v. Parker* (Mo. Sup.) 650.

Statements in a dying declaration *held* inadmissible, as referring to matters anterior to the killing not a part of the *res gestae*.—*State v. Parker* (Mo. Sup.) 650.

Deceased's knowledge of impending dissolution *held* sufficiently shown to justify the admission of his dying declaration.—*State v. Parker* (Mo. Sup.) 650.

§ 7. — Weight and sufficiency.

In a prosecution for murder, evidence *held* to justify a conviction.—*Reynolds v. Commonwealth* (Ky.) 277.

Evidence examined, and *held* to sustain defendant's conviction of manslaughter.—*Bohannan v. Commonwealth* (Ky.) 322.

Evidence *held* sufficient to sustain a conviction of murder in the first degree.—*State v. Wilson* (Mo. Sup.) 696.

In a prosecution for homicide, evidence *held* to justify a conviction of murder in the first degree.—*State v. May* (Mo. Sup.) 918.

Evidence in prosecution for homicide considered, and *held* to support a verdict of murder in second degree.—*White v. State* (Tex. Cr. App.) 173.

Evidence *held* to warrant charge on assault with intent to murder.—*Thomas v. State* (Tex. Cr. App.) 178.

In a prosecution for murder, circumstantial evidence *held* insufficient to support a conviction.—*Hernandez v. State* (Tex. Cr. App.) 840.

Evidence in prosecution for homicide *held* to sustain a verdict of murder in the second degree.—*Burrows v. State* (Tex. Cr. App.) 848.

§ 8. Trial—Instructions in general.

An instruction that if the jury found defendant guilty of murder in the first degree they would simply so state, as they had no responsibility with respect to the punishment therefor, *held* proper.—*State v. May* (Mo. Sup.) 918.

Under Pen. Code, arts. 653, 717, 720, *held* error not to have given an instruction on manslaughter.—*Lee v. State* (Tex. Cr. App.) 195.

§ 9. — Instructions as to nature and circumstances of act.

Instruction requiring acquittal if the killing was done by another than defendant, while defendant was making an assault on deceased without intent to kill, *held* erroneously refused.—*Cecil v. State* (Tex. Cr. App.) 197.

In a prosecution for homicide, in which it was claimed that deceased was killed by another than defendant, the jury should have been instructed that if such were the case, and no assault was made by defendant, and no aid or assistance rendered by him at the time, they should acquit.—*Cecil v. State* (Tex. Cr. App.) 197.

In a prosecution for murder *held* error not to charge on the issue of conspiracy if any such issue was raised by the evidence.—*Moore v. State* (Tex. Cr. App.) 595.

§ 10. — Instructions as to passion and provocation.

In a murder trial, an instruction *held* to sufficiently define a standard for the measurement of the question of provocation necessary to reduce the crime to manslaughter.—*Cook v. Commonwealth* (Ky.) 283.

In a murder trial, the failure to use the word "feloniously" in the instruction on manslaughter *held* not error.—*Cook v. Commonwealth* (Ky.) 283.

§ 11. — Instructions as to self-defense.

In a prosecution for murder, an instruction on self-defense *held* not objectionable as requiring that defendant should have been in imminent danger.—*Reynolds v. Commonwealth* (Ky.) 277.

Instruction on the subject of self-defense *held* erroneous as giving undue prominence to particular evidence.—*Reynolds v. Commonwealth* (Ky.) 277.

In a murder trial, use of the word "avoiding" in the self-defense instruction *held* not error.—*Cook v. Commonwealth* (Ky.) 283.

An instruction as to self-defense *held* not erroneous.—*Freeman v. State* (Tex. Cr. App.) 185.

A charge on accidental shooting *held* not misleading.—*Lankster v. State* (Tex. Cr. App.) 388.

The concluding clause of a charge on self-defense, based on threats, *held* not misleading.—*Aldredge v. State* (Tex. Cr. App.) 843.

§ 12. — Instructions as to grade or degree of offense.

Under Cr. Code, § 239, providing that if there be a reasonable doubt of the degree of defendant's offense he shall only be convicted of the lower degree, it is error, in a prosecution for homicide, to omit to so instruct.—*Arnold v. Commonwealth* (Ky.) 753.

Evidence of defendant's intoxication and want of motive *held* to justify charge as to manslaughter.—*Henderson v. Commonwealth* (Ky.) 781.

An instruction, in a prosecution for murder in the first degree, that jury could convict of murder in the second degree, *held* not error.—*State v. Schaeffer* (Mo. Sup.) 518.

The fact that an instruction defining murder in the second degree omitted the word "feloniously" *held* not error.—*State v. Parker* (Mo. Sup.) 650.

An instruction on murder in the second degree *held* justified by the evidence.—*State v. Gleason* (Mo. Sup.) 676.

In a prosecution for homicide, refusal of the court to instruct on manslaughter *held* not error.—*State v. May* (Mo. Sup.) 918.

In a prosecution for murder in the second degree, *held* not error to charge on murder in the first degree.—*White v. State* (Tex. Cr. App.) 173.

In a prosecution for murder, a charge on manslaughter *held* not erroneous, because excluding from consideration slanderous remarks alleged to have been made by deceased concerning defendant's wife.—*McComas v. State* (Tex. Cr. App.) 189.

On a prosecution for murder, *held* error not to have given an instruction on aggravated assault.—*Lee v. State* (Tex. Cr. App.) 195.

Evidence *held* sufficient to suggest the issue of manslaughter, so as to justify its submission to the jury.—*Aldredge v. State* (Tex. Cr. App.) 843.

Instruction submitting question of murder in first degree by either of two methods charged and proven *held* not prejudicial error.—*Burrows v. State* (Tex. Cr. App.) 848.

Evidence in prosecution for assault with intent to murder *held* to require submission of question of simple assault to jury.—*Catling v. State* (Tex. Cr. App.) 853.

§ 13. New trial.

Evidence offered on a motion for new trial of a murder case on the ground of newly discovered evidence examined, and *held*, that the denial of the motion was not error.—*State v. Reynolds* (Mo. Sup.) 39.

§ 14. Appeal and error.

Verdict of manslaughter against a defendant on trial for murder *held* to preclude objections by him to the instruction in regard to the provocation necessary to reduce the crime to manslaughter.—*Cook v. Commonwealth* (Ky.) 283.

In a prosecution for homicide, evidence on the part of the state which tended to aid defendant's defense *held* not prejudicial.—*Black v. Commonwealth* (Ky.) 772.

Charging as to involuntary manslaughter *held* not prejudicial; defendant having been convicted of manslaughter.—*Henderson v. Commonwealth* (Ky.) 781.

Error in not defining "violent passion," as used in an instruction on manslaughter in the fourth degree, is not ground for reversal of a conviction of murder in the second degree.—*State v. Schaeffer* (Mo. Sup.) 518.

Under Code Cr. Proc. art. 723, objection, in prosecution for homicide, to sufficiency of evidence, *held* too late when taken for first time on motion for rehearing of appeal.—*White v. State* (Tex. Cr. App.) 173.

In prosecution for murder in second degree, instruction on murder in first degree *held* not reversible error in view of verdict.—*White v. State* (Tex. Cr. App.) 173.

In a prosecution for homicide, evidence that witness knew a man who was with deceased at the time of the difficulty resulting in the homicide was nonprejudicial to defendant.—*Cecil v. State* (Tex. Cr. App.) 197.

In a prosecution for homicide, any error in submitting the question of murder in the first degree is rendered harmless by a verdict of murder in the second degree.—*Burrows v. State* (Tex. Cr. App.) 848.

HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Marriage."

Competency as witnesses, see "Witnesses," § 1 Rights of survivor, see "Descent and Distribution," § 1; "Executors and Administrators," § 3.

Transactions between, in fraud of creditors, see "Fraudulent Conveyances," § 1.

§ 1. Mutual rights, duties, and liabilities.

A husband is not required to reduce his wife's choses in action to possession.—*J. E. Hayner & Co. v. McKee* (Ky.) 347.

Husband could not establish a lien on land conveyed to his wife to the extent of purchase money paid by him, when it appeared that he has already been reimbursed by rents from the land, and moneys belonging to his wife, and he could not offset against such receipts money expended for her in medical bills, etc.—*Clay v. Clay's Guardian* (Ky.) 810.

§ 2. Conveyances, contracts, and other transactions between husband and wife.

A contract between husband and wife, being just and reasonable, will be enforced in equity.—*Moayon v. Moayon* (Ky.) 33.

The forgiving of the husband by the wife having a ground for divorce *held* sufficient con-

sideration for his contract to convey.—*Moayon v. Moayon* (Ky.) 33.

A deed from a husband to a wife is sufficient to vest the title in her, without any recital that it was to become her separate estate.—*Watts v. Bruce* (Tex. Civ. App.) 258.

§ 3. Wife's separate estate.

Creditors of husband *held* not entitled to subject to their claims certain property standing in the wife's name, and which had been bought out of the profits of her own business, which was managed by him.—*J. E. Hayner & Co. v. McKee* (Ky.) 347.

Under Ky. St. § 2128, a married woman in business for herself can buy real estate without her husband's approval.—*King v. Ballou* (Ky.) 771.

A contract by a married woman concerning her separate estate is valid.—*Robertson v. Robertson* (Ky.) 813.

In a suit to subject real estate purchased by a married woman to a debt of her husband, evidence *held* to justify a finding that the property was purchased with money of the wife's separate estate.—*Lyon v. Lyon* (Ky.) 1102.

Under Ky. St. §§ 2127, 2128, contributions to a married woman on account of her having given birth to five children in one day *held* her separate estate, not subject to her husband's debts.—*Lyon v. Lyon* (Ky.) 1102.

Under Rev. St. art. 635, *held* that a deed of a married woman's land, executed by her husband and one acting under a power of attorney from the wife, privily acknowledged by her, is valid.—*Nolan v. Moore* (Tex. Sup.) 583.

Where a husband conveyed his homestead to his wife for a consideration moving from her separate estate, his possession of the premises thereafter was not adverse to her.—*Hunter v. Magee* (Tex. Civ. App.) 230.

Land purchased with the separate funds of a wife *held* not community property, subject to the husband's debts.—*Hall v. Levy* (Tex. Civ. App.) 263.

§ 4. Actions.

In an action for damages to the community by injuries to the wife, plaintiff *held* entitled to recover for the injury, pain, and suffering, nursing, medical attendance, etc., and for loss of the wife's services.—*Galveston, H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 78.

A wife is not a necessary or proper party to a suit brought by the husband for injuries to her arising from defendant's negligence.—*Galveston, H. & S. A. Ry. Co. v. Baumgarten* (Tex. Civ. App.) 78.

IMPEACHMENT.

Of witness, see "Witnesses," §§ 3-6.

IMPRISONMENT.

See "Bail"; "False Imprisonment."

Escape of prisoner, see "Escape."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Allowance or recovery of compensation, see "Ejectment," § 4.

Impairment of vested rights to improvements, see "Constitutional Law," § 2.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," §§ 4-7.

Where one in good faith makes improvements on the land of another, the owner is not entitled to them either at law or in equity.—*Darnall v. Jones' Ex'rs* (Ky.) 1108.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Municipal Corporations," § 1.

INDEMNITY.

See "Guaranty"; "Principal and Surety."

Under an agreement between a bridge company and certain railway companies using the bridge, the railroad companies *held* liable for a judgment, damages, and costs incurred by the bridge company in defending a suit at the request of the railroad companies.—*Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 822.

A bridge company entitled to recover from certain railroad companies the amount of a judgment and costs incurred by it in behalf of the railroad companies *held* not entitled to recover from the solvent railroad companies the amount due from certain insolvent ones.—*Pittsburg, C. & St. L. R. Co. v. Dodd* (Ky.) 822.

INDEX.

Of judgments, see "Judgments," § 11.

INDICTMENT AND INFORMATION.

Agreements to compromise, see "Contracts," § 1.
Service, see "Criminal Law," § 17.

Against particular classes of parties.

See "Carriers," § 1; "Railroads," § 1.

For particular offenses.

See "Forgery"; "Gaming," § 3; "Homicide," § 4; "Larceny," § 1; "Malicious Mischief"; "Receiving Stolen Goods."

Discrimination in charges by carriers, see "Carriers," § 1.

Operation of railroad under unrecorded lease, see "Railroads," § 1.

Removal of dead body, see "Dead Bodies."

Violation of liquor laws, see "Intoxicating Liquors," § 4.

§ 1. Filing and formal requisites of information or complaint.

Under Rev. St. § 2477, *held*, that verification on information and belief by the prosecuting attorney of an information makes an affidavit on which to base it unnecessary.—*State v. Jacobs* (Mo. App.) 482.

§ 2. Requisites and sufficiency of accusation.

Under Cr. Code, § 125, *held* that, J. J. being indicted under the name of A. J., the style of the prosecution may be changed to J. J., though there was a person in the county named A. J., who was first arrested.—*Commonwealth v. Jenkins* (Ky.) 363.

An indictment for forgery, containing inconsistent allegations as to the date of the instrument forged, *held* bad.—*Hickman v. State* (Tex. Cr. App.) 587.

Under the statute, an indictment for forgery in which the copy of the instrument forged bears date of more than ten years back is bad.—*Hickman v. State* (Tex. Cr. App.) 587.

A variance in a proper name in two clauses of an indictment for forgery *held* immaterial.—*Albert v. State* (Tex. Cr. App.) 846.

Description of money in indictment for robbery *held* sufficient.—*Wilson v. State* (Tex. Cr. App.) 862.

Indictment for perjury *held* to be sufficient.—*Freeman v. State* (Tex. Cr. App.) 1001.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

The state *held* not required to elect between counts in an indictment charging theft of and receiving stolen mules.—*Bynum v. State* (Tex. Cr. App.) 844.

§ 4. Amendment.

Filing of an information termed an "amended one," but in fact a new one, *held* proper.—*Fortenberry v. State* (Tex. Cr. App.) 593.

§ 5. Conviction of offense included in charge.

Under Rev. St. 1899, § 2361, when evidence shows the actual commission of the crime of rape, a conviction of an assault with intent to commit rape cannot be sustained.—*State v. Scott* (Mo. Sup.) 897.

Under an indictment charging an assault to rape, the court may submit the question of a simple or aggravated assault.—*Caddell v. State* (Tex. Cr. App.) 1015.

§ 6. Waiver of defects and objections, and alder by verdict.

On prosecution for violation of local option law, objection that clerk of county court failed to place his file mark on information or affidavit *held* made too late.—*Taylor v. State* (Tex. Cr. App.) 181.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

INFANTS.

See "Guardian and Ward."

Custody and support on divorce of parents, see "Divorce," § 3.

Sales of intoxicating liquor to minors, see "Intoxicating Liquors," § 2.

§ 1. Actions.

Amendment substituting next friend for foreign guardian *held* properly allowed.—*St. Louis, I. M. & S. Ry. Co. v. Haist* (Ark.) 893.

Where a guardian ad litem is appointed under Civ. Code Prac. § 38, his claim for an allowance for his services, both in the lower court and on appeal, should be made by motion in the lower court.—*Williams v. Williams* (Ky.) 271.

Under the pleadings and proof in a personal injury action by a minor, an instruction not to allow anything for his loss of earning power before his majority *held* properly refused.—*Chesapeake & O. Ry. Co. v. Wilder* (Ky.) 353.

Where a next friend of a minor sued to set aside an execution sale of his property, and was recognized by the court as next friend, the minor is bound by the result of such suit.—*Day v. Johnson* (Tex. Civ. App.) 426.

A judgment entered against a minor, under an agreement made by his next friend, *held* properly set aside as improvident.—*Day v. Johnson* (Tex. Civ. App.) 426.

INFORMATION.

See "Homicide," § 4; "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INHERITANCE TAX.

See "Taxation," § 8.

INJUNCTION.

Restraining particular acts or proceedings.

See "Execution," § 1.

Foreclosure, see "Mortgages," § 4.

Interference with erection of telephone poles, see "Telegraphs and Telephones," § 1.

§ 1. Actions for injunctions.

That no injury could result to defendants from an injunction, as the bond would indemnify them against loss, *held* not ground for granting it.—*Parsons v. Weller* (Ky.) 273.

Injunction cannot be obtained by a city official to restrain private persons, nominated as members of its board of public works, but who had not assumed their duties, from threatening to remove him from his position.—*Parsons v. Weller* (Ky.) 273.

§ 2. Violation and punishment.

It is error to punish the violation of a preliminary injunction by instructing that defendant's testimony in his own behalf is not to be construed, as it is also error to regard obedience to a preliminary injunction by instructing that defendant is entitled to a verdict.—*Lake v. Copeland* (Tex. Civ. App.) 89.

In order to render one guilty of a contempt, consisting of the violation of an injunction, it is not necessary that the writ should have been served on him, if he had actual knowledge of its issuance.—*Ex parte Stone* (Tex. Cr. App.) 1000.

The fact that defendant in injunction suit had answered by an attorney *held* not to show that he had knowledge of the issuance of injunction.—*Ex parte Stone* (Tex. Cr. App.) 1000.

IN PAIS.

Estoppel, see "Estoppel," § 3.

INSANE PERSONS.

§ 1. Actions.

A lunatic *held* not a necessary party to a suit against his committee to enforce the right of the lunatic's wife and family, under Ky. St. § 2150, to hold his exempt property.—*Riddle v. Fannin* (Ky.) 290.

INSANITY.

Resulting from drunkenness as defense to crime, see "Criminal Law," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of bank, see "Banks and Banking," § 1.

Of building and loan associations, see "Building and Loan Associations."

Of corporation, see "Corporations," § 4.

INSTRUCTIONS.

Harmless error, see "Appeal and Error," § 22; "Criminal Law," § 32.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 22; "Homicide," §§ 8–12.

Necessity of objection for purpose of review see "Criminal Law," § 29.

INSURANCE.

Admissions by insured as evidence, see "Evidence," § 4.

On state buildings, see "States."

§ 1. Insurance agents and brokers.

Where there was no evidence that defalcations arose in the employment of an insurance

agent as a district manager, error in sustaining a plea by his sureties alleging a discharge by such appointment was harmless.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

An insurance agent's bond *held* to contemplate a recovery after agreements changing his duties, and hence the fact that defalcations occurred while filling the position of district manager was no defense to the liability of the sureties.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

Where an insurance agent had been appointed district manager before the execution of his bond, his sureties cannot claim freedom from liability for his acts as such, on the ground that they supposed they were executing a bond for a soliciting agent only.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

In an action on a bond of an insurance agent for misappropriation, it was no defense that the company's general agent was also liable to it for such misappropriation.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

A plea that a large part of the items embezzled by defendant's principal were not within the bond sued on, without specifying the items objected to, *held* not sufficiently specific.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

Contract for the appointment of an agent for an insurance company *held* not to constitute a variance with the petition, in that it showed a contract by the company's agent, and not on behalf of the company.—*Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.*

Proof of a certain custom *held* not alone sufficient to show that an insurer had knowledge of the issuance of two accident policies to one person for a single period.—*Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.) 1016.*

§ 2. The contract in general.

A railroad ticket agent *held* authorized in selling an accident policy to a cripple to waive a provision that the policy did not insure any crippled person.—*Standard Life & Accident Ins. Co. v. Holloway (Ky.) 796.*

Under Ky. St. § 702, a person who had signed an application for co-operative fire insurance, but to whom no policy had been delivered, and who had not paid the premium, *held* not a member of the company.—*Blue Grass Ins. Co. v. Cobb (Ky.) 1099.*

§ 3. Assignment or other transfer of policy.

An assignment of a life policy to one paying premiums, but having no other insurable interest, *held* to give an interest in the policy only to the extent of the payments.—*Mutual Life Ins. Co. v. Richards (Mo. App.) 487.*

§ 4. Cancellation, surrender, abandonment, or rescission of policy.

Evidence *held* not to show an abandonment of a life policy by the insured.—*Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.*

§ 5. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Under Rev. St. 1899, § 7890, that insured willfully misrepresented that plaintiff was his wife, and that he did not have syphilis, *held* no defense to an action on the policy, where it was found that the matter misrepresented did not contribute to his death.—*Ashford v. Metropolitan Life Ins. Co. (Mo. App.) 712.*

Under Acts 1895, p. 332, c. 160, § 22 (Shannon's Code, § 3306), warranties *held* not to void a life policy, unless made with intent to deceive, or unless matter represented increases risk of loss.—*Hartford Life Ins. Co. v. Stalling (Tenn.) 960.*

§ 6. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Sickness *held* no excuse for nonpayment of premium as provided by fire policy.—*Home Ins. Co. v. Wood (Ky.) 15.*

Waiver of provision as to payment of premium note for fire policy, being voluntary, *held* revoked by notice to pay.—*Home Ins. Co. v. Wood (Ky.) 15.*

Provision in contract of loan from insurance company on paid-up policy, for forfeiture of policy on default in interest, *held* void.—*New York Life Ins. Co. v. N. L. Curry & Bro. (Ky.) 736.*

A clause in a policy against accidental discharge of an automatic sprinkler *held* to refer only to defects in the sprinkler and not to any other appliance in assured's building.—*Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo. Sup.) 635.*

Under Rev. St. 1889, § 5856, an insurance company cannot deduct loans advanced to the assured other than for payment of premiums from the amount appropriated for temporary insurance.—*Smith v. Mutual Ben. Life Ins. Co. (Mo. Sup.) 935.*

An insurance policy *held* not to comply with Rev. St. 1889, § 5859, so as to exclude the policy from the operation of section 5856, providing that a policy shall not be forfeited for nonpayment of premiums, etc.—*Smith v. Mutual Ben. Life Ins. Co. (Mo. Sup.) 935.*

Under Rev. St. 1889, § 5860, contract of insurance providing for emergency assessment on policy *held* old line policy, and hence, under sections 5856-5859, not forfeited for nonpayment of last premium.—*Folkens v. Northwestern Nat. Life Ins. Co. (Mo. App.) 720.*

Under certain circumstances, agent of insurance company *held* empowered to extend payment of premiums.—*Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.*

Under a New York statute an insurance company *held* required to give notice of maturity of premiums as extended.—*Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.*

Under a New York statute and a policy of insurance, the insurance company *held* required to give notice of maturity of premiums to non-residents of that state.—*Washington Life Ins. Co. v. Berwald (Tex. Civ. App.) 436.*

The rights of an insurer, under accident policies limiting the issuance of one policy to a person for a single period, *held* not affected by its failure to return to the insured before the injury to him the premium paid under one of the two policies issued to one person for a single period.—*Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.) 1016.*

Stipulations in accident policies issued to the same person at the same time for a single period *held* to render one of the policies void.—*Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.) 1016.*

§ 7. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Where the agent of an accident insurance company knew that insured was a cripple when he issued the policy, the company was estopped to deny a waiver of a provision that the policy did not insure cripples.—*Standard Life & Accident Ins. Co. v. Holloway (Ky.) 796.*

Insurance company *held* to have waived any right to forfeit fire policy because of untruthful statements in application.—*Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co. (Mo. App.) 139.*

Insurance company *held* estopped to forfeit fire policy because of contract of sale by the in-

sured.—Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co. (Mo. App.) 139.

The rule that an agent of an insurance company has authority to waive conditions of the policy applies to a mutual company organized under Rev. St. 1899, c. 119, art. 10.—Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co. (Mo. App.) 139.

Where an insurance agent, having authority to consent to a transfer of the property, orally consented thereto, the insurer was bound thereby.—Home Mut. Ins. Co. v. Nichols (Tex. Civ. App.) 440.

Where insurer consented to a transfer of the property and an assignment of the policy, a breach of condition by the original holder *held* no defense to an action for a subsequent loss.—Home Mut. Ins. Co. v. Nichols (Tex. Civ. App.) 440.

§ 8. Risks and causes of loss.

Clauses of a policy insuring against the accidental discharge of an automatic sprinkler *held* to except a loss caused by insured's neglect to care for the property after loss, but not a loss caused by negligence of assured's servants.—Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo. Sup.) 635.

A provision in a policy against the accidental discharge of an automatic sprinkler *held* to refer to care required after the discharge, and not to care required to prevent the accident.—Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo. Sup.) 635.

The act of assured's servant in placing window brass rods over the pipes of a sprinkling apparatus *held* not the willful act of assured within a policy exempting loss caused thereby.—Wertheimer-Swartz Shoe Co. v. United States Casualty Co. (Mo. Sup.) 635.

An accident policy exempting insurer from liability for death by voluntarily or involuntarily taking poison *held* to include death resulting from an accidental taking of a poisonous medicine.—Kennedy v. Aetna Life Ins. Co. (Tex. Civ. App.) 602.

A stipulation in an accident policy *held* not to relieve the insurer from liability for injuries sustained by the insured while on a hunting expedition.—Wilkinson v. Travelers' Ins. Co. (Tex. Civ. App.) 1016.

Death resulting from eating unsound oysters *held* caused by accidental means within terms of an accident policy.—Maryland Casualty Co. v. Hudgins (Tex. Civ. App.) 1047.

Where death of insured was caused by eating unsound oysters, an accident insurance company *held* liable, notwithstanding clause in policy exempting it from liability for injuries resulting from poison or anything accidentally or otherwise taken.—Maryland Casualty Co. v. Hudgins (Tex. Civ. App.) 1047.

§ 9. Extent of loss and liability of insurer.

Under Ky. St. § 700, a provision in a fire policy, providing that the company should not be liable beyond the actual cash value of the property at the time of loss, *held* of no validity.—Hartford Fire Ins. Co. v. Bourbon County Court (Ky.) 739.

Under Ky. St. § 700, a fire policy, providing that the loss should not exceed what it would cost to replace the building, *held* invalid in so far as it concerns the total loss.—Hartford Fire Ins. Co. v. Bourbon County Court (Ky.) 739.

Under Ky. St. § 700, a provision of a fire policy, providing that amount of loss should be the cash value with proper deduction for depreciation, "however caused" *held* invalid.—Hartford Fire Ins. Co. v. Bourbon County Court (Ky.) 739.

Under terms of accident policy, the allowance, in a verdict, of indemnity for time during which the insured was disabled preceding the employment of a physician *held* error.—Hayes v. Continental Casualty Co. (Mo. App.) 135.

In an action on a policy limiting plaintiff's recovery to three-fourths of the value of property, an instruction authorizing recovery of the full value is erroneous.—Roberts v. Insurance Co. of America (Mo. App.) 144.

§ 10. Notice and proof of loss.

Where an accident insurance company, on being notified of an accident to a policy holder, denied its liability, it thereby waived the proof of loss of time which the policy in terms required.—Hayes v. Continental Casualty Co. (Mo. App.) 135.

Condition of accident policy that immediate notice of the accident shall be given does not apply where notice is prevented by unconsciousness of insured, resulting from the accident.—Hayes v. Continental Casualty Co. (Mo. App.) 135.

Where proofs of loss had been waived, the requirement that they be furnished could not be revived by a subsequent demand therefor.—Roberts v. Insurance Co. of America (Mo. App.) 144.

A clause in an accident policy, requiring immediate notice of accident or injury, *held* void, under Rev. St. art. 3379.—Maryland Casualty Co. v. Hudgins (Tex. Civ. App.) 1047.

§ 11. Adjustment of loss.

Under Ky. St. § 700, *held* that if a certain provision of a fire policy meant that the question whether there had been a total loss should be submitted to arbitrators, the provision was void.—Hartford Fire Ins. Co. v. Bourbon County Court (Ky.) 739.

§ 12. Right to proceeds.

A fire policy issued by a mutual assessment insurance company, *held* to terminate with the death of the member and devise of the insured property to his son.—Cook v. Kentucky Growers' Ins. Co. (Ky.) 764.

§ 13. Payment or discharge, contribution, and subrogation.

Measure of damage stated, in an action brought by one whose property has been destroyed by fire, for the use of the insurers who have paid his loss, against the one by whose negligence or wrong the damage occurred.—Cumberland Telegraph & Telephone Co. v. Dooley (Tenn.) 457.

An insurer against accidental injury *held* not subrogated to the rights of assured, injured through the negligence of a third party to recover damages for such negligence.—Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Sup.) 168.

Batts' Ann. Civ. St. art. 3071, imposing a penalty on insurance companies for failure to pay within the time specified, *held* not to apply to accident insurance.—Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Sup.) 168.

Rev. St. art. 3071, imposing penalties on insurance companies for failing to pay insurance, *held* inapplicable to accident company.—Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Civ. App.) 621.

§ 14. Actions on policies.

A refusal of a life insurance company to pay the first installment of policy payable in annual installments *held* not to authorize judgment against it for the whole amount.—New York Life Ins. Co. v. English (Tex. Sup.) 58.

That insured, injured through the negligence of his employer, settled with the latter and released it from liability, *held* not a defense to an action for accident insurance.—Aetna Life Ins. Co. v. J. B. Parker & Co. (Tex. Civ. App.) 621.

An insurer under an accident policy paying into court a sum in full for an insured's injuries *held* precluded from questioning its liability to the amount so paid.—*Wilkinson v. Travelers' Ins. Co.* (Tex. Civ. App.) 1016.

§ 15. — Pleading.

Variance in action on insurance policy as to number and name of insured *held* immaterial.—*Etna Life Ins. Co. v. J. B. Parker & Co.* (Tex. Civ. App.) 621.

An accident insurance company merely pleading exemption from liability on ground that death resulted from eating oysters containing ptomaine poison *held* confined to such defense.—*Maryland Casualty Co. v. Hudgins* (Tex. Civ. App.) 1047.

§ 16. — Evidence.

On an issue whether building had been totally destroyed by fire, certain photographs in evidence *held* inconclusive in favor of the insurer.—*Hartford Fire Ins. Co. v. Bourbon County Court* (Ky.) 739.

In an action on a fire policy *held* proper to admit testimony as to what steps would be necessary to restore the building.—*Hartford Fire Ins. Co. v. Bourbon County Court* (Ky.) 739.

Under Ky. St. § 700, *held* that, where in an action on a fire policy the question is whether there has been a total loss, testimony of architects and builders as to cost of replacing the building was properly rejected.—*Hartford Fire Ins. Co. v. Bourbon County Court* (Ky.) 739.

In an action on a fire policy *held* not error to exclude a certain letter from an adjuster of defendant.—*Hartford Fire Ins. Co. v. Bourbon County Court* (Ky.) 739.

Evidence *held* insufficient to warrant a finding that insurance was in force before the delivery of the policy and payment of the premium.—*Blue Grass Ins. Co. v. Cobb* (Ky.) 1099.

Testimony of the insured in an accident policy that he jumped from a car, fearing a wreck, *held* not overthrown by proof that there was no wreck.—*Hayes v. Continental Casualty Co.* (Mo. App.) 135.

Verdict for plaintiff in action on fire policy *held* manifestly against the weight of the evidence.—*Etna Ins. Co. v. Eastman* (Tex. Civ. App.) 431.

Certain evidence admitted in action on life policy *held* not objectionable as an attempt to vary the policy by parol.—*Washington Life Ins. Co. v. Berwald* (Tex. Civ. App.) 436.

§ 17. — Trial.

Whether insurer's agent had knowledge that plaintiff was a cripple when its agent issued a policy to him *held* a question for the jury.—*Standard Life & Accident Ins. Co. v. Holloway* (Ky.) 796.

Refusal to instruct that the term "strict care," as used in an accident policy, meant "immediate care," on the ground that such definition would not enlighten the jury, was not error.—*Hayes v. Continental Casualty Co.* (Mo. App.) 135.

Conflicting evidence as to duration of unconsciousness of the holder of an accident policy, resulting from an accident, *held* to be a question for the jury.—*Hayes v. Continental Casualty Co.* (Mo. App.) 135.

In action on fire policy, an instruction *held* erroneous as ignoring certain defenses.—*Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co.* (Mo. App.) 139.

In an action on a policy, an instruction failing to submit an issue as to whether proofs of loss

had been waived *held* error.—*Roberts v. Insurance Co. of America* (Mo. App.) 144.

§ 18. Mutual benefit insurance — Corporations and associations.

Until one has been initiated into a local lodge of a fraternal beneficiary association, the association cannot rightfully issue a benefit certificate to him.—*Hiatt v. Fraternal Home* (Mo. App.) 463.

Unauthorized acts of deputy organizer of fraternal association in collecting dues and assessments *held* not binding on supreme or local lodge.—*Hiatt v. Fraternal Home* (Mo. App.) 463.

§ 19. — The contract in general.

Under Ky. St. § 679, and the facts, a by-law of a mutual benefit association relating to the subject of suicide of an insured *held* not a part of a certificate issued by it.—*Mooney v. Ancient Order of United Workmen* (Ky.) 288.

Beneficiary certificate, countersigned after death of insured, *held* void.—*Hiatt v. Fraternal Home* (Mo. App.) 463.

Evidence *held* not to show a waiver of misrepresentations in application for benefit certificate.—*Callies v. Modern Woodmen of America* (Mo. App.) 713.

Furnishing blank proofs of death *held* not to constitute waiver as to false statements in an application for a benefit certificate.—*Callies v. Modern Woodmen of America* (Mo. App.) 713.

Evidence *held* to show that there was no warranty as to certain answers in an application for a fraternal benefit certificate.—*Callies v. Modern Woodmen of America* (Mo. App.) 713.

Fraudulent concealment of material facts will avoid liability on benefit certificate.—*Callies v. Modern Woodmen of America* (Mo. App.) 713.

§ 20. — Forfeiture or suspension.

Local lodge of beneficiary association *held* not estopped to deny contract of issuance.—*Hiatt v. Fraternal Home* (Mo. App.) 463.

The holder of a life benefit certificate who had paid benefit assessments *held* not released from duty to pay other assessments.—*Supreme Council American Legion of Honor v. Landers* (Tex. Civ. App.) 880.

§ 21. — Beneficiaries and benefits.

When an insured is insane when committing suicide determined.—*Mooney v. Ancient Order of United Workmen* (Ky.) 288.

A mutual benefit certificate payable to a designated beneficiary, and which is silent on the subject of suicide, becomes void if the insured commits suicide when sane, but not if he is insane.—*Mooney v. Ancient Order of United Workmen* (Ky.) 288.

§ 22. — Actions for benefits.

In an action on a mutual benefit certificate, the question whether the insured was sane or insane at the time of committing suicide *held*, under the evidence, for the jury.—*Mooney v. Ancient Order of United Workmen* (Ky.) 288.

The pleadings in an action on a life policy *held* to fix the status of defendant as an ordinary life insurance company.—*Cauveren v. Ancient Order of Pyramids* (Mo. App.) 141.

Evidence in an action on a life policy *held* to justify leaving to the jury the question of waiver of a health certificate from the policy holder on payment of arrears.—*Cauveren v. Ancient Order of Pyramids* (Mo. App.) 141.

INTENT.

Evidence as to in criminal prosecutions, see "Homicide," § 5.

INTEREST.

See "Usury."

Effect of pecuniary interest as to credibility of witness, see "Witnesses," § 5.

On loans by building and loan associations, see "Building and Loan Associations."

INTERNATIONAL LAW.

See "Ambassadors and Consuls."

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Drunkness as defense to crime, see "Criminal Law," § 1.

§ 1. Local option.

On the contest of an election under the liquor law, the question whether the decision of the Court of Civil Appeals was in conflict with a decision of the Court of Criminal Appeals *held* immaterial.—Norman v. Thompson (Tex. Sup.) 62.

That a notice of an election under the liquor law was not posted as required *held* to furnish no grounds for contest of election, under Rev. St. art. 3397.—Norman v. Thompson (Tex. Sup.) 62.

A certificate of a county judge of notice of a local option election *held* insufficient to put local option into effect.—Lively v. State (Tex. Cr. App.) 303.

The local option law in 1892 could only be repealed by vote of the entire people in the territory in which it was operative.—Ex parte Elliott (Tex. Cr. App.) 837.

The legislature in amending the provisions of the local option law cannot affect territory in which the law is already in force.—Ex parte Elliott (Tex. Cr. App.) 837.

In a prosecution for violating the local option law, a charge that the law was in force *held* justified.—Sebastian v. State (Tex. Cr. App.) 849.

Under Rev. St. art. 3387, failure to post notice of local option election for the full 12 days before the election *held* not to invalidate it.—Norman v. Thompson (Tex. Civ. App.) 64.

§ 2. Offenses.

To warrant conviction for selling liquor to a minor, the seller must know the buyer is a minor.—Gray v. State (Tex. Cr. App.) 169.

Pen. Code 1901, art. 405, *held* not to prevent a physician from giving a prescription to obtain intoxicating liquor in a prohibited district to himself.—Hawk v. State (Tex. Cr. App.) 842.

§ 3. Criminal prosecutions.

Under Rev. St. § 2748, a justice has jurisdiction of a prosecution for selling liquor without a license.—State v. Back (Mo. App.) 466.

§ 4. — Indictment, information, or complaint.

An indictment for selling liquor without a license need not allege the name of the person to whom the sale was made.—State v. Back (Mo. App.) 466.

In a prosecution for selling liquor without a license, where the evidence showed that defendant was a clerk in a drug store conducted by a registered pharmacist, the prosecution was properly for selling liquor without a license as a dramshop keeper, and not for selling liquor as a druggist or registered pharmacist.—State v. Back (Mo. App.) 466.

It is not necessary that the jurat to a complaint for violating the local option law show that it was sworn to by a credible person.—Burk v. State (Tex. Cr. App.) 585.

§ 5. — Evidence.

In a prosecution for pursuing the occupation of selling intoxicating liquors without license, evidence *held* insufficient to show that defendant pursued such occupation.—Barnes v. State (Tex. Cr. App.) 177.

On prosecution for violation of local option law, evidence *held* sufficient to sustain a finding that intoxicating liquor was sold by accused.—Taylor v. State (Tex. Cr. App.) 181.

Evidence in prosecution for illegal sale of liquor *held* to authorize a finding of a sale by defendant.—Latham v. State (Tex. Cr. App.) 182.

In a prosecution for sale of liquor to a minor, evidence that defendant had knowledge that the boy was a minor *held* sufficient to support a conviction.—Carwile v. State (Tex. Cr. App.) 376.

Evidence that a sale of beer took place on Sunday considered, and *held* to support a conviction.—Tackaberry v. State (Tex. Cr. App.) 384.

In a prosecution for violating the local option law, admission of evidence of several sales *held* not error, in the absence of a request to require the state to elect.—Walker v. State (Tex. Cr. App.) 401.

Evidence in a prosecution for violation of a local option law *held* to sustain a conviction.—Grimes v. State (Tex. Cr. App.) 589.

Evidence *held* sufficient to sustain a conviction for violating local option law.—Sebastian v. State (Tex. Cr. App.) 849.

On a prosecution for an unlawful sale of liquor, evidence as to other sales *held* inadmissible.—Grimes v. State (Tex. Cr. App.) 862.

§ 6. — Trial.

A charge in a prosecution for illegal liquor selling *held* not to shift the burden of proof.—Grimes v. State (Tex. Cr. App.) 589.

In a prosecution for violating the local option law, where the proof showed that alcohol was sold, a charge defining intoxicating liquor *held* not necessary.—Sebastian v. State (Tex. Cr. App.) 849.

INTOXICATION.

Instructions, see "Criminal Law," § 22.

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 3.

JAILS.

See "Prisons."

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 4.

JOINDER.

Of causes of action, see "Action," § 1.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Authority as to signing and settling bills of exceptions, see "Exceptions, Bill of," § 1.

Comments on evidence, see "Criminal Law," § 18.

Mandamus to judge, see "Mandamus," § 2.

§ 1. Rights, powers, duties, and liabilities.

A bail bond, taken by a judge after adjournment for the day, *held* valid.—State v. Eyer-mann (Mo. Sup.) 539.

An action for damages cannot be maintained against a judge of a court of record for oppressively, maliciously, and corruptly entering a decree of disbarment against plaintiff as an attorney.—Webb v. Fisher (Tenn.) 110.

§ 2. Disqualification to act.

Under Rev. St. 1899, § 1760, a probate judge, objected to as having been of counsel, cannot determine the fact, but must certify the proceedings to the circuit court.—State ex rel. Latimer v. Gray (Mo. App.) 1081.

Under Rev. St. 1899, § 1760, the fact that the probate judge is objected to, as having been of counsel in some matters of exceptions to an administrator's report, necessitates certifying to the circuit court all of the exceptions.—State ex rel. Latimer v. Gray (Mo. App.) 1081.

Sayles' Ann. Civ. St. art. 1069, requiring an exchange of district judges where a judge is disqualified, *held* not in violation of Const. art. 11, § 5.—Kruegel v. Nash (Tex. Civ. App.) 601.

JUDGMENT.

Harmless error, see "Appeal and Error," § 22. In criminal prosecutions, see "Criminal Law," § 27.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

In actions by or against particular classes of parties.

See "Counties," § 4; "Infants," § 1; "Partnership," § 3; "States," § 3.

In particular civil actions or proceedings.

See "Ejectment," § 3; "Specific Performance," § 3.

Decree in equity, see "Equity," § 4.

On appeal or writ of error, see "Appeal and Error," § 24.

On bonds, see "Bail," § 1.

On insurance policy, see "Insurance," § 14.

To enforce vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

To foreclose mortgage, see "Chattel Mortgages," § 3.

§ 1. Nature and essentials in general.

Record *held* to show that a decree was rendered in vacation and was void.—Biffle v. Jackson (Ark.) 569.

Where an answer contained affirmative defenses and a general denial, and defendant refused to plead further after the granting of a motion to make the denials more definite and certain, rendition of judgment for plaintiff on an ex parte hearing *held* error.—Ritchey v. Home Ins. Co. (Mo. App.) 44.

§ 2. On consent, offer, or admission.

Where an agreement for judgment was filed, and the court ordered "judgment as per agreement filed," a judgment entered thereon is valid, though it does not recite that evidence

was heard.—Day v. Johnson (Tex. Civ. App.) 426.

§ 3. By default.

An amendment to a petition to have an interest in land set aside *held* to set up a distinct cause of action from that in the original petition, so that, process not having issued thereon, the default judgment was void.—Cope v. Slayden (Ky.) 284.

That the judgment is in form one by default instead of one overruling demurrer to the petition *held* harmless.—Lane v. Dowd (Mo. Sup.) 632.

Refusal of judgment against a nonresident by default, and allowing him until the succeeding term to answer, *held* not error.—Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.) 432.

§ 4. On trial of issues.

Under Acts 1894 (Ky. St. §§ 2127, 2128), married woman *held* estopped by judgment against her to attack execution sale on the ground that she was merely surety for her husband.—Herring v. Johnston (Ky.) 793.

Where the return on an application for mandamus against a circuit judge, to compel the decision of a case, showed that the case had been on submission on a full record but two judicial days before the application was made, the writ will be denied.—McInerney v. Tarvin (Ky.) 1107.

§ 5. Opening or vacating.

A judgment rendered on a compromise *held* not subject to be set aside for representations inducing it, consisting of the allegations of the pleadings.—Watts v. Bruce (Tex. Civ. App.) 258.

A judgment rendered on a compromise in an action for the recovery of land *held* not subject to be set aside, because defendant did not represent all the title adverse to plaintiffs.—Watts v. Bruce (Tex. Civ. App.) 258.

§ 6. Equitable relief.

A judgment creditor's insolvency will entitle the judgment debtor to enjoin the collection of the judgment, so that a counterclaim which he has may be established as a credit against it.—Norton v. Wochler (Tex. Civ. App.) 1025.

§ 7. Collateral attack.

Judgment against nonresident infant defendants *held* not open to collateral attack as void for want of jurisdiction of persons.—Myers v. Pedigo (Ky.) 734.

Judgment of circuit court, in action by purchaser from widow to establish title to homestead, *held* not open to collateral attack because void for want of jurisdiction of subject-matter.—Myers v. Pedigo (Ky.) 734.

§ 8. Construction and operation in general.

A judgment in an action to set aside a former judgment and for the recovery of land, and which disposed of all the land in accordance with the previous judgment, *held* to have determined the rights of a party thereto not bound by such prior judgment.—Watts v. Bruce (Tex. Civ. App.) 258.

§ 9. Merger and bar of causes of action and defenses.

An action for the reduction of city limits, which was dismissed without trial on the merits, *held* no bar to mandamus proceedings to compel a subsequent city council to pass a second ordinance for the same purpose.—City of Lebanon v. Knott (Ky.) 790.

A decree in partition, rendered pursuant to Rev. St. 1899, § 4386, *held* conclusive in subsequent suit in ejectment between the same parties.—Bartley v. Bartley (Mo. Sup.) 521.

The fact that the indorsee of notes, when sued on a check given for their purchase, fail-

d to counterclaim the indorser's liability on his indorsement, will not preclude a subsequent suit to enforce it; the statute authorizing counterclaims being permissive.—*Norton v. Wochler* (Tex. Civ. App.) 1025.

10. Conclusiveness of adjudication.

Validity of claim against estate *held res judicata*.—*Robertson v. Robertson* (Ky.) 813.

Defendant in replevin *held* not entitled to introduce evidence of damage after judgment in another suit with which the replevin action had been consolidated.—*Freeman v. Lavenue* (Mo. App.) 1085.

Order appointing third party guardian of certain children *held* conclusive as to fitness of the third party and unfitness of the mother.—*Beardsley v. Thomas* (Tex. Civ. App.) 411.

An indorser who has recovered judgment for the purchase price of notes is estopped thereby from denying their validity when his liability as indorser is sought to be enforced.—*Norton v. Wochler* (Tex. Civ. App.) 1025.

11. Lien.

A purchaser of property is charged with notice of a judgment entered against his vendor under a name differently spelled, but *idem sonans*, and practically identical.—*Green v. Meyers* (Mo. App.) 128.

An omission to name costs, or the amount thereof, does not invalidate a judgment, under Rev. St. 1899, § 3759.—*Green v. Meyers* (Mo. App.) 128.

Judgment abstracted by initials of Christian name is notice.—*Green v. Meyers* (Mo. App.) 128.

Where indices of a judgment abstract are kept on the vowel system, a purchaser of property whose vendor's name may be spelled with either one of two vowels is bound to search under both.—*Green v. Meyers* (Mo. App.) 128.

A judgment lien *held*, under Sayles' Rev. St. arts. 3289, 3290, to have expired when plaintiffs purchased land from the judgment debtor.—*First Nat. Bank v. Adams* (Tex. Civ. App.) 403.

A judgment *held* insufficient to create a lien by reason of defects in the abstract, and in the record and indexing thereof.—*Schneider v. Dorsey* (Tex. Civ. App.) 1029.

12. Payment, satisfaction, merger, and discharge.

Evidence considered, and *held* to show that a certain judgment had been satisfied.—*Howard v. London Mfg. Co.* (Ky.) 771.

Where a plaintiff in ejectment recovered judgment of restitution and for damages and rent, and defendant recovered judgment for improvements, the amounts should be set off.—*Tice v. Fleming* (Mo. Sup.) 689.

Where one of three defendants, against whom a joint judgment had been rendered, paid the entire sum due and took an assignment from the judgment creditor, the judgment was thereby extinguished, and the purchaser was not entitled to enforce contribution by execution.—*Deleshaw v. Edelen* (Tex. Civ. App.) 413.

13. Actions on judgments.

Allegations of jurisdiction of court of sister state *held* sufficient in action on its judgment.—*Montgomery v. Consolidated Boat Store Co.* (Ky.) 816.

Transcript of judgment of sister state, certified as required by St. U. S. §§ 905-909 [U. S. Comp. St. 1901, pp. 677-679], *held* to contain a complete copy of the judgment.—*Montgomery v. Consolidated Boat Store Co.* (Ky.) 816.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

Of property of infant, see "Guardian and Ward," § 3.

On execution, see "Execution," § 3.

Evidence *held* insufficient to warrant setting aside judicial sale for inadequacy of appraisal.—*Mastin v. Zweigart* (Ky.) 750.

The mere fact that a brother of an appraiser bid at a judicial sale will not invalidate it.—*Mastin v. Zweigart* (Ky.) 750.

Evidence *held* insufficient to warrant setting aside a judicial sale for prejudice of appraisers.—*Mastin v. Zweigart* (Ky.) 750.

On a judicial sale of lands, taxes should be paid from the purchase price.—*Brown v. Timmons* (Tenn.) 958.

Where on a judicial sale of lands taxes are not paid from the price before confirmation, the same may be done after confirmation, while the funds are under the control of the court.—*Brown v. Timmons* (Tenn.) 958.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 2.

Appellate jurisdiction, see "Justices of the Peace," § 2.

Effect of appearance, see "Appearance."

Of disputed claims against decedents' estates, see "Executors and Administrators," § 4.

Of particular courts, see "Courts."

Want of, ground for collateral attack on judgment, see "Judgment," § 7.

Jurisdiction of particular actions or proceedings.

See "Habeas Corpus," § 1.

Against surviving partners, see "Partnership," § 4.

By or against trustees in bankruptcy, see "Bankruptcy," § 1.

Criminal prosecutions, see "Intoxicating Liquors," §§ 3-6.

JURY.

Custody and conduct, see "Criminal Law," § 24.

Discrimination as to service on juries, see "Civil Rights."

Disqualification of juror as ground for new trial, see "Criminal Law," § 26.

Instructions in civil actions, see "Trial," § 5.

Instructions in criminal prosecutions, see "Criminal Law," § 22.

Harmless error in selection and impaneling of jurors, see "Appeal and Error," § 22.

Questions for jury in civil actions, see "Trial," § 4.

Questions for jury in criminal prosecutions, see "Criminal Law," § 21.

Taking case or question from jury at trial, see "Trial," § 4.

Verdict in civil actions, see "Trial," § 6.

Verdict in criminal prosecutions, see "Criminal Law," § 25.

1. Right to trial by jury.

The amendment to Const. art. 2, § 28, allowing nine jurors to find a verdict in courts of record, is constitutional.—*Hubbard v. St. Louis & M. R. R. Co.* (Mo. Sup.) 1073.

2. Summoning, attendance, discharge, and compensation.

On a trial for murder, the failure of the court to accept, in the list of 40 from whom the 12 jurors were selected, some persons summoned whom defendant would have preferred to those accepted, *held* not error.—*State v. Reynolds* (Mo. Sup.) 39.

Rev. St. § 3795, providing for the drawing of jurors, *held* directory only.—State v. May (Mo. Sup.) 918.

Under Rev. St. §§ 3795, 3797, where jury panel had been exhausted before a jury had been obtained to try a criminal case, the court was justified in making out a list of additional names to be summoned to complete the panel.—State v. May (Mo. Sup.) 918.

Rev. St. § 3797, authorizing a trial judge to make out a list of jurors to complete a panel, *held* applicable, though the jury was a special jury, as distinguished from a regular one.—State v. May (Mo. Sup.) 918.

§ 3. Competency of jurors, challenges, and objections.

Failure to investigate jurors' competency on voir dire *held* to preclude urging their prejudice on motion in arrest.—Russell v. State (Tex. Cr. App.) 190.

An examination of a juror *held* not to show he had such an opinion as to disqualify him.—Taylor v. State (Tex. Cr. App.) 396.

On a prosecution for receiving stolen property, *held* error to allow on the jury those who had served on the jury on the trial of the thief.—Clark v. State (Tex. Cr. App.) 591.

In criminal cases certain conduct on trial *held* not erroneous as a challenge to a juror during his absence from courtroom.—Dodd v. State (Tex. Cr. App.) 1015.

Where the interests of two defendants jointly sued were identical, they were not entitled to separate jury lists or more than six peremptory challenges.—St. Louis Southwestern Ry. Co. of Texas v. Barnes (Tex. Civ. App.) 1041.

JUSTICES OF THE PEACE.

§ 1. Procedure in civil cases.

Under Rev. St. § 3852, written contract *held* admissible in justice's court on behalf of defendant, without having been pleaded.—Helm v. Missouri Pac. R. Co. (Mo. App.) 148.

Under Rev. St. 1899, § 3853, a suit before a justice cannot be dismissed for insufficiency of the account filed by plaintiff, where a sufficient account is filed before trial.—White v. Missouri Pac. Ry. Co. (Mo. App.) 716.

In an action on account before a justice, account filed *held* sufficient.—White v. Missouri Pac. Ry. Co. (Mo. App.) 716.

Though the return of service indorsed on a justice's summons does not show that the person making the service had not authority to make it, the presumption is in favor of the judgment.—Foust v. Warren (Tex. Civ. App.) 404.

§ 2. Review of proceedings.

A defense setting up a partial failure of consideration is a counterclaim, and must be pleaded before a justice, under Rev. St. §§ 3852, 4078, in order to be available on appeal.—Shepherd v. Padgett (Mo. App.) 490.

Under Rev. St. 1899, §§ 3381, 3382, an appellant, who failed to file his appeal within the time limited, *held* not entitled to show cause for his default, where the appellee did not file a transcript, but moved to dismiss the appeal.—Warner v. Donahue (Mo. App.) 492.

Under Rev. St. 1899, art. 2, § 4160, subd. 4, Sunday is to be included in computing the time within which an appeal from a justice's judgment in forcible entry and detainer shall be taken.—Warner v. Donahue (Mo. App.) 492.

Under Rev. St. 1899, §§ 1699, 1731, 3370, an appeal from a justice in forcible entry, taken while a term of the circuit court was adjourned in the county for the purpose of holding court in other counties of the same circuit, *held* to

have been taken in term time, and returnable within six days.—Warner v. Donahue (Mo. App.) 492.

In an action on a note to a bank, proof offered by defendant on an appeal from a justice's judgment *held* not a change in the defense, forbidden by Rev. St. 1899, § 4079.—Van Buren County Sav. Bank v. Mills (Mo. App.) 497.

Dismissal of action by county court on appeal from justice's court *held* error, notwithstanding dismissal of plea in reconvention, by which commencement of suit on Sunday had been waived.—Benchoff v. Stephenson (Tex. Civ. App.) 106.

One who intervened in a suit in justice's court to foreclose a lien, but who failed to ask for judgment against defendant, could amend in the county court.—Douglas v. Robertson (Tex. Civ. App.) 868.

On appeal from a justice to the district court, it is not necessary for appellant to give a bond, where no judgment against him except for costs is rendered, and defects in the bond are immaterial.—Voges v. Dittlinger (Tex. Civ. App.) 875.

Where plaintiff sued in the justice's court for special salary, it was error to permit him to amend in the county court, claiming an additional item as guaranteed salary.—Sun Life Ins. Co. v. Murff (Tex. Civ. App.) 1040.

KNOWLEDGE.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LACHES.

Effect in equity, see "Equity," § 2.

LANDLORD AND TENANT.

Mining leases, see "Mines and Minerals," § 1.
Operation of railroad under unrecorded lease, see "Railroads," § 1.

§ 1. Terms for years.

Where a landlord, after abandonment of the premises by the tenant, rents on his own account, it is an acceptance of the surrender.—Hayes v. Goldman (Ark.) 563.

Tenant *held* to have elected to renew lease for another year.—Hayes v. Goldman (Ark.) 563.

Conveyance by landlord of such title to demise premises as he had acquired under purchase at a foreclosure sale *held* not to release tenant from liability for rent, whether landlord's remaining title was valid or not.—Alford v. Carver (Tex. Civ. App.) 869.

Attornment of tenant to third person under threatened eviction *held* not to release tenant from liability to landlord for rent.—Alford v. Carver (Tex. Civ. App.) 869.

§ 2. Premises, and enjoyment and use thereof.

Where a landlord lets premises, the occupation of which subsequently constitutes a nuisance, the landlord is not liable, unless the nuisance complained of arose necessarily from such use.—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 954.

In action for damages from nuisance, consisting of railroad roundhouse, question whether a nuisance arose necessarily from its ordinary use by defendant's lessee *held* for the jury.—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 954.

In action for damages from nuisance, consisting of railroad roundhouse, *held* error to withdraw testimony tending to show round-

house used by tenant of defendant.—*Louisville & N. Terminal Co. v. Jacobs* (Tenn.) 954.

A tenant *held* not entitled to recover for the loss of the use of water and improvements, in the absence of evidence of damage thereby.—*Riggs v. Gray* (Tex. Civ. App.) 101.

In the absence of a promise by a landlord to reimburse a tenant for repairs, the amount expended therefor cannot be recovered.—*Riggs v. Gray* (Tex. Civ. App.) 101.

3. Rent and advances.

Evidence *held* not require submission of question whether landlord had accepted tenant's surrender of premises.—*Hayes v. Goldman* (Ark.) 563.

Where a tenant removed and sold cotton the day succeeding the execution of an affidavit for a distress warrant before the levy thereof, such acts established that he was "about to so remove the property" when the affidavit was made.—*Riggs v. Gray* (Tex. Civ. App.) 101.

A tenant in an action for distress *held* entitled to recover from the landlord the value of property levied on under the distress warrant, which was delivered to the landlord and consumed by him.—*Riggs v. Gray* (Tex. Civ. App.) 101.

The carrying of cotton to a gin to be baled, and the using of a reasonable amount of feed, *held* not to constitute an appropriation of the products by the tenant, justifying the issuance of a distress warrant.—*Riggs v. Gray* (Tex. Civ. App.) 101.

LANDS.

See "Public Lands."

LARCENY.

See "Receiving Stolen Goods."

1. Prosecution and punishment.

Defendant in a larceny case, none of the articles being worth \$50, *held* entitled to a charge on misdemeanor, on the theory that the articles may have been taken at different times.—*White v. State* (Tex. Cr. App.) 185.

Instruction, in prosecution for theft, upon recent possession of stolen property, *held* unnecessary in view of evidence.—*Ellison v. State* (Tex. Cr. App.) 188.

Requested instruction, in prosecution for theft, as to the necessity of taking, *held* sufficiently covered by charge given.—*Ellison v. State* (Tex. Cr. App.) 188.

On a prosecution for horse theft, an instruction that, if defendant took the horse merely to use it, the jury should acquit, *held* proper.—*Windom v. State* (Tex. Cr. App.) 193.

On a prosecution for horse theft, an instruction that the jury should acquit, if defendant "believed" the horse had been borrowed by one and turned over to him, *held* proper.—*Windom v. State* (Tex. Cr. App.) 193.

On prosecution for horse theft, *held*, that there was no variance between indictment and proof.—*Windom v. State* (Tex. Cr. App.) 193.

An indictment for the theft of lost money properly charges the ownership and possession in the owner of such money.—*Martin v. State* (Tex. Cr. App.) 386.

An instruction in a prosecution for horse stealing, that certain evidence could only be used for identification of the horse, *held* properly refused.—*Hays v. State* (Tex. Cr. App.) 98.

Evidence *held* sufficient to sustain a conviction for the theft of mules.—*Bynum v. State* (Tex. Cr. App.) 844.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 16.

LAW REPORTS.

Reading to jury, see "Trial," § 3.

LEADING QUESTIONS.

See "Witnesses," § 2.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Municipal Corporations," § 2.

LEVEES.

A sale by the St. Francis district levee board of timber standing on lands purchased by the board *held*, under the amendment to Act Feb. 15, 1898, to be valid.—*Myers v. Rolfe* (Ark.) 52.

LEVY.

Of attachment, see "Attachment," § 2.

LIBEL AND SLANDER.

1. Words and acts actionable, and liability therefor.

In an action for slander, certain language *held* actionable per se.—*Fred v. Traylor* (Ky.) 768.

A railway company which makes an agreement whereby a third party is to solicit advertising, and which thereafter denounces him as a swindler, *held* guilty of libel.—*St. Louis S. W. Ry. Co. of Texas v. McArthur* (Tex. Civ. App.) 76.

2. Privileged communications, and malice therein.

Defamatory matter in a pleading *held* pertinent to the issues in the suit.—*Crockett v. McLanahan* (Tenn.) 950.

Defamatory matter concerning a stranger in a pleading is absolutely privileged, if it is pertinent to the issues of the suit.—*Crockett v. McLanahan* (Tenn.) 950.

By the question whether alleged defamatory matter contained in a pleading was pertinent to the issues in the case is meant whether there was probable cause for including the matter in the pleading.—*Crockett v. McLanahan* (Tenn.) 950.

Whether or not a certain communication was privileged *held* to depend on whether it was actuated by malice.—*St. Louis S. W. Ry. Co. of Texas v. McArthur* (Tex. Civ. App.) 76.

3. Actions.

Under Code, § 83, plaintiff may sue in one action for slanderous statements made by defendant to different parties at different times.—*Fred v. Traylor* (Ky.) 768.

It is a question of law whether defamatory matter in a pleading is pertinent to the issues thereof.—*Crockett v. McLanahan* (Tenn.) 950.

A demurrer *held* not to admit want of reasonable cause for making defamatory statements in the pleading.—*Crockett v. McLanahan* (Tenn.) 950.

Where, in an action for libel, the court charged the jury to find the publication was false before finding for plaintiff, it was unnecessary for it to give defendant's request to find in its favor if the publication was true.—*St. Louis S. W. Ry. Co. of Texas v. McArthur* (Tex. Civ. App.) 76.

Where the party writing a libelous letter respecting plaintiff was defendant's general passenger and ticket agent, it was unnecessary to show that defendant had ratified his conduct, to render it liable for exemplary damages.—*St. Louis S. W. Ry. Co. of Texas v. McArthur* (Tex. Civ. App.) 76.

Evidence in an action for libel held to tend to show express malice, warranting exemplary damages.—*St. Louis S. W. Ry. Co. of Texas v. McArthur* (Tex. Civ. App.) 76.

§ 4. Criminal responsibility.

A criminal libel is committed by any writing calculated to create disturbance of the peace, corrupt public morals, or lead to any act which when done is indictable.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

LICENSES.

Injuries to licensees, see "Negligence," § 1; "Railroads," §§ 7, 10.

§ 1. For occupations and privileges.

In a prosecution for pursuing an occupation without license, the state should not merely show the orders of the commissioner's court levying the tax, but also, from the minutes of the court, the amount of such levy.—*Barnes v. State* (Tex. Cr. App.) 177.

§ 2. In respect of real property.

Obstructions by a railroad across its right of way, which had been used by the public as a road, held sufficient notice of the revocation of the license to the public to use the road.—*Illinois Cent. R. Co. v. Waldrop* (Ky.) 1116.

The permissive use of its right of way by a railroad company as a passway does not confer on the public a right to its use, and the company may close the passway at any time.—*Illinois Cent. R. Co. v. Waldrop* (Ky.) 1116.

Railroad company held to have license coupled with interest in certain switch built on private land.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

License of railroad company in switch on private land held not revocable or arbitrary.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

Tenant held not entitled to revoke license given railroad company by owner to use of switch track on the land.—*Darlington v. Missouri Pac. Ry. Co.* (Mo. App.) 122.

LIENS.

Liens acquired by particular remedies or proceedings.

See "Attachment," § 2; "Judgment," § 11.

Particular classes of liens.

See "Attorney and Client," § 3; "Carriers," § 2; "Mechanics' Liens," "Railroads," § 6.

Bailees, see "Bailment."

Mortgage, see "Mortgages," § 1.

Vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

In a suit to foreclose a lien, another lienholder may intervene.—*Douglas v. Robertson* (Tex. Civ. App.) 868.

Where a party agreed to look only to the property of a voluntary association for his claims, such agreement did not create an equitable lien against the property of the association.—*Industrial Lumber Co. v. Texas Pine Land Ass'n* (Tex. Civ. App.) 875.

LIFE ESTATES.

See "Dower."

Creation by deed, see "Deeds," § 2.

Creation by will, see "Wills," § 4.

An agreement by a life tenant to reimburse one who has paid part of the purchase price for land held not enforceable against the lands in the hands of the remainderman.—*Clay v. Clay's Guardian* (Ky.) 810.

LIFE INSURANCE.

See "Insurance," § 6.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Laches, see "Equity," § 2.

Particular actions or proceedings.

See "Ejectment," § 1.

Against carriers, see "Carriers," § 3.

Between partners, see "Partnership," § 2.

To enforce lien, see "Railroads," § 6.

§ 1. Statutes of limitation.

Under Ky. St. §§ 2515, 2523, 4021, and Act May 23, 1890, p. 149, c. 1763, an action to recover back taxes on an annuity alleged to have been omitted held barred after five years from the date the property should have been assessed.—*Commonwealth v. Nute* (Ky.) 1090.

Under Ky. St. §§ 460, 2515, 2523, 4021, a proceeding to compel a taxpayer to list property for any one year is barred if not begun within five years from the time when it could first have been instituted.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

Rev. St. 1899, § 4297, limiting the time within which an action can be brought on a judgment to ten years, does not apply to a judgment recovered before such statute was enacted.—*Tice v. Fleming* (Mo. Sup.) 689.

Limitations do not run in favor of one in possession of land, as against the state.—*Zevola v. Hoffman* (Tex. Civ. App.) 443.

§ 2. Computation of period of limitation.

When a claim for rent for a certain year is first made in an amended petition, filed after the time within which an action could be brought therefor, the claim is barred.—*Fisher v. Musick's Ex'r* (Ky.) 787.

Creditor held excused from discovery of fraud, so as to relieve from bar by limitations his suit to set aside fraudulent conveyance.—*Wilhoit v. Musselman* (Ky.) 1112.

Limitations held not to have begun to run against remaindermen's right to recover land in which decedent's widow had conveyed her quarantine right, until her death.—*Graham v. Stafford* (Mo. Sup.) 507.

A claim for attorney's fees, as provided in a note, held barred by limitations, if not prosecuted within four years after the maturity of the note.—*Nease v. James* (Tex. Civ. App.) 87.

Under Rev. St. art. 3358, an action to enjoin the execution of a judgment is barred at the expiration of four years after the existence of the judgment is discovered.—*Foust v. Warren* (Tex. Civ. App.) 404.

LIMITATION OF LIABILITY.

Of carriers, see "Carriers," §§ 2, 5.

In insurance policy, see "Insurance," § 9.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

LIVE STOCK.

Carriage of, see "Carriers," § 3.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 1.

LOCATION.

Of railroads, see "Railroads," § 2.

LOGS AND LOGGING.

In a contract for the sale of standing timber, a description of the timber as, "all the merchantable yellow poplar, ash, and cucumber trees owned by us" on a certain tract of land is sufficiently definite.—*Hays v. McLin* (Ky.) 339.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 4.

MAINTENANCE

See "Champerly and Maintenance."

MALICE.

See "Libel and Slander," § 2; "Malicious Mischief."

Evidence of, in action for malicious prosecution, see "Malicious Prosecution," § 1.

MALICIOUS MISCHIEF.

In a prosecution for maliciously shooting a dog, evidence *held* not to justify the shooting on the ground of self-defense.—*Atchison v. State* (Tex. Cr. App.) 998.

Where defendant pleaded alibi, to a prosecution for maliciously shooting a dog, he was not entitled to set up apparent danger in justification.—*Atchison v. State* (Tex. Cr. App.) 998.

In a prosecution for maliciously shooting a dog, evidence of the dog's viciousness *held* inadmissible.—*Atchison v. State* (Tex. Cr. App.) 998.

In a prosecution for maliciously shooting a dog, evidence that others had threatened to shoot the dog *held* inadmissible.—*Atchison v. State* (Tex. Cr. App.) 998.

In a prosecution for maliciously shooting a dog, evidence *held* to justify a conviction.—*Atchison v. State* (Tex. Cr. App.) 998.

In a prosecution for killing a dog, a bill of exceptions that defendant offered to prove threats by others to kill the dog, not naming such persons, *held* insufficient.—*Atchison v. State* (Tex. Cr. App.) 998.

MALICIOUS PROSECUTION.

See "False Imprisonment."

§ 1. Actions.

In action for malicious prosecution, an instruction as to probable cause that should be given set out.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

The question as to what facts constitute probable cause for a prosecution is a question of law for the court.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

On malicious prosecution, the question whether certain facts existed, which if they do exist show probable cause, is for the jury.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

In an action for malicious prosecution, libelous matter that was laid before the grand jury, but which was not included in the indictment against plaintiff, *held* not admissible to justify defendant's conduct.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

In action for malicious prosecution, *held* error not to permit in evidence certain paragraphs of the indictment, though the prosecuting attorney had elected not to prosecute on them.—*Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 754.

The fact that a person has been acquitted of a criminal charge does not tend to prove a want of probable cause for the prosecution, on a suit for malicious prosecution.—*Bekkeland v. Lyons* (Tex. Sup.) 56.

MALICIOUS TRESPASS.

See "Trespass," § 2.

MANDAMUS.

To compel payment of municipal bonds, see "Municipal Corporations," § 11.

§ 1. Nature and grounds in general.

Under Rev. St. 1889, § 8067, mandamus will not lie to compel a tax collector to receive a school tax for the proper district, where the list filed erroneously charged it to another district.—*State ex rel. Hamilton v. Brown* (Mo. Sup.) 640.

§ 2. Subjects and purposes of relief.

Under Code Civ. Proc. § 477, Ky. St. § 1563, the court may issue writ of mandamus against the governing committee of a political party as officers.—*Young v. Beckham* (Ky.) 1092.

Under Const. Amend. 1884, § 8, the Supreme Court *held* to have jurisdiction of a proceeding by mandamus to compel the Court of Appeals to reinstate an appeal improvidently dismissed.—*State ex rel. Chicago, R. I. & P. Ry. Co. v. Smith* (Mo. Sup.) 692.

The action of the trial judge in refusing to allow the account of witnesses in a criminal case, under Code Cr. Proc. art. 1068, cannot be reviewed or controlled by mandamus.—*Murray v. Gillespie* (Tex. Sup.) 160.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 24.

MANSLAUGHTER.

See "Homicide," § 2.

MAPS.

As evidence, see "Evidence," § 7.

MARRIAGE.

See "Divorce"; "Husband and Wife."

Facts examined and *held* not sufficient to establish a common-law marriage.—*Lee v. State* (Tex. Cr. App.) 1005.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.**§ 1. The relation.**

A servant *held* rightfully discharged.—*Shute & Limont v. McVitie* (Tex. Civ. App.) 433.

§ 2. Services and compensation.

Where a contract for services is silent as to where the services are to be performed, oral evidence is admissible to show the intent of the parties.—*Cook v. Todd* (Ky.) 779.

Where a contract for services is silent as to the place where they are to be rendered, it will be presumed they are to be rendered in the state.—*Cook v. Todd* (Ky.) 779.

Where plaintiff contracted to superintend a manufacturing plant in the state, he was not required to object to the removal of the plant to another state, to preserve his rights, under the contract, to the salary after such removal, on his refusal to move with it.—*Cook v. Todd* (Ky.) 779.

A servant, suing for compensation after discharge, *held* not entitled to recover salary for full term of his employment.—*Shute & Limont v. McVitie* (Tex. Civ. App.) 433.

Where a servant, employed for a certain term for a certain compensation, is discharged, that his services resulted in no profit to employers *held* not to affect his compensation.—*Shute & Limont v. McVitie* (Tex. Civ. App.) 433.

Where a servant is rightfully discharged, he is entitled to recover the difference between the value of his services and any sums paid him, not exceeding his salary, less damages occasioned by his breach of the contract.—*Shute & Limont v. McVitie* (Tex. Civ. App.) 433.

In an action by servant for compensation, *held* not error to refuse to submit issues raised by master's plea in reconvention for damages.—*Shute & Limont v. McVitie* (Tex. Civ. App.) 433.

§ 3. Master's liability for injuries to servant—Nature and extent in general.

Those operating a railroad train are not required to be on the lookout for an employé of the road riding on the track on a tricycle with the consent of his foreman.—*Jacobs' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 308.

In action for injury to miner, *held* unnecessary to show willful concealment by mine boss of fact that blast had been ignited.—*Bane v. Irwin* (Mo. Sup.) 522.

Railroad engineer *held* guilty of negligence.—*Black v. Missouri Pac. Ry. Co.* (Mo. Sup.) 559.

Where an employé's injuries, received in Texas, resulted from negligence of a railroad in loading a car loaded in New Mexico, its liability must be determined by the laws of the

former state.—*El Paso & N. W. Ry. Co. v. McComas* (Tex. Civ. App.) 629.

§ 4. — Tools, machinery, appliances, and places for work.

Where a servant's injury is the result of the master's failure to furnish a safe place to work, it is not necessary to show gross negligence in order to recover.—*Tradewater Coal Co. v. Johnson* (Ky.) 274.

In a servant's action for personal injuries caused by the fall of coal in defendant's mine, evidence *held* to show negligence as a matter of law.—*Tradewater Coal Co. v. Johnson* (Ky.) 274.

On an issue whether a plank was rotten or not, evidence that it had been in use two years longer than its ordinary life *held* proof that it was defective.—*Adams Exp. Co. v. Smith* (Ky.) 752.

A master is liable for not furnishing his servant a safe place to work in though he leases the premises from a third party.—*Adams Exp. Co. v. Smith* (Ky.) 752.

A petition in an action for injuries to an employé, alleging an unsafe place to work, *held* to state a cause of action.—*King's Adm'r v. Covington, F. & A. Ry. Co.* (Ky.) 757.

Master *held* not to be required to see that a certain gasoline lamp was in safe condition.—*Langdon-Creasy Co. v. Rouse* (Ky.) 1113.

A petition against a mine owner for the death of an employé, under Rev. St. 1899, § 8811, *held* not to allege a failure to comply with any act required by the statute.—*Barron v. Missouri Lead & Zinc Co.* (Mo. Sup.) 534.

An apparatus being secured in the usual way, the master is not liable to the employé.—*Beckman v. Anheuser-Busch Brewing Ass'n* (Mo. App.) 710.

An employer is only required to provide a place as reasonably safe as the proper carrying on of the work will reasonably permit.—*Sinberg v. Falk Co.* (Mo. App.) 947.

Employer *held* not to have furnished deceased employé with safe place to work.—*Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 626.

§ 5. — Methods of work, rules, and orders.

Railroad company *held* guilty of negligence occasioning death of bridge builder struck by hand car while returning from work.—*Middleborough R. Co. v. Stallard's Adm'r* (Ky.) 17.

In an action for the killing of a flagman at a highway crossing, evidence *held* to justify a finding of negligence on the part of the railroad company.—*Missouri, K. & T. Ry. Co. of Texas v. Goss* (Tex. Civ. App.) 94.

In an action by an employé against a railroad for injuries, certain conduct of a foreman in charge of and assisting in moving a hand car *held* to show negligence.—*Missouri, K. & T. Ry. Co. of Texas v. Smith* (Tex. Civ. App.) 418.

Where a railroad's negligence in loading a car is shown to be the proximate cause of a servant's injuries, its liability is established, though it might not have foreseen that the injury would occur.—*El Paso & N. W. Ry. Co. v. McComas* (Tex. Civ. App.) 629.

§ 6. — Warning and instructing servant.

Servant, in action for personal injuries, *held* not charged as a matter of law with notice of a defect in the machine by which she was injured.—*United Laundry Co. v. Steele* (Ky.) 305.

§ 7. — Fellow servants.

Negligence of conductor *held* to have contributed to death of engineer's fellow servant, so as to charge the company under Louisiana law.

Facts *held* to show that a servant's injury resulted from the master's failure to furnish a safe place to work, so that the negligence of fellow servants would not preclude recovery.—*Tradewater Coal Co. v. Johnson* (Ky.) 274.

A helper and an operator of a machine *held* fellow servants, precluding a recovery for injuries to the helper by the operator's negligence.—*Richardson v. Mesker* (Mo. Sup.) 506.

Status of mine boss as vice principal in ordering miner to fire blast *held* not affected by his act as fellow servant in preparing blasts, etc.—*Bane v. Irwin* (Mo. Sup.) 522.

The relation of vice principal, borne by a mine boss toward a miner, is not altered by the fact that there is a general superintendent, who has supervision of both.—*Bane v. Irwin* (Mo. Sup.) 522.

A railroad foreman *held* not to have lost his status as vice principal of plaintiff.—*Missouri, K. & T. Ry. Co. of Texas v. Smith* (Tex. Civ. App.) 418.

Where defendant corporation employed C. in its shipping department, it was liable for his negligence.—*Roberts v. Fielder Salt Works* (Tex. Civ. App.) 618.

Fellow servant doctrine *held* inapplicable to one charged with duty of furnishing safe place to work.—*Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 626.

A push car *held* a car, within Rev. St. art. 4560f, making railroads liable for injuries to servants while operating cars, though caused by the negligence of a fellow servant.—*Texas & P. Ry. Co. v. Webb* (Tex. Civ. App.) 1044.

Plaintiff *held* to have been engaged in operating car when injured, within Rev. St. art. 4560f, making railroads liable for injuries to servants while operating cars, though caused by negligence of fellow servant.—*Texas & P. Ry. Co. v. Webb* (Tex. Civ. App.) 1044.

§ 8. — Risks assumed by servant.

Servant is not required to inspect the premises to see if they are safe.—*Adams Exp. Co. v. Smith* (Ky.) 752.

An employé, straining his back in lifting steel rails, on account of alleged failure of master to furnish enough men for the work, *held* not entitled to recover.—*Haviland v. Kansas City, P. & G. R. Co.* (Mo. Sup.) 515.

Miner, injured by unexpected explosion, *held* not to have assumed the risk, in view of direction of mine boss to return and fire it.—*Bane v. Irwin* (Mo. Sup.) 522.

A miner does not assume the risk incident to a substitution of a more dangerous explosive, where he is not notified thereof.—*Chambers v. Chester* (Mo. Sup.) 904.

The employé assumes the risk of an apparent defect in an apparatus affecting only his safety and which he can readily remedy.—*Beckman v. Anheuser-Busch Brewing Ass'n* (Mo. App.) 710.

A flagman, killed at a railroad grade crossing, *held* not to have assumed the risk of the negligent operation of the train by which he was killed.—*Missouri, K. & T. Ry. Co. of Texas v. Goss* (Tex. Civ. App.) 94.

The danger to a railroad section man in throwing ties from the door of a box car *held* an assumed risk.—*St. Louis S. W. Ry. Co. of Texas v. Austin* (Tex. Civ. App.) 212.

Employé whose death was occasioned by employer's negligence *held* not to have assumed the risk.—*Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 626.

Railroad employé killed while loading cotton on car *held* to have assumed risk.—*St. Louis*

Where plaintiff did not know that a defective step on an engine had not been repaired at an intervening station, he did not assume the risk of injury in subsequently using it.—*Gulf, C. & S. F. Ry. Co. v. Garren* (Tex. Civ. App.) 1028.

§ 9. — Contributory negligence of servant.

Railroad bridge builder, killed by being struck by hand car while returning from work, *held* not guilty of contributory negligence.—*Mid-dlesborough R. Co. v. Stallard's Adm'r* (Ky.) 17.

One injured by colliding with railroad train while riding tricycle on track *held* guilty of gross negligence.—*Jacobs' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 308.

Employé of a railroad, riding on the track on a tricycle with the consent of his foreman, is required to keep a lookout for trains.—*Jacobs' Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 308.

A servant *held* guilty of contributory negligence, barring recovery for injuries.—*Richardson v. Mesker* (Mo. Sup.) 506.

A flagman, killed while endeavoring to warn pedestrians crossing the track of their danger, *held* not guilty of contributory negligence, barring recovery.—*Missouri, K. & T. Ry. Co. of Texas v. Goss* (Tex. Civ. App.) 94.

The negligence of an engineer, whereby a brakeman is placed in immediate danger and is injured, is the proximate cause of the resulting injury.—*San Antonio & A. P. Ry. Co. v. Anker-son* (Tex. Civ. App.) 219.

Where plaintiff's injuries resulted from alleged negligence of the railroad in loading a car, the fact that he assisted in the loading *held* not to release the railroad from liability.—*El Paso & N. W. Ry. Co. v. McComas* (Tex. Civ. App.) 629.

Railroad employé neglecting precautions in loading cotton on car *held* guilty of contributory negligence.—*St. Louis S. W. Ry. Co. of Texas v. Barrett* (Tex. Civ. App.) 884.

A railroad fireman *held* not guilty of contributory negligence in using a defective step.—*Gulf, C. & S. F. Ry. Co. v. Garren* (Tex. Civ. App.) 1028.

An engineer's promise to a fireman to have a defective step on the engine repaired was the promise of the company, on which the fireman was entitled to rely.—*Gulf, C. & S. F. Ry. Co. v. Garren* (Tex. Civ. App.) 1028.

§ 10. — Evidence in actions.

In an action by a servant for injuries from being burned by a gasoline lamp evidence tending to show that the employer had reason to believe that the lamp was safe *held* improperly excluded.—*Langdon-Creasy Co. v. Rouse* (Ky.) 1113.

Evidence *held* to show that plaintiff's injury was not the result of the master's failure to furnish safe appliances.—*Holmes v. Braden-baugh* (Mo. Sup.) 550.

Question whether plaintiff ever knew of one injured in a railroad accident getting well until his case was tried *held* properly excluded.—*Black v. Missouri Pac. Ry. Co.* (Mo. Sup.) 559.

In an action by a miner for injuries, plaintiff's evidence *held* to render not conjectural a finding that had he known of the more dangerous character of the powder used he might have avoided the accident.—*Chambers v. Chester* (Mo. Sup.) 904.

Evidence in action for negligent injury *held* sufficient to have justified finding that engineer's failure to signal was the proximate cause of ac-

cident.—San Antonio & A. P. Ry. Co. v. Anker-son (Tex. Civ. App.) 219.

In an action for injuries to a fireman by a defective engine step, evidence that he supposed that it was repaired at an intervening station *held* competent.—Gulf, C. & S. F. Ry. Co. v. Garren (Tex. Civ. App.) 1028.

§ 11. — Questions for jury in actions.

The question of a servant's contributory negligence *held* one for the jury.—Crabtree Coal Min. Co. v. Sample's Adm'r (Ky.) 24.

Whether or not a certain employé of defendant was the superior of plaintiff's intestate in the work of operating the mine in which intestate was killed *held* to be a question for the jury.—Crabtree Coal Min. Co. v. Sample's Adm'r (Ky.) 24.

In an action against a railroad for injuries to a servant, whether the engineer was guilty of gross negligence *held* properly submitted to jury.—Louisville & N. R. Co. v. Gordan (Ky.) 811.

Whether or not a brakeman on a freight train was guilty of contributory negligence *held* to be a question for the jury.—Louisville & N. R. Co. v. Gordan (Ky.) 811.

In an action by a servant for injuries caused by defective premises the question of plaintiff's negligence *held* properly submitted to jury.—Adams Exp. Co. v. Smith (Ky.) 752.

In an action by a servant for injuries from being burned by a gasoline lamp furnished by the employer, evidence considered and *held* to require submission to the jury of the issue whether the lamp was defective.—Langdon-Creasy Co. v. Rouse (Ky.) 1113.

In action by servant for injuries, question whether he was guilty of contributory negligence *held* for the jury.—Black v. Missouri Pac. Ry. Co. (Mo. Sup.) 559.

Evidence in an action by a miner for injuries *held* to warrant submitting to the jury the question of notice to plaintiff of the substitution of a powder of higher explosive quality.—Chambers v. Chester (Mo. Sup.) 904.

Testimony of an injured miner that he was exercising care *held* not to render improper for the jury the question of notice to him that the powder furnished was a higher explosive than that ordinarily used.—Chambers v. Chester (Mo. Sup.) 904.

Evidence in an action by a miner for injuries *held* to warrant submitting to the jury the question whether, had plaintiff known of the more dangerous character of the powder furnished him, he might not have avoided the accident.—Chambers v. Chester (Mo. Sup.) 904.

Question of assumption of risk on conflicting evidence *held* for the jury.—Sinberg v. Falk Co. (Mo. App.) 947.

Where the evidence failed to show that plaintiff's duty required any more skill or knowledge than he possessed, it was error to submit that issue to the jury.—St. Louis S. W. Ry. Co. of Texas v. Austin (Tex. Civ. App.) 212.

It is a question for the jury whether a brakeman, acting under stress of sudden peril, was guilty of contributory negligence by choosing the means he did to avert the accident.—San Antonio & A. P. Ry. Co. v. Anker-son (Tex. Civ. App.) 219.

In an action for injuries to a servant, evidence *held* to require a submission of defendant's negligence to the jury.—Roberts v. Fielder Salt Works (Tex. Civ. App.) 618.

In action for injury to servant alleged to be owing in part to the use of a car with defective wheels, the evidence *held* not to warrant submission of issue whether the wheels were defective.—El Paso & N. W. Ry. Co. v. McComas (Tex. Civ. App.) 629.

Evidence examined, in an action for the death of a railroad employé, caused by a fall from a coal car, and *held* insufficient to go to the jury.—Johnson v. Houston & T. C. R. Co. (Tex. Civ. App.) 1021.

In an action for injuries to a fireman by reason of a defective engine step, whether plaintiff was justified in believing that the step had been repaired was for the jury.—Gulf, C. & S. F. Ry. Co. v. Garren (Tex. Civ. App.) 1028.

§ 12. — Instructions in actions.

Instruction, in an action by employé for injuries, *held* not erroneous, as unsupported by the pleadings.—United Laundry Co. v. Steele (Ky.) 305.

In an action for the death of a brakeman, alleged to have been caused by the overloading of a car, an instruction *held* not misleading.—Louisville, H. & St. L. Ry. Co. v. Chandler's Adm'r (Ky.) 805.

In action by servant for injuries, an instruction *held* to have properly submitted the issue of contributory negligence.—Black v. Missouri Pac. Ry. Co. (Mo. Sup.) 559.

Any error in instruction asked by a miner, suing for injuries, *held* cured by instruction given at employer's request.—Chambers v. Chester (Mo. Sup.) 904.

Instructions given at request of a miner suing for injuries *held* not erroneous, as requiring notification of change in powder used, irrespective of miner's knowledge.—Chambers v. Chester (Mo. Sup.) 904.

Instructions given at request of miner suing for injuries *held* not erroneous, as assuming matters in dispute.—Chambers v. Chester (Mo. Sup.) 904.

Instruction given at request of miner suing for injuries *held* not erroneous, as authorizing a recovery for employer's failure to notify him of increased risk, notwithstanding his own knowledge.—Chambers v. Chester (Mo. Sup.) 904.

Instruction given at request of miner suing for injuries *held* not erroneous, as authorizing recovery despite contributory negligence, in view of instruction given for employer.—Chambers v. Chester (Mo. Sup.) 904.

Negligence which "contributed to plaintiff's injury" *held* to mean negligence which "contributed to cause or produce the injury," in an instruction on contributory negligence.—San Antonio & A. P. Ry. Co. v. Anker-son (Tex. Civ. App.) 219.

Instruction in action against employer for negligently causing death of employé *held* properly refused as inapplicable to facts.—Merchants' & Planters' Oil Co. v. Burns (Tex. Civ. App.) 628.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

Of evidence in criminal prosecutions, see "Criminal Law," § 9.

MEASURE OF DAMAGES.

See "Damages," § 2.

MECHANICS' LIENS.

§ 1. Enforcement.

A petition to enforce a lien for materials *held* defective as not showing compliance with Ky. St. § 2468.—Newport & Dayton Lumber Co. v. Lichtenfeldt (Ky.) 778.

Defect in a petition to enforce a lien for materials *held* not cured.—Newport & Dayton Lumber Co. v. Lichtenfeldt (Ky.) 778.

MEDICINES.

See "Poisons."

MERGER.

Of contract, see "Contracts," § 3.

MINES AND MINERALS.**§ 1. Title, conveyances, and contracts.**

Contract for development of oil lands construed, and *held* to confer only an option.—*Emery v. League* (Tex. Civ. App.) 603.

Compliance within reasonable time with stipulation to secure partition of grantor's interest *held* necessary to preserve interest of grantee under contract for development of oil lands.—*Emery v. League* (Tex. Civ. App.) 603.

Contract for development of oil lands *held* to have been forfeited by failure to comply within reasonable time with stipulation requiring grantee to obtain partition of lands.—*Emery v. League* (Tex. Civ. App.) 603.

MINISTERS.

To foreign countries, see "Ambassadors and Consuls."

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

By insured, see "Insurance," §§ 5, 19.

MISTAKE.

In contract for sale of realty, see "Vendor and Purchaser," § 1.

MONOPOLIES.**§ 1. Trusts and other combinations in restraint of trade.**

So much of the anti-trust statutes of 1889 and 1899 as authorize the cancellation of permits to do business within the state is constitutional and valid.—*National Cotton Oil Co. v. State* (Tex. Civ. App.) 615.

MORTGAGES.

Of personal property, see "Chattel Mortgages." Of railroads, see "Railroads," § 6.

§ 1. Construction and operation.

Mortgage by partners on firm property *held* superior to individual mortgages by the partners.—*Harris v. Tuttle* (Ky.) 16.

§ 2. Transfer of property mortgaged or of equity of redemption.

In a suit by a mortgagee to charge a grantee of the mortgaged premises with an unpaid balance of the mortgage debt, the burden is on the plaintiff to show an assumption of the debt by the grantee.—*Heffernan v. Weir* (Mo. App.) 1085.

§ 3. Payment or performance of condition, release, and satisfaction.

A tender, not kept up, of the amount due, though refused, *held* not to forfeit the lien of the deed of trust securing the debt.—*Knollenberg v. Nixon* (Mo. Sup.) 41.

§ 4. Foreclosure by exercise of power of sale.

Sale of property under a trust deed *held* void as against a purchaser at sheriff's sale.—*Shields v. Hobart* (Mo. Sup.) 675.

The fact that notes secured by a deed of trust were given for purchase money *held* not to justify a sale under the deed, after the death of the grantee of the land, who had assumed the debt.—*Whitmire v. May* (Tex. Sup.) 375.

Death of the owner of land subject to a deed of trust *held* to revoke the power of sale contained in the deed, so that the land could be applied to the debt only by proceedings in the administration of decedent's estate.—*Whitmire v. May* (Tex. Sup.) 375.

The mortgagee having exercised his option to declare all the notes due for default, and commenced foreclosure, the mortgagor cannot have it stopped by payment of what otherwise would have been due and costs to date.—*Lincoln v. Corbett* (Tex. Civ. App.) 224.

§ 5. Foreclosure by action.

A mortgagor, who had notice of foreclosure, *held*, four years after the time of redemption had expired and after the debt was barred by limitations, estopped by laches from then first disputing the validity of the sale.—*Ayers v. McRae* (Ark.) 52.

Amendment setting up irregularities in foreclosure sale to answer in ejectment by foreclosure purchaser *held* improperly refused.—*Robinson v. United Trust* (Ark.) 992.

Evidence in foreclosure *held* to show payment, so as to render decree of sale improper.—*Hall v. Metcalfe* (Ky.) 18.

Under Ky. St. § 2135, a wife *held* not a necessary party to a suit to foreclose a mortgage on her husband's land in which she joined.—*Morgan v. Wickliffe* (Ky.) 1122.

MOTIONS.

Continuance in civil actions, see "Continuance." New trial in criminal prosecutions, see "Criminal Law," § 26.

Relating to pleadings, see "Pleading," § 5.

Striking out evidence, see "Trial," § 2.

MOTIVE.

Evidence as to, in criminal prosecutions, see "Homicide," § 5.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Municipal census, see "Census."

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 2.

§ 1. Creation, alteration, existence, and dissolution.

In mandamus to compel the passage of an ordinance for the striking of certain territory from a city, under Ky. St. § 3483, an answer that the city had a large bonded indebtedness, and that petitioners had received special privileges therefrom, *held* demurrable.—*City of Lebanon v. Knott* (Ky.) 790.

An order of the county court incorporating a fourth class city *held* a judgment.—*State ex rel. Jackson v. Town of Mansfield* (Mo. App.) 471.

Under Rev. St. 1889, art. 1, § 30, a county court *held* without jurisdiction to incorporate a community previously organized as a town or city.—*State ex rel. Jackson v. Town of Mansfield* (Mo. App.) 471.

§ 2. Legislative control of municipal acts, rights, and liabilities.

Provision of Const. § 161, that no change in compensation of a municipal officer shall be

made during his term of office, *held* required to be read with section 156, giving power to transfer a city from one class to another.—*Gilbert v. City of Paducah* (Ky.) 816; *Crow v. Same, Id.*

Act March 9, 1895, *held* not violative of Const. art. 10, § 10, providing that the General Assembly shall not impose taxes on municipalities for municipal purposes. Rev. St. 1889, §§ 7922, 4575, 7663, par. 2.—*Elting v. Hickman* (Mo. Sup.) 700.

§ 3. Officers, agents, and employes.

The marshal of a city of the third class coming into the second class will be treated as chief of police till the next election; the offices including the same duties.—*Gilbert v. City of Paducah* (Ky.) 816; *Crow v. Same, Id.*

Provision of Ky. St. § 3264, that transfer of a city of the third class shall not affect the rights and duties of an officer thereof, *held* to be read with section 3172, and that such officer could retain his office only as could one of a city originally in the second class.—*Gilbert v. City of Paducah* (Ky.) 816; *Crow v. Same, Id.*

§ 4. Public improvements—Power to make improvements or grant aid therefor.

The letting by a city of a contract for a sidewalk within the time allowed the owner for laying it *held* not to affect the validity of the tax bill for the improvement; the owner not having constructed it.—*City of Springfield ex rel. Updergraff v. Mills* (Mo. App.) 462.

The police power of a city having entire control of its streets and sidewalks is sufficient to enable it to cause the repair of a hole in a sidewalk.—*Lentz v. City of Dallas* (Tex. Sup.) 59.

§ 5. — Preliminary proceedings and ordinances or resolutions.

Ordinance providing for the grading of a street "full width to the curb grade" *held* not void, under Ky. St. §§ 2833, 2835, for failing to designate what part was sidewalk and what part carriageway.—*Burghard v. Fitch* (Ky.) 778.

Where a city has power, under its charter, to open a way to a river for an outlet to a sewer, the fact that the outlet is blocked by filling made by a land company does not invalidate an ordinance ordering the construction of the sewer.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. Sup.) 944.

§ 6. — Contracts.

Plaintiff *held* not entitled to recover on grading contracts with a city, after accepting tax bills in full payment, though the bills were illegally issued.—*Dalton v. City of Poplar Bluff* (Mo. Sup.) 1068.

One *held* to have entered into an approved contract and bond for construction of a sidewalk within ten days from acceptance of his bid, as required by ordinance.—*City of Springfield ex rel. Updergraff v. Mills* (Mo. App.) 462.

In an action against a contractor for breach of a contract to construct city waterworks, the measure of damages defined.—*City of Sherman v. Connor* (Tex. Civ. App.) 238.

In an action against a contractor for breach of a contract to construct city waterworks, the city, under the evidence, *held* not damaged if the amount paid the contractor, plus the sum paid to complete the works, did not exceed the contract price.—*City of Sherman v. Connor* (Tex. Civ. App.) 238.

Where the original contract for the construction of city waterworks was valid, and permitted changes, and changes were made, but the jury found for the contractor, including extras, in a sum less than the contract price, the fact that there was no provision for the levy of

a tax to pay for the extras *held* immaterial.—*City of Sherman v. Connor* (Tex. Civ. App.) 238.

A contractor, failing to construct city waterworks according to his contract, *held* entitled to recover the value of the work done, less the payments made to him, added to the sum paid by the city to complete the works.—*City of Sherman v. Connor* (Tex. Civ. App.) 238.

A contractor, breaching contract to build city waterworks, *held* not prevented from recovering the value of his work, though the fund procured by the sale of the waterworks bonds had been paid out by the city in completing the works.—*City of Sherman v. Connor* (Tex. Civ. App.) 238.

§ 7. — Assessments for benefits, and special taxes.

Ordinance creating a joint sewer district *held* not a violation of city charter.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. Sup.) 944.

Sewer draining a portion of a city *held* not a public sewer, and the cost thereof could be assessed on property drained, under city charter.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. Sup.) 944.

The fact that a sewer has once been designated as public by ordinance, when it is not so in fact, does not invalidate a subsequent ordinance assessing the completion of the sewer on property drained.—*South Highland Land & Improvement Co. v. Kansas City* (Mo. Sup.) 944.

§ 8. Police power and regulations.

Where the warrant in civil suit did not state a cause of action, *held* that a default taken therein could not furnish a basis for a judgment against defendants.—*Town of McMinnville v. Stroud* (Tenn.) 949.

A municipal corporation cannot maintain a suit for the violation of a criminal statute.—*Town of McMinnville v. Stroud* (Tenn.) 949.

§ 9. Use and regulation of public places, property, and works.

A county road *held* to have become a city street.—*City of Louisville v. Brewer's Adm'r* (Ky.) 9.

§ 10. Torts.

One stumbling over post in highway *held* not guilty of contributory negligence as matter of law.—*City of Louisville v. Brewer's Adm'r* (Ky.) 9.

City *held* to have had constructive notice of a defect in a highway.—*City of Louisville v. Brewer's Adm'r* (Ky.) 9.

A municipal corporation is not liable for the injuries sustained by one run into by a sled while attempting to cross a street.—*Dudley v. City of Flemingsburg* (Ky.) 327.

In an action against a city for injuries, the improper reception of evidence of improbable future damages, and the refusal of a certain instruction with respect thereto, *held* reversible error.—*Lentz v. City of Dallas* (Tex. Sup.) 59.

Charter provisions of a city *held* not to release it from liability for failing to repair a hole in the sidewalk.—*Lentz v. City of Dallas* (Tex. Sup.) 59.

A city *held* liable only for the exercise of reasonable diligence to guard excavations in a street made by another after due notice.—*Browne v. Bachman* (Tex. Civ. App.) 622.

That a city granted a franchise to B. to excavate in its streets *held* not to render it liable for B.'s failure to comply with an ordinance requiring the covering or fencing of excavations.—*Browne v. Bachman* (Tex. Civ. App.) 622.

City ordinances forbidding leaving a ditch open in a street *held* not to apply to the city,

nor render the city's failure to comply there-with negligence per se.—*Browne v. Bachman* (Tex. Civ. App.) 622.

A violation of a city ordinance, by leaving an open ditch in a street by city licensee, *held* negligence per se.—*Browne v. Bachman* (Tex. Civ. App.) 622.

An instruction that plaintiff could not recover for injuries sustained by falling into an unprotected ditch in a city street if he had knowledge of its existence *held* erroneous.—*Browne v. Bachman* (Tex. Civ. App.) 622.

In an action for injuries by falling into an unprotected ditch in a city street, evidence that plaintiff was addicted to intoxication *held* inadmissible.—*Browne v. Bachman* (Tex. Civ. App.) 622.

In an action for injuries sustained by a failure to guard an excavation in a street, as required by a city ordinance, such ordinance *held* admissible as against the city on the issue of negligence vel non.—*Browne v. Bachman* (Tex. Civ. App.) 622.

A city ordinance, making it a misdemeanor for any person to leave open a ditch dug in a street, *held* valid, and admissible in an action against a licensee for injuries sustained by violation thereof.—*Browne v. Bachman* (Tex. Civ. App.) 622.

§ 11. Fiscal management, public debt, securities, and taxation.

One having a general judgment against a county is not entitled to mandamus to compel payment from funds derived from taxes levied for the payment of certain bonds.—*State ex rel. Hopper v. Cottengim* (Mo. Sup.) 498.

Act March 9, 1895, *held* not violative of Const. art. 4, § 47, declaring that the legislature shall have no power to authorize any county, city, town, or township to lend its credit or grant public money in aid of any individual, association, or corporation.—*Elting v. Hickman* (Mo. Sup.) 700.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT INSURANCE.

See "Insurance," §§ 18-22.

MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

NAMES.

The rule of idem sonans applies to records.—*Green v. Meyers* (Mo. App.) 128.

The names "Sibert" and "Seibert" are idem sonans.—*Green v. Meyers* (Mo. App.) 128.

NATIONAL BANKS.

See "Banks and Banking," § 2.

NAVIGABLE WATERS.

See "Waters and Water Courses."

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Carriers," §§ 2, 5; "Municipal Corporations," § 10.

Employers, see "Master and Servant," §§ 3-12.
Fellow servants, see "Master and Servant," § 7.

Insured, see "Insurance," § 8.

Railroad companies, see "Railroads," §§ 7-11.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 2.

Condition or use of particular species of property, works, or machinery.

See "Railroads," §§ 7-11; "Street Railroads," § 1.

Contributory negligence.

Of addressee of fraudulent message, see "Telegraphs and Telephones," § 2.

Of passenger, see "Carriers," § 6.

Of person injured in street, see "Municipal Corporations," § 10.

Of person injured on railroad track, see "Railroads," § 10.

Of servant, see "Master and Servant," § 9.

§ 1. Acts or omissions constituting negligence.

Under the evidence in an action for injuries caused by the falling of a door in defendant's depot, an instruction authorizing recovery, unless plaintiff was working for the benefit of his master only, and not in the preparation of goods for shipment, *held* proper.—*Chesapeake & O. Ry. Co. v. Wilder* (Ky.) 353.

Obstruction by a railroad of its right of way *held* to have remained for sufficient time to notify the public of the revocation of the license to use the way as a road.—*Illinois Cent. R. Co. v. Waldrop* (Ky.) 1116.

Those who use a roadway over a railroad company's right of way, after permission for its use has been withdrawn, and sufficient notice of the withdrawal has been given, are trespassers.—*Illinois Cent. R. Co. v. Waldrop* (Ky.) 1116.

After sufficient notice had been given of the purpose of the railroad company to withdraw its right of way from public use by building of obstructions, it was not bound to continue such obstructions beyond a reasonable time.—*Illinois Cent. R. Co. v. Waldrop* (Ky.) 1116.

§ 2. Proximate cause of injury.

Employer's negligence *held* concurring with that of co-tortfeasor so as to make it liable for negligently causing death of employé.—*Merchants' & Planters' Oil Co. v. Burns* (Tex. Civ. App.) 626.

§ 3. Actions.

An answer *held* to plead contributory negligence only as to the happening of the accident, and not in the treatment of the injuries.—*Louisville & N. R. Co. v. Mason* (Ky.) 27.

Where plaintiff was injured by an insecure and unsafe door, while he was moving certain hogsheads in defendant's depot, certain evidence *held* admissible on the issue as to whether plaintiff was moving the hogsheads to load them on defendant's cars for shipment, or merely for the master's convenience.—*Chesapeake & O. Ry. Co. v. Wilder* (Ky.) 353.

In an action for personal injuries, evidence *held* to require submission of the issue of defendants' negligence to the jury.—*Butts v. National Exchange Bank* (Mo. App.) 1083.

In an action to recover for the destruction of property by fire, which was communicated through defendant's building, when it could have been controlled, but for dynamite therein, evidence that the people were warned to keep away, because there was dynamite in defendant's building, *held* admissible.—*Cumberland Telegraph & Telephone Co. v. Dooley* (Tenn.) 457.

In a personal injury action, charge as to burden of proof of contributory negligence *held* erroneous.—*Gulf, C. & S. F. Ry. Co. v. Robinson* (Tex. Civ. App.) 70.

It is error in a personal injury case to instruct that the burden of proving contributory

negligence is on defendant, where the issue has been raised by testimony produced by plaintiff.—Missouri, K. & T. Ry. Co. of Texas v. Jolley (Tex. Civ. App.) 871.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEGROES.

See "Civil Rights."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

Ground for new trial in criminal prosecution, see "Criminal Law," § 26; "Homicide," § 13.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 26; "Homicide," § 13; "Larceny," § 1.

Necessity of showing motion for new trial in record on appeal, see "Appeal and Error," § 6.

Opening or vacating judgment, see "Judgment," § 5.

Remand by appellate court for new trial, see "Appeal and Error," § 24.

Review of discretion in granting or refusing, see "Appeal and Error," § 20.

§ 1. Grounds.

Error in refusing leave to file an answer after the time limited has expired cannot be made a ground of a motion for new trial.—Rigdon v. Ferguson (Mo. Sup.) 504.

Newly discovered evidence *held* not a ground for new trial under certain circumstances.—San Antonio & A. P. Ry. Co. v. Moore (Tex. Civ. App.) 226.

An application for continuance for testimony of a witness may not be abandoned, and a new trial sought for such testimony as newly discovered.—St. Louis S. W. Ry. Co. of Texas v. Bowles (Tex. Civ. App.) 451.

NEXT OF KIN.

See "Descent and Distribution."

NOMINATION.

For office, see "Elections," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

Acceptance of guaranty, see "Guaranty," § 1.

Action or process, see "Process," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

Defects in goods, see "Sales," § 4.

Defects or obstructions in streets, see "Municipal Corporations," § 10.

Local option election, see "Intoxicating Liquors," § 1.

Loss insured against, see "Insurance," § 10.

Maturity of premiums, see "Insurance," § 6.

Nature of passengers' baggage, see "Carriers," § 7.

Revocation of license, see "Licenses," § 2.

To particular classes of parties.

See "Carriers," § 7.

Purchaser at execution sale, see "Execution," § 3.

Seller of goods, see "Sales," § 4.

NUISANCE.

On demised premises, see "Landlord and Tenant," § 2.

§ 1. Private nuisances.

Charter right of corporation to erect terminal facilities where it saw fit *held* no defense in action against it for damages from nuisance consisting of roundhouse erected by it.—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 954.

In an action by the owner of property for damages from a nuisance consisting of a neighboring roundhouse, an instruction that the jury might consider discomfort and annoyances in the use of her home was proper.—Louisville & N. Terminal Co. v. Jacobs (Tenn.) 954.

In one action one may recover damages for personal discomfort and for depreciation of property owing to the erection of a coal hoist.—Daniel v. Ft. Worth & R. G. Ry. Co. (Tex. Sup.) 578.

Railroad company *held* liable for nuisance created by butchers depositing, under contract with company, near third person's premises, carcasses of cattle killed in accident.—Gulf, C. & S. F. Ry. Co. v. Chenault (Tex. Civ. App.) 868.

OATH.

Of guardian, see "Guardian and Ward," § 1.

OBSTRUCTING JUSTICE.

In a trial for resisting an officer who was attempting to serve a writ, the writ *held* properly admitted without also introducing the affidavit.—Meador v. State (Tex. Cr. App.) 186.

OBSTRUCTIONS.

Of process, see "Obstructing Justice."

OFFER.

Of judgment, see "Judgment," § 2.

Of proof, see "Criminal Law," § 19.

Of reward, see "Rewards."

OFFICERS.

Bribery, see "Bribery."

Mandamus affecting, see "Mandamus," § 2.

Quo warranto, see "Quo Warranto."

Resisting officer, see "Obstructing Justice."

Particular classes of officers.

See "Ambassadors and Consuls"; "Clerks of Courts"; "District and Prosecuting Attorneys"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Corporate officers, see "Corporations," § 3.

County officers, see "Counties," § 1.

Municipal officers, see "Municipal Corporations," § 3.

Partition commissioners, see "Partition," § 1.

Referees, see "Reference," § 1.

School officers, see "Schools and School Districts," § 1.

§ 1. Appointment, qualification, and tenure.

Under Const. §§ 233, 234, *held*, that Act March 3, 1884, incorporating a private police and detective agency, with power to the members to arrest and imprison, is unconstitutional.—Swincher v. Commonwealth (Ky.) 306.

OPENING.

Foreclosure sale, see "Mortgages," § 5.
Judgment, see "Judgment," § 5.
Judicial sales, see "Judicial Sales."

OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.
In criminal prosecutions, see "Criminal Law," § 13.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 5, 8.

PARENT AND CHILD.

See "Guardian and Ward"; "Infants."
Custody of children on divorce, see "Divorce," § 8.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 8.
In criminal prosecutions, see "Criminal Law," § 12.

PARTIES.

Admissions as evidence, see "Evidence," § 4.
Death ground for abatement, see "Abatement and Revival," § 2.
Domicile or residence as affecting venue, see "Venue," § 1.
Harmless error in joinder of parties, see "Appeal and Error," § 22.
Persons entitled to allege error, see "Appeal and Error," § 18; "Criminal Law," § 32.
Persons entitled to homestead exemption, see "Homestead," § 1.
Persons who may purchase at tax sales, see "Taxation," § 5.
Persons who may receive rewards, see "Rewards."

In actions by or against particular classes of parties.

See "Carriers," § 7; "Husband and Wife," § 4; "Insane Persons," § 1.

In particular actions or proceedings

See "Trespass to Try Title," § 1.
Criminal prosecutions, see "Criminal Law," § 2.
For causing death, see "Death," § 1.
Foreclosure, see "Mortgages," § 5.
For injuries to passengers' baggage, see "Carriers," § 7.
On appeal or writ of error, see "Appeal and Error," § 4.

To particular classes of conveyances, contracts, or transactions.

See "Assignments," § 2; "Fraudulent Conveyances," § 2; "Release," § 1; "Usury," § 1.

§ 1. New parties and change of parties.

In an action against a railroad for damages to property, *held* proper to permit parties having agreed to indemnify the company to become parties defendant.—Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co. (Tex. Civ. App.) 1038.

PARTITION.

§ 1. Actions for partition.

Commissioner in partition *held* not incompetent to act as such.—Garth's Guardian v. Thompson (Ky.) 782.

It appearing that no substantial injustice has been done in making partition, *held* that the judgment of the trial court will not be disturbed on appeal.—Garth's Guardian v. Thompson (Ky.) 782.

In partition, the present value of certain notes executed by decedent *held* to have been improperly charged against the land.—Stevens v. Stevens (Mo. Sup.) 542.

PARTNERSHIP.

§ 1. The relation.

Transaction between parties *held* not to constitute them partners, so as to render erroneous instruction, in action on note in which they were sought to be charged as partners, ignoring effect of such transaction.—Moore v. Williams (Tex. Civ. App.) 222.

Evidence of party's admission of partnership *held* inadmissible in action on note signed by him in which others were sought to be charged as his partners.—Moore v. Williams (Tex. Civ. App.) 222.

One *held* an agent for certain cotton dealers, and not their partner.—Shute & Limont v. McVitie (Tex. Civ. App.) 433.

§ 2. Mutual rights, duties, and liabilities of partners.

One partner *held* not able to deprive other of right to profits, though the latter had not furnished money as he had agreed to.—Stuart v. Harmon (Ky.) 365.

The doctrine of stale demand *held* to have no application to the fact.—Stuart v. Harmon (Ky.) 365.

§ 3. Rights and liabilities as to third persons.

Instruction, in action on note in which defendants were sought to be charged as partners, ignoring effect of agreement between them, which had not been pleaded, *held* proper.—Moore v. Williams (Tex. Civ. App.) 222.

In action on note, seeking to charge defendants as partners, question asked to elicit evidence of assumption of indebtedness *held* properly excluded; the evidence being irrelevant.—Moore v. Williams (Tex. Civ. App.) 222.

Under Rev. St. arts. 1224, 1346, where all the members of the firm answered individually, judgment could not be rendered by default against the firm.—Owen v. Kuhn, Loeb & Co. (Tex. Civ. App.) 432.

§ 4. Death of partner, and surviving partners.

Where administrator of a partnership estate mingles the funds thereof with his own property so that they cannot be separated, all the property becomes that of the partnership estate.—Tufts v. Latshaw (Mo. Sup.) 679.

In a suit by an administrator of a partner against the surviving partner, who has mingled the assets of the firm with his own, a court of equity alone has jurisdiction.—Tufts v. Latshaw (Mo. Sup.) 679.

§ 5. Dissolution, settlement, and accounting.

On an accounting of a distillery partnership, referred to a commissioner, the latter was authorized to accept the agreement of counsel as to the cost of the manufacture of the product.—McBrayer v. Hanks' Ex'rs (Ky.) 2.

A judgment that the cost of settling a partnership account be borne equally by the parties *held* not error.—Dyer v. Ballinger (Ky.) 738.

Interest may be allowed on the sum due to a partner before a partnership accounting, where the sum is withheld after due, and accounting prevented by the misconduct of the

other partner.—*Corralitos Co. v. Mackay* (Tex. Civ. App.) 624.

PART PERFORMANCE.

See "Frauds, Statute of," § 4.

PARTY WALLS.

Evidence *held* not to establish alleged agreement to contribute to rebuilding party wall.—*Griffin v. Sansom* (Tex. Civ. App.) 864.

Making use of rebuilt party wall *held* not to render adjoining owner liable to contribute thereto.—*Griffin v. Sansom* (Tex. Civ. App.) 864.

PASSENGERS.

See "Carriers," §§ 4-7.

PAYMENT.

See "Compromise and Settlement."

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Insurance," § 13; "Judgment," § 12; "Mortgages," § 3.

Subscriptions to corporate stock, see "Corporations," § 1.

§ 1. Application.

A debtor has the right to designate the particular indebtedness to which payments made by him are to be credited.—*Howard v. London Mfg. Co. (Ky.)* 771.

§ 2. Pleading, evidence, trial, and review.

Entry in memorandum books of insured *held* not admissible on the question of a note being accepted for the first premium on his policy.—*New York Life Ins. Co. v. Johnson's Adm'r (Ky.)* 762.

PENALTIES.

For failure to pay insurance, see "Insurance," § 13.

For overcharges by carriers, see "Carriers," § 1.

For violation of city ordinances, see "Municipal Corporations," § 8.

Nonpayment of tax, see "Taxation," § 7.

Violations of gaming laws, see "Gaming," § 2.

PERJURY.

§ 1. Prosecution and punishment.

The materiality of testimony on which perjury is assigned is usually a question for the court.—*Luna v. State* (Tex. Cr. App.) 378.

Under the evidence in a prosecution for perjury, *held* error not to charge that, if defendant believed he had reasonable grounds on which to predicate an affidavit for a search warrant, he should be acquitted.—*Luna v. State* (Tex. Cr. App.) 378.

Under the evidence, *held* error not to charge, in a prosecution for perjury, that, if defendant believed the statements were true when he made them, he should be acquitted.—*Luna v. State* (Tex. Cr. App.) 378.

In a prosecution for perjury, evidence tending to show defendant's belief as to the guilt of the person against whom he swore out an affidavit *held* improperly executed.—*Luna v. State* (Tex. Cr. App.) 378.

In a prosecution for perjury, evidence showing a circumstance suggesting to defendant the belief of the truth of the matters to which he swore *held* improperly excluded.—*Luna v. State* (Tex. Cr. App.) 378.

In a prosecution for perjury, certain testimony *held* to have been properly received.—*Freeman v. State* (Tex. Cr. App.) 1001.

Evidence in a prosecution for perjury *held* to sustain a conviction.—*Freeman v. State* (Tex. Cr. App.) 1001.

PERSONAL INJURIES.

See "Negligence"; "Torts."

Survival of action for personal injuries on death of party, see "Abatement and Revival," § 2.

To convicts, see "Convicts."

To employé, see "Master and Servant," §§ 3-12.

To licensee, see "Railroads," § 7.

To passenger, see "Carriers," § 5.

To person on or near railroad tracks, see "Railroads," § 10.

To person on or near street railroad tracks, see "Street Railroads," § 1.

To traveler on highway, see "Municipal Corporations," § 10.

To traveler on highway crossing railroad, see "Railroads," § 9.

PHYSICIANS AND SURGEONS.

Expenses of medical treatment as element of damage, see "Damages," § 1.

Opinion evidence, see "Evidence," § 9.

PLEA.

In civil actions, see "Pleading," § 1.

In criminal prosecutions, see "Criminal Law," § 6.

PLEADING.

Error in refusing leave to file pleading after expiration of time as ground for new trial, see "New Trial," § 1.

Estoppel by pleadings, see "Estoppel," § 1.

Presentation of objections for purpose of review, see "Appeal and Error," § 3.

Presumptions on appeal, see "Appeal and Error," § 19.

Privileged matter in pleadings, see "Libel and Slander," § 2.

To sustain judgment, see "Judgment," § 1.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 4; "Statutes," § 4.

In actions by or against particular classes of parties.

See "Carriers," §§ 2, 5; "Executors and Administrators," § 6; "Partnership," § 3; "Street Railroads," § 1.

Telegraph companies, see "Telegraphs and Telephones," § 2.

In particular actions or proceedings.

See "Ejectment," § 2; "Equity," § 3; "False Imprisonment," § 1; "Fraud," § 2; "Libel and Slander," § 3; "Negligence," § 3.

Condemnation proceedings, see "Eminent Domain," § 2.

For breach of contract, see "Carriers," § 4; "Contracts," § 5.

For breach of warranty, see "Sales," § 6.

For delay in delivery of telegram, see "Telegraphs and Telephones," § 2.

For loss of goods, see "Carriers," § 2.

For personal injuries, see "Carriers," § 5; "Street Railroads," § 1.

For price of goods, see "Sales," § 5.

Indictment or criminal information or complaint, see "Indictment and Information."

On bond of insurance agent, see "Insurance," § 1.

On insurance policy, see "Insurance," §§ 15, 22.

On judgment, see "Judgment," § 13.
 On note, see "Bills and Notes," § 2.
 Pleas in criminal prosecutions, see "Criminal Law," § 6.
 Suits in justice courts, see "Justices of the Peace," § 1.
 To enforce attachment, see "Attachment," § 3.
 To enforce mechanic's lien, see "Mechanics' Liens," § 1.
 To recover penalty for violation of gaming laws, see "Gaming," § 2.

§ 1. Plea or answer, cross complaint, and affidavit of defense.

An answer which merely groups the allegations of the petition together, and denies them as a whole, violates the Code.—*Stephens v. Wilson* (Ky.) 336.

In mandamus to compel the governing authority of a political party to place plaintiff's name on the ballot before a primary, the court under the pleadings will assume that a primary has been called.—*Young v. Beckham* (Ky.) 1092.

Under Rev. St. 1899, § 609, general denial in an answer held indefinite and uncertain.—*Ritchey v. Home Ins. Co.* (Mo. App.) 44.

Matter specially pleaded, if admissible under the general denial, should be stricken out as redundant.—*Bolton v. Missouri Pac. Ry. Co.* (Mo. Sup.) 530.

Plea of personal privilege need not affirmatively allege that pleader had never submitted to jurisdiction of the court.—*Sites v. Lane* (Tex. Civ. App.) 873.

Plea of personal privilege failing to state that pleader had never submitted to jurisdiction of the court held cured by a reply to defendant's answer in the action stating such fact.—*Sites v. Lane* (Tex. Civ. App.) 873.

§ 2. Demurrer or exception.

Where defendant demurred to plaintiff's reply, it was proper to carry the demurrer back to the first paragraph of defendant's answer.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'r* (Ky.) 22.

Where an exception to a plea was in effect a general demurrer, and was properly sustained, the plea must be held to have set up no sufficient ground of defense.—*Foster v. Franklin Life Ins. Co.* (Tex. Civ. App.) 91.

§ 3. Amended and supplemental pleadings and replender.

An application to file a supplemental answer, denying the residence of plaintiff's intestate, at the trial, held properly denied for lack of diligence.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'r* (Ky.) 22.

§ 4. Filing, service, and withdrawal.

Rule 4 of the circuit court, providing that pleadings not filed in time may be stricken out on motion, etc., held reasonable.—*Rigdon v. Ferguson* (Mo. Sup.) 504.

§ 5. Motions.

Answer filed, notwithstanding refusal of leave to file same, held properly stricken out.—*Rigdon v. Ferguson* (Mo. Sup.) 504.

§ 6. Defects and objections, waiver, and aid by verdict or judgment.

A defect in a petition against a city for injuries due to a defect in a highway held cured by verdict.—*City of Louisville v. Brewer's Adm'r* (Ky.) 9.

Any objection to filing of cross-petition by defendant held waived by answer.—*Stuart v. Harmon* (Ky.) 365.

Any defect in petition to set aside fraudulent conveyance held cured by subsequent pleadings.—*Wilhoit v. Musselman* (Ky.) 1112.

Under Rev. St. 1899, § 655, where the attention of the trial court is not called to a vari-

ance between the pleading and proof, all objection to the variance is waived.—*Hayes v. Continental Casualty Co.* (Mo. App.) 185.

Where an objection that an answer did not state a defense was taken by objection to evidence thereunder, it will be overruled, if the answer is sufficient after verdict.—*Maugh v. Hornbeck* (Mo. App.) 153.

POISONS.

In a prosecution for attempt to kill by poison, evidence held insufficient to support a conviction.—*Gables v. State* (Tex. Cr. App.) 377.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

See "Constitutional Law," § 1.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 2.

POWERS.

Of attorney, see "Principal and Agent."

Of sale in mortgage, see "Mortgages," § 4.

§ 1. Construction and execution.

Where a will gave all testator's property to his widow for life, and provided that in case of necessity the widow might sell any of it for the benefit of the family, a sale of realty by the widow was valid, though no actual necessity existed.—*Matthews v. Capshaw* (Tenn.) 964.

A deed purporting to convey a fee with general warranty held not invalid because failing to state that it was under the power in a will.—*Matthews v. Capshaw* (Tenn.) 964.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Divorce," § 2; "Ejectment"; "Habeas Corpus," § 1; "Quo Warranto," § 2; "Replevin"; "Trespass to Try Title," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Continuance"; "Damages," §§ 4-6; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Trial"; "Venue."

Verdict, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

For violation of liquor laws, see "Intoxicating Liquors," §§ 3-6.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 2; "New Trial."

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 22.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 5.

PREMIUMS.

For insurance, see "Insurance," § 6.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1; "Easements," § 1.

PRESUMPTIONS.

On appeal or error, see "Appeal and Error," § 19; "Criminal Law," § 32.

PRIMARY ELECTIONS.

See "Elections," § 1.

PRINCIPAL AND ACCESSORY.

See "Criminal Law," § 2.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."
Admissions by agent, see "Evidence," § 4.
Corporate agents, see "Corporations," § 3.
Insurance agents, see "Insurance," § 1.

§ 1. Rights and liabilities as to third persons.

Agents who employ a real estate broker to find a purchaser for their principal's lands are not liable to the broker for commissions, having fully disclosed their principal.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

Where an agent sold a buggy of his principal in payment of the agent's debt, the principal was entitled to recover the value of the buggy and damages for its detention.—*Low v. Moore* (Tex. Civ. App.) 421.

PRINCIPAL AND SURETY.

See "Bail"; "Guaranty"; "Indemnity."
Liability of sureties on bonds of clerks of courts, see "Clerks of Courts."
Liability of sureties on bonds of county officers, see "Counties," § 1.
Liability of sureties on bonds of insurance agents, see "Insurance," § 1.
Subrogation of sureties on payment of debt, see "Subrogation."

§ 1. Creation and existence of relation.

A surety, though signing on condition that another sign as surety, which was not done, is liable; the bond having been delivered without the obligee knowing of the condition.—*Seaton v. McReynolds* (Tex. Civ. App.) 874.

§ 2. Discharge of surety.

Sureties on a building contract held released by a material change in the specifications without the sureties' consent.—*Erfurth v. Stevenson* (Ark.) 49.

Sureties on a building contract, released by a material change in the contract, held not estopped to assert freedom from liability by subse-

quently indorsing orders of the contractors on the owner for money due under the contract.—*Erfurth v. Stevenson* (Ark.) 49.

§ 3. Remedies of creditors.

Verdict for defendants in action on note held not palpably against the weight of evidence.—*Caudle v. Ford* (Ky.) 270.

In action on note, evidence held not to show that certain interest credited on the note had not been paid.—*Columbia Finance & Trust Co. v. Mitchell's Adm'r* (Ky.) 350.

In an action on an insurance agent's bond, where but one issue was submitted to the jury, an instruction that the burden of proof was on the defendants held not error.—*Foster v. Franklin Life Ins. Co.* (Tex. Civ. App.) 91.

PRIORITIES.

Between deed and dower rights, see "Dower," § 1.

Of attachment liens, see "Attachment," § 2.

Of mortgages, see "Mortgages," § 1.

PRISONS.

Under Const. art. 3, § 6, and Shannon's Code, §§ 7226, 7423, action of court in remitting, at subsequent term, the remaining portion of imprisonment, and costs, adjudged against one convicted of crime, held void.—*State v. Dalton* (Tenn.) 456.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 2.

Disclosure by witness, see "Witnesses," § 1.

PROCESS.

Effect of appearance, see "Appearance."

In action against corporation, see "Corporations," § 3.

In criminal prosecutions, see "Criminal Law," § 5.

In justice courts, see "Justices of the Peace," § 1.

Resistance or obstruction, see "Obstructing Justice."

To sustain judgment, see "Judgment," § 3.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin"; "Sequestration."

§ 1. Service.

Under Rev. St. 1899, §§ 575, 9303, an order authorizing service by publication in a tax suit, on the ground that defendant was a non-resident, held not justified by an affidavit stating that defendant had absconded from his usual place of abode in the state.—*Parker v. Burton* (Mo. Sup.) 663.

§ 2. Defects, objections, and amendment.

Exceptions to a citation were not waived by at the same time and on the same paper filing a plea to the merits (Rev. St. art. 1262).—*Pyron v. Graef* (Tex. Civ. App.) 101.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of loss insured against, see "Insurance," § 10.

PROPERTY.

Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," § 2.
Dedication to public use, see "Dedication."
Licenses in respect to real property, see "Licenses," § 2.
Taking for public use, see "Eminent Domain."

Particular species of property.

See "Improvements"; "Logs and Logging"; "Mines and Minerals."

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 21.

PROVOCATION.

Evidence as to in criminal prosecutions, see "Homicide," § 5.

PROXIMATE CAUSE.

Of injury, see "Carriers," §§ 5, 6; "Negligence," § 2; "Railroads," § 9.

PUBLICATION.

Service of process, see "Process," § 1.

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 11; "States," § 2.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," §§ 4-7.

PUBLIC LANDS.

§ 1. Disposal of lands of the states.

Where land had been previously patented by the state, a subsequent patent thereto is void.—*Combs v. Combs* (Ky.) 8.

Act May 27, 1899, expressly validated sales of school lands made prior to January 1st of that year, when the applicant had not settled on the land at the time of his application, but did so within six months thereafter.—*Bates v. Bratton* (Tex. Sup.) 157.

Act April 19, 1901, relating to forfeited school land, held not retrospective as to land sales made under former acts.—*Bates v. Bratton* (Tex. Sup.) 157.

Under article 42181, Rev. St. 1895, school land which has been abandoned by the purchaser is not on the market until the land commissioner has declared a forfeiture.—*Bates v. Bratton* (Tex. Sup.) 157.

Greer county having been decided by the United States Supreme Court not to be a part of Texas, the state of Texas held entitled to re-
72 S.W.—76

cover land granted to it for school purposes.—*Greer County v. State* (Tex. Civ. App.) 104.

An entry on land by applicant to purchase under Act 1900, § 6, as amended by Act April 15, 1901, held a trespass as against one occupying the land under lease from commissioner of general land office.—*Adair v. Hays* (Tex. Civ. App.) 256.

When confederate land scrip has been located, and the land surveyed, the scrip becomes merged in the land, though no patent has issued, and a deed to the land passes title.—*Watts v. Bruce* (Tex. Civ. App.) 258.

A duplicate land certificate, issued in place of one lost by the commissioner of the land office, confers no greater right than the original.—*Kempner v. State* (Tex. Civ. App.) 888.

There is no such thing as an innocent purchaser as against the state claiming under a patent issued without authority of and contrary to law.—*Kempner v. State* (Tex. Civ. App.) 888.

Under Act Feb. 4, 1841, held that patent issued on a certificate of the clerk of court to a claimant that he had had a verdict was void; there having been a new trial in which judgment was against him.—*Kempner v. State* (Tex. Civ. App.) 888.

The files of a suit for a certificate for land held such that reasonable diligence would have shown one buying land, patent for which was issued on a certificate of the court to claimant, that there was a new trial in which judgment was against claimant.—*Kempner v. State* (Tex. Civ. App.) 888.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

PUNISHMENT.

For violation of injunction, see "Injunction," § 2.
Instructions as to, see "Homicide," § 8.

QUARANTINE.

Widow's right, see "Executors and Administrators," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 21.

QUIETING TITLE.

§ 1. Proceedings and relief.

The losing party in a suit to quiet title cannot be allowed for improvements made on the land after suit was instituted.—*Biffle v. Jackson* (Ark.) 566.

In an action to quiet title, evidence held to justify a finding that a lost deed from the patentee to plaintiff's grantor, executed in 1848, covered the land in controversy.—*Combs v. Combs* (Ky.) 8.

Ky. St. § 11, does not authorize a suit to quiet title against mortgages executed by the

plaintiff himself to be brought in the county where the land lies.—*Shouse v. Taylor* (Ky.) 324.

QUO WARRANTO.

§ 1. Nature and grounds.

The state, in quo warranto proceedings to oust a city from its corporate franchise, *held* barred by laches.—*State ex rel. Jackson v. Town of Mansfield* (Mo. App.) 471.

A proceeding by quo warranto to oust a municipality from its franchise, brought by the state's attorney without leave, is within the trial court's discretion, to be exercised after full hearing.—*State ex rel. Jackson v. Town of Mansfield* (Mo. App.) 471.

§ 2. Jurisdiction, proceedings, and relief.

A judgment holding proceedings for the incorporation of a city valid will not be reversed, where the evidence of the prior incorporation of the village is both oral and meager.—*State ex rel. Jackson v. Town of Mansfield* (Mo. App.) 471.

RAILROADS.

See "Street Railroads."

Carriage of goods and passengers, see "Carriers."

Right of railroad train porter to carry weapons, see "Weapons."

Taxation of railroad property, see "Taxation," § 4.

§ 1. Control and regulation in general.

An indictment under Ky. St. §§ 791, 793, for operating a railroad under a lease without having it recorded, *held* sufficient.—*Commonwealth v. Chesapeake & O. Ry. Co.* (Ky.) 359.

§ 2. Location of road, termini, and stations.

A decision in an injunction case *held* to involve a conclusion that a railroad had not abandoned a right of way in a street.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

§ 3. Right of way and other interests in land.

Necessary increase in the value of land caused by a new railroad *held* a sufficient consideration for an agreement to donate land for a right of way.—*Cadiz R. Co. v. Roach* (Ky.) 280.

Where a landowner agreed to donate land for a railroad right of way, and repudiated his grant only after the road had been partially constructed, he was estopped from denying the obligation of his agreement on the ground that it was without consideration.—*Cadiz R. Co. v. Roach* (Ky.) 280.

Construction of a part of a railroad in reliance on a promise to donate land for a right of way *held* a sufficient consideration for the promise.—*Cadiz R. Co. v. Roach* (Ky.) 280.

Facts stated in certified questions *held* not to show, as a matter of law, an abandonment by a railroad company of a right of way in a street.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

Rev. St. art. 4558, in regard to forfeiture by railroads of right of way grants, *held* not applicable to the failure of a railroad to use acquired rights to terminal and connection facilities.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

A railroad company *held* to have accepted a city's grant of a right of way, though not all the portion granted was in actual use.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

Facts *held* to show acceptance by railroad companies of an ordinance authorizing the occupation

of a city street.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 201.

Forfeiture of a railway company's right to use a city street for a right of way *held* enforceable only by the state or city, and not by another railway company.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 201.

§ 4. Construction, maintenance, and equipment.

A person injured by a railroad's failure to provide sufficient stock guards, as required by Sand. & H. Dig. §§ 6238, 6239, *held* limited to the penalty prescribed by such statute.—*Choctaw & M. R. Co. v. Vosburg* (Ark.) 574.

An instruction in an action for damage to crops, by the alleged insufficiency of a railroad stock guard, *held* erroneous, as imposing too great a liability.—*Choctaw & M. R. Co. v. Vosburg* (Ark.) 574.

Under Ky. St. § 1793, a railroad company *held* not required to erect cattle guards where its road enters or leaves a farm, or at a private passway.—*Payton v. Louisville & N. R. Co.* (Ky.) 346.

In an action against a railroad company for a failure to construct proper sluiceways, required by Rev. St. art. 4436, an instruction defining the duty of the company *held* proper.—*Gulf, C. & S. F. Ry. Co. v. Ryon* (Tex. Civ. App.) 72.

§ 5. Sales, leases, traffic contracts, and consolidation.

Facts *held* to show a modification of a written contract for the use of a railroad bridge by the acts of the parties.—*Pittsburg, C., C. & St. L. R. Co. v. Dodd* (Ky.) 822.

Contract between a bridge company and railroads using the bridge *held* terminated, though the railroads continued to use the bridge.—*Pittsburg, C., C. & St. L. R. Co. v. Dodd* (Ky.) 822.

Facts *held* to show a construction of a contract for the use of a railroad bridge by the parties thereto.—*Pittsburg, C., C. & St. L. R. Co. v. Dodd* (Ky.) 822.

New draw span and piers for a railroad bridge *held* not improvements within a contract making railroad companies using the bridge liable for improvements.—*Pittsburg, C., C. & St. L. R. Co. v. Dodd* (Ky.) 822.

A railroad, purchasing the property of another company at foreclosure sale, *held* to have acquired the rights of its predecessor to the use of certain streets for its right of way.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 201.

The charter of a railroad company purchasing the property of another at foreclosure sale *held* not to require the purchaser to surrender the right of way to a city street which it had acquired by the purchase, and to reacquire it by exercise of its charter powers.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 201.

§ 6. Indebtedness, securities, liens, and mortgages.

Holders of railroad mortgage bonds, improperly denied admission to a pool organized by bondholders to purchase the property at foreclosure sale, *held* entitled to an accounting.—*Reed v. Schmidt* (Ky.) 367.

Under Ky. St. § 771, holders of railroad mortgage bonds *held* entitled to membership in a pool organized by bondholders to purchase the property at foreclosure sale.—*Reed v. Schmidt* (Ky.) 367.

Holders of railroad mortgage bonds *held* to have become members of a pool organized by bondholders to purchase the property at foreclosure sale.—*Reed v. Schmidt* (Ky.) 367.

closure sale of a former grantee, from claiming under the sale.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

A purchaser at a foreclosure sale of a railroad company *held* to have obtained the right to use an unused portion of a right of way in a city street.—*Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.* (Tex. Sup.) 161.

A civil engineer is not entitled to a lien for wages earned by him in the construction of a railroad, under Rev. Sa. art. 3312.—*Gulf & B. Val. Ry. Co. v. Berry* (Tex. Civ. App.) 1049.

Under Rev. St. arts. 3312–3315, limitations do not run against suit to enforce lien of railroad laborers, when the wages are payable in the future, until the time specified for payment.—*Gulf & B. Val. Ry. Co. v. Berry* (Tex. Civ. App.) 1049.

§ 7. Operation.

Employees of a railroad company *held* to owe no duty to a licensee to see that he safely boarded the train at a station.—*Cook's Adm'r v. Louisville & N. R. Co.* (Ky.) 729.

Under Rev. St. arts. 4440, 4535, 4536, 4539, railroad company *held* not liable for crossing accident occasioned by negligence of servants of other company, with which it maintained joint yards and sidings.—*Missouri, K. & T. Ry. Co. of Texas v. Jolley* (Tex. Civ. App.) 871.

§ 8. — Statutory, municipal, and official regulations.

Failure of a carrier to keep its ticket office open 30 minutes before the departure of a passenger train, as required by statute, is negligence per se.—*International & G. N. R. Co. v. Lister* (Tex. Civ. App.) 107.

A petition in an action for injuries by a carrier's failure to keep its ticket office open before train time *held* not objectionable on the ground that the allegations of damage were vague and uncertain.—*International & G. N. R. Co. v. Lister* (Tex. Civ. App.) 107.

A petition in an action for injuries by reason of a carrier's failure to have its ticket office open before train time *held* sufficient.—*International & G. N. R. Co. v. Lister* (Tex. Civ. App.) 107.

Rev. St. § 4507, *held* not to require a railroad company to signal an engine backing from a switch to the main track, where within 80 rods of the crossing.—*Texas & P. Ry. Co. v. Berry* (Tex. Civ. App.) 423.

§ 9. — Accidents at crossings.

In an action for the killing of plaintiff's intestate at a railroad crossing, the admission of evidence that, after the accident, witness crossed the track at that place and listened for a whistle or bell, and heard none until he was within 20 feet of the crossing, etc., *held* error.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'r* (Ky.) 22.

An instruction, in an action for killing plaintiff's intestate at a railroad crossing, defining the degree of care required of plaintiff and of the railroad company, *held* proper.—*Chesapeake & O. Ry. Co. v. Riddle's Adm'r* (Ky.) 22.

In action for death of person at a private crossing, *held* not negligence not to have given a signal on approaching the crossing.—*Early's Adm'r v. Louisville, H. & St. L. Ry. Co.* (Ky.) 348.

In action for death of one killed by being run over by a railroad train, *held* not error to direct verdict for defendant.—*Early's Adm'r v. Louisville, H. & St. L. Ry. Co.* (Ky.) 348.

It is not negligence on the part of a railway company for a hand car not to give a signal when approaching a crossing.—*Louisville & N. R. Co. v. Howerton* (Ky.) 760.

The presence of a mudhole in a street caused by a railroad's negligence *held* not the proximate cause of the death of plaintiff's decedent by being thrown from his buggy when his horse, frightened by defendant's train, ran away.—*Neely v. Ft. Worth & R. G. Ry. Co.* (Tex. Sup.) 159.

To leave cars in a street so near a crossing that a coupling therewith cannot be made without forcing them onto the crossing, and to make the coupling without seeing whether the crossing is clear, is negligence.—*St. Louis S. W. Ry. Co. of Texas v. Bowles* (Tex. Civ. App.) 451.

Whether one struck by cars while crossing a street was negligent *held* a question for the jury.—*St. Louis S. W. Ry. Co. of Texas v. Bowles* (Tex. Civ. App.) 451.

A railroad company *held* not to have assumed to keep in repair a footpath across the right of way at a crossing.—*San Antonio & A. P. Ry. Co. v. Montgomery* (Tex. Civ. App.) 616.

§ 10. — Injuries to persons on or near tracks.

In an action against a railroad company for negligent death, evidence *held* not to show want of due care on the part of defendant, justifying recovery in spite of the negligence of deceased.—*Dugan's Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 291.

Instruction, in an action against a railroad company for personal injuries, *held* proper, and not prejudicial to plaintiff, though inaptly worded.—*Givens v. Louisville & N. R. Co.* (Ky.) 320.

Evidence in an action against a railroad for personal injuries considered, and *held* to justify a finding that the injuries resulted from plaintiff's contributory negligence.—*Givens v. Louisville & N. R. Co.* (Ky.) 320.

Servants of a railroad company in charge of a train, seeing a person sitting in a perilous position, have a right to assume that he will get out of the way.—*Givens v. Louisville & N. R. Co.* (Ky.) 320.

Evidence *held* sufficient to show a boy seven years of age capable of contributory negligence.—*Givens v. Louisville & N. R. Co.* (Ky.) 320.

In action against railroad company for occasioning death of licensee on its tracks, instruction submitting issue as to negligence in failing to have warning signal at place of accident *held* erroneous as submitting issue not made by pleadings.—*St. Louis S. W. Ry. Co. v. Eitel* (Tex. Civ. App.) 205.

In action against railroad company for death of licensee on its tracks, instruction *held* erroneous as excluding issue of contributory negligence.—*St. Louis S. W. Ry. Co. v. Eitel* (Tex. Civ. App.) 205.

In action against a railroad company for occasioning the death of a licensee on its tracks, instruction *held* erroneous as assuming negligence in failing to blow whistle and ring bell.—*St. Louis S. W. Ry. Co. v. Eitel* (Tex. Civ. App.) 205.

Railroad company cannot be required to look out for persons on path alongside of track if it does not know of such path.—*Reichert v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1031.

Evidence, in an action against a railroad for injuries to one walking along the track not to disclose negligence in the company.—*Reich-*

ert v. International & G. N. Ry. Co. (Tex. Civ. App.) 1031.

§ 11. — Fires.

Question as to how engines setting fires were operated, and whether they were in repair, *held* to be for the jury, in an action against a railroad company for damages from fires.—Illinois Cent. R. Co. v. Scheible (Ky.) 325.

Evidence of other fires occasioned by defendant's engines *held* admissible in action against railroad company for fire set by engine.—Illinois Cent. R. Co. v. Scheible (Ky.) 325.

A contract by a railroad company to relieve itself from liability for fire in a building communicated thereto by its negligence is not against public policy.—Wabash R. Co. v. Ordelheide (Mo. Sup.) 684.

A contract by which a railroad company allows one to erect a warehouse on its right of way, he to hold it harmless from damage by fire therein, is not unconstitutional.—Wabash R. Co. v. Ordelheide (Mo. Sup.) 684.

Rev. St. 1899, § 1111, providing a railroad company shall be responsible for damage to one whose property is destroyed by fire communicated by locomotives in use on its road, renders it liable regardless of negligence.—Wabash R. Co. v. Ordelheide (Mo. Sup.) 684.

RAPE.

§ 1. Offenses and responsibility therefor.

Under Pen. Code 1895, arts. 633, 636, cohabitation with a single woman obtained by means of a sham marriage constitutes rape.—Lee v. State (Tex. Cr. App.) 1005.

§ 2. Prosecution and punishment.

In a prosecution for rape, the state *held* not required to elect at the conclusion of the testimony on which specific act it would rely.—State v. Scott (Mo. Sup.) 897.

In a prosecution for rape, testimony of physician as to result of examination of prosecutrix made three months afterwards *held* admissible.—State v. Scott (Mo. Sup.) 897.

Evidence *held* to sustain finding of intent, in making assault, to commit rape.—Berry v. State (Tex. Cr. App.) 170.

A conviction of assault with intent to commit rape *held* unsupported by the evidence.—Simmons v. State (Tex. Cr. App.) 395.

Testimony of prosecutrix's father as to his not being able to find her the night of the rape *held* admissible to corroborate her.—Knowles v. State (Tex. Cr. App.) 398.

On a prosecution for statutory rape, prosecutrix having testified that she had intercourse with defendant only, and that he was the father of her child, he may show she had intercourse with others at the time alleged.—Knowles v. State (Tex. Cr. App.) 398.

Admission, in a statutory rape case, of prosecutrix's testimony as to how she knew her age, *held* not error.—Knowles v. State (Tex. Cr. App.) 398.

In a trial for rape by means of a sham marriage, the fact that nine months later the defendant married another woman *held* admissible.—Lee v. State (Tex. Cr. App.) 1005.

In a trial for rape by means of a sham marriage, the fact that defendant obtained another wife by abduction *held* inadmissible.—Lee v. State (Tex. Cr. App.) 1005.

On trial for rape certain evidence *held* properly excluded.—Lee v. State (Tex. Cr. App.) 1005.

RATIFICATION.

Of acts of corporate officers, see "Corporations," § 3.

Of acts of insurance agent, see "Insurance," § 1.

REAL ACTIONS.

See "Ejectment"; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REASONABLE DOUBT.

Instructions, see "Criminal Law," § 22.

RECEIVERS.

§ 1. Nature and grounds of receivership.

Under Civ. Code Prac. § 298, order appointing a receiver to prevent the sale of valuable timber from land against a portion of which a lien was being enforced *held* proper.—Dupoyster v. Ft. Jefferson Imp. Co. (Ky.) 268.

§ 2. Actions.

An action will lie against a receiver for a wrongful act of the corporation, committed before his appointment.—Ratcliff v. B. Baer & Co. (Ark.) 896.

An action against a receiver, brought before the same judge who appointed the receiver, will not be dismissed on appeal because leave of court was not first obtained.—Ratcliff v. B. Baer & Co. (Ark.) 896.

RECEIVING STOLEN GOODS.

In a prosecution for receiving and concealing stolen goods, the evidence examined, and *held* insufficient to sustain a conviction.—Henningberg v. State (Tex. Cr. App.) 175.

Where the indictment charges the receiving and concealing of stolen goods from a certain person, the evidence must correspond therewith.—Henningberg v. State (Tex. Cr. App.) 175.

In a prosecution for receiving and concealing stolen goods, the evidence *held* insufficient to sustain a conviction.—Henningberg v. State (Tex. Cr. App.) 175.

RECORDS.

Copies as evidence, see "Evidence," § 7.

Estoppel by record, see "Estoppel," § 1.

Of deeds, see "Deeds," § 1.

Operation of railroad under unrecorded lease, see "Railroads," § 1.

Of judicial proceedings.

Abstract for purpose of review, see "Appeal and Error," § 9.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 5-12; "Criminal Law," § 31.

REDEMPTION.

From sale on execution, see "Execution," § 3.

From tax sales, see "Taxation," § 6.

REFERENCE.

§ 1. Referees and proceedings.

Commissioner to whom partnership accounting was referred *held* to have properly rejected all disputed, unproved items, on which the pleader had the burden of proof.—McBayer v. Hanks' Ex'rs (Ky.) 2.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Proceedings and relief.

Purchaser of lot *held* entitled to a quitclaim to her certain part thereof, deeded to co-purchaser.—Murray v. Roach (Ky.) 807.

Purchaser of lot *held* entitled to damages from co-purchaser for property sold by him which he represented was to be half hers.—*Murray v. Roach* (Ky.) 807.

REHEARING.

See "New Trial."

RELEASE.

See "Compromise and Settlement"; "Payment."

§ 1. Construction and operation.

Where plaintiff, who was injured while riding in his employer's wagon by collision with defendant's car, received compensation from and released his employer, he thereby also released defendant, even though he could not have recovered from his employer.—*Hubbard v. St. Louis & M. R. R. Co.* (Mo. Sup.) 1073.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

Of evidence in criminal prosecutions, see "Criminal Law," § 7.

REMAINDERS.

See "Life Estates."

Creation by deed, see "Deeds," § 2.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 24.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

REMOVAL OF CAUSES.

§ 1. Power to remove and right of removal in general.

A proceeding to cause the assessment for taxation of certain omitted property *held* not removable into the circuit court of the United States.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

§ 2. Citizenship or alienage of parties.

Action by a state is not removable into a federal court, under Act Cong. Aug. 13, 1888, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508].—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

RENEWAL.

Of lease, see "Landlord and Tenant," § 1.

RENT.

See "Landlord and Tenant," § 3.

RENUNCIATION.

Of contract, see "Contracts," § 4.

REOPENING CASE.

For further evidence, see "Criminal Law," § 19; "Trial," § 2.

REPAIRS.

Of premises demised, see "Landlord and Tenant," § 2.

REPLEVIN.

§ 1. Damages.

Where a replevin action has resulted only in an interlocutory judgment, a motion for leave to introduce evidence as to defendant's damages cannot be granted.—*Freeman v. Lavenue* (Mo. App.) 1085.

Damages to defendant in replevin can only be assessed in the replevin action after final judgment in defendant's favor.—*Freeman v. Lavenue* (Mo. App.) 1085.

REPORTS.

Reading from law reports to jury, see "Trial," § 3.

REPUTATION.

Relevancy of evidence, see "Evidence," § 2.

REQUESTS.

For instructions in civil actions, see "Trial," § 5.

For instructions in criminal prosecutions, see "Criminal Law," § 23.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

RESERVATIONS.

In deeds, see "Deeds," § 2.

RES GESTÆ.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Criminal Law," § 7.

RES JUDICATA.

See "Judgment," §§ 9, 10.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 28-32; "Justices of the Peace," § 2.

REVOCATION.

Of license, see "Licenses," § 2.

REWARDS.

A constable who arrests a person for misdemeanor *held* not entitled to recover a reward for the conviction of any one committing such misdemeanor.—*Southwestern Telegraph & Telephone Co. v. Priest* (Tex. Civ. App.) 241.

In an action to recover a reward offered for the conviction for violation of Pen. Code, art. 784, that plaintiff has been informed the reward would not cover the cutting of dead wires *held* a proper special defense.—*Southwestern Tele-*

graph & Telephone Co. v. Priest (Tex. Civ. App.) 241.

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 8.

RIGHT TO OPEN AND CLOSE.

See "Trial," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 8.

Within insurance policy, see "Insurance," § 8.

ROADS.

See "Highways."

Streets in cities, see "Municipal Corporations," §§ 9, 10.

SALES.

See "Vendor and Purchaser."

By levee board, see "Levees."

Enforcement of purchase price of chattels against exempt property, see "Exemptions," § 1.

Of bridges, see "Bridges," § 1.

Of intoxicating liquors, see "Intoxicating Liquors."

Of property of decedent in general, see "Executors and Administrators," § 2.

Of property of decedent under order of court, see "Executors and Administrators," § 5.

Of property of infant under order of court, see "Guardian and Ward," § 3.

Of railroads, see "Railroads," § 5.

Of standing timber, see "Logs and Logging."

On execution, see "Execution," § 3.

On foreclosure of mortgage, see "Mortgages," §§ 4, 5.

On order or judgment of court, see "Judicial Sales."

Tax sales, see "Taxation," § 5.

§ 1. Requisites and validity of contract.

A contract for the sale of chattels, made and to be performed in Arkansas, where it was unenforceable, could not be enforced in Texas.—*Jones v. National Cotton Oil Co.* (Tex. Civ. App.) 248.

§ 2. Construction of contract.

Contract to deliver cotton seed hulls during the "running season of 1901 and 1902" construed.—*Hume v. S. Netter, A. Geismar & Co.* (Tex. Civ. App.) 865.

§ 3. Operation and effect.

A sale of goods held conditioned on cash payment, and that title did not pass until notes and a mortgage were given to secure payment under a subsequent agreement.—*Austin v. Welch* (Tex. Civ. App.) 881.

§ 4. Warranties.

The purchaser of property, rescinding for defects, must within a reasonable time after their discovery offer to restore the property and place the seller in statu quo.—*J. I. Case Threshing Mach. Co. v. Lyons* (Ky.) 356.

In action for price of machinery, purchasers held not entitled to defend on ground of breach of warranty of quality.—*J. I. Case Threshing Mach. Co. v. Lyons* (Ky.) 356.

Where contract for sale of machinery requires notice of defects to be given to seller and a certain agent, notice to agent alone is not sufficient.—*J. I. Case Threshing Mach. Co. v. Lyons* (Ky.) 356.

Instructions in action for breach of warranty in sale of driving mare held proper.—*Knoepker v. Ahman* (Mo. App.) 483.

The seller of meal knowing that the purpose for which it is bought is to feed it to cattle, held, that there is an implied warranty that it is wholesome and fit for that purpose.—*Houston Cotton Oil Co. v. Trammell* (Tex. Civ. App.) 244.

§ 5. Remedies of seller.

Evidence held sufficient to support a finding that a written contract did not embody the entire agreement of the parties.—*Huber Mfg. Co. v. Hunter* (Mo. App.) 484.

The right of a purchaser of an article to recover damages for fraud in its sale, in diminution of the seller's demand for the price, does not depend on his giving notice of alleged defects in a reasonable time, or returning the article.—*Huber Mfg. Co. v. Hunter* (Mo. App.) 484.

In an action for goods sold, plaintiff's failure to prove the contract alleged held not to preclude recovery.—*Childers v. R. C. Stone Milling Co.* (Mo. App.) 1077.

On an issue whether a purchaser of goods had paid for the same, a verdict for defendant held against the weight of the evidence.—*Preston v. Barber* (Tex. Civ. App.) 225.

§ 6. Remedies of buyer.

In action for the price of machinery, written evidence held to show that a certain engine had been purchased by defendant from a third person.—*J. I. Case Threshing Mach. Co. v. Lyons* (Ky.) 356.

In an action on notes given for the price of machinery, an answer held to sufficiently allege a breach of warranty to authorize the introduction of evidence thereof.—*Maugh v. Hornbeck* (Mo. App.) 153.

Evidence held sufficient to support a finding that trees sold plaintiff were not of the quality contracted for.—*De Foe v. Wilmas* (Mo. App.) 475.

The measure of damages for selling unsound feed for cattle, whereby they were made sick, held to be their diminished market value at the time and place they were injured.—*Houston Cotton Oil Co. v. Trammell* (Tex. Civ. App.) 244.

In action for price of machinery sold with warranty, answer held sufficient, though it did not show the particular defects of the machine relied on as a breach.—*Lane & Bodley Co. v. City Electric Light & Water Works Co.* (Tex. Civ. App.) 425.

Burden held to be on one suing for breach of contract to deliver cotton seed hulls during the running season of defendant's plant to show that the running season was over.—*Hume v. S. Netter, A. Geismar & Co.* (Tex. Civ. App.) 865.

§ 7. Conditional sales.

Under contract of conditional sale, the seller held to have the right to retake possession in default of payment.—*Henderson v. Mahoney* (Tex. Civ. App.) 1019.

SATISFACTION.

See "Compromise and Settlement"; "Payment"; "Release."

Of judgment, see "Judgment," § 12.

SCHOOLS AND SCHOOL DISTRICTS.

School lands, see "Public Lands," § 1.

§ 1. Public schools.

Under Ky. St. 1899, § 4437, school trustees can be restrained from collecting a tax for the repair of a school house located on land to

which they do not hold a title in fee simple.—*Dawson v. Trustees Common School Dist. No. 40 (Ky.)* 806.

It will be presumed that the action of the county superintendent in changing the boundaries of school districts was based on a proper reason.—*Farley v. Gilbert (Ky.)* 1098.

Under Ky. St. § 4428, the action of county superintendents in rearranging school districts does not oust the district trustees.—*Farley v. Gilbert (Ky.)* 1098.

Rev. St. 1899, § 9742, expressly provides that, in changing the boundary between established school districts, one district shall not encroach on another simply to acquire territory.—*State ex rel. School Dist. No. 1 v. Denny (Mo. App.)* 467.

It is not necessary for a board of arbitration, appointed under Rev. St. 1899, § 9742, to consider the necessity for a change in the boundary between school districts, to keep a record of their proceedings.—*State ex rel. School Dist. No. 1 v. Denny (Mo. App.)* 467.

Proceedings of a board of arbitrators in regard to a change of boundary between school districts *held* void on their face.—*State ex rel. School Dist. No. 1 v. Denny (Mo. App.)* 467.

Under Act Feb. 21, 1900, c. 7, § 10, and Rev. St. arts. 3994, 3999, 4018, *held*, that trustees of independent school district are to be elected for the first time at election at which incorporation is determined.—*Hillebrandt v. Devine (Tex. Civ. App.)* 266.

SEALS.

On acknowledgments of deeds, see "Acknowledgment," § 1.

On chattel mortgages, see "Chattel Mortgages," § 1.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

SELF-DEFENSE.

See "Affray"; "Assault and Battery."

Instructions as to, see "Homicide," § 11.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 3.

SEPARATION.

Of jury, see "Criminal Law," § 24.

Of witnesses, see "Trial," § 2.

SEQUESTRATION.

In a trial for resisting an officer who was attempting to serve a writ of sequestration, the writ *held* valid, and therefore properly admitted in evidence.—*Meador v. State (Tex. Cr. App.)* 186.

SERVICE.

Of indictment, see "Criminal Law," § 17.

Of process, see "Process," § 1.

SERVICES.

See "Master and Servant," § 2.

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

In action for price of goods, see "Sales," § 5.

§ 1. Subject-matter.

In an action on a contract, set-off *held* allowable, because arising out of a related transaction, and also claiming liquidated damages.—*Spears & Kattman v. Netherlands Fire Ins. Co. (Tex. Civ. App.)* 1018.

SETTLEMENT.

See "Compromise and Settlement"; "Payment"; "Release."

By assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

By partners, see "Partnership," § 5.

Of bill of exceptions, see "Exceptions, Bill of," § 1.

SHERIFFS AND CONSTABLES.

Right to rewards, see "Rewards."

§ 1. Powers, duties, and liabilities.

Deputy sheriff, executing warrant for arrest, which was issued by a court having no jurisdiction to issue it, was liable for damages.—*Stephens v. Wilson (Ky.)* 336.

Sheriff, advising, etc., execution of void warrant for arrest, *held* liable for damages.—*Stephens v. Wilson (Ky.)* 336.

A sheriff, as principal, is liable for the acts of his deputy done under color of his office.—*Stephens v. Wilson (Ky.)* 336.

Acts of a deputy sheriff in calling on a constable to assist in arresting suspected burglars, and in receiving plaintiff in jail, *held* unauthorized, under Rev. St. arts. 4897, 4906, and Code Cr. Proc. art. 50, and not official acts, for which the sheriff was responsible.—*Maddox v. Hudgeons (Tex. Civ. App.)* 414.

SIGNALS.

On trains, see "Railroads," § 9.

SIGNATURES.

On bills of exceptions, see "Exceptions, Bill of," § 1.

SLANDER.

See "Libel and Slander."

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.

§ 1. Nature and grounds of remedy in general.

Because a husband has no remedy to compel his wife to live with him forever is no defense to specific performance of his agreement to convey property in consideration of her agreement to live with him, which she had commenced to do.—*Moayon v. Moayon (Ky.)* 33.

It is no defense against specific performance of an agreement for sale of an undivided interest in property that it may subsequently be sold to an undesirable person.—*Moayon v. Moayon (Ky.)* 33.

Facts *held* to show that specific performance of a contract to purchase land should not be decreed, because the contract was incapable of performance without great hardship.—*Williamson v. Dils (Ky.)* 292.

§ 3. Proceedings and relief.

In action for the investment of title to certain land in plaintiff, and damages for breach to convey portion of land contracted for, the judgment *held* warranted by the pleadings.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

In action for damages for breach of contract to convey land, and for investment of title to certain land in plaintiff, judgments rendered *held* not confused or intermingled.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STALE DEMAND.

See "Equity," § 2.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 6.

Of case or facts for purpose of review, see "Appeal and Error," §§ 5-12; "Criminal Law," § 31.

STATES.

Courts, see "Courts."

Legislative power over municipal corporation, see "Municipal Corporations," § 2.

Public lands, see "Public Lands," § 1.

§ 1. Property, contracts, and liabilities.

Under Ky. St. §§ 224, 230, 233, *held* to be the duty of the board of commissioners of an insane asylum to procure insurance, and of the superintendent to certify the premium to the state auditor.—*Furnish v. Satterwhite* (Ky.) 309.

§ 2. Fiscal management, public debt, and securities.

Act March 9, 1895, *held* not violative of Const. art. 4, § 46, prohibiting the legislature from granting or authorizing the making of any grant of public money or thing of value to any individual, association, or corporation.—*Elting v. Hickman* (Mo. Sup.) 700.

§ 3. Actions.

A joint resolution authorizing suit against the commonwealth *held* to be as effective as a law, pursuant to Const. § 231.—*Commonwealth v. Lyon* (Ky.) 323.

STATUTES.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 3.

Provisions relating to particular subjects.

See "Descent and Distribution"; "Exceptions. Bill of," § 1; "Gaming," § 2; "Highways," § 1; "Intoxicating Liquors"; "Limitation of Actions," § 1; "Master and Servant," § 7; "Mechanics' Liens"; "Municipal Corporations," § 10; "Railroads," § 8.

Allowances to surviving wife, see "Descent and Distribution," § 1.

Appointment of officers, see "Officers," § 1. Claims against decedents' estates, see "Executors and Administrators," § 4.

Conduct of election, see "Elections," § 2. Conviction of offense included in that charged, see "Indictment and Information," § 5.

Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

Certain parts of Ky. St. § 3264, relative to transfer of cities of the third class, *held* valid, so that in pursuance thereof the legislature may, under Const. § 156, make the transfer.—*Gilbert v. City of Paducah* (Ky.) 816; *Crow v. Same, Id.*

§ 2. General and special or local laws.

Const. § 59, is not violated by a joint resolution of the general assembly authorizing certain claimants to sue the commonwealth.—*Commonwealth v. Lyon* (Ky.) 323.

Act March 9, 1895, *held* not violative of Const. art. 9, § 7, declaring that the legislature shall provide for the classification of cities and towns.—*Elting v. Hickman* (Mo. Sup.) 700.

§ 3. Subjects and titles of acts.

Act May 20, 1897 (Ky. St. § 1241a), *held* to have but one subject, expressed in the title, within Const. § 51.—*Weber v. Commonwealth* (Ky.) 30.

Act March 9, 1895, *held* not violative of Const. art. 4, § 28, declaring that no bill shall contain more than one subject, which shall be expressed in the title.—*Elting v. Hickman* (Mo. Sup.) 700.

§ 4. Pleading and evidence.

In suing in Arkansas for a death by wrongful act occurring in Louisiana, it is not necessary to set out the Louisiana statute in *hæc verba*, but it is sufficient to set out its substance and effect.—*St. Louis, I. M. & S. Ry. Co. v. Haist* (Ark.) 893.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Art. 1, § 10.....1070

STATUTES AT LARGE.

1888, Aug. 13, ch. 866, 25

Stat. 433 [U. S. Comp.

St. 1901, p. 508].....1119

1890, May 2, ch. 182, 26

Stat. 81.....568

1896, May 25, ch. 252, §

19, 29 Stat. 184 [U. S.

Comp. St. 1901, p. 499] 568

1898, July 1, ch. 541, §§ 1,

2, 30 Stat. 544, 546 [U.

S. Comp. St. 1901, pp.

3419, 3420].....723

1898, July 1, ch. 541, § 17,

30 Stat. 550 [U. S. Comp.

St. 1901, p. 3428].....546

1898, July 1, ch. 541, § 47,

30 Stat. 557, 565 [U. S.

Comp. St. 1901, p. 3438] 723

1898, July 1, ch. 541, § 67c,

30 Stat. 564 [U. S. Comp.

St. 1901, p. 3449].....207

1898, July 1, ch. 541, § 70,

30 Stat. 565 [U. S. Comp.

St. 1901, p. 3451].....723

REVISED STATUTES.

§§ 905-909 [U. S. Comp.

St. 1901, pp. 677-679].. 816

§ 1014 [U. S. Comp. St.

1901, p. 716].....568

§ 5136 [U. S. Comp. St.

1901, p. 3455].....1060

§ 5197 [U. S. Comp. St.

1901, p. 3493].....925

§ 5198 [U. S. Comp. St.

1901, p. 3493].....926, 1054

§ 5498 [U. S. Comp. St.

1901, p. 3707].....330

COMPILED STATUTES

1901.

Page 499.....568

Page 508.....1119

Pages 677-679.....816

Page 716.....568

Pages 3419, 3420.....723

Page 3428.....546

Page 3438.....723

Page 3440	207
Page 3451	723
Page 3455	1060
Page 3493	925, 926, 1054
Page 3707	330

ARKANSAS.

**SANDELS & HILL'S
DIGEST.**

Ch. 25	372
§ 3713	893
§§ 5908, 5911, 5912	893
§§ 6238, 6239	574

LAWS.

1850-51, p. 71	994
1852, p. 9	994
1893, p. 172	52
1901, p. 164	371

KENTUCKY.

CONSTITUTION.

Bill of Rights, § 2	314
§§ 3, 23	806
51	30
59	323
156, 161	816
215	360, 361, 758
231	323
234	306

CIVIL CODE.

83	768
§§ 194, 237	732
337	783
739	272

CIVIL CODE OF PRACTICE.

38	271, 781
51, subsecs. 3, 4	351
90	742
208	268
477	1092
596	344
604. Amended by Laws 1880. Disputed Hand- writings	319
605	762
606, subd. 2.	818, 762, 810
737, subd. 4.	1104

**CRIMINAL CODE OF
PRACTICE.**

124	758
125	363
239	753
281	283, 772
348	13

GENERAL STATUTES.

Ch. 28, art. 17	336
-----------------------	-----

STATUTES 1899.

Ch. 41, art. 12	1094
Art. 12	1092
11	324
93	268
133	307
§§ 224, 230, 233	309
469	1090, 1119
545	820
679	283
700	739
702	1099
771	367
783	302
§ 791, 793	359
820	361
950	820
1110	322
1241a	30, 31

1242	1
1809	308
§§ 1550, 1553, 1563, 1565	1092
1702, 1708	793
1793	346
1907a	744
§§ 1958, 1958	1095
1969	11
2022	777
2068	276
2127	793, 1102
2128	771, 793, 1102
2135	1122
2150	290
2353	810
2463	778
2515	1090, 1119
2516	784
2523	1090, 1119
§§ 2833, 2835	778
3172	817
3294	816, 817
3483	790
4021	744, 1090, 1119
4044	279
4049	745
4050	279
4052	809
4241	809, 819
4428	1098
4437	806

LAWS.

1884, p. 511, c. 277	308
1886. Disputed Handwrit- ings	319
1890, p. 149, ch. 1763	1090, 1119
1900, ch. 5, § 12	271

LOUISIANA.

CIVIL CODE.

Art. 2315	893
-----------------	-----

MISSOURI.

CONSTITUTION.

Amend. § 8	692
Art. 2, § 15	554, 1070
Art. 2, § 20	689
Art. 2, § 28	1073
Art. 4, §§ 28, 46, 47	700
Art. 9, § 7	700
Art. 10, §§ 3, 10	700, 701

REVISED STATUTES 1879.

§§ 1909, 1910, 1906	518
---------------------------	-----

REVISED STATUTES 1889.

Ch. 42, art. 9	477
Art. 1, § 30	471
§ 2773	669
§ 3709	132
4209	518
4575	700
5435	554
§ 5856	935, 936
§§ 5856-5860	720
§ 5859	935, 936
5977	925
6796	689
§§ 7663, 7922	700
8067	640

REVISED STATUTES 1895.

§§ 3795, 3797	019
---------------------	-----

REVISED STATUTES 1899.

Page 94	692
Ch. 12, art. 10	477
Ch. 119, art. 10	139

Ch. 149, §§ 9130, 9131. 9133, 9135, 9136	655
Art. 2, § 4160, subd. 4.	492
13	499
96	1075
457	461
575	663
593	632
604	44
650	632
655	136
728	489
§ 744, 745	461
813	692
863	475, 477
1111	684
§§ 1362, 1368	134
1408	463
§§ 1690, 1731	492
1760	1081
2361	897
§§ 2477, 2483, 2515	482
2543	539
2640	466
2689	513
2748	406
2800	540
2812	132, 134
2934	501
3170	1080
§§ 3370, 3381, 3382	492
3413	1080
3620	501
§§ 3706, 3711	925
3759	128
3852	148, 490
3853	716
4078	490
4079	497
4297	689
4386	521
4463 et seq.	723
4591	665
4656	644
4680	1062
§§ 5252-5255, 5257	700
7890	712
8811	534
9150	1075
9303	663
9742	467

LAWS.

1895, p. 105	477
1895, p. 253, §§ 16, 17	700

TENNESSEE.

CONSTITUTION.

Art. 3, § 6	456
-------------------	-----

SHANNON'S CODE.

§ 720	112
§§ 3171, 3172	450
§ 3306	960
§§ 4025, 4026	967
4684	118
§§ 7226, 7423	456

LAWS.

1871, p. 70, ch. 78	967
1875, p. 189, ch. 106	963
1883, p. 259, ch. 183	967
1893, ch. 174	112
1895, p. 116, ch. 76, § 11	958
1895, p. 332, ch. 160, § 22	960
1890, ch. 243, § 1	116

TEXAS.

CONSTITUTION.

Art. 5, § 6	409
Art. 5, § 6. Amended by Laws 1891, p. 198, § 6	1050
Art. 5, § 11	601

CODE OF CIVIL PROCEDURE 1895.

Art. 277, subd. 4. 181

CODE OF CRIMINAL PROCEDURE.

Art. 50 415
 Art. 567 172
 Art. 705 862
 Art. 723 173, 193
 Art. 887 585, 586, 588, 594, 599
 Art. 1093 160

GENERAL LAWS 1901.

Page 31 78

HARTLEY'S DIGEST.

Art. 2755. Repealed by
 Hart. Dig. art. 2760. 608
 Art. 2760 608

PENAL CODE 1895.

Art. 229 187
 Art. 367 600
 Art. 379. Amended by
 Laws 1901, p. 26, ch. 22 850
 Art. 379. Amended by
 Laws 1901, p. 27. 191
 Art. 380 592
 Art. 407 401
 Art. 592, subd. 3. 168
 Arts. 633, 636. 1005

REVISED STATUTES 1895.

Art. 308 83
 Art. 635 583
 Art. 1194, cl. 17. 405
 Art. 1194, § 23. 1043
 Art. 1224 432
 Art. 1262 101
 Art. 1346 432
 Arts. 1867, 1869. 407
 Art. 2312 416
 Art. 2600 73
 Art. 2996 404
 Arts. 3021, 3022, 3027. 626
 Art. 3071 621
 Art. 3212 416
 Art. 3251 882
 Arts. 3312, 3313, 3315. 1049, 1050
 Art. 3328 882
 Art. 3344 258
 Art. 3347 581
 Art. 3358 405
 Art. 3379 1047
 Art. 3387 64
 Art. 3397 62
 Arts. 3994, 3999. 266
 Art. 4018 266
 Art. 42181 157
 Art. 4436 72
 Art. 4440 871
 Art. 4507 423
 Arts. 4535, 4536, 4539. 871
 Art. 4558 161
 Art. 4560f 1044

SAYLES' CIVIL STATUTES.

Art. 996 409
 Art. 1069 601
 Art. 1317 99
 Arts. 3289, 3290. 403
 Arts. 3353a, 4647. 163

WHITE'S ANNOTATED CODE OF CRIMINAL PROCEDURE.

Art. 887 186

WHITE'S ANNOTATED PENAL CODE.

Art. 379 179, 190
 Art. 389 179

LAWS.

1841, Feb. 4, §§ 1-3, 6. 888
 Public Lands 409
 1891, p. 12. 1059
 1891, p. 198, § 6. 157
 1895, p. 63. 1059
 1895, p. 79, ch. 53. 872
 1897, p. 87, ch. 73. 157
 1899, p. 259. 266
 1900, ch. 7, §§ 1, 10. 871
 1900, c. 11, § 6. Amended
 by Laws 1901, p. 254. 256
 1901, p. 26, ch. 22. 191
 1901, p. 27. 256
 1901, p. 254. 157
 1901, p. 292, §§ 3, 9. 157

STIPULATIONS.

Consent to judgment, see "Judgment," § 2.

STOCK.

Bank stock, see "Banks and Banking," § 1.
 Corporate stock, see "Corporations," § 1.

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

STOLEN GOODS.

See "Receiving Stolen Goods."

STREET RAILROADS.

Carriage of passengers, see "Carriers."

§ 1. Regulation and operation.

In an action for injuries to a pedestrian on the track of a street railway, an instruction that, if she did not exercise ordinary care, she could not recover, *held* not erroneous in failing to require that she look and listen before starting to cross.—*Louisville Ry. Co. v. Poe* (Ky.) 6.

Instruction in an action against street railway company *held* to properly define the degree of care required of defendant toward a child crossing its tracks.—*Gorman's Adm'r v. Louisville Ry. Co.* (Ky.) 760.

A street car company is only required to use ordinary care towards persons on the street.—*Gorman's Adm'r v. Louisville Ry. Co.* (Ky.) 760.

A street railway company has not an exclusive right to the use of its tracks.—*Klockenbrink v. St. Louis & M. R. R. Co.* (Mo. Sup.) 900.

Contributory negligence of plaintiff will not preclude a recovery in an action against a street railway company, where defendant's servants could have discovered his peril in time to avoid injury to him.—*Klockenbrink v. St. Louis & M. R. R. Co.* (Mo. Sup.) 900.

Where evidence is introduced without objection on subjects not counted on as negligence, defendant is not entitled to an instruction declaring such evidence immaterial.—*Klockenbrink v. St. Louis & M. R. R. Co.* (Mo. Sup.) 900.

Evidence in an action against a street railway company for injuries *held* sufficient to justify the jury in finding defendant guilty of negligence.—*Klockenbrink v. St. Louis & M. R. R. Co.* (Mo. Sup.) 900.

A requested charge on contributory negligence in case of collision of a hack and street car *held* improper.—*El Paso Electric St. Ry. Co. v. Ballinger & Longwell* (Tex. Civ. App.) 612.

Defendant, having pleaded one thing as contributory negligence, *held* not entitled to submit evidence of other contributory negligence.—*El Paso Electric St. Ry. Co. v. Ballinger & Longwell* (Tex. Civ. App.) 612.

STREETS.

See "Highways"; "Municipal Corporations," §§ 9, 10.

SUBROGATION.

Of insurer, see "Insurance," § 13.

Where a surety paid one-half of the debt created for the price of certain land, he was entitled to a lien thereon by subrogation.—*Barnes v. Barnes* (Ky.) 282.

Husband *held* obligated to pay the purchase price of land, and that on payment thereof no

Purchaser of land at a judicial sale under a decree subrogating complainants to certain rights *held* not to have acquired a right of subrogation to the rights of complainants in the suit in which the decree was rendered.—*Roberts v. Best* (Mo. Sup.) 657.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 1.

Time *held* to be of the essence of a contract to pay a subscription for the construction of a railroad.—*Garrison v. Cooke* (Tex. Sup.) 54.

SUICIDE.

Of insured, see "Insurance," § 21.

SUIT.

See "Action."

SUMMONS.

See "Process."

SUPPLEMENTAL PLEADING.

See "Pleading," § 8.

SUPPRESSION.

Of deposition, see "Depositions."

SUPREME COURTS.

See "Courts," § 2.

SURETYSHIP.

See "Principal and Surety."

SURFACE WATERS.

See "Waters and Water Courses," § 1.

SURPRISE.

At trial as ground for continuance, see "Continuance."

SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

SURVIVING PARTNERS.

See "Partnership," § 4.

SUSPENSION.

Of benefit insurance, see "Insurance," § 20.

TAXATION.

See "Licensees," § 1; "Municipal Corporations," § 11.

Assessments for municipal improvements, see "Municipal Corporations," § 7.

Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

§ 1. Nature and extent of power in general.

Act March 9, 1895, *held* not violative of Const. art. 10, § 3, providing taxes shall be levied for public purposes only.—*Elting v. Hickman* (Mo. Sup.) 700.

Act March 9, 1895, *held* not violative of Const. art. 10, § 3, declaring that taxation should be uniform.—*Elting v. Hickman* (Mo. Sup.) 700.

§ 3. Liability of persons and property

Under Ky. St. §§ 4044, 4050, personal property which has been listed by the owner in the county where the owner resides cannot be assessed in the county where the property is located.—*Wren v. Boske* (Ky.) 279.

Under Ky. St. § 4049, the owner of a dower interest in a decedent's land *held* bound for the payment of taxes thereon.—*Commonwealth v. Hamilton* (Ky.) 744.

Under Ky. St. 1899, § 4052, the curators of an estate *held* liable for taxes on the estate property, even after they had parted with possession of it.—*Commonwealth v. Riley's Curators* (Ky.) 809.

§ 4. Levy and assessment.

Under Ky. St. § 4021, a proceeding to assess omitted property, not begun within five years from the date of the omission, cannot be maintained.—*Commonwealth v. Hamilton* (Ky.) 744.

In a proceeding against the owner of a dower interest in omitted land to compel its assessment, the fact that she was described "H Trustee of A. H." *held* not to affect her personal liability.—*Commonwealth v. Hamilton* (Ky.) 744.

The act of the owner of a dower interest in land, in rendering the entire land for taxes, is not binding on the children or remaindermen.—*Commonwealth v. Hamilton* (Ky.) 744.

Under Ky. St. 1899, §§ 4052, 4241, a statement designating property for taxation as "money, notes, bonds, mortgages," etc., *held* sufficiently to describe it.—*Commonwealth v. Riley's Curators* (Ky.) 809.

The statement in an information by auditor agent *held* to sufficiently describe property sought to be assessed as omitted property under Ky. St. 1899, § 4241.—*Commonwealth v. Collins* (Ky.) 819.

The present worth of an annuity, and not the annual payments thereunder, *held* the amount the annuitant was required to list for taxation.—*Commonwealth v. Nute* (Ky.) 1090.

Action of state board in fixing valuation of property liable to taxation *held* conclusive after certain time.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

Railroad bridge *held* not to have a separate franchise value, apart from that of the rest of the railroad property, for the purpose of assessment for taxation.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

It is the policy of the law to put at rest stale demands of whatever character, including demands for taxes.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

Act May 23, 1890, relating to action to recover taxes, deals more directly with cases where the assessment and levy has been made than with cases of omitted assessments.—*Chicago, St. L. & N. O. Ry. Co. v. Commonwealth* (Ky.) 1119.

§ 5. Sale of land for nonpayment of tax.

Under Sand. & H. Dig. c. 25, the court, in proceedings to confirm a tax sale, cannot determine any question other than that of the validity of the sale.—*Beardsley v. Hill* (Ark.) 372.

Widow who had permitted homestead to be forfeited for nonpayment of taxes *held* to have redeemed from the sale.—*Rowland v. Wadly* (Ark.) 994.

his agent, *held* sufficient, though the purchaser did not know who the agent represented.—*Logan's Heirs v. Logan* (Tex. Civ. App.) 416.

§ 7. Forfeitures and penalties.

Estate of deceased property owner *held* not liable, under Rev. St. 1899, § 9150, to penalties for his false return of property for taxation, notwithstanding section 96.—*State ex rel. Ward v. Atchison* (Mo. Sup.) 1075.

§ 8. Legacy, inheritance, and transfer taxes.

Where a will is contested, it is the duty of the executor and the clerk of the county court to approximate the amount of collateral inheritance tax payable, subject to revision on final settlement.—*Shelton v. Campbell* (Tenn.) 112.

A collateral inheritance tax *held* assessable only on the amount remaining after payment of all debts and expense of executing the will and of a contest thereof.—*Shelton v. Campbell* (Tenn.) 112.

Where a will contest does not affect the amount of collateral inheritance tax payable by an estate, it does not extend the time of the maturity of the tax under Shannon's Code, § 729; but, if not paid within one year after decedent's death, interest accrues thereon.—*Shelton v. Campbell* (Tenn.) 112.

Under Acts 1893, c. 174, where the county clerk employed the state revenue agent to sue to collect an inheritance tax, such agent was entitled to a fee of 5 per cent. from the estate therefor, in addition to his salary as revenue agent.—*Shelton v. Campbell* (Tenn.) 112.

TELEGRAPHS AND TELEPHONES.

§ 1. Establishment, construction, and maintenance.

Injunction *held* issuable to restrain an old telephone company from preventing the erection by a new company of its poles.—*Cumberland Telephone & Telegraph Co. v. Louisville Home Tel. Co.* (Ky.) 4.

§ 2. Regulation and operation.

Pleadings *held* to sustain a judgment on the ground of delay in transmitting a telegram, though the petition only alleged negligence in delivering, and the parties having on the trial treated the issue as made.—*Western Union Telegraph Co. v. Parsons* (Ky.) 800.

The jury *held* properly told that an unexcused delay of 27 hours in transmitting a telegram made the company liable.—*Western Union Telegraph Co. v. Parsons* (Ky.) 800.

A telegram company *held* liable for delay in transmitting a message announcing death of son.—*Western Union Telegraph Co. v. Parsons* (Ky.) 800.

That a telegram company has no messengers at its office, and its agent is not allowed to leave its office, is no excuse for delay in delivering a message.—*Western Union Telegraph Co. v. Parsons* (Ky.) 800.

The agent *having* been told to which place the telegram was to be sent, the presence in the state of another place of the same name *held* no excuse for delay in transmission.—*Western Union Telegraph Co. v. Parsons* (Ky.) 800.

In an action against a telegram company for damages, caused by the receipt by plaintiff of a fraudulent message sent by one who had tapped the wires, in answer to a message sent by plaintiff, *held* proper not to admit stipulation on back of defendant's blank.—*Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.) 232.

In an action against a telegram company for damages, owing to plaintiff's receipt of a message fraudulently sent by one who had tapped the wires, defendant *held* guilty of negligence.—*Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.) 232.

Where the agent of a telegram company writes a message on the company's blank, which the sender does not see, sign, or agree to, the stipulations on the back of such blank are not binding on the sender.—*Western Union Tel. Co. v. Uvalde Nat. Bank* (Tex. Civ. App.) 232.

In order to constitute an offense under Pen. Code, art. 784, the wires cut by defendant must have been live ones used in the transmission of messages.—*Southwestern Telegraph & Telephone Co. v. Priest* (Tex. Civ. App.) 241.

A telegram *held* not to show a consummated sale, so as to relieve the telegram company from damages for sale to another, because of delay in delivering the message.—*Western Union Tel. Co. v. Snow* (Tex. Civ. App.) 250.

Telegram company *held* liable for one's losing a purchase through delay in delivering a telegram, though, if he had noticed it was delayed, he could, by telegraphing, have prevented the loss.—*Western Union Tel. Co. v. Snow* (Tex. Civ. App.) 250.

In an action for delay in delivering a telegram notifying a son of the serious sickness of his mother, evidence that they were more than ordinarily affectionate *held* admissible.—*Western Union Tel. Co. v. Waller* (Tex. Civ. App.) 264.

In an action for delay in delivering a telegram, the testimony of a person, to whom the messenger boy was directed, that he would have told where the addressee could be found, *held* admissible.—*Western Union Tel. Co. v. Waller* (Tex. Civ. App.) 264.

Where a telegram was delivered in Texas to be transmitted to a person in the Indian Territory, the rights of the parties and rule of damages are to be determined by the laws of Texas.—*Western Union Tel. Co. v. Waller* (Tex. Civ. App.) 264.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

In an action for an accounting between tenants in common, a mode for a statement and settlement of the account considered and adopted.—*Barnes v. Barnes* (Ky.) 282.

TENDER.

Of payment of mortgage, see "Mortgages," § 3. Of redemption from tax sale, see "Taxation," § 6.

TERMS.

Of leases, see "Landlord and Tenant," § 1.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 1.

TESTAMENTARY POWERS.

Construction and execution, see "Powers," § 1.

Evidence as to in criminal prosecutions, see "Homicide," § 5.

TIMBER.

See "Logs and Logging."

TIME.

For filing pleadings, see "Pleading," § 4.
For rendition of judgment, see "Judgment," § 4.
For taking proceedings for transfer of cause, see "Criminal Law," § 30.
Of delivery of goods, see "Sales," § 2.
To plead, see "Criminal Law," § 6.

TITLE.

Color of title, see "Adverse Possession."
Of statutes, see "Statutes," § 3.
Particular matters affecting title, see "Adverse Possession," § 2.
Title insurance, see "Insurance," § 9.

TOOLS.

Liability of employer for defects, see "Master and Servant," § 4.

TORTS.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Municipal Corporations," § 10.
Agents, see "Principal and Agent," § 1.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 1.

Particular torts.

See "False Imprisonment," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."

In an action for injuries resulting to plaintiff from defendant's assault on a third party, certain evidence held immaterial.—Ezell v. Outland (Ky.) 784.

Instructions held erroneous in an action for damages resulting from an assault on a third party.—Ezell v. Outland (Ky.) 784.

If defendant acted in self-defense, he would not be liable for damages resulting to plaintiff from defendant's assault on a third party.—Ezell v. Outland (Ky.) 784.

An instruction based on the theory of self-defense, in an action for injuries to plaintiff resulting from defendant's assault on a third party, held harmless error.—Ezell v. Outland (Ky.) 784.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

TRAFFIC CONTRACTS.

Between railroads, see "Railroads," § 5.

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 31.

See "Logs and Logging."

TRESPASS.

Injuries to trespassers, see "Negligence," § 1.
On public lands, see "Public Lands," § 1.
To the person, see "False Imprisonment."

§ 1. Actions.

Where, in trespass for cutting timber, plaintiff's title was put in issue, and he failed to introduce proof thereof, a verdict for the defendant was properly directed.—Hays v. Ison (Ky.) 733.

§ 2. Criminal responsibility.

Instruction in trespass held erroneous, under Sayles' Rev. Civ. St. art. 1317, as assuming controverted issue as to rightful possession of property.—Lake v. Copeland (Tex. Civ. App.) 99.

TRESPASS TO TRY TITLE.

See "Ejectment."

§ 1. Proceedings.

Attempt of grantee of defendant in trespass to try title to become a party without leave of court held futile.—Riviere v. Wilkens (Tex. Civ. App.) 608.

TRIAL.

See "New Trial"; "Reference"; "Witnesses."
Contributory negligence of person injured as question for jury, see "Carriers," § 6.

Harmless error in instructions, see "Appeal and Error," § 22.

Instructions as to contributory negligence of person injured, see "Carriers," § 6.

Instructions as to damages, see "Damages," § 6.

Presentation of objections to instructions for purpose of review, see "Appeal and Error," § 3.

Trial de novo on appeal, see "Appeal and Error," § 16.

Trial of right to property levied on, see "Execution," § 2.

Proceedings incident to trials.

See "Continuance."

Entry of judgment after trial of issues, see "Judgment," § 4.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of particular civil actions or proceedings.

See "Libel and Slander," § 3; "Malicious Prosecution," § 1; "Negligence," § 3; "Torts"; "Trove and Conversion," § 1.

Against administrator, see "Executors and Administrators," § 6.

Against partnership, see "Partnership," § 3.

Disputed claims against estate of decedent, see "Executors and Administrators," § 4.

For breach of contract, see "Contracts," § 5.

For causing death, see "Death," § 1.

For damages for nuisance on demised premises, see "Landlord and Tenant," § 2.

For delay in shipment of live stock, see "Carriers," § 3.

For fires caused by operation of railroad, see "Railroads," § 11.

For injuries from maintenance of railroad, see "Railroads," § 4.

For injuries to live stock, see "Carriers," § 3.

For money collected by attorney, see "Attorney and Client," § 2.

For personal injuries, see "Carriers," § 5; "Master and Servant," §§ 11, 12; "Municipal Corporations," § 10; "Railroads," §§ 1, 9, 10. For rent, see "Landlord and Tenant," § 3. For wages, see "Master and Servant," § 2. For wrongful execution, see "Execution," § 4. On insurance policy, see "Insurance," §§ 17, 22. Trespass to try title to real property, see "Trespass to Try Title."

Trial of criminal prosecutions.

See "Affray"; "Forgery"; "Gaming," § 8; "Larceny," § 1; "Malicious Mischief"; "Perjury," § 1; "Rape," § 2; "Trespass," § 2. Criminal prosecutions, see "Criminal Law," §§ 16-25; "Homicide," §§ 8-12. For carrying pistol, see "Weapons." For shooting at another, see "Weapons." For violation of liquor laws, see "Intoxicating Liquors," § 6.

§ 1. Course and conduct of trial in general.

In action on note, *held* proper to give defendant burden of proof and closing argument to the jury.—Columbia Finance & Trust Co. v. Mitchell's Adm'r (Ky.) 350.

§ 2. Reception of evidence.

In an action for the breach of a contract for failure to renew loans, and thereby causing a forced sale of plaintiff's property at a loss, permitting the advertisement for the sale of the property to be sent to the jury after the case had been submitted to them was erroneous.—E. H. Taylor, Jr., & Sons v. Louisville Public Warehouse Co. (Ky.) 20.

It is in the discretion of the court to allow plaintiff, after announcing through, to introduce other testimony.—Western Union Telegraph Co. v. Parsons (Ky.) 800.

Where objection is made to offers of evidence, it is the better practice to let the jury retire and then hear the proposed evidence and the objections thereto.—Leicher v. Keeney (Mo. App.) 145.

In an action by a passenger for assault by carrier's servant, refusal of instruction excluding matter relevant to cause of difference *held* proper.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

Where witnesses to the amount of damage to the land based their estimates on improper elements, the refusal of the court to strike out such estimates was error.—Gulf, C. & S. F. Ry. Co. v. Ryon (Tex. Civ. App.) 72.

In an action against a railroad for injuries, one of defendant's medical expert witnesses *held* properly excluded, under the rule excluding witnesses from attendance on the examination of other witnesses.—Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App.) 418.

Where all the evidence of a witness as to the fall of the market was objected to, and some of the evidence was admissible, the objection was properly overruled.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

§ 3. Arguments and conduct of counsel.

Where, on attention being called to the fact that plaintiff's counsel was reading from a law report to the jury, the court caused him to desist, and instructed the jury to disregard what he had read, such reading, though improper, was not ground for reversal.—Hayes v. Continental Casualty Co. (Mo. App.) 135.

Held not error to permit only one argument for plaintiff; defendant's counsel declining to argue the case.—Collins v. Clark (Tex. Civ. App.) 97.

§ 4. Taking case or question from jury.

An instruction that, "under the pleadings and evidence, the verdict must be for plaintiff," should not be made where he has supported his case by parol evidence, unless it requires the

interpretation of the court.—Dalton v. City of Poplar Bluff (Mo. Sup.) 1068.

§ 5. Instructions to jury.

Refusal to give certain proper instructions *held* not prejudicial error.—Crabtree Coal Min. Co. v. Sample's Adm'r (Ky.) 24; Givens v. Louisville & N. R. Co. (Ky.) 320.

An instruction in an action for trespass *held* erroneous as a charge on the facts.—Percifull v. Coleman (Ky.) 28.

Where instruction given by court requires defendant to use the same degree of care fixed in an instruction requested by plaintiff, plaintiff cannot complain.—Gorman's Adm'r v. Louisville Ry. Co. (Ky.) 760.

In an action for the death of a brakeman, a defect in an instruction *held* cured by a subsequent instruction.—Louisville, H. & St. L. Ry. Co. v. Chandler's Adm'r (Ky.) 806.

Where the court fails to submit a particular defense, but defendant fails to ask a proper instruction relative thereto, he cannot complain.—St. Louis S. W. Ry. Co. of Texas v. McArthur (Tex. Civ. App.) 76.

Where there was nothing to cause suspicion of the testimony of the one witness, who testified to the amount of damages sustained in an action on a bond, which exceeded the penalty, it was not error for the court to charge that, if the jury found for plaintiff, they should find for the entire amount sued for.—Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 91.

A charge that plaintiff must make out his case by a preponderance of the evidence does not require him to prove immaterial facts pleaded by him.—Collins v. Clark (Tex. Civ. App.) 97.

In an action for injuries at a railroad crossing, an instruction *held* objectionable as a charge on the weight of evidence.—Texas & P. Ry. Co. v. Berry (Tex. Civ. App.) 423.

In an action for injuries at a railroad crossing, an instruction *held* erroneous, as assuming that plaintiff was placed in a perilous position by defendant's negligence.—Texas & P. Ry. Co. v. Berry (Tex. Civ. App.) 423.

A charge *held* not on the weight of evidence, as assuming that failure of a carrier to provide a stool for a passenger while alighting was negligence.—Missouri, K. & T. Ry. Co. of Texas v. Sherrill (Tex. Civ. App.) 429.

In the absence of a proper requested charge, defendant cannot complain of the general charge that verdict should not be against it, if it had exercised ordinary care to avoid the accident.—El Paso Electric St. Ry. Co. v. Ballinger & Longwell (Tex. Civ. App.) 612.

When there is no evidence to support an issue raised by the pleadings, it is error to submit such issue.—El Paso & N. W. Ry. Co. v. McComas (Tex. Civ. App.) 629.

The denial of requested instructions covered by the court's general charge was not error.—Texas & P. Ry. Co. v. Hall (Tex. Civ. App.) 1052.

§ 6. Verdict.

Verdict expressing recovery in words and figures varying in amount *held* controlled by the words.—Shaefer v. Missouri Pac. Ry. Co. (Mo. App.) 154.

Where a court refused to accept a verdict for ambiguity, it was not error to permit plaintiff's counsel to write out and have signed in open court a verdict such as the jury intended to render.—International & G. N. R. Co. v. Lister (Tex. Civ. App.) 107.

§ 7. Trial by court.

Motion for additional findings in trespass to try title *held* sufficiently definite.—Parker v. Thomas (Tex. Civ. App.) 229.

ruled, does not thereby wholly waive its right to have the ruling reviewed.—Klockenbrink v. St. Louis & M. R. R. Co. (Mo. Sup.) 900.

Court's ruling on the admission of evidence held not to show ground for complaint.—Wynn v. Followill (Mo. App.) 140.

TRIAL OF RIGHT OF PROPERTY.

See "Execution," § 2.

TROVER AND CONVERSION.

§ 1. Actions.

Attorneys' fees are not recoverable as actual damages, in an action for conversion.—Lee v. McDonnell (Tex. Civ. App.) 612.

The charge in an action for conversion held bad in not referring the jury to the evidence as to the value of the property.—Lee v. McDonnell (Tex. Civ. App.) 612.

Charge on issue of exemplary damages in an action for conversion should require the jury to find the facts alleged as a basis therefore, or else to find for defendant thereon.—Lee v. McDonnell (Tex. Civ. App.) 612.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors." Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Under Ky. St. 1899, § 2353, no trust results where a deed is made to one person and the consideration is paid by another.—Clay v. Clay's Guardian (Ky.) 810.

Payment of purchase price for land by a husband who directs title to be conveyed to his wife presumed to be a provision for his wife.—Clay v. Clay's Guardian (Ky.) 810.

Where property is conveyed to a trustee for the sole use of a married woman, title vests absolutely in her on the death of her husband.—Temple v. Ferguson (Tenn.) 455.

§ 2. Construction and operation.

Conveyance of property in trust for the separate use of a married woman creates an active trust.—Temple v. Ferguson (Tenn.) 455.

Conveyance of property in trust for separate use of a married woman is not within the statute of uses.—Temple v. Ferguson (Tenn.) 455.

Trustee held not to have taken a fee, but merely an estate coextensive with the life of the husband as beneficiary.—Temple v. Ferguson (Tenn.) 455.

§ 3. Management and disposal of trust property.

Where a cestui que trust gives a person an order on the trustee for the amount she owes him, and he settles it with the trustee for less than its face, the trustee is not liable to the trust estate for the profits.—Bush v. Webster (Ky.) 364.

Where a trustee of land for the benefit of infants sells timber therefrom, it would be presumed that he applied the price to the extinguishment of a lien against the land.—Howard v. London Mfg. Co. (Ky.) 771.

UNITED STATES.

See "Census."

Courts, see "Removal of Causes."

USES.

Operation of statute of uses to execute trusts, see "Trusts," § 2.

USURY.

Loans by building and loan associations, see "Building and Loan Associations."

Usurious interest by national banks, see "Banks and Banking," § 2.

§ 1. Usurious contracts and transactions.

Giving of individual note, with new security, in satisfaction of joint usurious note, held not to preclude defense of usury to maker.—German Ins. Bank v. Fabel (Ky.) 329.

Where three usurious purchase-money notes were executed, and two were paid more than a year before suit on the third, usury paid on the first two cannot be allowed as a credit on the others.—Carter v. Farthing (Ky.) 745.

A bank held without authority to apply certain payments to usurious interest.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

Certain facts held no justification for charging interest in excess of legal rate.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

The charging of 7 per cent. interest on overdue interest, and of 12 per cent. interest on certain overdrafts, held usurious in the absence of written agreement, under Rev. St. Mo. 1899, § 3706, and the National Banking Act, § 5197.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

A compounding of interest on a note every six months held in violation of Rev. St. Mo. 1889, § 5977 (Rev. St. 1899, § 3711), and of the National Banking Act, § 5197.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

Where usurious interest is included in a renewal note, the fact that such note bears interest at a legal rate does not purge the transaction of usury.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

When a long account is one continuous transaction, any item thereof becoming tainted with usury, held to affect the entire transaction.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

The rule that before final judgment there is a locus penitentiae for a creditor held not applicable where a statute provides that the charging of usurious interest shall work a forfeiture of the entire interest carried by a note.—Citizens' Nat. Bank v. Donnell (Mo. Sup.) 925.

Rev. St. 1899, § 3709, relating to usury, construed, and held to contemplate allowance to creditor guilty of usury of rate of interest fixed by statute, in absence of contractual stipulation.—Arbuthnot v. Brookfield Loan & Building Ass'n (Mo. App.) 132.

VACATION.

Vacating particular proceedings.

See "Execution," § 1; "Judicial Sales"; "Judgment," § 5.

Foreclosure sale, see "Mortgages," § 5. Judgment against garnishee, see "Garnishment," § 2.

Sale on execution, see "Execution," § 3.

VALUE.

Hearsay evidence, see "Evidence," § 6.
Limits of jurisdiction, see "Appeal and Error," § 2.

VENDOR AND PURCHASER.

See "Sales."

Innocent purchaser of public land, see "Public Lands," § 1.

Purchasers at sale on execution, see "Execution," § 3.

Requirements of statute of frauds, see "Frauds, Statute of," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. **Requisites and validity of contract.**
Reformation of title bond for mutual mistake granted.—*King v. Ballou* (Ky.) 771.

A vendor, sued for fraudulent representations inducing the vendee to purchase, *held* not entitled to defend by showing negligence on the vendee's part.—*Leicher v. Keeney* (Mo. App.) 145.

The representations of a vendor that a tract contains 160 acres, while it contained 18 acres less, is a material representation.—*Leicher v. Keeney* (Mo. App.) 145.

Where a vendor's fraudulent representations relate to the quantity of land sold, it is immaterial whether the sale is in gross or by the acre.—*Leicher v. Keeney* (Mo. App.) 145.

§ 2. **Rights and liabilities of parties.**

Where plaintiff claimed title to land under a deed which was junior to one executed by the same grantor to defendant, but recorded in the wrong county, after a certified copy of such record was recorded in the proper county, the burden was on plaintiff to show that he was a purchaser for value without notice.—*Moody v. Ogden* (Tex. Civ. App.) 253.

The recitals of a consideration in a deed are insufficient to show that the grantee was a purchaser for value, as against the grantee in a prior unrecorded deed from the same grantor.—*Moody v. Ogden* (Tex. Civ. App.) 253.

§ 3. **Remedies of vendor.**

In an action to enforce a lien for the purchase price of land against the subsequent purchaser, who assumed the debt, a judgment directing that the land be sold to pay the debt and costs *held* proper.—*McBrayer v. Hanks' Ex'rs* (Ky.) 2.

§ 4. **Remedies of purchaser.**

In action for damages for breach of contract to convey land, the measure of damages stated.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

In action for damages for breach of contract to convey land paid for by plaintiff, plaintiff *held* not entitled to interest on purchase money paid.—*Krepp v. St. Louis & S. F. R. Co.* (Mo. App.) 479.

VENUE.

Of particular actions or proceedings.

See "Quieting Title," § 1.

Against corporations, see "Corporations," § 3.
Criminal prosecutions, see "Criminal Law," § 3.

§ 1. **Domicile or residence of parties.**

In action by real estate broker for commissions, prospective purchaser living in adjoining county *held* entitled to be sued only in his county.—*Scottish American Mortg. Co. v. Davis* (Tex. Civ. App.) 217.

VERDICT.

In civil actions, see "Trial," § 6.

In criminal prosecutions, see "Criminal Law," § 25.

Operation and effect as curing defects in pleading, see "Indictment and Information," § 6; "Pleading," § 6.

Review on appeal or writ of error, see "Appeal and Error," § 21.

VERIFICATION.

Of information, see "Indictment and Information," § 1.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 2.

VICE PRINCIPALS.

See "Master and Servant," § 7.

VILLAGES.

See "Municipal Corporations."

VOTERS.

See "Elections."

WAGERS.

See "Gaming," § 1.

WAGES.

See "Master and Servant," § 2.

WAIVER.

See "Estoppel."

Of objections to particular acts or proceedings.

See "Appearance"; "Indictment and Information," § 6; "Pleading," § 6; "Process," § 2; "Trial," § 8.

Competency of juror, see "Jury," § 3.

Invalidity of contract as within statute of frauds, see "Frauds, Statute of," § 4.

Jurisdiction of court, see "Courts," § 1.

Proofs of loss, see "Insurance," § 10.

Of rights or remedies.

See "Garnishment," § 3; "Insurance," §§ 7, 19, 20.

Breach of warranty, see "Sales," § 4.

Exemption of homestead, see "Homestead," § 4.
Fine for nonpayment of loan to building and loan association, see "Building and Loan Associations."

Notice of acceptance of guaranty, see "Guaranty," § 1.

Right to foreclose mortgage, see "Chattel Mortgages," § 3.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

Carriers as warehousemen, see "Carriers," § 7.

WARRANT.

For arrest, see "Criminal Law," § 5.

WARRANTY.

By insured, see "Insurance," §§ 5, 6, 19.

On sale of goods, see "Sales," §§ 4, 6.

§ 1. Surface waters.

Where one wrongfully discharges surface water onto the premises of another, the latter is entitled to recover the actual damage up to the beginning of the action, without reference to total depreciation of the value of the inheritance.—*Ready v. Missouri Pac. Ry. Co.* (Mo. App.) 142.

In estimating the damages resulting from the wrongful discharge of surface water onto plaintiff's premises, the jury *held* entitled to consider certain facts.—*Ready v. Missouri Pac. Ry. Co.* (Mo. App.) 142.

A verdict of \$400 in an action for wrongfully discharging surface water onto plaintiff's premises *held* not excessive.—*Ready v. Missouri Pac. Ry. Co.* (Mo. App.) 142.

Where a railroad company cut a ditch, and put in a culvert under its track, and discharged through such culvert surface water which had formerly found its way along ditches on the sides of the track onto plaintiff's premises, it is liable for the injuries thereto.—*Ready v. Missouri Pac. Ry. Co.* (Mo. App.) 142.

§ 2. Public water supply.

Evidence *held* to show that taking of water from railroad company's waterworks system was by license, and was not a supplying of water by the company to citizens of a town under a contract with a land company.—*Louisville & N. R. Co. v. Dickey* (Ky.) 332.

Land and railroad companies *held* to have right to abrogate contract for supply of water; rights of citizens against land company not being affected.—*Louisville & N. R. Co. v. Dickey* (Ky.) 332.

Provisions in contract between land and railroad companies for supply of water by the latter *held* to give the railroad company right to abandon contract.—*Louisville & N. R. Co. v. Dickey* (Ky.) 332.

Railroad company *held* to have abandoned contract to supply town with water.—*Louisville & N. R. Co. v. Dickey* (Ky.) 332.

An ordinance prohibiting the city officials from furnishing water to consumers until all indebtedness of such consumers for water previously supplied should be paid is reasonable and valid.—*Jones v. City of Nashville* (Tenn.) 985.

WAYS.

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 9, 10.

WEAPONS.

An instruction in a prosecution, under Ky. St. § 1242, that defendant was guilty if the shooting was done in a sudden heat, *held*, under the facts, prejudicial to defendant.—*Violet v. Commonwealth* (Ky.) 1.

Since Ky. St. § 1242, creating the offense of shooting at another, the instructions should follow the statute in defining the offense.—*Violet v. Commonwealth* (Ky.) 1.

One's intention *held* no defense to carrying a concealed weapon, in violation of Ky. St. § 1309.—*Swincer v. Commonwealth* (Ky.) 306.

Evidence in prosecution for carrying a pistol *held* to sustain the defense of reasonable ground for fear of assault, and such imminent danger as not to admit of securing legal protection.—*Williams v. State* (Tex. Cr. App.) 380.

Railroad porter *held* to be at his place of business when on board train, so as to be ex-

him some 150 miles every day, is a traveler, so as to be exempted from criminal liability for carrying a pistol.—*Williams v. State* (Tex. Cr. App.) 380.

Under the statute a person is not justified in carrying arms merely because he has reasonable ground to apprehend an attack.—*Hood v. State* (Tex. Cr. App.) 592.

In a prosecution for unlawfully carrying a pistol, evidence of prior difficulties between defendant and other persons *held* properly excluded.—*Hood v. State* (Tex. Cr. App.) 592.

WIDOWS.

Dower, see "Dower."

Rights under statutes of descent and distribution, see "Descent and Distribution," § 1.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Construction and execution of powers, see "Powers," § 1.

Construction and execution of trusts, see "Trusts."

Legacy and succession taxes, see "Taxation," § 8.

§ 1. Testamentary capacity.

Tests of mental capacity to make a will stated.—*Crowson v. Crowson* (Mo. Sup.) 1065.

On an issue as to mental capacity of a testator, his statements made before and after the execution of the will are competent evidence.—*Crowson v. Crowson* (Mo. Sup.) 1065.

Evidence in a contest of a will for mental incapacity and undue influence examined and *held* that there was no substantial evidence to support the verdict that the paper was not the will of the deceased.—*Crowson v. Crowson* (Mo. Sup.) 1065.

§ 2. Contracts to devise or bequeath.

Where defendant contracted to make plaintiff his heir, and thereafter defendant's wife disinherited plaintiff by will, and defendant attempted to do the same, such acts constituted a breach of the contract, entitling plaintiff to recover the reasonable value of her services.—*Clark v. West* (Tex. Civ. App.) 100.

In an action for services on breach of a contract to make plaintiff defendant's heir, an instruction authorizing a recovery if defendant failed to adopt plaintiff *held* not error.—*Clark v. West* (Tex. Civ. App.) 100.

§ 3. Requisites and validity.

Statements of a testator *held* not competent as direct evidence of undue influence, but only admissible to show mental condition.—*Wall v. Dimmitt* (Ky.) 300.

In a will contest by heirs, who alleged that the will was procured by the undue influence of testatrix's husband, evidence that the husband had stated that he would see that contestants received no part of the wife's estate was admissible.—*Wall v. Dimmitt* (Ky.) 300.

A deed *held* to pass a present interest, and not to be testamentary in character.—*Christ v. Kuehne* (Mo. Sup.) 537.

Undue influence, or fraud, in the procurement of the execution of a will, to invalidate it, must have dominated the will of the testator at the time of its execution.—*Crowson v. Crowson* (Mo. Sup.) 1065.

The burden is on contestants to show undue influence or fraud in the procurement of the

execution of a will.—*Crowson v. Crowson* (Mo. Sup.) 1065.

§ 4. Construction.

A will construed, and *held* that the wife took the estate in fee.—*Smith v. Smith* (Ky.) 766.

Where an ambiguity in a will appears on the face of the instrument, parol evidence is not admissible to explain it.—*Smith v. Smith* (Ky.) 766.

Devise construed, and *held* to give life estate to parents of beneficiary, subject to charge for his education, then life estate to beneficiary, and remainder to his lawful children.—*Webster v. Brown* (Ky.) 774.

A devise of the rents and profits of land passes title to the land itself.—*Mayer v. Karn* (Ky.) 1111.

Will construed and *held* that the wife took a life estate in one half of the property, with remainder to testator's daughter in fee, and the daughter took an estate in fee to the other half.—*Mayer v. Karn* (Ky.) 1111.

It is presumed that a testator's intention was that his property should pass according to the will.—*Mayer v. Karn* (Ky.) 1111.

Extrinsic evidence *held* to show that devise did not include certain land.—*Thomas v. Scott* (Ky.) 1129.

Extrinsic evidence *held* admissible in explanation of latent ambiguity in devise.—*Thomas v. Scott* (Ky.) 1129.

Will construed, and *held* to vest only a life estate in the shares bequeathed to testator's children.—*Overton v. Nashville Trust Co.* (Tenn.) 108.

§ 5. Rights and liabilities of devisees and legatees.

Will construed, and *held*, that certain real estate did not pass under the will, but went to the heir at law.—*Franck v. Franck* (Ky.) 275.

Ky. St. § 2063, providing that the conversion of money or property advanced to one of testator's heirs into other property or thing, with or without the consent of testator, shall not be an ademption, unless a contrary intention appears, applies only where the devisee is an heir of testator.—*Franck v. Franck* (Ky.) 275.

WITNESSES.

See "Depositions"; "Evidence."

Absence as ground for continuance, see "Continuance"; "Criminal Law," § 16.

Experts, see "Evidence," § 9.

Harmless error in examination, see "Criminal Law," § 32.

Indorsement on indictment or information, see "Criminal Law," § 17.

Opinions, see "Evidence," § 9.

Perjury, see "Perjury."

§ 1. Competency.

Civ. Code Prac. § 606, precludes a stockholder in a corporation from testifying relative to transactions between the corporation and a decedent.—*Storey v. First Nat. Bank* (Ky.) 318.

Under Civ. Code Prac. § 606, a widow cannot, in an action on her husband's life policy, testify to a communication between them.—*New York Life Ins. Co. v. Johnson's Adm'r* (Ky.) 762.

A policy holder in a mutual insurance company *held* not disqualified by interest, under Civ. Code Prac. §§ 605, 606, subsec. 2, to testify for it, in an action on a life policy.—*New York Life Ins. Co. v. Johnson's Adm'r* (Ky.) 762.

Under Civ. Code Prac. § 606, testimony of a husband that his wife had agreed to reimburse

him for money expended for certain land conveyed to her *held* incompetent to establish such agreement.—*Clay v. Clay's Guardian* (Ky.) 810.

In a suit by a wife to set aside mortgage of her land to secure husband's debt, *held* that the husband is a competent witness, under Rev. St. 1899, § 4656.—*Turner v. Overall* (Mo. Sup.) 644.

Attorney for building and loan association *held* competent witness in his action against the association to cancel his note and deed of trust.—*Arbuthnot v. Brookfield Loan & Building Ass'n* (Mo. App.) 132.

In order to be entitled to testify concerning a matter, the witness must not "guess" as to it.—*Reichert v. International & G. N. Ry. Co.* (Tex. Civ. App.) 1031.

Defendant cannot object to testimony as that of his wife, it appearing that at the time he was married to her he had a wife living.—*Crow v. State* (Tex. Cr. App.) 392.

§ 2. Examination.

In an action against a city for injuries, a question *held* objectionable as leading.—*Lents v. City of Dallas* (Tex. Sup.) 59.

§ 3. Credibility, impeachment, contradiction, and corroboration.—In general.

Where the testimony of defendant's witness to prove the bad character of the state's witness proved his good character, defendant may not prove a particular transaction of the state's witness, collateral in its nature, to rebut or refute his own witness.—*Lankster v. State* (Tex. Cr. App.) 388.

§ 4. — Character and conduct of witness.

Evidence in a prosecution for felony for impeachment purposes *held* improperly admitted.—*Morgan v. Commonwealth* (Ky.) 1098.

In a prosecution for felony, designation of defendant's sister as "notorious" by prosecuting attorney *held* improper.—*Morgan v. Commonwealth* (Ky.) 1098.

Cross-examination of defendant on trial for felony *held* proper for impeachment purposes.—*Morgan v. Commonwealth* (Ky.) 1098.

Under Rev. St. 1899, § 4630, to affect the credibility of a witness, he may be questioned as to his having been convicted of any specified offense.—*Chouteau Land & Lumber Co. v. Chrisman* (Mo. Sup.) 1062.

Evidence that plaintiff was excitable and accustomed to profanity *held* inadmissible to discredit his testimony that he was a Christian.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

Evidence that witness was in the saloon or "joint" business is inadmissible to discredit him.—*Shaefer v. Missouri Pac. Ry. Co.* (Mo. App.) 154.

The state, on cross-examination of defendant, may prove, in order to impeach him, that he has been previously convicted of crime.—*McDonald v. State* (Tex. Cr. App.) 383.

§ 5. — Interest and bias of witness.

Where a witness testified that she was unfriendly toward defendant, it was not error to sustain an objection to a question whether she did not desire to see defendant convicted.—*State v. May* (Mo. Sup.) 918.

In an action against a railroad for injuries, plaintiff was properly allowed to ask one of defendant's witnesses whether or not, under a general rule of defendant, negligent employees were discharged, and had to do their best as witnesses for the company, or get out.—*Missouri, K. & T. Ry. Co. of Texas v. Smith* (Tex. Civ. App.) 418.

In an action against a railroad for injuries, *held* proper for plaintiff to show on cross-ex-

amination of some of defendant's witnesses that they were not subpoenaed, but were in its employ, and attended at its request, and in expectation that it would pay them.—*Missouri, K. & T. Ry. Co. of Texas v. Smith* (Tex. Civ. App.) 418.

§ 6. — Inconsistent statements by witness.

Plaintiffs failing to prove certain facts by their witness *held* not entitled to prove by third parties that witness had told them he would testify to such facts.—*Howe & Johnson v. Skidmore* (Ky.) 792.

Testimony of county attorney as to what certain witnesses had testified to before the grand jury *held* proper.—*Lee v. State* (Tex. Cr. App.) 195.

It was competent for defendant to show that a witness, who had testified that defendant did the killing, had stated on the examining trial that he did not know who did the killing.—*Cecil v. State* (Tex. Cr. App.) 197.

Where a witness denied making statements in an alleged affidavit sworn to by him, the affidavit was not admissible, without further proof that he made the statements.—*Terry v. State* (Tex. Cr. App.) 382.

A witness may not be impeached as to testimony irrelevant to the issue.—*Lankster v. State* (Tex. Cr. App.) 388.

On a prosecution for theft, certain evidence *held* admissible as affecting the credibility of the prosecuting witness.—*Lewandowski v. State* (Tex. Cr. App.) 594.

In a prosecution for rape of a female under 15, refusal to permit her to be asked on cross-

examination whether she had not stated to others she was 16 at about the same time *held* error.—*Miller v. State* (Tex. Cr. App.) 906.

WORK AND LABOR.

Claims against decedents' estates for services see "Executors and Administrators," § 4.
Liens for work and materials, see "Mechanics' Liens."

WRITS.

See "Process."

Particular writs.

See "Execution"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Quo Warranto"; "Replevin"; "Sequestration."

Writ of error, see "Appeal and Error."

WRONGFUL ATTACHMENT.

See "Attachment," § 4.

WRONGFUL EXECUTION.

See "Execution," § 4.

WRONGS.

See "Torts."

YEAR.

Agreements not to be performed within one year, see "Frauds, Statute of," § 1.
Estates for years, see "Landlord and Tenant."

TABLES OF SOUTHWESTER

IN

STATE REPORTS.

VOL. 70, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.		Ark. Rep.	S. W. Rep.		Ark. Rep.	S. W. Rep.		Ark. Rep.	S. W. Rep.		Ark. Rep.	S. W. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	62	66	71	66	195	166	66	1058	258	67	398	355	50	27
5	65	709	74	66	150	175	66	646	262	68	495	358	68	2
10	65	706	79	66	200	179	67	865	264	68	243	364	67	78
12	65	706	83	66	197	185	68	489	272	68	37	371	69	6
17	65	709	88	66	346	189	66	919	290	67	397	376	68	3
19	65	932	90	66	349	189	72	570	291	67	752	385	67	7
22	65	933	93	66	348	185	66	922	293	67	754	386	68	18
24	65	937	94	66	345	197	66	921	295	67	757	387	68	13
25	65	942	99	66	434	200	66	918	300	67	761	389	67	10
28	65	934	107	66	432	204	66	926	305	67	755	393	68	2
30	65	935	111	66	442	207	66	916	309	67	869	395	68	48
34	66	194	122	66	438	211	67	312	312	67	867	401	68	24
39	66	347	127	66	433	215	66	924	317	67	864	407	68	25
43	66	198	129	66	439	221	66	923	319	68	490	409	68	24
43	66	914	136	66	661	226	67	870	326	67	1014	411	68	48
49	66	147	144	66	680	230	65	936	329	67	1011	415	68	6
54	66	146	145	66	658	232	65	929	331	67	752	418	68	4
56	68	243	151	66	649	240	67	311	337	68	28	420	68	6
59	66	152	156	66	658	244	67	309	343	68	24	423	68	4
61	66	148	157	66	648	246	67	310	346	68	28	427	68	8
65	66	144	161	66	647	249	67	396	348	68	31	432	68	8
68	66	145	163	66	645	253	67	400	351	68	32	434	66	9
69	66	202												

*Reported in full, with opinion, in the Southwestern; not reported in full in the Arkansas Reports.

VOL. 70, ARKANSAS REPORTS

	Page	
A. F. Shapleigh Hardware Co. v. Hamilton (68 S. W. 490).....	319	Brinkley Car Works (67 S. W. 752)
Allen v. State (65 S. W. 933).....	22	British & American (65 S. W. 936)
Allen v. State (68 S. W. 28).....	337	Bromley v. Aday
Arkansas Cent. R. Co. v. Jackson (67 S. W. 757)	295	Brown v. Rushing
Barton v. Grand Lodge I. O. O. F. (70 S. W. 305)	1613	Buffalo Zinc & Co. (S. W. 572)...
Bennett v. State (66 S. W. 198, 914).....	43	Castle v. Hillmar
Benson v. Files (68 S. W. 493).....	423	Cathay v. Bowen
Bergstrand v. Townsend (70 S. W. 307) ..	600	Central Coal & Coke Co. (69 S. W. 129)
Berry v. Meir (66 S. W. 439).....	129	Choctaw, O. & C. (S. W. 303)...
Black v. Robinson (68 S. W. 489).....	185	Choctaw & M. R. (879)
Blanton v. Rose (68 S. W. 674).....	415	Choctaw & M. R. (W. 495)
Bloch Queensware Co. v. Metzger (65 S. W. 929)	232	City of Ft. Smith (679)
Bloom v. Strauss (69 S. W. 548; 72 S. W. 563)	483	Crebbin v. Delon
Bluff City Lumber Co. v. Floyd (68 S. W. 484)	418	Crenshaw v. Collins
Bogenshultz v. O'Toole (67 S. W. 400) ..	253	Crenshaw v. State
Bonville v. State (69 S. W. 544).....	1613	
Bordwell v. Dills (66 S. W. 646).....	175	
Boysen v. Robertson (68 S. W. 243).....	56	
Brady, Ex parte (68 S. W. 34).....	376	
Brewster v. City of Pine Bluff (65 S. W. 934)	28	Davis v. Moore (Driver v. Board Levee Dist. (68 S. W. 1221))

* Reported in full, with opinion, in the Southwestern; not reported in full in the Arkansas Reports.

* Reported in full in the Arkansas Reports; not reported in full in the Southwestern.

Morrilton (67 S. W. 312).....	211	Norman v. Poole (66 S. W. 433).....	127
Earl v. Westfall Commission Co. (66 S. W. 148).....	61	North American Trust Co. v. Chappell (69 S. W. 546).....	507
Fakes v. Wilder (69 S. W. 260).....	449	Penrose v. Doherty (67 S. W. 398).....	276
Farmers' Saving, Building & Loan Ass'n v. Berger (69 S. W. 57).....	1613	Pitchcock v. Donnahoo (68 S. W. 145)....	68
Ferguson v. Josey (66 S. W. 345).....	94	Pope v. Campbell (68 S. W. 916).....	207
Fitzhugh v. Hackley (66 S. W. 146).....	54	Prescott & N. Ry. Co. v. Smith (67 S. W. 865).....	179
Foote, Ex parte (65 S. W. 706).....	12	Pugh v. Sherrer (68 S. W. 675).....	1613
Ft. Smith v. Scruggs (69 S. W. 679).....	549	Quertermous v. Walls (67 S. W. 1014)....	325
Gatens v. Neely (66 S. W. 438).....	122	Rankin v. Schofield (66 S. W. 197).....	63
German-American Ins. Co. v. Harper (67 S. W. 755).....	305	Reagan v. Hodges (69 S. W. 531).....	531
Goldsmith v. Lewine (69 S. W. 308).....	516	Ritter v. State (69 S. W. 262).....	472
Goodbar Shoe Co. v. Stewart (68 S. W. 250).....	407	Roth v. Merchants' & Planters' Bank (66 S. W. 918).....	200
Goodman v. Pareira (66 S. W. 147).....	49	Russell v. Berry (67 S. W. 864).....	317
Grant v. State (67 S. W. 397).....	290	Rust Land & Lumber Co. v. Isom (66 S. W. 434).....	99
Graves v. Graves (69 S. W. 544).....	541	St. Louis, I. M. & S. Ry. Co. v. Dooley (67 S. W. 1012).....	330
Grayson v. Bowlin (66 S. W. 658).....	145	St. Louis, I. M. & S. Ry. Co. v. Farr (68 S. W. 243).....	264
Griffith v. Mosley (67 S. W. 309).....	244	St. Louis, I. M. & S. Ry. Co. v. Jacobs (68 S. W. 248).....	401
Gunn v. Thompson (69 S. W. 261).....	500	St. Louis, I. M. & S. Ry. Co. v. James (68 S. W. 153).....	387
Hadley v. Bryan (66 S. W. 921).....	197	St. Louis, I. M. & S. Ry. Co. v. Pickett (67 S. W. 870).....	226
Hale v. Brown (69 S. W. 260).....	471	St. Louis, I. M. & S. Ry. Co. v. Thurmond (68 S. W. 488).....	411
Hall v. Roulston (68 S. W. 24).....	343	St. Louis, I. M. & S. Ry. Co. v. Wilson (66 S. W. 661).....	136
Hays v. Comstock-Castle Co. (66 S. W. 649).....	151	St. Louis, I. M. & S. Ry. Co. v. Woodward (69 S. W. 55).....	441
Head v. Phillips (68 S. W. 878).....	432	St. Louis S. W. Ry. Co. v. Gate City Co-op. Grocery Co. (65 S. W. 706).....	10
Henry v. Tillar (67 S. W. 310).....	246	St. Louis & S. F. R. Co. v. Cooksey (69 S. W. 259).....	481
Hot Springs Electric Light Co. v. City of Hot Springs (67 S. W. 761).....	300	Salem v. Colley (66 S. W. 195).....	71
Hughes v. State (68 S. W. 676).....	420	Seabrook v. Orto (68 S. W. 677).....	506
Jackson v. Gorman (66 S. W. 346).....	88	Seawel v. Dirst (68 S. W. 1058).....	106
James v. State (68 S. W. 247).....	1613	Sewer Dist. No. 1 of Ft. Smith v. School Dist. of Ft. Smith (68 S. W. 152).....	59
Jarvis v. State (67 S. W. 76).....	1613	Shapleigh Hardware Co. v. Hamilton (68 S. W. 490).....	319
Johnston v. Clark (67 S. W. 396).....	249	Simpson v. Brown-Desnoyers Shoe Co. (70 S. W. 305).....	508
Jones v. Dillard (66 S. W. 202).....	69	Simpson v. State (65 S. W. 932).....	19
Jones v. Hill (66 S. W. 194).....	34	Singer Mfg. Co. v. Rogers (67 S. W. 75; 68 S. W. 153).....	385
Jones v. Seaborn (66 S. W. 194).....	34	Spears v. State (66 S. W. 660).....	144
Kansas & Texas Coal Co. v. Gabsky (66 S. W. 915; 72 S. W. 572).....	434	Stanley v. Aetna Ins. Co. (66 S. W. 432).....	107
Keeton v. State (66 S. W. 645).....	163	State v. Arkadelphia Lumber Co. (67 S. W. 1011).....	329
Kelley v. Graham (69 S. W. 551).....	490	State v. Aven (67 S. W. 752).....	291
Kitts v. State (69 S. W. 545).....	521	State v. Caldwell (66 S. W. 150).....	74
Lancashire Ins. Co. v. Stanley (62 S. W. 66).....	1	State v. Doss (67 S. W. 867).....	312
Lane v. Queen City Mill. Co. (50 S. W. 274).....	355	State v. McNair (66 S. W. 144).....	65
Levy v. State (68 S. W. 485).....	610	Stiewel v. American Surety Co. (68 S. W. 1021).....	512
Little Rock & Ft. Smith Ry. Co. v. Jamison (68 S. W. 28).....	346	Stitt v. Rector (69 S. W. 552).....	1613
Louisiana & N. W. Ry. Co. v. Phelps (65 S. W. 709).....	17	Supreme Lodge Knights of Pythias v. Robbins (67 S. W. 758).....	364
McCarthy v. Kirksley (69 S. W. 53).....	444	Thompson v. State (65 S. W. 708).....	1613
McConnell v. Arkansas Brick & Mfg. Co. (69 S. W. 559).....	568	Town of Salem v. Colley (66 S. W. 195)....	71
McFarlane v. Grober (69 S. W. 56).....	371	Trulock v. State (69 S. W. 677).....	558
McTighe v. McKee (67 S. W. 754).....	293	Vance v. State (68 S. W. 37).....	272
Maloney v. Terry (66 S. W. 919; 72 S. W. 570).....	189	Wallace v. Incorporated Town of Cuba-nola (68 S. W. 485).....	395
Martin-Alexander Lumber Co. v. Johnson (66 S. W. 924).....	215	Ward v. Morris (66 S. W. 1130).....	613
Matthews v. Kimball (66 S. W. 651; 69 S. W. 547).....	451	Ward v. State (66 S. W. 926).....	204
Memphis Land & Timber Co. v. Board of Directors of St. Francis Levee Dist. (68 S. W. 242).....	409	Weil v. Finneran (69 S. W. 310).....	509
Memphis & L. R. R. Co. v. Organ (66 S. W. 922).....	195		
Mitchell v. State (65 S. W. 935).....	30		
Moore v. McCloy (69 S. W. 311).....	505		
Muense v. Harper (67 S. W. 869).....	309		
Murrell v. Henry (66 S. W. 647).....	161		

¹ Reported in full, with opinion, in the Southwest-ern; not reported in full in the Arkansas Reports.

¹ Reported in full, with opinion, in the Southwest-ern; not reported in full in the Arkansas Reports

TO ARK.—Continued.

	Page	
White v. State (65 S. W. 937).....	24	Will
White Sewing Mach. Co. v. Logan (66 S. W. 348).....	93	Will
Williams v. State (68 S. W. 241).....	393	You
Wills v. City of Ft. Smith (66 S. W. 922).....	221	

VOL. 107, KENTUCKY

Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	53	799	98	51	609	178	53	269	237
5	53	828	98	53	956	184	53	291	231
10	53	850	108	53	10	191	53	277	293
14	53	812	114	53	970	200	53	288	298
20	53	820	119	53	1050	212	53	295	310
24	53	927	122	53	1052	219	53	293	326
32	53	846	125	53	967	223	51	530	330
35	53	968	130	53	1063	223	53	262	332
41	53	844	134	53	28	236	53	413	339
44	53	931	139	53	24	244	53	260	344
49	53	950	143	53	37	252	53	655	349
53	53	972	148	53	3	257	53	648	354
61	53	958	154	53	8	263	53	645	356
66	53	25	160	53	18	269	53	642	362
70	53	1056	163	53	29	273	53	652	370
77	53	975	169	53	86	279	53	653	379
88	53	1064	172	53	272	283	53	332	384

VOL. 107, KENTUCKY

	Page	
Abbott v. Commonwealth (55 S. W. 196)...	624	Edw
Ach v. Barnes (53 S. W. 293).....	219	Emi
Adair v. Hancock Deposit Bank (53 S. W. 295)	212	Far
Ætna Ins. Co. v. Glasgow Electric Light & Power Co. (52 S. W. 975).....	77	Far
Baldwin v. Phoenix Ins. Co. (54 S. W. 13).....	356	Co
Bitzer v. O'Bryan (54 S. W. 951).....	590	Foll
Book v. Commonwealth (55 S. W. 7)....	605	Fou
Brown Banking Co. v. Stockton (54 S. W. 854)	492	S.
Caldwell v. Story (52 S. W. 850).....	10	Gun
Cecil v. Cecil's Ex'r (52 S. W. 1063).....	130	
C. H. Brown Banking Co. v. Stockton (54 S. W. 854).....	492	Hay
City of Covington v. Commonwealth (39 S. W. 836)	680	Hen
City of Louisville v. Bitzer (54 S. W. 951).....	590	Her
City of Louisville v. Louisville Public Warehouse Co. (53 S. W. 291).....	184	Hog
City of Louisville v. Meglemry (52 S. W. 1052)	122	Huf
City of Louisville v. Snow's Adm'r (54 S. W. 860)	536	Hug
Combs v. Letcher County (54 S. W. 177)...	379	er
Commonwealth v. Bond (53 S. W. 642)...	269	Hui
Commonwealth v. Cope (53 S. W. 272)...	173	Irw
Commonwealth v. Farmers' & Shippers' Leaf Tobacco Warehouse Co. (52 S. W. 799)	1	Jon
Commonwealth v. Felton (53 S. W. 1046).....	330	Lan
Commonwealth v. Gaither (54 S. W. 956).....	572	Leb
Commonwealth v. Glass (53 S. W. 18)....	160	95
Commonwealth v. Overby (53 S. W. 36)...	169	Lin
Commonwealth v. Rose (54 S. W. 863)...	566	(5
Commonwealth v. Rose (54 S. W. 862)...	567	Lon
Coppage v. Johnson (55 S. W. 424).....	620	Lou
Covington, City of, v. Commonwealth (39 S. W. 836).....	680	S.
Cynthiana Building & Loan Ass'n v. Florence (55 S. W. 207).....	636	Lou
Davis v. Western Union Tel. Co. (54 S. W. 849)	527	W
Deposit Bank of Carlisle v. Stitt (52 S. W. 950).....	49	10
Donelan v. Draddy (53 S. W. 1038).....	339	Lou
Drake v. Drake (52 S. W. 846).....	32	58

107 KY.—Continued.		Page		Page
Louisville & N. R. Co. v. Chesapeake & O. R. Co. (53 S. W. 277).....	191		Pullman Palace Car Co. v. Hunter (54 S. W. 845)	519
Louisville & N. R. Co. v. Farmers' & Drovers' Live-Stock Commission Firm (52 S. W. 972).....	53		Rains v. White (52 S. W. 970).....	114
Louisville & N. R. Co. v. Smith (53 S. W. 269)	178		Respass v. Commonwealth (53 S. W. 24)...	139
Lovelace v. Lovell (55 S. W. 549).....	676		Rhodes v. Commonwealth (54 S. W. 170)...	354
Loving v. Commonwealth (55 S. W. 434)...	575		Rhodes v. People's Sav. & Bldg. Ass'n (52 S. W. 1050).....	119
Matthews v. Rogers (53 S. W. 413).....	236		Rumbley v. Hall (54 S. W. 4).....	349
Mauget v. Plummer (52 S. W. 844).....	41		Safety Building & Loan Ass'n v. Montjoy (54 S. W. 719).....	473
Mayfield v. Wright (54 S. W. 864).....	530		Shuck v. Lebanon (53 S. W. 655).....	252
Meagher v. Bowling (54 S. W. 170).....	412		Smith v. First Nat. Bank (53 S. W. 648)...	257
Menefee v. Alexander (53 S. W. 553).....	279		Spalding v. St. Joseph's Industrial School for Boys of the City of Louisville (54 S. W. 200)	382
Meyler v. Wedding (53 S. W. 809).....	310		Standard Oil Co. v. Commonwealth (55 S. W. 8)	606
Meyler v. Wedding (60 S. W. 20).....	685		Stovall v. McOutchen (54 S. W. 969).....	577
Montgomery v. Allen (53 S. W. 813).....	298		Tarr v. Muir (53 S. W. 663).....	283
Moore v. Continental Ins. Co. (53 S. W. 652)	273		Turner v. Thompson (55 S. W. 210).....	647
Morrow v. Western Union Tel. Co. (54 S. W. 853)	517		Vanmeter v. Fidelity Trust & Safety Vault Co. (53 S. W. 10).....	108
Nall v. Tinsley (54 S. W. 187).....	441		Washington Life Ins. Co. of New York v. Menefee's Ex'r (53 S. W. 260)	244
Napper v. Mutual Life Ins. Co. of Kentucky (53 S. W. 28).....	134		Weaver v. Toney (54 S. W. 732).....	419
Neeley v. McCollum (53 S. W. 37).....	143		Webster v. Lowe (53 S. W. 1030).....	293
Negley v. Henderson Bridge Co. (54 S. W. 171)	414		Western Union Tel. Co. v. Crider (54 S. W. 963)	600
Nunn v. Citizens' Bank (53 S. W. 665)...	262		Western Union Tel. Co. v. Fisher (54 S. W. 830)	513
O'Connor v. Sherley (52 S. W. 1056).....	70		Western Union Tel. Co. v. Johnson (55 S. W. 427)	631
Onions v. Covington & C. Elevated Railway, Transfer & Bridge Co. (53 S. W. 8)	154		Western Union Tel. Co. v. McIlvoy (55 S. W. 428)	633
Owensboro & N. R. W. Co. v. Townsend (53 S. W. 662).....	291		Western Union Tel. Co. v. Mathews (55 S. W. 427)	663
Owingsville & Mt. S. Turnpike Road Co. v. Bondurant's Adm'r (54 S. W. 718)...	505		Western Union Tel. Co. v. Steenbergen (54 S. W. 829).....	469
Pelley's Adm'r v. Earles (55 S. W. 550)...	640		Western Union Tel. Co. v. Van Cleave (54 S. W. 827).....	464
Pence's Adm'r v. Nelson County (53 S. W. 25)	66		Wheeler v. Traders' Deposit Bank (55 S. W. 552).....	653
Phillips v. Burton (52 S. W. 1064).....	88		White v. Taylor (52 S. W. 820).....	20
Pollock's Adm'r v. Smith (54 S. W. 740)...	509		Williams v. Williams (54 S. W. 716).....	496
Potter v. Continental Ins. Co. of City of New York (53 S. W. 669).....	326			
Poyntz v. Shackelford (54 S. W. 855)....	546			
Pritchard v. Smith (54 S. W. 717).....	483			

VOL. 169, MISSOURI REPORTS.

Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.	Mo. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	68	903	109	69	374	215	69	276	319	69	230
12	68	889	130	69	359	221	69	296	334	68	1035
31	68	900	137	69	384	227	69	300	341	69	17
38	68	917	159	69	363	236	69	304	357	69	13
51	68	930	166	69	297	252	69	282	371	69	303
74	68	902	177	69	4	258	68	1031	376	68	1043
77	68	883	194	69	368	272	69	469	388	69	353
80	68	1037	201	69	366	283	69	8	400	69	295
97	69	287	212	69	277	301	69	870			

VOL. 169, MISSOURI REPORTS.

	Page		Page
Ash v. Independence (68 S. W. 888).....	77	Newcomb v. New York Co. (69 S. W. 348)...	
Bank of Dexter v. Stoddard County Bank (68 S. W. 902).....	74	North St. Louis Build v. Obert (69 S. W. 10)	
Barber Asphalt Pav. Co. v. Ridge (68 S. W. 1043).....	376	O'Brien v. Ash (69 S. W. 463)	
Beauvais v. St. Louis (69 S. W. 1043)...	500	Overshiner v. Britton ((
Becher v. Deuser (69 S. W. 363).....	159	Patton v. Fox (69 S. W. 500)	
Burke's Estate, In re (69 S. W. 277).....	212	Penfield v. Vaughan (68 S. W. 1044)	
Case v. Espenschied (69 S. W. 276).....	215	Rees v. Andrews (69 S. W. 466)	
Citizens' Electric Lighting & Power Co., State ex rel., v. Longfellow (69 S. W. 374).....	109	Reno v. St. Joseph (70 S. W. 489)	
City of St. Louis v. Koch (70 S. W. 143).....	587	Ryans v. Boogher (69 S. W. 391)	
City of St. Louis v. Nelson (69 S. W. 460).....	461	St. Francis Mill Co. v. St. Louis, City of, v. K	
Crossan v. Crossan (70 S. W. 136).....	631	St. Louis, City of, v. Ne	
Crow, State ex rel., v. St. Louis (68 S. W. 900).....	31	Seafield v. Bohne (69 S. W. 119)	
Davidson v. Mayhew (68 S. W. 1031).....	258	Shannon County, State ex rel. (70 S. W. 119).....	
Dexter, Bank of, v. Stoddard County Bank (68 S. W. 902).....	74	Singer Mfg. Co. v. St. Louis (69 S. W. 903).....	
Gay v. Orcutt (69 S. W. 295).....	400	Smith v. Thompson (69 S. W. 391).....	
Green v. Hussey (69 S. W. 277).....	212	Spratt v. Early (69 S. W. 145).....	
Grigsby v. Barton County (69 S. W. 296).....	221	Stagg v. Edward We	
Hamilton v. McLean (68 S. W. 930).....	51	Co. (69 S. W. 391).....	
Hill, State ex rel., v. Atchison, T. & S. F. R. Co. (70 S. W. 1118).....	578	State v. Hardelein (70 S. W. 119).....	
Hill, State ex rel., v. Wabash R. Co. (70 S. W. 132).....	563	State v. Lynn (70 S. W. 119).....	
Hirst v. Ringen Real Estate Co. (69 S. W. 368).....	194	State v. Rigall (70 S. W. 119).....	
Hopper v. Hickam (69 S. W. 297).....	166	State ex rel. Citizens' Power Co. v. Longfel	
Kansas City v. Mastin (68 S. W. 1037)...	80	State ex rel. Crow v. S	
Kansas City v. Scarritt (69 S. W. 283)...	471	State ex rel. Hill v. At	
Laclede Construction Co. v. Tudor Iron Works (69 S. W. 384).....	137	R. Co. (70 S. W. 111)	
Laessig v. Travelers' Protective Ass'n of America (69 S. W. 469).....	272	State ex rel. Hill v. W	
Lester Real Estate Co. v. St. Louis (69 S. W. 300).....	227	W. 132).....	
Mallinckrodt Chemical Works v. Nemnich (69 S. W. 355).....	388	State ex rel. Shannon (70 S. W. 119).....	
Memphis Loan & Building Ass'n v. Arnett (69 S. W. 365).....	201	Thompson v. Traders' (68 S. W. 889).....	
Mill Co., St. Francis, v. Sugg (69 S. W. 359).....	130	United States Casualty S. W. 370).....	
Moore v. Moore (69 S. W. 278).....	432	United States Mortgag	
Moore v. Wilkerson (68 S. W. 1035).....	334	Crutcher (69 S. W. 38)	
Mullins v. Aieger (70 S. W. 4).....	521	Wells v. Porter (69 S. W. 145).....	
National Subway Co. v. St. Louis (69 S. W. 290).....	319	Wencker v. Missouri, S. W. 145).....	
		Western Storage & Glasner (68 S. W. 91)	
		Williams v. Kirby (70 S. W. 119)	
		Winslow Bros. Co. v. son Co. (69 S. W. 30)	
		Wright v. Doniphan (70 S. W. 119)	

